

Membership Denied: Subordination and Subjugation Under United States Expansionism

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I. INTRODUCTION

The Associated Press, July 16, 1999:

WASHINGTON (AP)—UNIFORM VOTING ACT SIGNED INTO LAW BY PRESIDENT CLINTON. As expected, President Clinton signed the Uniform Voting Act this morning. After some haggling in both the House and Senate over details of the bill, the UVA was sent to the President. The bill introduced into Congress by Senator Joseph Lieberman was the result of increasing pressure from both U.S. citizens and the global community. As a leader in the world, and the last remaining superpower, many had argued that the U.S. has a responsibility to ensure that none of its citizens are disenfranchised. Yet prior to the UVA many had recognized that the United States Government had denied its citizens living overseas, the right to vote. Thus, the UVA was passed:

To protect against the further disenfranchisement of minorities and to ensure that all citizens of the United States, irrespective of their residency in a state, shall have the right to vote in Presidential elections, and national referendums. These citizens are to include the U.S. citizens living in territories such as Puerto Rico, the U.S. Virgin Islands, Guam, and Micronesia. Henceforth these territories are to be given electoral votes in the same manner that states receive electoral votes.

Both the overseas citizens of the United States and the World Community applaud the United States legislation as a shining example of inclusion and concern for citizens that have historically been marginalized.¹

The Associated Press, November 8, 2000:

WASHINGTON (AP)—ELECTION STILL UNDECIDED. All eyes have turned to Florida and the United States overseas votes to determine the election. Florida's results have not been forthcoming because of the close election results in that state. Furthermore, the territories of the United States, having just been given the right to vote in Presidential elections, are having trouble counting the votes and submitting the results on time. Governor Bush trails Vice President Gore with 246 electoral votes and 266 electoral votes respectively. The 25 electoral votes from Florida could decide the next election. Furthermore there is concern in the Bush camp that he may not carry enough of the overseas territories to win the election. Puerto Rico, the largest of the overseas possession, nearly 4 million strong, weighs in with 8 electoral votes. The other statutory citizens in the U.S. Virgin Islands, Guam and the U.S. Marshall Islands each receive 3 electoral votes.²

The Associated Press, November 10, 2000:

WASHINGTON (AP)—AL GORE WINS PRESIDENTIAL ELECTION! With the election results in from the United States territories Al Gore is declared the winner of the 2000 Presidential Elections. With Gore taking Puerto Rico, Guam and the U.S. Marshall Islands, and Bush taking the U.S. Virgin Islands, Gore has 281 electoral votes to Bush's 249. Even should George Bush take Florida he would not have enough to defeat Al Gore.³

II. FICTION OR FUTURE?

The above fictional press releases are intended to illustrate a little known fact—that millions of United States citizens who reside in the United States island territories, such as Puerto Rico, do not have representation in the United States government and cannot decide their fate. As these reports suggest, for the inhabitants of United States territories, being a part of the United States does not necessarily mean being a member of this country's body politic. The above parable is intended to highlight a controversy concerning the millions of island people living under the United States flag. Indeed, some of these inhabitants even hold the

1. This is a fictional press release.
2. This is a fictional account of the 2000 United States Presidential election.
3. This is fictional.

status of United States citizens, yet they cannot vote in national elections and have no congressional representation.⁴

Nonetheless, to most Americans the above statements may appear to be unbelievable and even whimsical because Americans typically cannot imagine that any, let alone millions, of United States citizens are denied key rights. As demonstrated by the recent nonfictional presidential election controversy concerning the accuracy of the results in the State of Florida, questions over the vote of a few hundred citizens are significant enough to hold decisions affecting the entire country in abeyance. Yet, as a result of the United States' relationship with its island territories and despite perceptions, millions of United States citizens are disenfranchised and cannot vote. However, if the very same individuals were residents of one of the fifty states or for that matter, of a foreign sovereign nation, they could, as United States citizens, exercise their right to vote. The individuals who exist in this disenfranchised status are the peoples of the island groups of Puerto Rico, the American Samoa, Guam, the Northern Mariana Islands, the U.S. Virgin Islands, Micronesia, the Marshall Islands, and Palau. While the bulk of these islands are formally considered United States territories, the Federated States of Micronesia, the Republic of Marshall Islands, and Palau have chosen to become autonomous but are included herein because issues persist concerning their sovereignty.⁵

The characterization of the United States as a power that annexes distant lands and disenfranchises its inhabitants is perhaps troubling because the American psyche does not associate colonialism with the United States. And yet, "our nation finds itself referred to as a 'colonial power' despite its renunciation of such a policy in 1776."⁶ As historian Arnold Leibowitz observed, "[t]he United States . . . somewhat to its own astonishment,

4. See, e.g., RICHARD DELGADO, *THE COMING RACE WAR?: AND OTHER APOCALYPTIC TALES OF AMERICA AFTER AFFIRMATIVE ACTION AND WELFARE* 142 (1996); RICHARD DELGADO, *THE RODRIGO CHRONICLES: CONVERSATIONS ABOUT AMERICA AND RACE* 19–21 (1995); George W. Gold, *The Racial Prerequisite in the Naturalization Law*, 15 B.U. L. REV. 462 (1935); Neil Gotanda, *Race, Citizenship, and the Search for Political Community Among "We the People,"* 76 OR. L. REV. 233 (1997); Kevin R. Johnson, *An Essay on Immigration, Citizenship, and U.S./Mexico Relations: The Tale of Two Treaties*, 5 SW. J. L. & TRADE AM. 121 (1998); Yxta Maya Murray, *The Latino-American Crisis of Citizenship*, 31 U.C. DAVIS L. REV. 503 (1998); Sylvia R. Lazos Vargas, *Deconstructing Homo(geneous) Americanus: The White Ethnic Immigrant Narrative and Its Exclusionary Effect*, 72 TUL. L. REV. 1493 (1998).

5. Unlike other works on the subject, such as Jon M. Van Dyke, *The Evolving Legal Relationships Between the United States and Its Affiliated U.S.-Flag Islands*, 14 U. HAW. L. REV. 445 (1992), this Article rejects the United States' authority to "establish different regimes for these insular communities than those that govern the states." *Id.* at 448. This Article repudiates any form of colonial subjugation.

6. Patsy T. Mink, *Micronesia: Our Bungled Trust*, 6 TEX. INT'L L.J. 181, 181 (1971); see also John B. Metelski, *Micronesia and Free Association: Can Federalism Save Them?*, 5 CAL. W. INT'L L.J. 162, 165 (1975).

[is] the [world's] largest overseas territorial power."⁷ As such, the disassociation of United States citizens described above is in reality not far-fetched at all.⁸

Despite the allegedly neutral and liberating notions of justice and equality that are associated with American legal rhetoric, particularly citizenship law, an examination of America's nineteenth and twentieth century expansionism reveals that these principles fail to apply to all persons associated with America.⁹ Notwithstanding this nation's role in international movements calling for self-determination of colonized peoples throughout the world,¹⁰ this country established and has maintained what can be described as colonies. In an era of self-determination and in the decade dedicated to the eradication of colonialism,¹¹ the leader of the free world and great emancipator of the oppressed has maintained a colonial regime.

This country has maintained its possessions without a great deal of opposition. It has fostered the disenfranchised status of these possessions through the use of certain psychological tools, which will be labeled as: (1) citizenship status, (2) international status, and (3) economic dependency and American idealism. These tools have convinced United States mainland citizens, the international community, and the conquered that the United States' relationship with the conquered territorial peoples is not colonial. The United States has persuaded the conquered and the international community of the conquered's membership in the United States body politic by using labels such as "statutory citizen," and "national." The United States has also found

7. ARNOLD H. LEIBOWITZ, *DEFINING STATUS: A COMPREHENSIVE ANALYSIS OF UNITED STATES TERRITORIAL RELATIONS* 3 (1989); see also Ediberto Román, *Empire Forgotten: The United States's Colonization of Puerto Rico*, 42 VILL. L. REV. 1119, 1120-23 (1997) [hereinafter *Empire Forgotten*].

8. *Empire Forgotten*, supra note 7, at 1202; Ediberto Román, *The Alien-Citizen Paradox and Other Consequences of U.S. Colonialism*, 26 FLA. ST. U. L. REV. 1, 3-4 (1998).

9. This Article focuses on what Frantz Fanon reminded us was the reality that the "[c]olonial[ist] and imperial[ist] have not paid their score' [For this reason,] [w]e must take stock of the nostalgia for empire, as well as the anger and resentment it provokes in those who were ruled." EDWARD SAID, *CULTURE AND IMPERIALISM* 12 (1993) (quoting FRANZ FANON, *THE WRETCHED OF THE EARTH* 79 (Constance Farrington trans., 1963)).

10. See generally Rebecca Tsosie, *Tribal Environmental Policy in an Era of Self-Determination: The Role of Ethics, Economics, and Traditional Ecological Knowledge*, 21 VT. L. REV. 225 (1996).

11. *Id.*

approval for its fictitious grant of autonomy by using thinly veiled euphemisms for colony, such as “commonwealth status,” “federated states,” and “free association.”

The use of economic dependence on United States public or private investment, which is often coupled with democratic rhetoric in order to foster a need-based desire for association, also facilitates the continued control over the territories.¹² These psychological creations or tools, when combined, have served a dual purpose of convincing the conquered that they in effect exist in a paradox: they live in a free and autonomous foreign state and at the same time they are full-fledged citizens or members of the United States’ body politic. These psychological or hegemonic creations have fostered an anomalous and oxymoronic existence because these peoples are neither members of the American family, nor are they members of free and autonomous sovereign nations.¹³

III. THE ASPIRATIONS OF LIBERALISM VERSUS THE REALITY OF EXPANSIONISM

With roots dating back to Greek philosophy, liberalism is largely a “normative political philosophy [that is premised upon] a set of moral arguments about the justification of political action and institutions.”¹⁴ The recent development of the theory is recognized as stemming from such writers as John Locke, John Stuart Mill, Adam Smith, Alexis de Toqueville, Friedrich Von Hayek, and more recently, from writer Ronald Dworkin.¹⁵ According to Professor Kymlicka, two base preconditions are necessary for the attainment of a good life.¹⁶ The first, is living our life from the inside in accordance with our beliefs about what gives value to life; the second, is that we be free to question those beliefs.¹⁷ Because these preconditions are essential and at their root appear to be premised upon notions of freedom and that which is just, government is

12. In such a dependency setting, the acted upon state, such as Guam, has its economic infrastructure so penetrated that crucial decision-making power is exercised by the influencing power, such as the United States.

13. See discussion *infra* Part V.B.

14. WILL KYMLICKA, *LIBERALISM, COMMUNITY AND CULTURE* 9 (1989). At least one author has asserted that liberalism and colonialism developed during the same time period, stating that “[t]heir contradictions were allowed because the eligibility for so-called universal rights was understood to be conditioned upon one’s subjectivity, shaped by notions of racial superiority. The subordination produced through this encounter does not solely implicate what is sought to be redressed through civil rights.” Leti Volpp, *Righting Wrongs*, 47 *UCLA L. REV.* 1815, 1833 (2000).

15. See Alan Ryan, *Liberalism*, in *A COMPANION TO CONTEMPORARY POLITICAL PHILOSOPHY* 291 (Robert E. Goodin & Philip Pettit eds., 1993).

16. KYMLICKA, *supra* note 14, at 12–13.

17. *Id.* at 13.

to “treat[] people as equals, with equal concern and respect, by providing for each individual the liberties and resources needed to examine and act on [those] beliefs. This requirement forms the basis of contemporary liberal theories of justice.”¹⁸ Professor Dworkin observed that notions of equality and neutrality are at the core of liberalism. He noted:

I argue that the constitutive morality of liberalism “is a theory of equality that requires official neutrality amongst theories of what is valuable in life. . . . [Liberalism’s] constitutive morality provides that human beings must be treated as equals by their government, not because there is no right and wrong in political morality, but because that is what is right. Liberalism does not rest on any special theory of personality, nor does it deny that most human beings will think that what is good for them is that they be active in society. Liberalism is not self-contradictory: the liberal conception of equality is a principle of political organization that is required by justice, not a way of life for individuals.”¹⁹

The precepts of liberal theory have had considerable influence on American jurisprudence and political philosophy.²⁰ The works of John Locke have contributed greatly to American notions of justice, particularly in the areas of citizenship.²¹ Yet, despite the egalitarian basis of liberal theory, the apparent American adoption of the theory in its jurisprudence, American history, particularly with respect to citizenship law, demonstrates a practice that is anything but egalitarian. In other words, the reality of American history belies the precepts of its leading theory.²² An examination of this country’s expansionism throughout the last century, all too often evidences not equality and liberty, but subordination.²³

18. *Id.*

19. RONALD DWORKIN, *LAW’S EMPIRE* 441 (1986) (citation omitted).

20. “A fundamental tenet of neoclassical liberalism posits that equality of rights is necessary to human flourishing. . . . The life of liberalism began in capitalist market societies and it can only be fully comprehended in terms of the social and economic institutions that shaped it.” Danaya C. Wright, *Foreword: Toward a Multicultural Theory of Property Rights*, 12 U. FLA. J.L. & PUB. POL’Y 2, 2–3 (2000).

21. See JOHN LOCKE, *THE SECOND TREATISE ON CIVIL GOVERNMENT* 66 (C. B. Macpherson ed., Hackett Publishing 1980) (1690); see also Douglas G. Smith, *Citizenship and the Fourteenth Amendment*, 34 SAN DIEGO L. REV. 681, 696 (1997).

22. Professor Pedro Malavet provides a fine critique of the application of American liberal theory to the United States citizens of Puerto Rico. See Pedro A. Malavet, *Puerto Rico: Cultural Nation, American Colony*, 6 MICH. J. RACE & L. 1 (2000).

23. Though liberalism and colonialism may seem to be incompatible with each other, one author has noted that

universal claims of liberalism were able to justify political exclusions, and this logic continues to operate in the post-colonial moment. It serves as a basis for distinguishing Others, whether they be women, gays and lesbians, or ethnic

In order to situate a discourse that intersects liberalism's egalitarianism under citizenship law with the actualities of United States expansionist endeavors, it is necessary to understand colonialism, not only as a historical phenomenon, but also as a current political and economic reality.²⁴

Colonialism as a concept, because of its elusive nature, has often escaped rigorous scholastic examination. Jurgen Osterhammel, however, has defined it as a "relationship of domination between an indigenous (or forcibly imported) majority and a minority of foreign invaders."²⁵ He describes the relationship as one where the fundamental decisions affecting the lives of the colonized people are made and determined in a distant metropolis pursuant to the colonial ruler's interests.²⁶ In such relationships, the colonizers, because of their self-proclaimed superiority and ordained mandate to rule, typically reject cultural compromises with the conquered.²⁷

Edward Said defines colonialism as "the implanting of settlements on distant territory."²⁸ Said observes: "Neither imperialism nor colonialism is a simple act of accumulation and acquisition."²⁹ They are both "supported and perhaps even impelled by impressive ideological formations that include notions that certain territories and people *require* and beseech domination, as well as forms of knowledge affiliated with domination."³⁰ In fact, "the vocabulary of classic nineteenth-century imperial culture is plentiful with words and concepts like 'inferior' or 'subject races.'"³¹

and religious minorities. When confronted with difference, liberalism spawns strategies of exclusion based on class, gender, sexuality, ethnicity, religion, and race.

Ratna Kapur & Tayyab Mahmud, *Hegemony, Coercion, and Their Teeth-Gritting Harmony: A Commentary on Power, Culture, and Sexuality in Franco's Spain*, 5 MICH. J. RACE & L. 995, 1014 (2000).

24. Writer Joseph Conrad described colonialism in the *Heart of Darkness* as: The conquest of the earth, which mostly means the taking it away from those who have different complexion or slightly flatter noses than ourselves, is not a pretty thing when you look into it too much. What redeems it is the idea only. An idea at the back of it, not a sentimental pretense but an idea; and an unselfish belief in the idea—something you can set up, and bow down before, and offer a sacrifice to . . .

JOSEPH CONRAD, *THE HEART OF DARKNESS* 10 (Robert Kimbrough ed., W.W. Norton & Co. 3d ed. 1988) (1902).

25. JURGEN OSTERHAMMEL, *COLONIALISM: A THEORETICAL OVERVIEW* 16 (Shelley L. Frisch trans., Markus Wiener Publishers 1997) (1997). However, historian Philip Curtin defined the term more generally when he described it as "domination by people of another culture." Philip D. Curtin, *The Black Experience of Colonialism and Imperialism*, in *SLAVERY, COLONIALISM, AND RACISM* 17, 23 (Sidney W. Mintz ed., 1974).

26. OSTERHAMMEL, *supra* note 25, at 16.

27. *See id.*

28. SAID, *supra* note 9, at 9.

29. *Id.*

30. *Id.*

31. *Id.*

Colonialism, as used here, includes the "oppression, humiliation, or exploitation of indigenous peoples."³² Neocolonialism will be used to denote indirect domination, usually economic or cultural, of countries formerly colonies but now arguably politically independent.³³

The term colony, which stems from colonialism but is not necessarily present in every colonial undertaking, is a new political organization created by invasion and cultural domination.³⁴ In a colony, rule by the distant metropolis is evident in that the ruled are dependent on a geographically remote "mother country" or imperial center, which claims exclusive rights of possession of said colony.³⁵

As such, in a colonial setting, "[t]he parent state alone . . . possesses [the] international personality and has the capacity to exercise international rights and duties."³⁶ Nevertheless, the parent state may bestow upon its colony a degree of internal and possibly even external autonomy.³⁷ However, these privileges do not eradicate the colonial relationship because they are dependent on the will of the parent state.³⁸ Subsequently, as possessions of the parent state, the inhabitants of colonies are captive people that are denied the basic human right of self-determination.³⁹

32. GEORGE H. NADEL & PERRY CURTIS, *IMPERIALISM AND COLONIALISM* 3 (1964).

33. "[C]olonialism is not just any relationship between masters and servants, but one in which an entire society is robbed of its historical line of development, *externally manipulated* and transformed according to the needs and interests of the colonial rulers." OSTERHAMMEL, *supra* note 25, at 15. Jurgen Osterhammel observes that colonial settings reject "cultural compromises with the colonized population, the colonizers are convinced of their own superiority and of their ordained mandate to rule." *Id.* at 17.

34. OSTERHAMMEL, *supra* note 25, at 15-16.

35. The significance of the metropolis' location is verified by the international community's definition of colony through the "salt water theory." G.A. Res. 1541, U.N. GAOR, 15th Sess., Supp. No. 16, at 106, U.N. Doc. A/14684 (1960). This theory maintains that a territory and its inhabitants are considered a dependent territory, or essentially a colony, if a body of saltwater separates it from its ruling country. *Id.* When the United Nations' General Assembly adopted Resolution 1541, which defined a dependent territory as a "territory which is geographically separate and is distinct ethnically and/or culturally from the country administering it," the United Nations essentially codified the "salt water theory." *Id.* This definition demonstrated the international communities' determination that, unlike independent countries, dependent territories are possessions of the parent country, which have no separate statehood or sovereignty. *See Empire Forgotten, supra* note 7, at 1119-25.

36. OPPENHEIM'S *INTERNATIONAL LAW* 276 (Robert D. Jennings & Arthur Watts eds., 9th ed. 1992).

37. *Id.*

38. *Id.*

39. This diametrical situation is best understood in light of imperialism. While

Imperialism, in turn, is intended to “mean the extension of sovereignty or control, whether direct or indirect, political or economic, by one government, nation or society over another together with the ideas justifying or opposing this process.”⁴⁰ Imperialism is essentially about power both as end and means.”⁴¹

seemingly similar, some have characterized the concept of colonialism differently from imperialism in that imperialism is a comprehensive concept which encompasses colonialism. See SAID, *supra* note 9, at 9. When analyzing the status of subjugated peoples, as here, an understanding of imperialism is needed because it presupposes the will and the ability of an imperial country to determine as ruler the national and international interests of the colony and the colonizer. This distinction is imperative since the United States’ relationship with its island acquisitions is both colonial and imperialistic in that it is founded on a cultural and racial superiority which results in the domination by, and in the interests of, a distant metropolis. And yet, it is the duplicity of the American Empire and not its colonial nature that distinguishes it from the other modern imperial powers. The United States’ cognizant conquest is hypocritical in light of its official commitment to the right to self-determination. The pretense is crucial in that it necessitates the creation of the hegemonic tools that are the center of this Article. See generally OSTERHAMMEL, *supra* note 25, at 21; SAID, *supra* note 9, at 7.

40. Because of space limitations, some forms of imperialism will only be mentioned in passing. For instance, the “Assyrians, Phoenicians, Ottoman Turks, Huns, Tartars, the warrior nations of Africa and the New World—to name but a few—have all created empires through conquest and colonization.” NADEL & CURTIS, *supra* note 32, at 3.

41. *Id.* at 1. “Imperialism generally involves the collision of two or more cultures and a subsequent relationship of unequal exchange between or among them. What confuses the issue has been the inability of men to analyze their real motives for territorial or cultural expansion and to separate them from rationalizations devised after the fact.” *Id.* As will be shown, by the mid-1880s imperialism “was no longer identified with merely a crude expansionist mood (‘jingoism’) or displays of brute force and gun-boat diplomacy. Connoting power, prestige, dignity, and affluence, ‘imperialism’ was invoked by some even as a panacea to cure political, social, and economic ills at home.” *Id.* at 2.

The eighteenth century saw a sudden, and often violent, upsurge in both acquisition and changing of colonies. *Id.* at 10. England “emerged from the protracted wars of the mid-century as a world power rivaled only by France in the size and affluence of her empire.” *Id.* at 10–11. “Since the colonial empires of the nineteenth century were established at different times and for different reasons any chronological division between the old and the new must be somewhat arbitrary. Despite many popular candidates for this claim, no single date marks the beginning of the so-called ‘new imperialism.’” *Id.* at 12. By the end of the nineteenth century, empires had expanded and developed. “Among the distinctive features of the new empires were a shift in emphasis, after mid-century, from private to national aspects of colonization, the relative abundance of capital for overseas investment, and the increasingly bitter agitation against imperialism itself.” *Id.* at 13. “No longer were colonies treated as the private property of the Crown . . .” *Id.*

Perhaps the most prominent feature of the new empires was the rise of aggressive competitors to challenge the imperial ascendancy of Great Britain and France. While Spanish, Portuguese, and Dutch retained portions of other former empires, Belgium, in the person of King Leopold II, followed by Germany and later Italy made successful bids for a place in the colonial sun. In the Far East the rush for concessions and territories was accelerated by the appearance of three other belligerent powers—the United States, Russia, and Japan. In Europe, after 1870, commercial and industrial rivalries, tensions

Colonialism nonetheless requires something more than the mere conquering and annexing of foreign lands.⁴² It also includes a mental state of both the conqueror and the conquered. Historian D. K. Fieldhouse elaborated on the necessary mental state for a colonial regime. He noted that a key “basis of imperial authority [is] the mental attitude of the colonist.”⁴³ His acceptance of subordination—whether through a positive sense of common interest with the parent state, or through inability to conceive of any alternative—makes the empire durable. The durability of the empire is sustained on both sides, that of the rulers and that of the distant ruled,⁴⁴ and, in turn, each has a set of interpretations of their common history with their own perspective, historical sense, emotions, and traditions.⁴⁵

arising out of the arms race, the increasingly rigid alliance system, and the demands of party politics all contributed to the momentum of overseas expansion. The British empire, furthermore, had a catalytic effect on the Continent where many political leaders and financiers were anxious to match, eventually to surpass, the wealth and prestige of “Greater Britain.”

Id. at 14–15.

Furthermore the “maturing capitalist economies of Western Europe, above all the industrial-financial complex in Great Britain, created needs [sic] that could apparently be satisfied only through investment in other parts of the world.” *Id.* at 13. During the 1890s, virtually all the great powers showed signs of imperialist hysteria.

The perverse application of Darwin’s theory of natural selection to nations and societies had created an appropriately amoral environment in which “superior” peoples could prove their fitness to survive at the expense of “inferiors.” The advent of mass electorates and of cheap, sensational journalism brought large sections of the working classes into the imperial arena where they could cheer the subjugation of Ashantis, Hottentots, Dervishes, or Bantu peoples. The pioneers and proconsuls of the new empires may have had much in common with the heroes of the old empires. But there was an important difference. *In the late nineteenth century a vast audience derived vicarious pleasure from following the exploits of these men in newspapers, lecture rooms, and music halls.*

Id. at 15 (emphasis added).

42. See Efrén Rivera Ramos, *The Legal Construction of American Colonialism: The Insular Cases (1901–1922)*, 65 REV. JUR. U.P.R. 225, 285 (1996). In this impressive work, the author addresses the notion of the conqueror’s “inherent ‘right’” to expand, which is, at least in part, a result of a “perceived ‘tradition of expansion,’ developed through a century of an almost continuous practice of territorial enlargement throughout the continent.” *Id.*

43. SAID, *supra* note 9, at 11 (citing D. K. FIELDHOUSE, *THE COLONIAL EMPIRES: A COMPARATIVE SURVEY FROM THE EIGHTEENTH CENTURY* 103 (1965) (discussing white colonists in the Americas, although the general point is broader)).

44. *Id.*

45. Imperialism consolidated the mixture of identities on a global scale. Yet just as human beings make their own history, they also create their own identities. Imperialism has the effect of altering the conquered’s vision of his or her own identity.

Thus, any changes to colonial rule cannot occur without the willingness of men and women to resist the pressures of colonial rule, challenge and project ideas of liberation, and imagine a new national community.⁴⁶ Liberating changes will not occur unless (1) economic or political exhaustion with the empire sets in at the home of the ruled, (2) the idea of empire and the cost of colonial rule are challenged publicly, (3) the representations of imperialism begin to lose their justification and legitimacy, and, finally (4) the rebellious “natives” impress upon the metropolitan culture the independence and integrity of their own culture, free from colonial encroachment.⁴⁷

A. *The United States Colonial Mandate: The Territorial Clause*

With its victory in the Spanish-American War, the United States entered into the race to become a world colonial power.⁴⁸ Yet, in light

Id. In his chapter on “the pitfalls of nationalist consciousness” in *The Wretched of the Earth*, Fanon foresaw what appears to be occurring with this country’s island dependencies. See FANON, *supra* note 9, at 119–64. His notion was that unless national consciousness at its moment of success was somehow changed into a social consciousness, the future would hold not liberation but an extension of imperialism. *Id.* Fanon’s theory is not meant to answer the appeals of a native chafing under the paternalistic surveillance of a European policeman and, in a sense, preferring the services of a native office in his place. On the contrary, it first represents colonialism as a totalizing system nourished in the same way that human behavior is informed by unconscious desires. Fanon’s implicit analogy is devastating.

46. See SAID, *supra* note 9, at 6–7.

47. See *id.*

48. In a narrow sense, then, the race for colonies was the product of diplomacy rather than of any more positive force. Germany set the example by claiming exclusive control over areas in which she had an arguable commercial stake, but no more, as a means of adding a new dimension to her international bargaining power, both in respect of what she had taken, and of what she might claim in the future. Thereafter the process could not be checked; for, under conditions of political tension, the fear of being left out of the partition of the globe overrode all practical considerations. Perhaps Britain was the only country which showed genuine reluctance to take a share; and this was due both to her immense stake in the continuance of the *status quo* for reasons of trade, and to her continued realism in assessing the substantive value of the lands under dispute. And the fact that she too joined in the competition demonstrated how contagious the new political forces were. . . . Colonies thus became a means out of the impasse; sources of diplomatic strength, prestige-giving accessions of territory, hope for future economic development. New worlds were being brought into existence in the vain hope that they would maintain or redress the balance of the old.

NADEL & CURTIS, *supra* note 32, at 92–93. “It was already the common experience of all the countries that had taken part in the partition of Africa and the Pacific that, except for the few windfalls . . . the new colonies were white elephants.” *Id.* at 94–95.

[T]heir attraction for investors, except in mines, etc., was negligible; they were unsuitable for large-scale emigration, and any economic development that had taken place was usually the result of determined efforts by the European state concerned to create an artificial asset. Moreover, in most cases, the cost of

of its own revolutionary history, the United States had a strong interest in developing mechanisms that would allow it to avoid the label of colonizer.

The acquisitions from the Spanish-American War provided the United States with the economic and strategic interest in maintaining an empire. The United States' expansionist authority derived from something other than just political machinations at the turn of the nineteenth century. Such mandate to rule territories derived from the very founding document of this government—the United States Constitution. Through Article IV, Section 3, Clause 2, known as the Territorial Clause, the framers envisioned expansion. The Clause provides in pertinent part:

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.⁴⁹

The genesis of the Territorial Clause took place at the Constitutional Convention in 1787 when the founding fathers briefly contemplated the future acquisition of new lands by the United States.⁵⁰ The debate that

administration was a dead weight on the imperial power. By 1900 all these facts were apparent and undeniable. They were constantly pressed by opponents of colonial expansion in each country Yet public opinion was increasingly oblivious to such facts: the possession of colonies had become a sacred cow, a psychological necessity.

Id. at 95.

49. U.S. CONST. art. IV, § 3, cl. 2. The structural framework of the clause is as follows:

The term "territory" as used in this provision is equivalent to the word "lands," and the words "respecting the territory" refer only to the territory owned by the United States at the time of the adoption of the Constitution, subsequently acquired property being subject to the legislation of Congress as an incident to its ownership. "To dispose of" means to make sales of the lands, or otherwise to raise money from them, and "needful rules" comprehends all appropriate legislation, including the passage of all laws necessary to secure the rights of the United States to the public lands, to provide for their sale, and to protect them from taxation.

WILLIAM A. SUTHERLAND, NOTES ON THE CONSTITUTION OF THE UNITED STATES 596 (1904).

50. LEIBOWITZ, *supra* note 7, at 10, 12. The actual debate took place on August 30, 1787 under motion of Governor Morris, a Pennsylvania delegate, after discussions on the acceptance of new states and the claims of the United States to western territory were postponed. JAMES MADISON, THE DEBATES IN THE FEDERAL CONVENTION OF 1787 WHICH FRAMED THE CONSTITUTION OF THE UNITED STATES OF AMERICA 489–96 (Gaillard Hunt & James Brown Scott eds., 1920). The clause was added to the Constitution by a vote of ten to one. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE

ensued during the Convention, prior to accepting the inclusion of the Territorial Clause, projected the dilemma of dealing with the newly acquired territory as states of "equal rank with other states."⁵¹ The western states, or backlands, were intended to eventually be admitted as states with equality of privileges.⁵² The northwest territory was already populated by migrants from the original states, and therefore the states that possessed interests in these territories opposed cession of the claimed lands to the United States.⁵³ In opposition, the smaller states without land claims lobbied for territorial control by the federal government.⁵⁴ The Territorial Clause arose to resolve this dispute over the backlands to which many of the thirteen original states laid proprietary claims.⁵⁵

Although the Constitution granted power to the federal government to admit new states and to govern over the territories, it did not expressly guarantee that these territories would become states. However, the territorial condition was considered transitory and temporary.⁵⁶ It was understood that the territories would eventually become states as soon as Congress deemed the people of the territories prepared.⁵⁷ Whether the people were prepared for statehood turned largely on whether the state was sufficiently populated.⁵⁸ The three steps for eventual incorporation as a state relied on successive increases in population of free male inhabitants and increasing self-governing power until reaching 60,000 free inhabitants with a governor, judges, and representatives with power

UNITED STATES 25 (Boston, Hilliard, Gray, and Co. 1833).

51. The idea of having the new states be of "equal rank with other States" was debated by James Madison on August 29, 1787 to counter Governor Morris's motion to strike the proposition that the new states would be intended on the same terms as the original terms. This equal rank was admitted to apply to the small states, but not to the western states until they themselves became part of the Union. MADISON, *supra* note 50, at 487-88.

52. *Id.*

53. Arthur Bestor, *Constitutionalism and the Settlement on the West: The Attainment of Consensus, 1754-1784*, in THE AMERICAN TERRITORIAL SYSTEM 13, 19 (John Porter Bloom ed., 1973). These economic interests were the source of ongoing tension from the drafting of the Articles of Confederation through the ratification of the Northwest Ordinance of 1787. *See id.* at 17-24.

54. *See id.*

55. LEIBOWITZ, *supra* note 7, at 10. At the Constitutional Convention, during the session of Thursday, August 30, 1787, the tension was apparent during the discussion of the formation of new states. Delegates from larger states holding claims in western lands were hesitant to allow separation of their claims as new states, and wanted guarantees that these would not be altered by the Constitution. *See* MADISON, *supra* note 50, at 491-93.

56. HENRY CAMPBELL BLACK, HANDBOOK OF AMERICAN CONSTITUTIONAL LAW 19 (3d ed. 1910).

57. *See id.*

58. *See* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 158 (2d ed. 1985).

to make laws for the territory, “so long as the laws were ‘not repugnant’ to the ordinance.”⁵⁹

Prior to the acquisition of the post-Spanish-American War territories, the Northwest Ordinance of 1787 encompassed the underlying theme and tradition of United States territorial expansion: eventual statehood and full incorporation of their inhabitants as citizens.⁶⁰ Congress produced Northwest Ordinance of 1787 to address the political and economic problems of the Northwest Territory.⁶¹ It eventually became the archetype for development of all territorial acquisitions.⁶²

The eventual statehood and full incorporation archetype envisioned that territories would become states after a period of tutelage, when enough free males would have settled in the territory.⁶³ A series of treaties entered into during this period evinces this point. For instance, Article III of the Treaty of 1803, whereby Louisiana became part of the United States, provided “that the inhabitants of the ceded territory shall be incorporated in the Union . . . and admitted as soon as possible . . . to the enjoyment of all rights, advantages, and immunities of the citizens of the United States . . .”⁶⁴ The treaty of 1819, under which Florida was annexed, and the treaties by which New Mexico, Utah, and California were annexed contained similar provisions.⁶⁵

This framework for the territories was for the most part, however, imposed on regions coherent with the original republic.⁶⁶ Interestingly enough though, from the earliest days, the inhabitants of these territories considered themselves citizens of the United States although residing in a “territory.”⁶⁷ In short, the spirit of the Northwest Ordinance carried with it the practice of a republican government which would bring about “equality with the mother country.”⁶⁸ As one scholar examining this

59. *Id.* at 159.

60. The Northwest Ordinance of 1787, ch. 8, 1 Stat. 50 (1789).

61. The passage of the Ordinance also had among the objectives to raise revenue for the then depleted federal coffers and to establish control of the settled areas to avoid future wars. Denis P. Duffey, *The Northwest Ordinance as a Constitutional Document*, 95 COLUM. L. REV. 929, 934 (1995). The Ordinance technically applied only to the Northwest Territory. See LEIBOWITZ, *supra* note 7, at 6.

62. LEIBOWITZ, *supra* note 7, at 6.

63. FRIEDMAN, *supra* note 58, at 158.

64. RUBIN FRANCIS WESTON, *RACISM IN U.S. IMPERIALISM: THE INFLUENCE OF RACIAL ASSUMPTIONS ON AMERICAN FOREIGN POLICY, 1893–1946*, at 188–89 (1972).

65. *Id.* at 189.

66. *See id.* at 159–67.

67. Bestor, *supra* note 53, at 13.

68. Robert F. Berkhofer, Jr., *The Northwest Ordinance and the Principle of*

period of expansion noted, “[a]ny status less than eventual statehood would have been a betrayal of the very principle upon which Americans had fought the Revolution.”⁶⁹

However, the cession of lands resulting from the victory in the Spanish-American War, with their fairly dense populations posed difficulties, namely the eventual incorporation of territories inhabited by people “utterly unlike those of the United States.”⁷⁰ It was at this critical point in American history that a logical, moral, and legal disconnect arose. Prior to this moment, the United States and its people sought to expand by annexing and inhabiting the western territories. In fact, when considering the status of the new inhabitants of the western territories, the United States Supreme Court referred to these individuals as “settler citizens.”⁷¹

This, in turn, largely justified the treatment of these individuals as United States citizens since they were citizens who merely moved west. With the Spanish-American War conquests, there existed economic and strategic interests in expansion. However, unlike the expansion of the western part of what is now the United States, incorporation of the more distant territories involved considerable difficulty.⁷²

Senator J.D. Richardson of Tennessee echoed this point when he noted the cause of the problem was the change from democratic expansion into sparsely settled and connected lands to the acquisition of territories like Puerto Rico, in which people were acquired without land sufficient for the migration of large numbers of Americans.⁷³ Representative James L. Shyden of Texas, in opposing the grant of United States citizenship to Puerto Ricans, was a bit more explicit. He observed that the climate and geography of Puerto Rico were not conducive to Anglo-Saxon government because the tropical people seemed to have heat in their blood.⁷⁴ As a consequence of these views, the expansion modality of eventual statehood created by the Northwest Ordinance and the Territorial Clause was distorted. There was little interest in inhabiting those islands or in

Territorial Evolution, in THE AMERICAN TERRITORIAL SYSTEM 45 (John Porter Bloom ed., 1969).

69. *Id.* at 46.

70. 2 JAMES BRYCE, *THE AMERICAN COMMONWEALTH* 572–75 (1911).

71. *See, e.g.*, *Scott v. Sandford*, 60 U.S. (19 How.) 393, 489 (1856).

72. *Balzac v. Porto Rico*, 258 U.S. 298, 309 (1922).

73. WESTON, *supra* note 64, at 190 (citing 33 CONG. REC. 1057 (1900)).

Alaska was a very different case from that of Porto Rico. It was an enormous territory, very sparsely settled and offering opportunity for immigration and settlement by American citizens. It was on the American continent and within easy reach of the then United States. It involved none of the difficulties which incorporation of the Philippines and Porto Rico presents.

Balzac, 258 U.S. at 309.

74. WESTON, *supra* note 64, at 195–96.

allowing the inhabitants of those islands to become United States citizens. As a result, the eventual statehood as the archetype for expansion was abandoned. Legal fictions were created to allow United States global influence without the necessity of fully accepting the people of color that inhabited the newly acquired territories. Despite the egalitarian rhetoric associated with American history, there is an abundance of evidence demonstrating the jingoistic basis for the denial of membership to the newly conquered peoples.

The Congressional debates over the status of the Filipinos and Puerto Ricans aptly evince this point. One Congressional report portrayed the Filipinos as “physically weaklings of low stature, with black skin, closely curling hair, flat noses, thick lips, and large, clumsy feet.”⁷⁵ Representative Sereno Payne trumpeted census reports taken of the people of Puerto Rico showing that “whites . . . generally full-blooded white people, descendants of the Spaniards,” outnumbered by nearly two-to-one the combined total of “negroes” and “mulattoes.”⁷⁶ Meanwhile, Congresspersons viewed the Filipinos as “non-white” and, therefore, uncivilized and un-American. Comparing the Filipinos to the people of Puerto Rico, Representative Thomas Spight noted “[h]ow different the case of the Philippine Islands, 10,000 miles away. . . . The inhabitants are of wholly different races of people from ours—Asiatics, Malays, negroes and mixed blood. They have nothing in common with us and centuries cannot assimilate them.”⁷⁷ Representative John Dalzell stated that he was unwilling “to see the wage-earner of the United States, the farmer of the United States, put upon a level and brought into competition with the cheap half-slave labor, savage labor, of the Philippine Archipelago.”⁷⁸ Other representatives shared this sentiment; Dalzell’s comments were greeted by loud applause in the House.⁷⁹ Similarly, Representative George Gilbert warned against “open[ing] wide the door by which these negroes and Asiatics can pour like the locusts of Egypt into this country.”⁸⁰ Senator William Bate likewise stated:

Let us not take the Philippines in our embrace to keep them simply because we are able to do so. I fear it would prove a serpent in our bosom. Let us beware

75. 33 CONG. REC. 3613 (1900) (quoting a report of the Philippine Commission to the President).

76. *Id.* at 1941 (statement of Rep. Payne).

77. *Id.* at 2105 (statement of Rep. Spight).

78. *Id.* at 1959 (statement of Rep. Dalzell).

79. *Id.*

80. *Id.* at 2172 (statement of Rep. Gilbert).

of those mongrels of the East, with breath of pestilence and touch of leprosy. Do not let them become a part of us with their idolatry, polygamous creeds, and harem habits.⁸¹

The fear of foreign influx was not limited to congressional debate. Scholars also contributed to the xenophobia.⁸² In a series of articles published in the *Harvard Law Review*, this racist fear of foreigners prevailed. One writer noted:

Our Constitution was made by a civilized and educated people. It provides guaranties of personal security which seem ill adapted to the conditions of society that prevail in many parts of our new possessions. To give the half-civilized Moros of the Philippines, or the ignorant and lawless brigands that infest Puerto Rico, or even the ordinary Filipino of Manila, the benefit of such immunities . . . would . . . be a serious obstacle to the maintenance there of an efficient government.⁸³

According to the United States' then existing model, the application of the ideals embodied in the Northwest Ordinance should have dictated that these new lands would obtain admission as States of the Union as of right when sufficient population had been attained.⁸⁴ However, with these territories, Congress's power was absolutely discretionary.⁸⁵

81. *Id.* at 3616 (statement of Sen. Bate). Though Senator Bate's comments contained racist overtones, they also expressed a distaste for the imperial nature of the United States' ambitions. Earlier in the debate, Senator Bate declared:

I was opposed to acquiring the islands of Spain, and for that reason, in part, voted against the ratification of the treaty of Paris. I am opposed to the retention of those . . . islands a moment longer than is necessary to reestablish order and security. I do not approve the manner in which the islands and their people were obtained and have been treated since they came under our control. But so long as the islands are under our control, and so long as our flag floats there, the representative of our authority, and peace having been secured, I shall, as far as may be within my power, advocate and support the extension to those people of every privilege, right, and immunity which the people of the States enjoy.

Id. at 3612.

82. See Gabriel A. Terrasa, *The United States, Puerto Rico and the Territorial Incorporation Doctrine: Reaching a Century of Constitutional Authoritarianism*, 31 J. MARSHALL L. REV. 55, 56 (1997) (noting that racism by politicians and scholars led to a plan to maintain the new territories as "dependencies," which were not due the same constitutional protections as the states).

83. Simeon E. Baldwin, *The Constitutional Questions Incident to the Acquisition and Government by the United States of Island Territory*, 12 HARV. L. REV. 393, 415 (1899).

84. Robert W. Johannsen, *Stephen A. Douglas and the Territories in the Senate*, in THE AMERICAN TERRITORIAL SYSTEM 87 (John Porter Bloom ed., 1973).

85. See 1 BRYCE, *supra* note 70, at 589 (discussing the difficulties maintained by Utah in obtaining admission to the Union because of the presence of the Mormon Church); see also Harrison Loesch, *The American Territories of Today and Tomorrow*, in THE AMERICAN TERRITORIAL SYSTEM 238 (John Porter Bloom ed., 1973) (asserting that Congress has dealt with each of the insular possessions on individual basis).

The Committee on the Pacific Island and Puerto Rico issued a report representing the prevalent view of the time. The committee ultimately supported a discretionary application of their existing expansionist model:

If [the United States] should acquire territory [which was] populated by an intelligent, capable, and law-abiding people . . . ⁸⁶ we might at once . . . incorporate that territory and people into the Union. . . . [B]ut if the territory should be inhabited by a people of wholly different character, illiterate, and unacquainted with our institutions, and incapable of exercising the rights and privileges guaranteed by the Constitution⁸⁷ . . . it would be competent for Congress to withhold from such people the operation of the Constitution and the laws of the United States, and, continuing to hold the territory as a mere possession of the United States. . . .⁸⁸

Although the Territorial Clause addressed Congress's power over the backlands, the insular possessions obtained from Spain, including Puerto Rico, the Philippine Islands, and Guam, were acquired pursuant to a so-called right of the United States as a sovereign nation.⁸⁹ According to existing American constructions, once acquired, these lands ceased to be foreign countries and became territories subject to the dominion and sovereignty of the United States, but would not become a part of the Union until incorporated by Congress.⁹⁰ However, there was no standard general prescription to deal with all acquisitions. Hawaii, which had been annexed by Congress at the brink of the Spanish-American War, was set up as a territory as if it had been in the North American continent with the Constitution of the United States in full force and continental tariffs as if it were part of the United States.⁹¹ In contrast, the island of Puerto Rico was organized as a colony⁹² with upper officials appointed by the federal government;⁹³ Guam was deemed a naval coaling station;⁹⁴ and the Philippines, like Puerto Rico, was allowed an extremely limited form of local self-governance with the federal government's presence in the form of military forces.⁹⁵

86. These are obviously codes for Anglo-Saxon people.

87. Obviously referring to non-European people.

88. S. REP. NO. 249, at 8–9 (1900).

89. BLACK, *supra* note 56, at 20.

90. *Id.*

91. 2 BRYCE, *supra* note 70, at 577–78; *see, e.g.*, LEIBOWITZ, *supra* note 7, at 17.

92. See Loesch, *supra* note 85, at 239, for the proposition that such commonwealth status has no constitutional basis but was beneficial to both Puerto Rico and the Philippines in developing self-governing administration.

93. 2 BRYCE, *supra* note 70, at 578.

94. *Id.*

95. WINFRED LEE THOMPSON, THE INTRODUCTION OF AMERICAN LAW IN THE

The controversy over these acquisitions at the time was posited mostly on the divergent views of the constitutionality of the acquisitions. During the Presidential elections of 1900, this subject was a main issue with Democrats mainly arguing that the domination over these acquisitions violated fundamental constitutional principles.⁹⁶ In addition, they argued that these remote and diverse territories would be “rather an encumbrance than a source of strength.”⁹⁷ Other issues included whether the new land should have the freedom to formulate its own government and court system, or whether the powers granted by the Constitution should fully apply to the indigenous peoples.⁹⁸

In addition to the disagreements on the constitutionality of the territorial acquisitions, the differences in treatment of the territories could not be reconciled with the traditional application of the Territorial Clause to the Northwest Territory. While there was appreciation for Hawaii as a great source of business for the United States,⁹⁹ Congress eventually overlooked the fact that the majority of the population was Japanese and Chinese with nearly 30,000 Hawaiian aborigines and followed the traditional application of the Territorial Clause: eventual statehood.¹⁰⁰ With the post-Spanish-American War acquisitions possibly not having the same advantages of Hawaii, these possessions, acquired primarily through the motivations of military necessity and perhaps the potential commercial advantage,¹⁰¹ were deemed unworthy of the final stage of territoriality. During the 1910s, continued colonial status of those possessions was objected to because the Constitution and the frame of government are not “well fitted for ruling over distant subjects of another race.”¹⁰² Admittance to the union was seen as even more difficult due to the differences in languages, customs, and traditions and viewed as detrimental to the political life of the American people since a democratic government was viewed as needing homogeneity and

PHILIPPINES AND PUERTO RICO 1898–1905, at 10 (1989).

96. 2 BRYCE, *supra* note 70, at 579. Compare this view with that of Jeffersonians who claimed the implied powers of Congress to acquire new territory is a constitutional right. JAMES EDWARD KERR, *THE INSULAR CASES: THE ROLE OF THE JUDICIARY IN AMERICAN EXPANSIONISM* 6 (1982).

97. 2 BRYCE, *supra* note 70, at 579.

98. LEIBOWITZ, *supra* note 7, at 10–13.

99. *Id.* at 17.

100. 2 BRYCE, *supra* note 70, at 578.

101. THOMPSON, *supra* note 95, at 2. Another rationale of moral imperative was advanced by President William McKinley by stating that “there was nothing left for us to do but to take them all, and to educate the Filipinos, and uplift and civilize and Christianize them, and by God’s grace do the very best we could by them, as our fellow men for whom Christ also died.” *Id.*

102. 2 BRYCE, *supra* note 70, at 585.

equality of the citizens.¹⁰³ These views were fleshed out by the Supreme Court in what are known as the “Insular Cases,”¹⁰⁴ in order to give meaning to the Territorial Clause application to these insular possessions.

B. The Creation of the Legal Fiction of the Incorporation Doctrine

The United States’ acquisition of the Philippines, Puerto Rico, and Guam gave rise to legal and political debates concerning the constitutional status of the territories, and the limitations on Congress in its treatment of the territories and their inhabitants.¹⁰⁵ The disagreement over the future development of the unsettled territories was somewhat touched upon by the Territorial Clause.¹⁰⁶ The debate ultimately reached the United States Supreme Court in the Insular Cases.¹⁰⁷

Political leaders and legal protagonists had distinctively different views on how to treat the territories and their inhabitants. One perspective held that the United States had the constitutional power to expand as did the European powers. But the expansion did not mean colonialism; it meant the acquisition of territories that would eventually become states.¹⁰⁸

Authority for this position relied on the analysis of two United States Supreme Court decisions that defined the “United States” as including the “territories” and clearly indicated the goal of statehood for all territories. In *Loughborough v. Blake*,¹⁰⁹ Justice Marshall held: “[United States] is the name given to our great republic, which is composed of

103. *Id.*

104. See *Empire Forgotten*, *supra* note 7, at 1142–43.

105. LEIBOWITZ, *supra* note 7, at 17.

106. U.S. CONST. art. IV, § 3, cl. 2.

107. See e.g., *Balzac v. Porto Rico*, 258 U.S. 298 (1922); *Dorr v. United States*, 195 U.S. 138 (1904); *De Lima v. Bidwell*, 182 U.S. 1 (1901); *Goetze v. United States*, 182 U.S. 221 (1901); *Crossman v. United States*, 182 U.S. 221 (1901); *Dooley v. United States*, 182 U.S. 222 (1901); *Huus v. N.Y. & Porto Rico S.S. Co.*, 182 U.S. 392 (1901); *Fourteen Diamond Rings v. United States*, 183 U.S. 176 (1901); JUAN R. TORRUELLA, *THE SUPREME COURT AND PUERTO RICO: THE DOCTRINE OF SEPARATE AND UNEQUAL* 40 (1985); see also Román, *supra* note 8, at 5; *Empire Forgotten*, *supra* note 7, at 1119–23.

108. In this view, “according to the spirit of the Constitution, the subjection of annexed territory to exclusive federal control is an abnormal and temporary stage necessarily preceding the normal and permanent condition of statehood.” *Constitutional Aspects of Annexation*, 12 HARV. L. REV. 291, 292 (1898). This view permitted United States expansion but would accord the newly acquired offshore territories the same treatment as the continental territorial acquisitions.

109. 18 U.S. (5 Wheat.) 317 (1820).

States and territories. The district of Columbia; or the territory west of the Missouri, is not less within the United than Maryland or Pennsylvania States [and thus the Constitution applies]”¹¹⁰

Chief Justice Taney, in the infamously racist decision of *Scott v. Sandford*,¹¹¹ held with respect to the territories that “an act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States . . . could hardly be dignified with the name of due process of law.”¹¹² He went on to observe:

There is certainly no power given by the Constitution to the Federal Government to establish or maintain colonies bordering on the United States or at a distance, to be ruled and governed at its own pleasure; nor to enlarge its territorial limits in any way, except by the admission of new States. That power is plainly given; and if a new State is admitted, it needs no further legislation by Congress, because the Constitution itself defines the relative rights and powers, and duties of the State, . . . and the Federal Government. But no power is given to acquire a Territory to be held and governed permanently in that character.

. . . .

. . . The power to expand the territory of the United States by the admission of new States is plainly given; and in the construction of this power by all departments of the Government, it has been held to authorize the acquisition of territory, not fit for admission at the time, but to be admitted as soon as its population and situation would entitle it to admission. It is acquired to become a State, and not to be held as a colony and governed by Congress with absolute authority. . . .¹¹³

Following the Spanish-American War acquisitions, another line of reasoning arose. Interestingly, this approach, which sought to limit the applicability of the Constitution to the territories, arose after this country acquired distant lands that were densely populated by people of color who spoke different languages and those lands were not perceived to have great commercial potential. Accordingly, those supporting colonialism argued that the congressional limitations applied only to the states or, in the alternative, that the Constitution granted the nation the legal power to govern these islands as colonies as substantially as England might govern them in order to teach nations how to live.¹¹⁴ This position relied on the terms of the various treaties entered into by the United States and made much of the fact that earlier treaties had specifically incorporated previous territories into the Union while no such treaty language was found in the Treaty of Paris, which established the United States’ so-

110. *Id.* at 319.

111. 60 U.S. (19 How.) 393 (1857).

112. *Id.* at 450.

113. *Id.* at 446–47.

114. James Bradley Thayer, *Our New Possessions*, 12 HARV. L. REV. 464, 466–67 (1899).

called right to acquire the post-Spanish-American War territories.¹¹⁵ The Supreme Court decisions in the Insular Cases, which settled the issue, sided with the exclusionary colonial perspective. They remain today the most influential decisions in territorial doctrine even though their values and premises now seem arcane and bigoted.¹¹⁶

The leading insular decision, *Downes v. Bidwell*, arose at the turn of the century.¹¹⁷ In *Downes*, the collector of customs attempted to collect duties on trade between Puerto Rico and the states on the grounds that Puerto Rico was a “foreign country” within the meaning of the tariff laws.¹¹⁸ The controversy centered on whether territorial tariffs could differ from tariffs in the states.¹¹⁹ If Puerto Rico was considered to be a part of the United States, then territorial tariffs would have to comport with the Uniformity Clause of the Constitution which requires that “all Duties, Imposts, and Excises shall be uniform throughout the United States.”¹²⁰

“The issue raised by the *Insular Cases* centered on whether the constitutional restrictions on Congressional authority applicable to the States serve as a check on the exercise of federal power with respect to the territories.”¹²¹ The Insular Cases also addressed the extent of the applicability of the U.S. Constitution to the inhabitants of the newly acquired territories.

Despite authority from both the *Loughborough* and *Scott* decisions, which suggested that the territories should be treated equally as states, “Justice Taney’s language in *Scott v. Sandford* was dismissed [by the *Downes* Court] as *dicta* . . . and, therefore, not binding as a precedent.”¹²²

“Justice Brown’s opinion [in *Downes*] was interpreted by other members of the Court as permitting [a broad] power by Congress.”¹²³ The decision made clear that Puerto Rico, as a territory, was merely a possession of the New Empire.¹²⁴ Justice Brown concluded: “We are

115. See, e.g., *Downes v. Bidwell*, 182 U.S. 244, 339 (1901) (holding that there is no incorporation for a territory if the treaty does not advocate incorporation unless Congress supports incorporation).

116. See *Empire Forgotten*, *supra* note 7, at 1119; Román, *supra* note 8, at 1.

117. 182 U.S. 244 (1901).

118. 182 U.S. at 247.

119. LEIBOWITZ, *supra* note 7, at 21.

120. U.S. CONST. art. I, § 8, cl. 1.

121. See LEIBOWITZ, *supra* note 7, at 21.

122. *Id.* at 22.

123. *Id.*

124. *Empire Forgotten*, *supra* note 7, at 1120.

therefore of opinion that the Island of Porto Rico is a territory appurtenant and belonging to the United States, but not a part of the United States within the revenue clauses of the Constitution; that the Foraker Act is constitutional.”¹²⁵

There is little question that at its core, the basis behind treating the territories differently was that these territories were inhabited by so-called uncivilized savages. Justice Brown wrote:

[I]f their inhabitants do not become, immediately upon annexation, citizens of the United States, their children thereafter born, whether savages or civilized, are such, and entitled to all the rights, privileges and immunities of citizens. If such be their status, the consequences will be extremely serious. . . .¹²⁶

....

It is obvious that in the annexation of outlying and distant possessions grave questions will arise from differences of race, habits, laws and customs of the people, and from differences of soil, climate and production, which may . . . be quite unnecessary in the annexation of contiguous territory inhabited only by people of the same race, or by scattered bodies of native Indians.¹²⁷

Justice Brown further elaborated upon the prevalent nativistic thought:

If those possessions are inhabited by alien races, differing from us in religion, customs, laws, methods of taxation and modes of thought, the administration of government and justice, according to Anglo-Saxon principles, may for a time be impossible; and the question at once arises whether large concessions ought not to be made for a time, that, ultimately, our own theories may be carried out, and the blessings of a free government under the Constitution extended to them. We decline to hold that there is anything in the Constitution to forbid such action.¹²⁸

The *Downes* Court concluded that the territories were different than the states.¹²⁹ Therefore, the Constitution did not apply to inhabitants of the territories in the same way it did to inhabitants of the states.¹³⁰ The Court concluded that Puerto Rico was “a territory appurtenant and belonging to the United States, but not a part of the United States within the . . . Constitution.”¹³¹

In his concurring opinion, Justice White contributed significantly to the United States’ expansionist modality.¹³² Quoting from an earlier opinion, Justice White wrote: “The Constitution confers absolutely on the government of the Union, the powers of making war, and of making

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

126. *Id.* at 279.

127. *Id.* at 282.

128. *Id.* at 287.

129. *Id.* at 250–51.

130. *See id.* at 251.

131. *Id.* at 287. The Court, nonetheless, acknowledged that Congress’s power was subject to the Constitution’s “fundamental limitations in favor of personal rights.” *Id.* at 268.

132. *See id.* at 302–03 (White, J., concurring).

treaties; consequently, that government possesses the power of acquiring territory, either by conquest or by treaty.”¹³³ “If it . . . be ceded by the treaty, the acquisition is confirmed, and the ceded territory becomes a part of the nation to which it is annexed, either on the terms stipulated in the treaty . . . or *on such as its new master shall impose*.”¹³⁴

Justice White opined that the scope of constitutional protection given to the inhabitants of the newly acquired territories depended on “the situation of the territory and its relations to the United States.”¹³⁵ Under this approach, Congress did not have to “‘extend’ the Constitution, but it could extend the United States.”¹³⁶ Full constitutional protection was reserved for territories that Congress had incorporated into the United States, as opposed to those merely acquired.¹³⁷ The line of acts necessary for demonstrating an intent to be incorporated was never clearly settled. Nonetheless, Justice White’s concurring opinion and subsequent Supreme Court decisions recognized the constitutional principle that a conquering country could take several approaches with a new territory.¹³⁸ The approaches could include (1) admitting the territory as a state; (2) incorporating it into the U.S. as an integral territory; (3) leaving it as a territory appurtenant; (4) leaving it foreign by foregoing acquisition; or (5) pursuing other seemingly appropriate alternatives.¹³⁹ Justice White justified this discretion by maintaining that the “evil of immediate incorporation”¹⁴⁰ would open up the borders to “millions of inhabitants of alien territory” who could overthrow “the whole structure of the government.”¹⁴¹

Under Justice White’s approach, only through incorporation could alien people attain the rights that peculiarly belong to the citizens of the United States.¹⁴² Thus, incorporation became a political decision.¹⁴³

133. *Id.* at 303 (quoting *American Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511, 542 (1828)).

134. *Id.* at 302 (emphasis added).

135. *Id.* at 293.

136. See Gerald L. Neuman, *Whose Constitution?*, 100 YALE L.J. 909, 961 (1991).

137. See Deborah D. Herrera, *Unincorporated and Exploited: Differential Treatment for Trust Territory Claimants—Why Doesn’t the Constitution Follow the Flag?*, 2 SETON HALL CONST. L.J. 593, 613 (1992) (discussing Justice White’s conclusion in *Downes* that “incorporation could not occur merely by the exercise of the treaty-making power; it required congressional legislation”); see also *Downes*, 182 U.S. at 339 (White, J., concurring).

138. See Neuman, *supra* note 136, at 961.

139. See *id.*

140. *Downes*, 182 U.S. at 313 (White, J., concurring).

141. *Id.*

142. See Ramos, *supra* note 42, at 247–49.

This principle allowed the United States to expand its empire without being constitutionally compelled to accept as citizens populations that might be part of an “uncivilized race.”¹⁴⁴ Otherwise, incorporation could trigger “the immediate bestowal of citizenship on those absolutely unfit to receive it.”¹⁴⁵

The question the Insular Cases failed to address is how these decisions comport with this country’s democratic principles and its representative form of governance. As Professor Neuman eloquently observed in his book, *Strangers to the Constitution*:

For the federal government to acquire total governing power over new territories—more complete, in fact, than in the states—without the consent of the local population and without according them . . . the rights reserved under the Constitution raise starkly the question of how the exercise of such governing power can be legitimated.¹⁴⁶

Despite its logical shortcomings, the United States Supreme Court followed the morally illegitimate constitutional principle announced in *Downes*.¹⁴⁷ In *Dorr v. United States*,¹⁴⁸ a majority of the Court adopted the territorial incorporation doctrine.¹⁴⁹ The *Dorr* Court recognized that the Constitution did not fully apply to an acquired territory if Congress had not incorporated the territory.¹⁵⁰ As Puerto Rico had never been “incorporated” by Congress, the limited form of United States citizenship that the Puerto Rican people eventually received was consistent with this constitutional doctrine.

Two decades later in *Balzac v. Porto Rico*,¹⁵¹ the Court reaffirmed the unequal citizenship status of the Puerto Rican people. The *Balzac* Court held that the citizenship status given to the Puerto Rican people under the 1917 Jones Act did not alter the constitutional status of its inhabitants.¹⁵² As a result, the residents of Puerto Rico had no right to demand a trial by jury under the Sixth Amendment to the United States Constitution.¹⁵³ Once again, the Court justified its denial of this right by

143. *See id.* at 245–50.

144. *Downes*, 182 U.S. at 306 (White, J., concurring). In an eloquent dissent in *Downes*, Justice Harlan courageously objected to the logic and morality of the incorporation doctrine: “The Constitution speaks not simply to the States in their organized capacities, but to all peoples, whether of States or territories.” *Id.* at 378 (Harlan, J., dissenting).

145. *Id.* at 306.

146. GERALD L. NEUMAN, *STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW* 100 (1996).

147. *See, e.g.,* *Dorr v. United States*, 195 U.S. 138, 139 (1904); *Balzac v. Porto Rico*, 258 U.S. 298, 305 (1922).

148. 195 U.S. 138 (1904).

149. *See supra* notes 117–45 and accompanying text.

150. *See Dorr*, 195 U.S. at 142–43.

151. 258 U.S. 298 (1922).

152. *See id.* at 307–09.

153. *See id.* at 309.

declaring that “[t]he jury system postulates a conscious duty of participation in the machinery of justice which it is hard for people not brought up in fundamentally popular government at once to acquire.”¹⁵⁴

IV. THE HEGEMONIC TOOLS OF UNITED STATES CONQUESTS

After the Spanish-American War, the United States had become a colonial power, and it achieved this with the full endorsement of the United States Constitution and the United States Supreme Court. This Part seeks to explain how the United States has maintained its empire without being labeled an empire builder.

The traditional response to the characterization of the United States’ colonial impetus has sought to shift the emphasis from the cognizant creation of an empire to the “choices” made by the conquered. This “colonialism by consent” defense contends that the conquered are not subjugated because they have, by act or omission, accepted the conquest.¹⁵⁵ This defense, however, can be questioned by examining the Italian political philosopher Antonio Gramsci’s theory of cultural hegemony.¹⁵⁶

The “spontaneous” consent given by the great masses of the population to the general direction imposed on social life by the dominant fundamental group; this consent is “historically” caused by the prestige . . . which the dominant group enjoys because of its position and function in the world of production.¹⁵⁷

Consistent with Gramsci’s theory, the consent of the conquered does not justify the colonial relationship because it is a byproduct of psychological domination.¹⁵⁸ In effect, the conquered accept their

154. *Id.* at 310. The *Balzac* Court, somewhat surprisingly, made completely inconsistent statements concerning the citizenship status of the people of Puerto Rico. Despite holding that such citizens did not have a constitutional right to trial by jury under the Sixth Amendment, the Court announced that the grant of United States citizenship to the people of Puerto Rico was “to put them as individuals on an exact equality with citizens from the American homeland.” *Id.* at 311.

155. T. Alexander Alienikoff, *Puerto Rico and the Constitution: Conundrums and Prospects*, 11 CONST. COMMENTARY 15, 33 (1994); see Ramos, *supra* note 42, at 285.

156. See Maureen Cain, *Gramsci, the State and the Place of Law*, in LEGALITY, IDEOLOGY AND THE STATE 95 (David Sugarman ed., 1983); Eugene D. Genovese, *The Hegemonic Function of Law*, in MARXISM AND LAW 279 (Piers Beirne & Richard Quinney eds., 1982).

157. See SELECTIONS FROM THE PRISON NOTEBOOKS OF ANTONIO GRAMSCI 12 (Quintin Hoare & Geoffrey Nowell Smith eds. & trans., 1971).

158. See EFRÉN RIVERA RAMOS, *THE LEGAL CONSTRUCTION OF IDENTITY: THE JUDICIAL AND SOCIAL LEGACY OF AMERICAN COLONIALISM IN PUERTO RICO 196–99* (2001).

unequal status and are “[c]ondemned to perceive reality through the conceptual spectacles of the ruling class, [and as a result,] they are unable to recognize the nature or extent of their own servitude.”¹⁵⁹ In a recent impressive work on the United States-Puerto Rico colonial experience, Professor Rivera Ramos observed, “hegemony is both a strategy of domination and the kind of domination resulting from its successful realization.”¹⁶⁰ Particularly in a colonial context, the perception by the subordinate that the dominant knows how to lead and prosper, coupled with the subordinate’s lack of political and economic autonomy, annihilates the subjugated peoples’ ability to question their consent to the conquest.¹⁶¹ Gramsci’s deconstruction of subjugation thus aptly applies to the fallacy of colonialism by consent. Gramsci’s theory is significant because the defense of colonialism by consent has served as a means of reconciling colonialism with the right to self-determination by making conquest a choice of the conquered.

The illusory reconciliation of this tension was especially important in the United States. In 1917, under the leadership of President Woodrow Wilson, the United States had committed itself to the international recognition of the right to self-determination.¹⁶² Yet, this right conflicted with the empire that the United States had established as a result of the Spanish-American War. The inconsistency led to the use of hegemony centered on an electoral version of democracy, where the colonial people are given the *opportunity* to exercise their right to choose.¹⁶³ This so-called procedural self-determination embraces imperialism by reducing the right to a formal manifestation of consent irrespective of the circumstances under which said consent was given.¹⁶⁴ For example, “the majority of a population subjected to colonial rule, may in a given juncture ‘choose’ a relationship with its metropolis that is ultimately a denial of self-determination.”¹⁶⁵ So that “[t]he formal act of election . . . result[s] only in the legal masking of a colonial relationship that remains colonial

159. Román, *supra* note 8, at 40 (citing JOSEPH V. FEMIA, *POLITICAL THOUGHT* 31 (1981)).

160. See RAMOS, *supra* note 158, at 15.

161. *Id.*

162. Wilson proclaimed that “no peace can last or ought to last which does not recognize and accept the principle that *governments derive all their just powers from the consent of the governed*, and that no right anywhere exists to hand peoples [from] sovereignty to sovereignty as if they were property.” W. OFUATEY-KODJOE, *THE PRINCIPLE OF SELF-DETERMINATION IN INTERNATIONAL LAW* 79 (1977) (quoting President Wilson).

163. Efrén Rivera Ramos, *Self-Determination and Decolonisation in the Society of the Modern Colonial Welfare State*, in *ISSUES OF SELF-DETERMINATION* 115, 121–25 (William Twining ed., 1991).

164. *Id.* at 124.

165. *Id.* at 125.

American citizenship, for instance, has been used as a tool for excluding African-Americans,¹⁷⁰ indigenous peoples,¹⁷¹ and other nonwhites.¹⁷²

The central discussion of the citizenship concept in the United States Constitution is addressed in the first section of the Fourteenth Amendment, which provides: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and the State wherein they reside."¹⁷³

The grant of citizenship is the formal recognition of these concepts and the guarantee of certain rights and duties, including the right to suffrage as well as other important constitutional rights.¹⁷⁴ "Its importance, [however], does not [merely] lie" with the delineated rights identified by the courts and legislatures.¹⁷⁵ Citizenship is considered to define the relationship between the individual and the state.¹⁷⁶ And it is by virtue of an individual's citizenship status that the individual is a member of the political community and by virtue of citizenship that he or she is supposed to have equal rights.¹⁷⁷ Its significance, however, is not limited to a certain set of rights. Indeed, "[v]ery early in its history the term already contained a cluster of meanings related to a defined legal or social status, a means of political identity, a focus of loyalty, a requirement of duties, an expectation of rights and a yardstick of good social behavior."¹⁷⁸ The status of citizen recognizes that such a person is

African-Americans, Chinese, Japanese, South Asian, and Native Americans. *See id.* at 603.

170. *See* Scott v. Sandford, 60 U.S. (19 How.) 393, 481–82 (1856).

171. *See* Goodell v. Jackson, 20 Johns. 693, 712 (N.Y. 1823).

172. *See* Ediberto Román, *Members and Outsiders: An Examination of the Models of United States Citizenship as Well as Questions Concerning European Union Citizenship*, 9 U. MIAMI INT'L & COMP. L. REV. 81, 92–100 (2000–2001).

173. U.S. CONST. amend. XIV, § 1. The first section of the amendment, known as the Privileges and Immunities Clause, guarantees that no state shall abridge the rights of a citizen of the United States. *See* U.S. CONST. amend. XIV, § 1. This section recognizes a form of dual citizenship in the state as well as in the nation. *Slaughter House Cases*, 83 U.S. (16 Wall.) 36, 73 (1873). In the consequential case attempting to address the term "citizen," Justice Miller, in the majority opinion in the *Slaughter House Cases*, indicated that the Fourteenth Amendment provided a definition of the concept. *Id.* at 73. However, section 1 of the Fourteenth Amendment identifies the conditions for attaining citizenship rather than defining the term. *Id.* at 683. Nevertheless, over time both jurists and scholars have shed considerable light on the importance of the term citizenship. Indeed, the term "citizen" has evolved to become something more than just being "born or naturalized within the United States." *Id.*; *see* Román, *supra* note 8, at 8.

174. Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1262–84 (1992).

175. Jonathan C. Drimmer, *The Nephews of Uncle Sam: The History, Evolution, and Application of Birthright Citizenship in the United States*, 9 GEO. IMMIGR. L.J. 667, 667 (1995).

176. ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 33 (1975).

177. *Id.*

178. DEREK HEATER, *CITIZENSHIP: THE CIVIC IDEAL IN WORLD HISTORY, POLITICS*

regardless of the juridicial appellation with which the 'new' status comes to be known."¹⁶⁶

In order to expose this conflict with the development of the right to self-determination, it is necessary to examine more than just the method of consent; it is necessary to examine the nature of the consent given the circumstances of the conquered. As such, in order to track the historical application of sovereignty principles, it is necessary to unearth the hegemonic tools that have for so long crippled the right to self-determination.¹⁶⁷

A. *The Mirage of Membership—United States Citizenship*

In the case of the United States, the tension between self-determination and colonialism has manifested itself in the creation of tools of both inclusion and exclusion. These hegemonic creations are especially noteworthy because, as a consequence of their use, those who reside in the colonial island territories, despite their subordinate status, still believe that to be a United States citizen one does not have to be of any particular national, linguistic, religious, or ethnic background. "All he [or she has] to do [is] commit himself [or herself] to the political ideology centered on the abstract ideals of liberty, equality, and republicanism. Thus, the universalist ideological character of American nationality meant that it was open to anyone who willed to become [a]n American."¹⁶⁸

However, the role that race has played in the exclusion of members to the United States' body politic is evidence of the folly upon which said observations were made.¹⁶⁹ It can be forcefully argued that, historically,

166. *Id.*; In his recent book, Dean Rivera Ramos reiterates this point when he persuasively argues that:

[S]elf-determination extends well beyond the act of choosing among different political status alternatives. It refers to the capacity or, normatively, to the right to continuously adopt, or participate in the production of, the norms that regulate the subject's own life The plenary powers claimed and exercised by the U.S. Congress over the peoples of the territories subvert the ideal of self-governance.

RAMOS, *supra* note 158, at 230.

167. The phenomenon of hegemony can manifest itself in a variety of fashions. Likewise, the tools or mechanisms used to attain a hegemonic relationship can vary. In this Article, the use of citizenship, international status labels, and economic dependence are examined. Other works have examined some of these tools as well as others, such as the effects of legal constructions. See RAMOS, *supra* note 158, at 20.

168. See Peter J. Spiro, *The Citizenship Dilemma*, 51 STAN. L. REV. 597, 601 (1999) (book review) (quoting Philip Gleason, *American Identity and Americanization*, in CONCEPTS OF ETHNICITY 62-63 (William Petersen et al., eds., 1982)).

169. Some groups denied citizenship because of their race or ethnicity include:

ordinarily one who possesses legal, social, and political power.¹⁷⁹ Consistent with liberal theory's precepts of liberty and equality,¹⁸⁰ citizenship is thus linked to the notions of freedom and full participation in government.¹⁸¹ Scholars have argued that because equality and belonging are inseparably linked, to acknowledge citizenship is to confer "belonging" to the United States.¹⁸²

AND EDUCATION 291 (2d ed. 1990).

179. THE BASIC WORKS OF ARISTOTLE 1176 (Richard McKeon ed., 1941). The Aristotelian construction recognizes that "[h]e who has the power to take part in the deliberative or judicial administration of any state is said by us to be a citizen of that state." *Id.* at 1177.

180. See, e.g., JOHN STUART MILL, ON LIBERTY (1869).

181. Johnny Parker, *When Johnny Came Marching Home Again: A Critical Review of Contemporary Equal Protection Interpretation*, 37 HOW. L. J. 393, 396 (1994). Justice Brandeis recognized its importance, declaring that the loss of citizenship was equivalent to the loss of everything that makes life worth living. *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922). Chief Justice Rehnquist more recently observed: "In constitutionally defining who is a citizen of the United States, Congress obviously thought it was doing something, and something important. Citizenship meant something, a status in and relationship with a society which is continuing and more basic than mere presence or residence." *Sugarman v. Dougall*, 413 U.S. 634, 652 (1973) (Rehnquist, J., dissenting). Chief Justice Warren described citizenship as "that status, which alone, assures [one] the full enjoyment of the precious rights conferred by our Constitution." *Perez v. Brownell*, 356 U.S. 44, 78 (1958) (Warren, C.J., dissenting). Justice Harlan, in *Afroyim v. Rusk*, 387 U.S. 253 (1967), observed: "[the] citizenry is the country and the country is its citizenry." *Id.* at 268 (Harlan, J., dissenting). Chief Justice Waite declared citizenship "convey[s] the idea of membership of a nation." *Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 166 (1875). In other words, citizenship is a broad concept that signifies not only the rights afforded in the Constitution, it is also supposed to guarantee an "individual's membership in a political community and the resulting relationship of allegiance and protection that binds the citizen and the state." Note, *Membership Has Its Privileges and Immunities: Congressional Power to Define and Enforce the Rights of National Citizenship*, 102 HARV. L. REV. 1925, 1932 n.42 (1989). It includes "the sense of permanent inclusion in the American political community in a non-subordinate condition." JOSÉ A. CABRANES, CITIZENSHIP AND THE AMERICAN EMPIRE: NOTES ON THE LEGISLATIVE HISTORY OF THE UNITED STATES CITIZENSHIP OF PUERTO RICANS 5 n.12 (1979). Thus, citizenship signifies an individual's "full membership" in a political community where the ideal of equal membership is theoretically to prevail. Román, *supra* note 8, at 8; see also Kenneth L. Karst, *Citizenship, Race, and Marginality*, 30 WM. & MARY L. REV. 1, 3-4 (1988). Citizenship thus refers not only to delineated rights but a broad concept of full membership or incorporation into the body politic. See Román, *supra* note 8, at 3. A correlative of this concept is a sense of belonging and participation in the community that is the nation. *Id.* This last component, which contains both legal and conceptual aspects, demonstrates a psychological component of the term. This construction of the term suggests the anointment of citizenship as recognizing an important title that goes to the heart of the individual's feeling of inclusion as well as the collective citizenry's sense of the virtue of this democracy. See CABRANES, *supra*, at 5 n.12.

182. Drimmer, *supra* note 175, at 667-68. The scholars can find considerable

Despite the widely held belief that citizenship confers full membership and equality, history belies these beliefs. Indeed, American history is replete with instances where those who should have been or actually were conferred with citizen status did not enjoy the benefits of citizenship.¹⁸³

Despite the liberal notions of full political membership and equality, as well as the Fourteenth Amendment's declaration bestowing citizenship on those born or naturalized in this country, it is open to question whether there are several types of United States citizens.¹⁸⁴ For instance, one can argue that there are the traditional Fourteenth Amendment citizens who

support in the founding fathers' interpretation of this construct prior to the drafting of the Constitution. For instance, the authors of the Federalist Papers addressed a form of national citizenship, in which citizens were to be endowed with equal rights. John Jay, in *Federalist No. 2*, observed that "[t]o all general purposes we have uniformly been one people—each individual citizen every where [sic] enjoying the same national rights, privileges and protection." THE FEDERALIST NO. 2, at 10 (John Jay) (Jacob E. Cooke ed., 1961). Madison, in *Federalist No. 57*, observed:

Who are to be the electors of the Federal Representatives [in Congress]? Not the rich more than the poor; not the learned more than the ignorant; not the haughty heirs of distinguished names, more than the humble sons of obscure and unpropitious fortune. The electors are to be the great body of the people of the United States. . . .

No qualification of wealth, of birth, of religious faith, or of civil profession is permitted to fetter the judgment or disappoint the inclination of the people.

THE FEDERALIST NO. 57 (James Madison) (Jacob E. Cooke ed., 1961). Scholars have also agreed that the concept of citizenship is associated with notions of equality. Professor Ackerman observed that "[i]n claiming citizenship, an individual is—first and foremost—asserting the existence of a social relationship between himself and others. More specifically, a citizen is (by definition) someone who can properly claim the right to be treated as a fellow member of the political community." BRUCE A. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* 74 (1980). Professor Fox, who recently examined the history of the term, observed that "Madison and the other authors of *The Federalist Papers* may have had little to say about the substance of . . . citizenship, but they did believe that such a thing existed, that it defined a sphere of equality." James W. Fox, Jr., *Citizenship, Poverty, and Federalism: 1787–1882*, 60 U. PITT. L. REV. 421, 439 (1999). James Kettner similarly noted: "revolution created the Status of 'America citizen' and produced an expression of the general principles that ought to govern membership in a free society . . . and it ought to confer equal rights." JAMES H. KETTNER, *THE DEVELOPMENT OF AMERICAN CITIZENSHIP, 1608–1870* at 10 (1978).

183. This suggests that citizenship is subjective and is to be applied depending upon whether the collective psyche believes an individual or group deserves the status. As Michael Walzer observed, "we who are already members do the choosing, in accordance with our own understanding of what membership means in our community and of what sort of a community we want to have." MICHAEL WALZER, *SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY* 32 (1983). Accordingly, when the citizenry, through their officials, decide on membership, whether like us or not, "we have to consider them as well as ourselves." *Id.*

184. While a host of reasons for these forms will be suggested, the fact remains that despite the rhetoric of equality and egalitarianism, American citizens live under differing models of incorporation and participation. See Ediberto Román, *Members and Outsiders: An Examination of the Models of United States Citizenship as Well as Questions Concerning European Union Citizenship*, 9 U. MIAMI INT'L & COMP. L. REV. 81, 88 (2000).

enjoy the full panoply of rights and privileges associated with citizenship. Many people of color, also known as minorities, believe that this “full” form of citizenship largely applies to white citizens. Accordingly, there are the “other” Fourteenth Amendment citizens, who because of constructions of race and perhaps other impositions of subordination, enjoy anything but equality and full membership.¹⁸⁵

Finally, there are the American citizens that hold the title of United States citizens but are not Fourteenth Amendment citizens. They are the alien-citizens. These are the forgotten citizens and are the focus of this Article’s analysis. They are forgotten because even immigration, constitutional and other scholars who often examine citizenship rarely discuss the rights of this subordinated group. The citizens in this group derived their subordinate rights as a result of colonial conquests sanctioned by Article IV of the United States Constitution, also known as the Territorial Clause.¹⁸⁶ The rights of this group do not derive from concepts of equality, which are the bedrock of the Fourteenth Amendment, but from concepts of expansionism under the Territorial Clause and accordingly, the plenary power of Congress. Congress, in turn, has granted a lesser form of citizenship to the alien-citizens, which does not include the right to suffrage.¹⁸⁷

For the alien-citizens, the label United States citizen serves a hegemonic function, which in turn, facilitates colonialism. The power of the status of citizen is that despite its vagaries, its psychological force is consequential. Accordingly, even if the subordinate and disenfranchised citizen does not share the equality of rights, the label alone serves to foster a sense of belonging. Thus, even if the alien-citizen does not enjoy the full compliment of rights held by true Fourteenth Amendment citizens, because of the imagined quality of the status of citizenship, the alien-citizen will likely still believe he or she belongs. The following Sections briefly illustrate how one can conclude that there are various models of United States citizenship and demonstrate how, despite the label that supposedly connotes full membership, not all who hold the status of citizens have enjoyed all of its rights and privileges.

185. *Id.* at 90.

186. U.S. CONST. art IV, § 3, cl. 2.

187. *See Román, supra* note 8, at 3.

1. *The Other Fourteenth Amendment Citizens*

a. *Indigenous People*

After the ratification of the Fourteenth Amendment, United States courts struggled with whether indigenous peoples were citizens by birthright.¹⁸⁸ By 1924, indigenous peoples could become United States citizens through treaty, through allotment, through a patent in fee simple by adopting the habits of civilized life by birth, and by minor status.¹⁸⁹ With the passage of the Indian American Citizenship Act of 1924, the United States government imposed a form of United States citizenship on all indigenous peoples and allowed them to have concurrent citizenship with their respective tribes.¹⁹⁰ These people were endowed with a less than equal form of citizenship; they were by no means afforded the full complement of privileges and immunities available to birthright citizens.¹⁹¹

This group does not enjoy the full complement of rights and privileges available to most other citizens. For instance, they are not allowed to attain presidential office or any other public office of that type.¹⁹² They are regarded as being part of their tribal communities and are only afforded fundamental constitutional rights.¹⁹³

b. *African-Americans*

Another vision of United States citizenship arises from the treatment of African-Americans. The subordinate and disenfranchised status of African-Americans is a perception that is not limited to the eras of *Scott v. Sandford*¹⁹⁴ and *Plessy v. Ferguson*;¹⁹⁵ it is a view still maintained by many Americans, particularly African-Americans.

The very nature of how African-Americans arrived in this country,

188. See Robert B. Porter, *The Demise of the Ongweheweh and the Rise of the Native Americans: Redressing the Genocidal Act of Forcing American Citizenship Upon Indigenous Peoples*, 15 HARV. BLACKLETTER L.J. 107, 120 (1999).

189. See *id.* at 120–23.

190. *Id.*

191. Professor Robert Porter observed that “Indians today have the status of a minor—acknowledged as citizens but not fully recognized as being able to care for one’s own affairs.” *Id.* at 135. They are U.S. citizens simply because they have been born in American soil, but they are regarded as being part of their tribal communities and are afforded rights and immunities subject to their tribal governments. *Id.* Only the fundamental rights of the Constitution are applicable to this group of “citizens.” See *id.*

185. Sharon O’Brien, *Tribes and Indians: With Whom Does the United States Maintain a Relationship?*, 66 NOTRE DAME L. REV. 1461, 1481 (1991).

186. *Id.*

194. 60 U.S. (19 How.) 393, 481 (1857).

195. 163 U.S. 537 (1896).

strongly suggests that, particularly those born here must be citizens, as they could owe no allegiance to any other government other than their place of birth.¹⁹⁶ Thus, the principles of equality and membership should have always applied to African-Americans. They, however, have not.

The history of court-sanctioned exclusion of African-Americans stems from the Court's decision in *Dred Scott v. Sandford*,¹⁹⁷ where the United States Supreme Court held that African-Americans, even those born in a free territory, were not United States citizens.¹⁹⁸

African-Americans were subsequently reminded of their status in *Plessy v. Ferguson*,¹⁹⁹ despite the enactment of the Fourteenth Amendment. Justice Brown, writing for the Court, upheld a statute that required the segregation of white and "colored" persons.²⁰⁰ The decision reiterated that notwithstanding the Amendment's declaration that "all persons born or

196. Drimmer, *supra* note 175, at 691–94.

197. 60 U.S. (19 How.) 393 (1857).

198. The Court refused to recognize citizenship of this group because of their perceived inferiority. *Id.* at 407. Specifically, the Court characterized African-Americans "as beings of an inferior order, and altogether unfit to associate with the white race." *Id.* Accepting differing models of membership, the Court refused to recognize African-Americans, even those born free, as citizens because "[i]t is not a power to raise to the rank of a citizen any one born in the United States, who, from birth or parentage, by the laws of the country, belongs to an inferior and subordinate class." *Id.* at 417. African-Americans were subsequently reminded of their subordinate status, notwithstanding the enactment of the Fourteenth Amendment. In *Plessy v. Ferguson*, 163 U.S. 537 (1896), Justice Brown, writing for the majority, upheld a statute that required the segregation of white and "colored" persons. *Id.* at 544. Justice Brown based the opinion's rationale on a constructed distinction between social and legal equality. *Id.* Specifically, the Justice observed: "The object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality." *Id.* The social versus legal distinction of *Plessy* replicated the subordinated status of African-Americans even after the enactment of the Fourteenth Amendment. It reiterated that notwithstanding the Amendment's declarations, "all persons born or naturalized" would be citizens; African-Americans were only citizens in name, *de jure* citizens, but not citizens in practice. The concepts of "equality of rights" and "equality of opportunity" were inapplicable to them. *Id.* at 554–45. Even after the constitutional Amendment that was enacted to acknowledge their freedom and equality, the Supreme Court reiterated that they were not true citizens, but second-class citizens or in Malcolm X's words, perhaps still slaves. *Id.* After engaging in an extensive discussion of the meaning of citizenship, Justice Taney, writing for the Court, noted: "We think they [African-Americans] are . . . not included and were not intended to be included, under the word "citizens" in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures citizens of the United States." *Id.*

199. *Plessy*, 163 U.S. at 537.

200. *Id.*

naturalized” would be citizens, African-Americans were not citizens in all respects.²⁰¹

Notwithstanding *Brown v. Board of Education*,²⁰² a decision that overturned the tortured logic of *Plessy*, African-Americans are repeatedly reminded of their subordinate nature.²⁰³ Such reminders arise from incidents such as racial profiling by police, also known as DWB or “Driving While Black,” or the more subtle forms of subordination as identified by Ellis Cose in his book *The Rage of a Privileged Class*,²⁰⁴ where he addresses how African-Americans, irrespective of their achievements, are repeatedly reminded of the inequality of society.²⁰⁵

c. Mexican-Americans

Though many Americans know that the United States annexed land from the American Indians,²⁰⁶ consisting of approximately “two million square miles of territory by conquest and by purchase,”²⁰⁷ the Mexican Annexation is not as recognized. “Prompted by [a] spirit of ‘manifest destiny,’”²⁰⁸ the United States declared war against Mexico to acquire

201. Román, *supra* note 172, at 92–93.

202. 347 U.S. 483 (1954).

203. As a recent reminder of this subordinated status, consider the following story recalled by lead author Ediberto Román. I recall when my best friend and closest version of a brother, who happens to be African-American and named Rodney King, oddly enough, wanted to leave my house after a long debate about racial politics at around 2:00 a.m. I told him to stay because the bus station, the New York or New Jersey Port Authority, was not very safe. He simply reminded me, “Ed, remember I’m black, everyone sees me as a criminal, so they are scared—I’ve got more problems with cops.” This saddened me and still does because you see my friend, who happens to be the most honest and honorable man I have ever met, could never take off the chains of stigma and subordination. It reminds me that despite my pride and willingness to fight for racial justice, I can hide because I happen to be light and “appear” to be white. I can put on a suit or sweats and be the proverbial “boy next door.” My best friend can rarely, if ever, do that and I hope I never forget that fact.

204. ELLIS COSE, *THE RAGE OF A PRIVILEGED CLASS* (1993).

205. *Id.* at 4–9. “You feel the rage of people, [of] your group . . . just being the dogs of society.” *Id.* at 5.

206. “Fifty years before the pilgrims landed at Plymouth Rock, there were Hispanic urban centers in New Mexico and in Florida. Yet Hispanics, according to most Americans, are our most recent arrivals—and they have some basis for thinking that.” Harry Pachon, *Crossing the Border of Discrimination: Has the Civil Rights Movement Ignored Generations of Hispanics?*, 15 HUM. RTS., Fall 1988, at 32, 33.

207. Christine A. Klein, *Treaties of Conquest: Property Rights, Indian Treaties, and the Treaty of Guadalupe Hidalgo*, 26 N.M. L. REV. 201, 201 (1996). What is not as well-known is the fact “that the United States conquered Mexico in 1848 and took over half- its then-existing territory. The states of California, Nevada, and Utah, as well as portions of Colorado, New Mexico, Arizona, and Wyoming were carved out of that 529,000 square mile cession by the Republic of Mexico.” *Id.*

208. The taking of the Mexican land was a result of the nation’s westward expansion, as journalist John O’Sullivan noted in 1845:

Away, away with all these cobweb tissues of rights of discovery, exploration,

additional territory.²⁰⁹ The result was the signing of the Treaty of Guadalupe Hidalgo.²¹⁰

As had occurred with the indigenous peoples,²¹¹ many of the treaty provisions were never honored.²¹² As Professor Richard Delgado observed:

The Treaty of Guadalupe Hidalgo . . . purported to guarantee to Mexicans caught on the U.S. side of the border full citizenship and civil rights, as well as protection of their culture and language. The treaty, modeled after ones drawn up between the U.S. and various Indian tribes, was given similar treatment: The Mexicans' ". . . property [was] stolen, rights were denied, language and culture suppressed, opportunities for employment, education, and political representation were thwarted."²¹³

Despite the grant of United States citizenship pursuant to the Treaty of Guadalupe Hidalgo in 1848, over one hundred years later Mexican-Americans were still not accepted as full members of the body politic.

settlement, contiguity, etc. . . . The American claim is *by the right of our manifest destiny* to overspread and to possess the whole of the continent which Providence has given us for the development of the great experiment of liberty and federative self-government entrusted to us. It is a right such as that of the tree to the space of air and earth suitable for the full expansion of its principle and destiny of growth.

Id. at 208 (citing RICHARD WHITE, *IT'S YOUR MISFORTUNE AND NONE OF MY OWN: A HISTORY OF THE AMERICAN WEST* 73 (1991)) (emphasis added).

209. *Id.*

210. Among other things, the treaty provided that the United States would respect private property rights of Mexican citizens in the newly created portions of the United States and provided that those individuals would be granted United States citizenship.

Id. The treaty provides in part:

The United States of America, and the United Mexican States, animated by a sincere desire to put an end to the calamities of the war which unhappily exists between the two Republics, and to establish upon a solid basis relations of peace and friendship, which shall confer reciprocal benefits upon the citizens of both, and assure the concord, harmony and mutual confidence, wherein the two peoples should live, as good neighbors.

Guadalupe T. Luna, *En El Nombre de Dios Todo-Poderoso: The Treaty of Guadalupe Hidalgo and Narrativos Legales*, 5 SW. J. L. & TRADE AM. 45, 45 (1998) (citing Treaty of Peace, Friendship, Limits and Settlement with the Republic of Mexico, Feb. 2, 1848, U.S.-Mex., 9 Stat. 922).

211. Richard Delgado, *Derrick Bell and the Ideology of Racial Reform: Will We Ever Be Saved?*, 97 YALE L.J. 923, 940 (1988) (book review). In fact, the Treaty of Guadalupe Hidalgo was "modeled after ones drawn up between the U.S. and various Indian tribes, [and] was given similar treatment . . . [that is,] 'property [was] stolen, rights were denied, language and culture suppressed, opportunities for employment, education, and political representation were thwarted.'" *Id.* (quoting A. RENDON, *CHICANO MANIFESTO* 71-72 (1971)).

212. Luna, *supra* note 210, at 71 (a thoughtful work examining the losses to the Mexican people after the war).

213. Delgado, *supra* note 211, at 940.

For instance, in 1954, the United States government initiated "Operation Wetback," the campaign to deport undocumented Mexicans, which invariably included Mexican-Americans.²¹⁴

Moreover, one popular depiction of illegal immigrants is that of Mexicans who have illegally crossed the border, despite the fact that at least as many illegal immigrants are the result of individuals overstaying their visas.²¹⁵ A classic example of the current anti-Mexican-American sentiment is California's attempt to implement Proposition 187, which would have denied illegal aliens access to government-funded social services including healthcare and education.²¹⁶

d. Other Nonwhite Citizens

Nonwhite, nonblack naturalized citizens are also often perceived to be subordinate U.S. citizens. As addressed in previous works,²¹⁷ American society has imposed a label of foreignness on several groups of American citizens.²¹⁸ These groups of outsiders, irrespective of citizenship status, are members of an excluded group of society. They are marginalized by the larger society and viewed as different from true Americans. They include Latina and Latino citizens, Asian-Americans, Arab-Americans, and other nonwhites.²¹⁹ In addition to being characterized as the "forgotten Americans" and the "invisible" ones among us, they are endowed with the immutable characteristic of alien or foreigner.²²⁰ In the white-over-black paradigm, if a person is not white, then that person is socially regarded as something other than American.²²¹

214. JUAN RAMÓN GARCIA, OPERATION WETBACK: THE MASS DEPORTATION OF MEXICAN UNDOCUMENTED WORKERS IN 1954, at 229–31 (1980); JULIAN SAMORA, LOS MOJADOS: THE WETBACK STORY 52 (1971).

215. STEPHEN H. LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY 955 (2d ed. 1997).

216. California Proposition 187, § 1, WL CAL PROP 187 (1994); see also Michael Scaperlanda, *Partial Membership: Aliens and the Constitutional Community*, 81 IOWA L. REV. 707, 709 (1996).

217. See Román, *supra* note 8, at 90.

218. See generally Kevin R. Johnson, *Racial Hierarchy, Asian Americans and Latinos as "Foreigners," and Social Change: Is Law the Way to Go?*, 76 OR. L. REV. 347 (1997).

219. Neil Gotanda, *Asian American Rights and the "Miss Saigon Syndrome,"* in ASIAN AMERICANS AND THE SUPREME COURT: A DOCUMENTARY HISTORY 1087, 1095–96 (Hyung-Chan Kim ed., 1992).

220. Professor Gotanda, in his work concerning "the Miss Saigon Syndrome," addressed the label of foreignness in what he termed the "other non-whites dualism." *Id.* at 1096.

221. *Id.* at 1095–96.

2. *The Alien-Citizens: The Citizens Who Are Unquestionably Denied Full Membership*

The last type of United States citizen is the alien-citizen.²²² For this group there has never been any pretense concerning the applicability of the Fourteenth Amendment or equality for that matter.²²³ These individuals did not receive citizenship through the vehicle used to grant or impose such status on all other groups who have attained it. They became associated with the United States as a result of being inhabitants of lands conquered by the United States. These people reside in territories acquired during the eras of the Spanish-American War and World War II. The United States Supreme Court and Congress have both concluded that the Territorial Clause of Article IV of the Constitution, and not the Fourteenth Amendment, determine the rights of this group.²²⁴ As interpreted, this provision endows Congress complete or plenary power over these people.²²⁵ In turn, the Court and Congress have kept this group in a subordinate and disenfranchised status.

By the time the Spanish-American War ended in 1898, the United States had acquired considerable experience in creating subordinate citizenship with African-Americans, indigenous peoples and Asian-Americans.²²⁶ As a result of the war, as well as the conquest of the Hawaiian nation, the United States began its endeavor as an overseas colonial power.²²⁷ In the Treaty of Paris, Spain officially ceded "to the United States the island of Porto Rico and other islands now under Spanish sovereignty in the West Indies."²²⁸ Consistent with the United States Constitution's grant to Congress of plenary power under the Territorial Clause, Article 9 of the treaty granted Congress the power over "the civil rights and political status" of the territories and its people.²²⁹ The Treaty of Paris endorsed the United States' imperialistic venture, as it was one of the first times in American history that "in a treaty acquiring territory for the United

222. See Román, *supra* note 8, at 90.

223. The label of alien-citizen can also theoretically apply equally to the other nonwhite citizens addressed in the previous section.

224. See *Downes v. Bidwell*, 182 U.S. 244, 251 (1901).

225. *Id.* at 251, 285.

226. See WESTON, *supra* note 64, at 35–36, 194–207.

227. *Empire Forgotten*, *supra* note 7, at 36–38.

228. Treaty of Paris, Dec. 10, 1898, U.S.-Spain, art. II, 30 Stat. 1754, 1755.

229. *Id.* art. IX, 30 Stat. at 1759; see also U.S. CONST. art. IV, § 3, cl. 2 ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . .").

States, there was no promise of citizenship.”²³⁰ In addition, the treaty contained “[no] promise, actual or implied, of statehood.”²³¹ As a result of the war, the United States acquired Puerto Rico, Guam, and the Philippines.²³²

The inhabitants of Puerto Rico were eventually granted citizenship in 1917.²³³ However, unlike their brethren on the mainland, these Americans are not entitled to participate in the national political process,²³⁴ are not entitled to the full protection of the Constitution, and can arguably be stripped of their status at any time.²³⁵ Similarly, the unincorporated territory of Guam has been granted this same form of American citizenship which clearly states that as a possession of the United States, the island can be bought, sold, or traded by the federal government.²³⁶ Similarly, the residents of the Virgin Islands were granted U.S. citizenship in 1927 and the inhabitants of the Northern Mariana Islands attained citizenship in 1976.²³⁷ The unincorporated territory of American Samoa has received even less—as nationals, they have even fewer rights. Accordingly, the diluted form of citizenship granted to these people under the auspices of

230. JOSÉ A. CABRANES, *CITIZENSHIP AND THE AMERICAN EMPIRE* 20 (1979).

231. *Id.*; cf. Treaty of Peace, Friendship, Limits, and Settlement with the Republic of Mexico, Feb. 2, 1848, U.S.-Mex., 9 Stat. 922.

232. JULIUS W. PRATT, *AMERICA'S COLONIAL EXPERIMENT* 68 (1950). The United States purportedly intervened in Spain's relationship with Cuba to help secure independence for Cuba. See H.R.J. Res. 24, 55th Cong., 30 Stat. 738 (1898) (declaring “[t]hat the people of the Island of Cuba are, and of right ought to be, free and independent”); *id.* at 739 (“[T]he United States hereby disclaims any disposition or intention to exercise sovereignty, jurisdiction, or control over [“Cuba.”]). The United States became a colonial as well as world power as a result of the war. 1 PHILIP S. FONER, *THE SPANISH-CUBAN-AMERICAN WAR AND THE BIRTH OF U.S. IMPERIALISM, 1895–1902*, at 1–150 (1972); 2 PHILIP S. FONER, *A HISTORY OF CUBA AND ITS RELATIONS WITH THE UNITED STATES* 162–275, 347–59 (1963).

233. The grant of United States citizenship to the Puerto Rican people did not occur without opposition based largely on racial grounds. See, e.g., WESTON, *supra* note 64, at 195. Representative James L. Shayden of Texas characterized the inhabitants of Puerto Rico as a cross between the blacks and whites. 48 CONG. REC. 2797 (1912). They were “less well fitted for self-government than the full-blooded African Negro.” *Id.* He believed that the problem of “[c]olor in this matter is more important than language.” *Id.* Representative James Marn of Illinois opposed citizenship to “a people who were ‘somewhat . . . strange’ to the internal problems of the United States and its civilization was not to be desired.” WESTON, *supra* note 64, at 196 (quoting 48 CONG. REC. 2797 (1912)).

234. See, e.g., Román *supra* note 8, at 1–47 (observing that despite Puerto Rican born, the residents of Puerto Rico retain an alien attribute despite being United States citizens as they cannot vote for President and Vice-President and do not have representation in Congress).

235. See generally Simeon E. Baldwin, *The Constitutional Questions Incident to the Acquisition and Government by the United States of Island Territory*, 12 HARV. L. REV. 393 (1899).

236. 48 U.S.C. § 1421f(c) (1994); *Guam v. United States*, 179 F.3d 630, 634–35 (9th Cir. 1999); Exec. Order No. 10,178, 15 Fed. Reg. 7313 (Nov. 1, 1950).

237. See RAMOS, *supra* note 158, at 156 n.69.

Congress's power under the Territorial Clause, changed little in terms of rights but facilitated a belief of belonging. The inhabitants were granted a title that suggested power in the political process, but in actuality. They received little more than a label coupled with a perception on their part that they were attaining something of consequence.

B. Economic Dependence

In the United States colonial context, the phenomenon of economic dependence is a fairly unique and unexplored area of subordination. Unlike the naked form of subordination and abuse by the European powers over the peoples of Africa and Asia during the seventeenth through twentieth centuries, the American colonial experience is evidenced not by enslavement of the conquered or the naked theft of natural resources. It is illustrated by the attainment of strategic military enclaves and certain markets. The genius of the American empire building is that it has occurred largely without the opposition of the conquered. Key to the American endeavor was the establishment and maintenance of economic dependency.

There is a distinction between dependency and interdependence. Interdependence entails not only sensitivities, "but also a capacity on the part of all the actors to affect the outcome of at least some important aspects of their interactions."²³⁸ Though interdependence may at times be unequal to some actors in some areas, for instance in an exchange between the United States and Canada, the actors invariably have advantages in other areas or realms.²³⁹ Thus, interdependence is seen as a dynamic relationship that is characterized by adjustment and agreement between the actors.²⁴⁰

Dependency, on the other hand, is a

phenomenon entailing external penetration of a Third World country's economic, political, and/or sociocultural processes that is so pervasive that ultimately crucial decisionmaking power is acquired and exercised by outsiders. The result is that the developing nation *loses control* over certain, and often important, aspects of its domestic and foreign policies.²⁴¹

"They have never been powerful enough to protect themselves against some of the most negative effects of interdependence."²⁴²

238. See H. MICHAEL ERISMAN, PURSUING POSTDEPENDENCY POLITICS: SOUTH-SOUTH RELATIONS IN THE CARIBBEAN 34 (1992).

239. *Id.*

240. *Id.*

241. *Id.* at 11-12.

242. ROBERT L. ROTHSTEIN, THE WEAK IN THE WORLD OF THE STRONG: THE

Economic dependency theory provides that the prosperity of developed countries, such as the United States, depends on their exploitation of less developed countries (LDCs) for such things as cheap resources and labor.²⁴³ The less developed country's socioeconomic and political dependency is tied strongly to the developed country, particularly in a country which has a colonized history.²⁴⁴ Dependency theory argues that poverty in LDCs is a direct result of capitalism and results in LDCs exporting cheap raw materials and importing expensive manufactured goods.²⁴⁵

Dependency Theory finds its early roots in Marxist writings on Imperialism.²⁴⁶ During the so-called postcolonial period, major writers and proponents of the theory were economic theorists of LDCs.²⁴⁷ Probably the most famous of the proponents on dependency theory was Raul Prebisch²⁴⁸ who was associated with the United Nations Economic Commission for Latin America (ECLA). The followers of his theory subscribe to the "Prebisch school" on economic dependency.²⁴⁹ The Prebisch school argued that "[t]he Third World nations cannot . . . ever expect to significantly improve their relative position in the global economic arena as long as they remained locked into trade relationships whereby they mostly export a few low-priced commodities to the industrialized states while simultaneously importing expensive manufactured products from them."²⁵⁰

DEVELOPING COUNTRIES IN THE INTERNATIONAL SYSTEM 309 (1977).

243. See generally ERISMAN, *supra* note 238; ROTHSTEIN, *supra* note 242; LATIN AMERICA'S ECONOMIC DEVELOPMENT: INSTITUTIONALIST AND STRUCTURALIST PERSPECTIVES (James L. Dietz & James H. Street eds., 1987) [hereinafter LATIN AMERICA'S ECONOMIC DEVELOPMENT].

244. ERISMAN, *supra* note 238, at 2-19.

245. *Id.* at 10.

246. *Id.*

247. *Id.*

248. For an excellent historical and analytical account of Raul Prebisch, see generally LATIN AMERICA'S ECONOMIC DEVELOPMENT, *supra* note 243, at 75-100. "Prebisch, the first head of ECLA, who died on April 29, 1986, was indisputably the 'father' of structuralism. . . . Prebisch analyzed the relations between nations at unequal levels of development, using the spatial imagery of center and periphery." *Id.* at 75. Prebisch eventually hypothesized

that peripheral countries faced three options [to combat the monetary tools of the center countries], all with unacceptable consequences: they could have strong currencies and maintain high levels of imports at the cost of high unemployment; they could fight unemployment with an expansionist monetary policy but would thereby create inflation and decrease their ability to import, because of a fall in the exchange value of their currencies; or, if they used monetary policy to maintain high levels of employment, but failed to devalue, their reserves would disappear.

Id. at 87.

249. ERISMAN, *supra* note 238, at 10.

250. The Prebisch school perceives economic dependency as a "technical problem rather than the product of fundamental flaws within the capitalist structure of the

Certainly, there is evidence that the United States has implemented programs aimed at creating economic dependence by some countries on the United States. For instance, “[b]eginning in the 1930s, the United States began to use sugar quotas to integrate the export-dependent Cuban economy into the United States system and foster economic dependence of the United States. In this era, the United States also worked through its diplomats to favor pro-U.S. leaders who would protect U.S. interests and suppress opposition movements.”²⁵¹ Furthermore, a 1959 report commissioned by the Kennedy Administration “outlines a strategy for furthering American interests in Micronesia, in part by intentionally fostering economic dependence on the United States.”²⁵²

To discourage independence for United States territories, the United States maintains relative economic prosperity under the status quo. Through economic incentives, the United States ensures that the island territories cannot afford a drastic charge for independence. Some have

international economic system.” The Prebisch school asserts that solutions to economic dependency lie through “more state involvement in internal capitalistic development and heavier emphasis on economic nationalism (as opposed to free trade) in the relations of the LDCs with the industrialized world.” *Id.* The Prebisch school was eventually seen as too moderate by many and a more radical form of the theory emerged in the “dependentistas.” *Id.* The dependentistas believed that the dependent relationship suffered by LDCs was “deliberately created and is maintained by the industrialized countries to facilitate their systematic pillaging of the Third World, [and dependentistas] are quite skeptical and even contemptuous of solutions limited to economic reforms, insisting instead that the real heart of the issue is to be found in the broad configurations of power at both the national and global levels.” *Id.*

251. C. Todd Piczak, *The Helms-Burton Act: U.S. Foreign Policy Toward Cuba, the National Security Exception to the Gatt and the Political Question Doctrine*, 61 U. PITT. L. REV. 287, 294–95 (1999).

252. Jon Hinck, *The Republic of Palau and the United States: Self-Determination Becomes the Price of Free Association*, 78 CAL. L. REV. 915, 938 (1990) (citing *U.S. Government Survey Mission to the Trust Territory of the Pacific Islands: Report to the President* (A. Solomon, Oct. 9, 1963) (confidential version)). Early postcolonial theorists, such as Andre Gunder Frank, Samir Amin, and Raul Prebisch divided the dependency of other countries into North and South. Under this view of the dependency theory (sometimes referred to as structuralist or neo-Marxist), colonialism organized economic relations between the colonizing states (the North) and the colonized societies (the South) by transforming the southern economies into satellites of the northern economies. Because of this economic satellite relationship, the colonial experience not only failed to transform colonies into developed countries, but led to the eventual dependence by the South on the North both for import and exports. Inhabitants of territories such as Micronesia and the U.S. Virgin Islands simply see an association with the world’s great power, even if in a subordinate situation, as preferable to no association. This does not condemn these individuals for their pragmatic decisions, but this Article challenges United States policy makers for their failure to formally accept these people.

argued that any United States “material aid to the colonies is an extension of exploitation, given to strengthen the economic dependency that binds colony to colonizer.”²⁵³ To sever the territorial ties with the United States would be in effect to cut one’s own “economic throat.”²⁵⁴

The United States Virgin Islands and Puerto Rico are peculiarly situated because they are comparatively small economies in the general Caribbean area and seek to attract foreign investment on the basis of their unique characteristics.²⁵⁵ Most recently, the Puerto Rican economy, heavily dependent on United States federal aid, has suffered from budget cuts by the Clinton Administration.²⁵⁶ The Clinton Administration began a ten-year “phase out” of section 936 of the Internal Revenue Service Code in 1996,²⁵⁷ which provided tax exemptions from income made by United States corporations operating in Puerto Rico. The section 936 tax exemption operated as an incentive for companies to operate in Puerto Rico. “This unilateral decision by the United States undermines the Puerto Rican economy and is but the most recent example of United States exploitation of its colonial possession.”²⁵⁸ “It is estimated that 100,000 Puerto Ricans were employed by companies operating under section 936 (of which 23,000 are in pharmaceuticals) and another 200,000 indirectly employed.”²⁵⁹ Section 936 also operated as an incentive to keep the status quo. Many in Puerto Rico were previously opposed to statehood because section 936 would no longer apply to Puerto Rico.²⁶⁰

253. Haunani-Kay Trask, *Politics in the Pacific Islands: Imperialism and Native Self-Determination*, 16 AMERASIA J. 1, 2 (1990).

254. The United States’ story of this form of dependence is as follows:

In the closing decade of the nineteenth century the United States was an emerging global power that was preparing to compete militarily and commercially with European nations. . . . Latin America was the only area in which United States business could expect to compete effectively with European capital The islands in the Caribbean and the Pacific would become stepping stones for U.S. firms to penetrate the fabled China market and from which to compete more effectively in Latin America against European business.

PEDRO A. CABÁN, *CONSTRUCTING A COLONIAL PEOPLE: PUERTO RICO AND THE UNITED STATES, 1898–1932*, at 16–17 (1999) (citing PAUL S. REINSCH, *WORLD POLITICS AT THE END OF THE NINETEENTH CENTURY* (1900)); see also ROBERT H. WIEBE, *THE SEARCH FOR ORDER: 1877–1920*, at 224, 239–40 (1967).

255. Modibo Ocran, *The Institutional and Policy Framework for Foreign Investment in the Eastern Caribbean, Puerto Rico, and the United States Virgin Islands*, 27 VAND. J. TRANSNAT’L L. 745, 755 (1994) (citing U.S. VIRGIN ISLANDS INDUS. DEV. COMM’N, *THE BEST INVESTMENT DEAL UNDER THE AMERICAN FLAG: U.S. VIRGIN ISLANDS 1* (1992)).

256. See generally *Welcome to Puerto Rico: Economy*, at <http://welcome.tpuertorico.org/economy.shtml> (last visited Oct. 20, 2001).

257. *Id.*

258. *Empire Forgotten*, *supra* note 7, at 1203.

259. *Welcome to Puerto Rico: Economy*, *supra* note 256.

260. See *Empire Forgotten*, *supra* note 7, at 1204.

It has yet to be seen what effect the eradication of section 936 status will have on the desires for independence or statehood in Puerto Rico and how much damage to the economy will be done.²⁶¹ However, economic decline has already started.²⁶²

Economic troubles arising from the United States are not unique to Puerto Rico. Guam, in recent years, has experienced a huge economic growth, thanks in large part to a growth in the tourism industry.²⁶³ The economy of Guam, however, suffers from restrictions placed on it by the United States government and military.²⁶⁴ Apparently “taxation without representation” does hold true for territories of the United States. For example, The Jones Act

classified Guam as a domestic port for ocean transportation but as international port for air transportation, which resulted in the creation of a monopoly for U.S. flagged vessels and hindered Guam’s economy with high shipping rates. At the same time, Guam’s air terminal subjects travelers to and from the United States to U.S. Customs due to its classification as a foreign airport.²⁶⁵

The other, smaller United States territories are situated similarly to Guam. Most people on the other United States territories either work in tourism, or for the government. The Commonwealth of the Northern Mariana Islands “is a United States jurisdiction consisting of fourteen tropical islands in the geographical region known as Micronesia—north of the equator, east of the Philippines and west of the international date line.”²⁶⁶ With an economy based largely on tourism, “the population has grown fourfold in seventeen years and now approaches 65,000.”²⁶⁷ With a population of only 65,000, the Commonwealth of the Northern Mariana Islands (and similarly American Samoa) have largely escaped

261. As the text suggests, time is always the ultimate judge of one’s actions.

262. See JOSÉ TRIAS MONGE, *PUERTO RICO: THE TRIALS OF THE OLDEST COLONY IN THE WORLD* 160 (1997). The Puerto Rican Jose Trias Monge observed that Puerto Rico was among the developing countries with the highest long-term rate of growth, but from 1991 to 1996 Puerto Rico’s rate of growth fell well behind many other developing countries. *Id.*

263. Paul Lansing & Peter Hipolito, *Guam’s Quest for Commonwealth Status*, 5 *UCLA ASIAN PAC. AM. L.J.* 1, 1 (1998).

264. *Id.*; see *Details About Guam*, at <http://www.gov.gu/details.html> (last visited Oct. 20, 2001) (stating that forty percent of people in Guam work for the government and that Guam is now facing the problem of building up the civilian economic sector to offset the impact of United States military downsizing).

265. Lansing & Hipolito, *supra* note 263, at 3.

266. See CNMI Law Revision Commission, *The Commonwealth of the Northern Mariana Islands*, at <http://cnmilaw.org.htmlpage/hpg02.htm> (last visited Oct. 20, 2001).

267. *Id.*

the attention of the American people.²⁶⁸ The other United States island territories are also largely economically dependent on the United States, with most working for the government as a result of military bases within the territories and others working in the tourism industry.

C. *The Myth of Sovereign Status*

Though all territories of the United States are economically dependent on the United States, the degrees of dependence vary greatly between one territory and another. The United States further fostered its dominion over the territories and at the same time eluded the label of colonizer by creating the illusion of sovereignty and thus freedom for the territories' residents. The United States achieved its goal by using the hegemonic tool that is described here as the euphemisms for sovereignty through terms such as "commonwealth,"²⁶⁹ "freely associated state,"²⁷⁰ "republic,"²⁷¹ and "autonomous territory."²⁷² In fact, these terms are used to grant the illusion to the international community of self-determination. The reality is often quite different, as can be demonstrated by examining each territory. Even members of Congress have noted, from time to time, that Puerto Rico and other United States territories remain in the firm grip of United States colonialism despite their new status.²⁷³

For instance, though Puerto Rico was granted commonwealth status in 1952, this status only affords Puerto Rico limited local control.²⁷⁴

268. In fact, it would probably be news to a large majority of United States citizens that residents of the Northern Mariana Islands are United States citizens. As discussed *supra* notes 222–35, though citizenship implies a bestowing of full rights and privileges, this is not the case for United States-flag islands.

269. See, e.g., *infra* notes 310–69 and accompanying text (discussing Guam and Puerto Rico).

270. See, e.g., *infra* notes 416–77 and accompanying text (discussing Micronesia).

271. Elizabeth A. McKibben, *The Political Relationship Between the United States and Pacific Island Entities: The Path to Self-Government in the Northern Mariana Islands, Palau, and Guam*, 31 HARV. INT'L L.J. 257, 258 (1990).

272. See, e.g., *infra* notes 369–87 and accompanying text (discussing the U.S. Virgin Islands).

273. See 142 CONG. REC. E299 (daily ed. Mar. 6, 1996) (statement of Rep. Young), 1996 WL 96464 ("After 400 years of colonial rule by Spain ended in 1898, it should not have taken another 100 years of American administration for the U.S. Congress to define the options for full and permanent self-government."); 142 CONG. REC. S284 (daily ed. Jan. 22, 1996) (statement of Sen. Simon), 1996 WL 23038 ("The reality is that commonwealth status . . . is simply another form of old-fashioned colonialism."); 137 CONG. REC. H4540 (daily ed. June 13, 1991) (statement of Rep. Serrano), 1991 WL 106487 ("Puerto Rico is one of the very few remaining territories in the entire world where the vestiges of colonialism still prevail."); see also José Julián Álvarez González, *The Empire Strikes Out: Congressional Ruminations on the Citizenship Status of Puerto Ricans*, 27 HARV. J. ON LEGIS. 309, 309 (1990) ("However much it may try to deny it, the United States has a colonial problem in Puerto Rico.").

274. See *Empire Forgotten*, *supra* note 7, at 1154.

Federal laws of the United States still apply to the people of Puerto Rico without their consent or control.²⁷⁵ Though the people have been granted United States citizenship status, they are unable to vote in national elections, and all laws passed by Puerto Rico must comport with United States laws.²⁷⁶ These inconsistencies in the granting of an "autonomous" status, and the resulting unequal treatment by the United States, is apparent in each territory.

Yet the status of commonwealth serves the hegemonic function, unlike citizenship which promotes a sense of belonging, it fosters a sense of autonomy or freedom from foreign control. As previously examined,²⁷⁷ a central debate in Puerto Rico's political sovereignty debate in the territory is whether the creation of the commonwealth status was the result of a compact between equals.²⁷⁸ The popular Democratic party, arguably the most popular of the territory's three major parties, has repeatedly argued that the 1952 status change created a relationship that empowered Puerto Rico with a true form of sovereignty, including the ability to prevent the United States from imposing its will in all instances.²⁷⁹ The reality appears to be otherwise. After 1952, for instance, when Puerto Rico was repeatedly interested in resolving its status question, it had to request the United States to resolve the status question.²⁸⁰ When the United States failed to act, Puerto Rico would hold referenda with no binding effect on the ultimate status question.²⁸¹

Other territories have not been granted even the limited autonomy bestowed on Puerto Rico. In a territory such as American Samoa, the residents have not been granted citizenship status, or any sovereignty

275. A 1981 study by the Comptroller General of the United States found that Puerto Rico received less favorable treatment than it would have received as a state under about twenty important federal spending programs, including Supplemental Security Income, Aid to Families with Dependent Children, Medicaid, General Revenue Sharing, social services under Title XX of the Social Security Act, and supplemental programs for educationally disadvantaged children under the Elementary and Secondary Education Act. See José A. Cabranes, *Puerto Rico: Colonialism as Constitutional Doctrine*, 100 HARV. L. REV. 450, 461 (1986) (citing JUAN R. TORRUELLA, *THE SUPREME COURT AND PUERTO RICO: THE DOCTRINE OF SEPARATE AND UNEQUAL* (1985)).

276. See *Empire Forgotten*, *supra* note 7, at 1154; see also Jones Act, Pub. L. No. 64-368, § 34, 39 Stat. 951 (1917) (codified at 48 U.S.C. § 731 (1994)).

277. See *Empire Forgotten*, *supra* note 7, at 1152-64.

278. *Id.*

279. See, e.g., *id.* at 1164; Román, *supra* note 8, at 26.

280. *Empire Forgotten*, *supra* note 7, at 1161; Roman, *supra* note 8, at 10.

281. *Empire Forgotten*, *supra* note 7, at 1153.

sounding label, by the United States.²⁸² The citizens of American Samoa have not even been granted this modicum of sovereignty. Rather, though the residents of American Samoa may elect their own local government, these governmental employees operate at the discretion of the United States Secretary of the Interior who can remove any government employee at will.²⁸³

Following World War II, the United States acquired, from the United Nations, Japan's control over the islands in the Pacific known as Micronesia.²⁸⁴ It did so by virtue of agreeing to become the administering authority of the Trust Territory pursuant to the Trusteeship Agreement with the United Nations in 1947.²⁸⁵ This occurred after the United States had overtaken these islands from Japan and formally ceded the territories to the United Nations, but still maintained considerable presence on the territories. The United States, pursuant to the agreement it entered into with the United Nations, agreed to assist these people to achieve self-government or independence. After decades of control with the purported purpose of promoting self-determination, the territories became four separate creations that were to denote the achievement of autonomy. They are the Commonwealth of the Northern Mariana Islands,²⁸⁶ the Federated States of Micronesia,²⁸⁷ the Republic of the Marshall Islands,²⁸⁸ and the Republic of Palau.²⁸⁹ Though individually negotiated and purportedly resulting in sovereign states, each entity created, or is creating, a close, sui generis political relationship with the United States.²⁹⁰

Despite the attainment of these sui generis political relationships, the United States still maintains control over at least one of these newly created sovereign lands. For instance, though Palau sought to be a "freely associated state," when Palau attempted to pass a "nuclear free" constitution, the United States asserted its control over Palau and invalidated

282. LEIBOWITZ, *supra* note 7, at 449.

283. James R. Thornbury, *A Time for a Change in the South Pacific?*, 67 REV. JUR. U.P.R. 1099, 1102 (1998).

284. See, e.g., Namoi Hirayasu, *The Process of Self-Determination and Micronesia's Future Political Status Under International Law*, 9 U. HAW. L. REV. 487, 490 (1987); McKibben, *supra* note 271, at 257; Comment, *International Law and Dependent Territories: The Case of Micronesia*, 50 TEMP L.Q. 58, 58 (1976).

285. Hinck, *supra* note 252, at 920-21 (citing U.N.-Trusteeship for Pacific Islands, Jul. 18, 1947, 61 Stat. 3301, T.I.A.S. 1665, 8 U.N.T.S. 189).

286. Commonwealth—Covenant to Establish—Northern Mariana Islands, Pub. L. 94-241, 90 Stat. 263 (1976).

287. Territories and Insular Possessions, Pub. L. 99-396, 100 Stat. 837 (1986).

288. Approval of the Compact of Free Association with the Government of Palau, Pub. L. 99-658, 100 Stat. 3672 (1986) [hereinafter Compact of Free Association].

289. *Id.* at 3672.

290. See *Fleming v. Dep't of Pub. Safety*, 837 F.2d 401, 404 (9th Cir. 1988).

the results of the constitutional endeavor.²⁹¹ The United States asserted its authority under the Territorial Clause despite the fact that the territory was not acquired pursuant to the Territorial Clause.²⁹² In response to United States pressure, the Palau District Legislature nullified the draft constitution and canceled the scheduled plebiscite.²⁹³

Nonetheless, as a result of a lawsuit filed by supporters of the constitution, the plebiscite went ahead and ninety-two percent of the electorate voted in favor of the constitution. The High Court of the Trust Territories, however, refused to certify the results because of the nullifying legislation.²⁹⁴

Other examples include the fact that in the Covenant with the Northern Marianas, the United States maintained limited sovereignty in order to protect its strategic interests.²⁹⁵ That Covenant also gave the United States authority to conduct the territory's foreign affairs.²⁹⁶

The United States has used this power to dictate issues beyond foreign affairs. When challenged, the United States asserted its Territorial Clause powers.²⁹⁷ With respect to Palau, the United States refused negotiations on the nuclear free constitution demanding that it must have the right to transport nuclear powered ships as well as ships and aircraft armed with nuclear weapons in order to carry out its defense obligation.²⁹⁸ In addition, the compact that was eventually entered into between the two lands²⁹⁹ allowed the United States to exercise eminent domain powers over lands for military purposes.³⁰⁰

The practice of granting commonwealth status in order to create a general feeling of sovereignty was not new. The United Kingdom has

291. Hinck, *supra* note 252, at 923 (noting that "Palau faced difficulties in drafting a constitution acceptable to the United States").

292. McKibben, *supra* note 271, at 275.

293. Hinck, *supra* note 252, at 926.

294. *Id.*

295. Commonwealth—Covenant to Establish—Northern Mariana Islands, *supra* note 286, §§ 101, 103, 104.

296. See McKibben, *supra* note 271, at 275.

297. See, e.g., United States *ex rel.* Richard's v. Sablan, No 8909008, 1989 WL 158917 (D. N. Mar. I. May 25, 1989).

298. Note, *Compacts of Free Association in the Trust Territory of the Pacific Islands: Plebiscite in the Republic of Palau*, 29 HARV. INT'L L.J. 149, 151 (1988).

299. Compact of Free Association, *supra* note 288, at 3673, § 101; Exec. Order No. 12,569, 51 Fed. Reg. 37,171 (Oct. 16, 1986).

300. See Bank of Hawaii, *Compact of Free Association*, <http://www.boh.com/econ/pacific/pal/05.asp> (last visited May 8, 2002); see also Jon Hinck, Comment, *The Republic of Palau and the United States: Self-Determination Becomes the Price of Free Association*, 78 CAL. L. REV. 915, 923-35 (1990).

applied these same tools with practically the same effects in its territories and has been criticized as being the only member of the European Union to deny full citizenship to overseas territories.³⁰¹ This criticism falls on the United States as well for the “granting” of limited citizenship to Puerto Ricans, Guamanians, and the inhabitants of the other U.S. territories, who, regardless of the citizenship status, remain different, subordinate, inferior, and dependent on the mainland counterpart.³⁰² In short, the significance of granting citizenship unilaterally on Puerto Ricans and Guamanians may have been an act of legal significance in Puerto Rico and Guam, but for Congress, it was an act of psychological significance.³⁰³ In effect, the accomplishment was two-fold. First, Puerto Ricans were appeased in the belief that their plea for increased self-government had been answered. Second, Congress retained plenary powers over Puerto Rico as a dependency and curtailed the nationalistic movement for independence, thus potentially creating the footprint for further assimilation³⁰⁴ as it had accomplished with the territories in the contiguous states.³⁰⁵

By perpetually denying its imperialistic actions, by granting the colonies a status which perpetuates the myth of self-determination, and by granting some autonomy regarding local affairs, the United States has acquired territories and their people and, without much guilt, treated them differently from citizens of states in the Union.

Though some might argue that the territories themselves have chosen this status, as Senator Tydings noted long ago when discussing the Jones Act:

301. See ROBERT ALDRICH & JOHN CONNELL, *THE LAST COLONIES* 21–22 (1998). The citizenship scheme applied by the British to British colonies is strikingly similar to the United States territorial citizenship conferment. *Id.* In parallel, those born in some territories have British passports but cannot vote in parliamentary elections. *Id.* Other territories do not enjoy all citizenship privileges or the right to live in Britain. *Id.* In striking similarity to the fictional introduction of this piece, Britain tightened its nationality laws to limit the number of citizens in commonwealth territories and limit the right to live abroad due to the fear of migration from the six million British citizens who would rather migrate than live in Hong Kong after the Chinese government would take over. *Id.* The citizenship was thus a “second-class form of citizenship.” *Id.*

302. See Román, *supra* note 8, at 15.

303. Arnold Leibowitz, *The Commonwealth of Puerto Rico: Trying to Gain Dignity and Maintain Culture*, 17 REV. JUR. U.P.R. 1, 11 (1982). The legal significance of the citizenship grant by Congress did not come about through political or economic spheres. It was given effect through the judiciary. *Id.*

304. See Jose Trias Monge, *Plenary Power and the Principle of Liberty: An Alternative View of the Political Condition of Puerto Rico*, 68 REV. JUR. U.P.R. 1, 8 (1999).

305. See LEIBOWITZ, *supra* note 7, at 144. The Insular Cases seemed to permit, however, plenary power of Congress to deal with these post-Spanish-American War territories without the proscribing guidelines of the Northwest Ordinance. See *id.* This interpretation of the Insular Cases seems to deviate from the constitutional mandate: the Territorial Clause, which had as its pragmatic application, the Northwest Ordinance.

If you are willing to have help of a kind and have no real voice in the government of the nation to which you are appended, why, then, that is one thing . . . If I were a Puerto Rican that would not satisfy me, just as it did not satisfy George Washington, Thomas Jefferson, and Simon Bolivar.³⁰⁶

The actions of the United States Congress and the Supreme Court during the past century demonstrate that, although most of the territories have repeatedly requested to be allowed to freely determine their own political future, the United States has insisted on dictating their internal and external rights and affairs.

Having briefly introduced the hegemonic tools, it is now possible to reveal the role that each has played in the United States' colonial empire. The following Part reviews the United States' relationship with its post-Spanish-American War acquisitions and the remarkably similar approach to its post-World War II acquisitions. By comparing these two imperialistic periods, this Article demonstrates how the hegemonic tools of citizenship, international status, and economic dependency have been repeatedly utilized to perpetuate the "Empire Forgotten."³⁰⁷ In so doing, this work seeks to expose the concomitant subjugation of millions who mistakenly believe themselves to be free members of the sovereign lands as well as formal members of the United States' body politic.³⁰⁸

V. POST-SPANISH-AMERICAN WAR COLONIAL ENDEAVORS

The Treaty of Paris, which culminated with the acquisition of Guam, the Philippines, and Puerto Rico, is considered one of the initial moments of United States overseas expansion.³⁰⁹

306. *Hearings Before the Committees on Territories and Insular Affairs*, 78th Cong. 137 (1943).

307. *See generally Empire Forgotten*, *supra* note 7.

308. "For neither Man nor Angel can discern [h]ypocrisie—the onely [sic] evil that walks invisible, except to God alone, by his permissive will, through Heav'n and Earth." *Paradise Lost, Book III*, in *THE POETICAL WORKS OF JOHN MILTON* 70 (Helen Darbishire ed., Oxford Univ. Press 1961) (1667) (resulting from a conversation between Satan and the Archangel Uriel in which Satan, disguised as an angel praises God to Uriel in order to obtain from him the location of Eden).

309. *See generally Treaty of Paris*, *supra* note 228. While Spain ceded Guam and Puerto Rico to the United States, the United States purchased the Philippines for twenty million dollars. *Id.* art. III, 30 Stat. at 1756; *see also CABRANES*, *supra* note 181, at 1, 19–20. After the Spanish-American War ended, Spain sold the Caroline Islands and the Northern Marianas. Larry Wentworth, *The International Status and Personality of Micronesian Political Entities*, 16 *ILSA J. INT'L & COMP. L.* 1, 2 (1993).

A. Puerto Rico

In the case of Puerto Rico, the illusion of self-rule began shortly after the conquest.³¹⁰ In the earliest stage of American occupation, Puerto Ricans were led to consider the military rule as a transitional period leading to eventual incorporation.³¹¹ This belief was shaped by comments such as that of General Nelson A. Miles, the military overseer of the territory, who pledged to protect the Puerto Rican people, promote prosperity, and bestow “the immunities and blessings of the liberal institutions of the [United States] Government” upon the inhabitants. This illusion of political progression was strengthened by the replacement of “the military government with a civilian colonial government.”³¹²

However, on the mainland, subsequent Supreme Court decisions in the Insular Cases clarified Puerto Rico’s relationship with the United States.³¹³ These decisions held that the United States Constitution did not fully apply to Puerto Rico.³¹⁴ The Court then proceeded to create the classifications of “incorporated” and “organized.”³¹⁵ The legal and political effect of these cases was clear by 1922. The subordinate and subjugated status of the territory’s inhabitants remained intact despite the grant of United States citizenship in 1917.³¹⁶ In addition, the decisions sanctioned the continued treatment of the territories as something other than states, sovereign lands, or territories intended to become incorporated.³¹⁷ In other words, they sanctioned colonialism. The creation of the incorporation doctrine was thus hegemonic because it created a facade of association but, in actuality, it fostered a colonial hierarchy based on the potential of eventual incorporation.³¹⁸ Justice Brown, however, revealed the true intent of these classifications by noting that the Court’s affirmation of the plenary power of Congress was necessary in order to prevent the automatic grant of citizenship to the inhabitants of the territories.³¹⁹

The line of cases that followed further developed the hierarchy of the incorporation doctrine, which held that all the rights and privileges of the

310. See Foraker Act, ch. 191, 31 Stat. 77 (1900) (codified as amended at 48 U.S.C. §§ 733, 736, 738–40, 744, 866 (1982)). The Foraker Act replaced Puerto Rico’s military government with a civilian government.

311. Professor Pedro A. Malavet provides a fine discussion of the Spanish rule over Puerto Rico. See generally Malavet, *supra* note 22.

312. *Empire Forgotten*, *supra* note 7, at 1142.

313. See cases cited *supra* note 107.

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

315. *Id.* at 341–42 (White, J., concurring).

316. See *Balzac v. Porto Rico*, 258 U.S. 298, 308–09 (1922).

317. See *Balzac*, 258 U.S. at 314; *Downes*, 182 U.S. at 244; *Huus v. N.Y. & Porto Rico Steamship Co.*, 182 U.S. 392, 396 (1901).

318. See cases cited *supra* note 317; see also RAMOS, *supra* note 158, at 121–42.

319. See cases cited *supra* note 317.

Constitution applied to incorporated territories while only “fundamental” constitutional rights applied to the residents of unincorporated territories.³²⁰

In order to conceal this outsider status, the role of citizenship as a hegemonic tool took form in the Jones Act of 1917.³²¹ The Act was a concession that responded to the xenophobic fear that full incorporation of Puerto Rico would darken the American frontier.³²² By creating a three-branch system, establishing a Bill of Rights and granting the inhabitants a diluted version of United States citizenship, the Act, in effect, lessened the colonial appearance of the United States’ relationship with Puerto Rico.³²³ Yet the decision to grant United States citizenship to the people of Puerto Rico enabled the United States to maintain Puerto Rico as an American possession.³²⁴ In addition, as stated in the Jones Act: “All laws enacted by the Legislature of Porto Rico³²⁵ shall be reported to the Congress of the United States . . . which hereby reserves the power and authority to annul the same.”³²⁶ Citizenship status, as well as the replication

320. In subsequent Insular Cases the Court recognized the following as fundamental: the Fourth Amendment protection against unreasonable searches and seizures in *Torres v. Puerto Rico*, 442 U.S. 465, 474 (1979) (holding that the Fourth Amendment applies to Puerto Rico and that a Puerto Rican statute authorizing the police to search the luggage of a person arriving in Puerto Rico from the United States was unconstitutional); the Due Process Clause in *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 668–69 n.5 (1974); the Equal Protection Clause in *Examining Board of Engineers, Architects, & Surveyors v. Flores de Otero*, 426 U.S. 572, 601 (1976); the First Amendment right to free speech and the constitutional right to travel in *Balzac v. Porto Rico*, 258 U.S. 298, 314 (1922) (holding that a prosecution for liable was not a violation of the First Amendment and that the right to a jury trial is not a fundamental right as applied to unincorporated territories); and *Califano v. Torres*, 435 U.S. 1, 4 n.6 (1978) (stating that there is a virtually unqualified constitutional right to travel between Puerto Rico and the fifty states of the Union).

321. Jones Act, Pub. L. No. 64-368, 39 Stat. 951 (1917) (codified at 48 U.S.C. § 731 (1994)).

322. See RONALD FERNANDEZ, *THE DISENCHANTED ISLAND: PUERTO RICO AND THE UNITED STATES IN THE TWENTIETH CENTURY* 57 (2d ed. 1996).

323. See CABRANES, *supra* note 181, at 72 (stating that the Jones Act granted substantially more government authority to Puerto Rico than had been allowed under the Foraker Act). Under the Jones Act, the Governor continued to be appointed by the President, but the Foraker Act’s legislative branch’s House of Delegates and Executive Council were replaced with a nineteen-member Senate and a thirty-nine-member House of Representatives elected by popular vote. See Jones Act, §§ 12, 26–27, 39 Stat. at 955–61.

324. See CABRANES, *supra* note 181, at 144; RAMOS, *supra* note 158, at 147; Leibowitz, *supra* note 7, at 146.

325. See generally Manuel Del Valle, *Puerto Rico Before the United States Supreme Court*, 19 REV. JUR. U.I.P.R. 13 (1984), WL 19 REVJUIPR 13.

326. Jones Act §§ 34, 39.

of the American structure of government, nonetheless resulted in the illusion of incorporation. The status of citizenship was particularly helpful in the United States' ability to manage the territory's people. The Puerto Rican people were granted a status that was supposed to mean something, something important.³²⁷ Yet these people are denied the right to vote for President and Vice-President and lack the fundamental right to congressional representation which has characterized United States citizenship.³²⁸ Nevertheless, the grant of this diluted form of citizenship served its purpose from the perspective of the metropolis. The grant promoted and assisted in establishing a sense of belonging on the part of the inhabitants as well as a sense of loyalty.³²⁹ The grant was also a response and attack on a growing nationalism movement in Puerto Rico's political spectrum.³³⁰

The grant of the statutory citizenship received by the people of Puerto Rico is also an example of the territory's status as a United States colony. The label that was bestowed upon the people by the dominant group provides inferior rights and is perhaps not even a status that was a matter of choice. Perhaps the best example of this stems from the case of Juan Mari Bras, a Puerto Rican born attorney and independence advocate.³³¹ After Mari Bras' right to vote in a Puerto Rican election was challenged following his previous effort at renouncing his United States citizenship in Venezuela, the Supreme Court of Puerto Rico upheld the lower court's ruling that Mari Bras had the right to vote in the local elections.³³² In 1998, the United States State Department vacated the certificate of loss of nationality that had been previously issued to Mari Bras.³³³ "The State Department [noted] that it considered Mari Bras a United States citizen 'by virtue of [his] birth in Puerto Rico.'"³³⁴ The Mari Bras case in at least some respects, represents that for the people of Puerto Rico, United States citizenship still may not be a matter

327. *Sugarman v. Dougall*, 413 U.S. 634, 652 (1973) (Rehnquist, J., dissenting) ("In constitutionally defining who is a citizen of the United States, Congress obviously thought it was doing something, and something important.").

328. As the lead author's father, Andres Román observed, "I was obligated to follow federal law when I lived both in Puerto Rico and New York. Why is it that federal law did not follow me when I moved to Puerto Rico? Am I less loyal here, less of a man or citizen?"

329. See RAMOS, *supra* note 158, at 148 (citing MARIA EUGENIA ESTADES FONT, *LA PRESENCIA MILITAR DE ESTADOS UNIDOS IN PUERTO RICO 1898-1918: INTERESES ESTRATÉGICOS Y DOMINACION COLONIAL* (1988)).

330. *Id.* at 202.

331. *Ramirez de Ferrer v. Mari Bras*, 144 P.R. Dec. 141, 1997 WL 870836 (P.R. 1997).

332. *See id.*

333. RAMOS, *supra* note 158, at 175.

334. *Id.* (quoting Robert Friedman, *Renunciation Oath Set Aside in Case of U.S. Citizen Mari Bras*, *SAN JUAN STAR*, June 5, 1998, at 8).

of choice. The case suggests that the imposed status is a prerequisite to being a Puerto Rican. Unlike other United States citizens who can renounce their status, Mari Bras was refused this right, if in fact it is a right and not merely a label.

As alluded to in earlier works,³³⁵ although the United States did not want to fully incorporate Puerto Rico or include its people as fully equal members of the body politic, there was substantial strategic interest in ensuring that Puerto Rico be maintained as an American military enclave.³³⁶ As part of the Monroe doctrine, Puerto Rico was to be a base to promote American interest in the Carribean, Mexico, and Central America, particularly in light of the creation of the Panama Canal. As Representative Cooper of Wisconsin observed:

We are never to give up Porto Rico for, now that we have completed the Panama Canal,³³⁷ the retention of the island becomes very important to the safety of the canal, and in that way to the safety of the Nation itself. It helps to make the Gulf of Mexico an American lake. I again express my pleasure that this bill grants these people citizenship.³³⁸

In 1943, the illusion of membership had still not evolved into incorporation with the United States' body politic.³³⁹ The Puerto Rican Legislature responded by demanding that Congress terminate "the colonial system of government" once and for all.³⁴⁰ After decades of United States congressional and executive studies, the United States denied Puerto Rico the options of independence or statehood.³⁴¹ With the help of influential Puerto Rican leaders, the hegemonic tool of international status was used and the colonial relationship was masked with the creation of commonwealth status.³⁴² This compromise afforded Puerto Ricans only limited local control, but to this day, maintains the less-than-equal status.³⁴³ The loss of citizenship has also been used during local elections and status

335. See *Empire Forgotten*, *supra* note 7, at 1119.

336. See *id.* at 1156.

337. See *id.* at 1149.

338. 54 CONG. REC. H4170 (Feb. 24, 1917) (statement of Sen. Cooper).

339. See *Empire Forgotten*, *supra* note 7, at 1151.

340. *Autonomy Is Asked in Puerto Rico Vote*, N.Y. TIMES, Feb. 11, 1943, at 6.

341. See *Empire Forgotten*, *supra* note 7, at 1209.

342. *Id.*

343. During the recent Presidential ballot contest, we have heard much of the voting rights of overseas service men and women. Are the thousands of United States citizens that are Puerto Ricans who fought for and still defend this country less worthy to cast their vote from overseas? The lunacy of their anomalous status is almost unbelievable, but is unfortunately their plight and evidence of their unacceptance.

referenda to provoke fear of being further disassociated.³⁴⁴ In addition, as addressed more fully in the previous section, Puerto Rico is burdened with being almost completely economically dependent on the United States.³⁴⁵

Today, the fate of the Puerto Rican people lies at the whim of American political leaders. The current situation on the island of Vieques is bringing international attention to an untenable situation in the United States territory.³⁴⁶ However, the use of the island for bombing purposes is not a recent event. Since 1940, when the United States Navy took over two-thirds of the twenty-one mile by four mile island of Vieques, the United States Navy has conducted training exercises on the island, which have included air, land, and sea bombings.³⁴⁷ Thus, Puerto Rico still serves, at least in some respects, the United States' strategic interests.

The use of the island for bombing practice has also had negative effects on the 9500 inhabitants. Recent studies indicate that "the bombing has hurled haunting levels of toxins into Vieques' air, water and fishing grounds—which some believe is why the cay has a 27% higher cancer rate than the main island."³⁴⁸

Last January, Bill Clinton, who feels Puerto Rico's pain—especially now that Hillary needs the votes of New York's Puerto Rican émigrés—made an agreement with the island's government. Puerto Rico would let the Navy stay until 2003, using only dummy bombs. In return, Puerto Rico would get, essentially, a bribe: some \$40 million in additional Washington aid. But most Puerto Ricans tell pollsters they want the Navy out now. Indeed, Vieques residents may soon pass a referendum that could void the three-year pact.³⁴⁹

On Thursday, June 14, 2001 President Bush said: "My attitude is that the Navy ought to find somewhere else to conduct its exercises for a lot of reasons. One, there has been some harm done to people in the past. Secondly, these are our friends and neighbors and they don't want us there."³⁵⁰ However, top Republicans in Congress have called for hearings

344. See *Empire Forgotten*, *supra* note 7, at 1166.

345. See discussion *supra* Part V.A.

346. See, e.g., James Anderson, *Vieques Vigil a Quagmire*, MIAMI HERALD, Oct. 18, 1999, at 9A; Tim Padgett, *The Guns of May, the Sounds of Countrymen*, TIME, May 15, 2000, at 4; Gerand Seenan, *Puerto Ricans in UK to Fight U.S. Bombs*, GUARDIAN, Feb. 29, 2000, 2000 WL 15584060.

347. Lillian Irizarry, *Vieques, Cleanup May Take Decades*, AP ONLINE, June 14, 2001, 2001 WL 22915389; see also *Puerto Rico Journey: The Eastern Islands, Vieques*, at <http://www.iit.edu/~PR/prvie.html> (last visited Oct. 28, 2001) (giving the size and population of the island).

348. Karen Gullo, *Study Looks at Health of Hispanics*, AP ONLINE, Feb. 25, 2000, 2000 WL 14324018; Padgett, *supra* note 346, at 4.

349. Padgett, *supra* note 346, at 4.

350. See Kate Snow & Dana Bash, CNN Washington Bureau, *Republicans Want Hearings into Vieques Decision* (June 14, 2001), available at <http://www.cnn.com/2001/ALLPolitics/06/14/congress.vieques.02/index.html>.

on the White House decision to halt bombing exercises.³⁵¹ Though it is yet to be seen if the bombing has, indeed, come to an end, environmentalists advise that it could take decades “to remove unexploded ammunition and clean up the battered reefs.”³⁵² Interestingly, irrespective of the result of President Bush’s efforts, his use of words such as “friends” and “neighbors” merely highlights the widely held belief that the Puerto Rican people are something other than United States citizens. Apparently, according to the administration, the bombings should end, not because the attacks are on our own people, but because the attacks are on our “friends” and “neighbors.”

B. Guam

Under the control of the United States, the people of Guam, living in an unincorporated territory, do not possess even the modicum of local autonomy brought by the anomalous commonwealth status. Instead, they live in a state akin to the naked colonialism of centuries past. Guam, the other major acquisition of the Spanish-American War, was ceded to the United States along with Puerto Rico in the Treaty of Paris.³⁵³ Since its acquisition in 1898, the United States has maintained absolute and plenary power over Guam under the Territorial Clause of the United States Constitution.³⁵⁴

Yet, like the people of Puerto Rico, the people of Guam have repeatedly requested autonomy. In 1901, Guamanians requested a change from a military government.³⁵⁵ This effort died in Congress.³⁵⁶ In 1933, the people of Guam refused to fill the seats of a newly created legislature because it had only advisory powers.³⁵⁷

Initially the territory was controlled by the Department of the Navy, and then, after over fifty years of absolute rule, control of Guam was transferred to the Department of the Interior.³⁵⁸ In 1949, after a challenge to the Naval Governor by the Guamanian Legislature, President Truman appointed a civilian governor and transferred the administration of the

351. *Id.*

352. Irizarry, *supra* note 347.

353. Samuel J. Cohen, *The Extension of U.S. Tax Treaties to U.S. Territories, as Illustrated by the Example of Guam*, 11 UCLA PAC. BASIN L.J. 32, 33 (1992).

354. McKibben, *supra* note 271, at 257.

355. *Id.* at 287.

356. Neil S. Solomon, *The Guam Constitutional Convention of 1977*, 19 VA. J. INT'L L. 725, 744 (1979).

357. *Id.* at 734.

358. McKibben, *supra* note 271, at 287.

territory from the Navy to the Department of the Interior.³⁵⁹ Yet this modification procured very little for the Guamanians since the Organic Act of 1950 only established a local government structure and granted statutory United States citizenship similar to the diluted form of citizenship granted to the people of Puerto Rico. As such, it failed to provide self-determination because it maintained the trapping of foreign control and failed to allow full incorporation as evidenced by the refusal to grant the Guamanians the right to elect United States federal representatives.³⁶⁰ In 1970, the people of Guam were afforded a form of quasi-representation similar to that afforded to the people of Puerto Rico which entails the election of a nonvoting representative who exercises a lobbyist-like role in Congress.³⁶¹ However, Guamanians' inability to participate in United States Presidential elections has remained unaltered. This inequity was further heightened when the United States Supreme Court dissolved the Guamanian Supreme Court.³⁶² This action was consistent with the Court's previous preacquisition confirmation of Congress' unconditional authority over the territories which is "an incident of sovereignty, and continues until granted away."³⁶³

Guam, like Puerto Rico, is plagued with political strife over its future leading to a lack of solidarity in its status goal. For instance, after requesting that the United States allow it to draft a constitution, the electorate refused to support it.³⁶⁴ Similarly, a 1987 commonwealth plebiscite resulted in a thirty-nine percent turn-out with little more than fifty percent approving the referendum.³⁶⁵

The Guamanian's relentless quest for autonomy has resulted in attempting the only option, compromise. Hoping to emulate the inhabitants of Puerto Rico, the Guamanian Legislature established a Commission of Self-Determination with the belief that commonwealth status will procure greater autonomy.³⁶⁶ The United States' response to creating the Commonwealth of Guam has been sluggish.³⁶⁷ Much like the Puerto Rican efforts to change Puerto Rico's status, the Guamanian efforts in Congress have died in legislative session.³⁶⁸ Currently, this request for

359. *Id.*

360. *Id.* at 287-89.

361. 48 U.S.C. §§ 1711-1715 (1994 & Supp. V 2000).

362. *Territory of Guam v. Olsen*, 431 U.S. 195, 202 (1977).

363. *Nat'l Bank v. County of Yankton*, 101 U.S. 129, 133 (1879).

364. Solomon, *supra* note 356, at 802.

365. McKibben, *supra* note 271, at 290 (citing Franklin J. Arceo Quitugua, Speaker of the 19th Guam Legislature, at St. Croix, U.S. Virgin Islands (Dec. 9, 1988)).

366. Jon M. Van Dyke et al., *Self-Determination for Nonself-Governing Peoples and for Indigenous Peoples: The Cases of Guam and Hawaii*, 18 U. HAW. L. REV. 623, 626 (1996).

367. *Id.* at 628.

368. *Id.*

an artificial form of autonomy afforded by commonwealth status is ongoing.

C. U.S. Virgin Islands

The U.S. Virgin Islands were “discovered” by Christopher Columbus on his second voyage to the New World.³⁶⁹ Christopher Columbus landed on St. Croix in 1493 and named the island “Santa Cruz.”³⁷⁰ Since its so-called discovery, six flags have flown over these islands before coming into the possession of the United States: Spanish, Dutch, British, French, Knights of Malta, and Danish.³⁷¹ According to 1990 census information, there are a little over 100,000 people living on the three U.S. Virgin Islands.³⁷² Though the U.S. Virgin Islands are composed of more than fifty islands, most people live on three major islands (St. Thomas, St. John, and St. Croix) with a surface area a little over 130 square miles.³⁷³

“The United States bought St. Thomas, St. John, and St. Croix from Denmark in 1916, after two previous attempts to purchase these islands had failed.”³⁷⁴ Fearing that Germany might acquire the islands, the United States agreed to pay Denmark twenty-five million in gold for what is now known as the U.S. Virgin Islands.³⁷⁵ Interestingly enough, though Danish voters approved the sale through a plebiscite, the residents of the U.S. Virgin Islands were never consulted.³⁷⁶ As with American Samoa and Guam, the islands were initially under the direction of the Department of the Navy, and later turned over to the Department of the Interior.³⁷⁷ The United States Navy governed the islands because they were intended to be part of naval operations fronting German activity in the Atlantic Ocean. At the time of acquisition, the island population had

369. *Facts and Figures about the U.S. Virgin Islands—St. Thomas, St. Croix, St. John, Water Island*, at <http://www.usvi-info.com/infousvi/faqsguide-info.html> (last visited Oct. 16, 2001) [hereinafter *Facts and Figures*].

370. *Id.*

371. *Id.*

372. *Id.*

373. *Id.*

374. Jon M. Van Dyke, *The Evolving Legal Relationships Between the United States and Its Affiliated U.S.-Flag Islands*, 14 U. HAW. L. REV. 445, 494–95 (1992).

375. *See id.*; *see also Facts and Figures*, *supra* note 369 (stating that the purchase was made in gold).

376. Van Dyke, *supra* note 374, at 495 (“The Danish voters approved this sale in a plebiscite, but no vote was taken among the residents of the Virgin Islands.”).

377. *Id.* at 496.

almost disappeared as a result of malaria and gastroenteritis. Economically, the islands were devastated; they were operating at a net loss of \$190,000 a year.

In 1917, Congress provided the islands with an organic act that established a temporary government that replaced the Navy.³⁷⁸ This act provided a judicial system, a bicameral legislature and a governor appointed by the President of the United States.³⁷⁹ The act contained a property requirement for suffrage. Some years later another organic act was passed that created a “municipal counsel” for each main island.³⁸⁰

In 1927, residents of the U.S. Virgin Islands were granted American citizenship, though much like Guam and Puerto Rico, no voting rights in national elections were conferred, and shortly thereafter, the military governor was replaced by a civilian.³⁸¹ The governor was appointed by the President and approved by the Senate.³⁸²

In 1964, the people of the U.S. Virgin Islands held their first constitutional convention which stated, in part: “The People of the Virgin Islands are unalterably opposed to annexation of the Virgin Islands by any State of the Union as a county, city or precinct, or to any commonwealth or other territory under the jurisdiction of the United States.”³⁸³ The convention also included provisions indicating a desire to hold local elections for governor, and to eliminate the President’s veto power over local legislation.³⁸⁴ Under increasing pressure from the U.S. Virgin Islands, the United States Congress passed the “Elective Governor Act of 1968.”³⁸⁵ The Act provides that the U.S. Virgin Islands would have a locally elected governor, abolishes the Department of the Interior’s control over the islands, and eliminates the President’s ability to veto local legislation.³⁸⁶ The islands then drafted a constitution that was approved by Congress in 1981.³⁸⁷ In 1993, despite the shortcomings of unincorporated status, the people of the U.S. Virgin Islands voted in a status referendum to maintain their relationship with the United States.³⁸⁸

Today the U.S. Virgin Islands exist in what has become known as an

378. *Id.*

379. *Id.*

380. *Id.* at 496–97.

381. *Id.*; see also *Facts and Figures*, *supra* note 369 (stating that the citizens of the U.S. Virgin Islands have no right to vote in Presidential elections).

382. Van Dyke, *supra* note 374, at 496.

383. *Id.* at 497–98.

384. *Id.* at 497.

385. *Id.* at 498.

386. *Id.*

387. *Id.*

388. *Id.*

“autonomous territory.”³⁸⁹ The U.S. Virgin Islands is an unincorporated territory that is governed under the Territorial Clause of the Constitution. Similar to Puerto Rico and Guam, the U.S. Virgin Islands, as unincorporated territories, are governed by the Supreme Court’s holdings regarding the Insular Cases and their inhabitants are only guaranteed “fundamental rights.” These inhabitants are only allowed nonvoting delegates to the United States Congress. Because of their “unique cultures, their small size and their distance from the mainland,” these territories “may never become states.”³⁹⁰

D. American Samoa

American Samoa is composed of seven islands in the South Pacific.³⁹¹ Located south of the equator, American Samoa is also the United States’ southern-most territory.³⁹² In 1872, United States Navy Commander Richard Meade visited Pago Pago and made an agreement with the Samoan High Chief that was rejected by the United States Government. However, on April 17, 1900, American Samoa and the United States signed the Deed of Cession, which resulted in American Samoa becoming a territory of the United States.³⁹³ The United States came into possession of Samoa through a series of treaties with Germany and Great Britain and American Samoa was deemed an “unorganized territory.”³⁹⁴ Under the Treaty of Berlin, which was ratified by the United States on February 16, 1900, the United States gained rights over the island group.³⁹⁵ During the 1940s, as Japan’s power in the Pacific grew, the importance of Samoa to United States interests also increased.³⁹⁶ By 1940, the U.S. Naval Station on the main island of Tutuila became increasingly important to American interests. In fact, during World War II, there were more United States military personnel

389. *Id.*

390. *Id.* at 447.

391. Office of the Governor, *American Samoa*, at <http://www.government.as/gov.htm> (last visited Apr. 21, 2002).

392. *American Samoa*, at <http://www.ipacific.com/samoa/samoa.html> (last visited Oct. 26, 2001).

393. It should be noted that while commonly referred to as a territory under 8 U.S.C. § 1101(a)(29) (1994), American Samoa is considered an “outlying possession[] of the United States.” *Id.*

394. Thornbury, *supra* note 283, at 1100.

395. Samoanet, *About American Samoa*, at <http://www.samoanet.com/amsamoa/> (last modified Aug. 2, 1997).

396. *Id.*

on the island of Tutuila than there were native Samoans.³⁹⁷

The population of American Samoa is approximately 55,000 people, with the majority of the natives living on the island of Tutuila.³⁹⁸ The people of American Samoa are United States nationals, but not United States citizens.³⁹⁹ As with the other territories, the United States controls, to a large extent, the internal functions of the government of American Samoa. Initially, in American Samoa, the U.S. Navy controlled governmental functions.⁴⁰⁰ In the 1950s, responsibility for governing the island shifted from the Navy to the Department of the Interior.⁴⁰¹

Though American Samoa's government is composed of branches similar to that of the United States system, with an executive, legislative, and judiciary branch, the United States Secretary of the Department of the Interior "holds the power of appointment over virtually every member of the government in the territory, including the judiciary."⁴⁰² Though the Samoan Legislature has statutes similar to those used in the United States, the Secretary of the Interior holds nearly all legislative, executive, and judicial power over Samoa.⁴⁰³ The Secretary of the Interior can appoint or remove government employees at will and even overrule any decisions of the Samoan courts.⁴⁰⁴ Thus, as in the other territories, American Samoa has been denied the right to self-determination, and instead, has been relegated to a position as a possession of the United States and is denied the same rights that the United States affords its mainland citizens. Unlike other United States territories, United States citizenship has not been extended to American Samoans⁴⁰⁵ and it appears unlikely that this will change in the near future.

Early on in its relationship with the United States, Samoans were allowed to manage their island while the United States concentrated on the operation of the coaling station and naval base at Tutuila. This arrangement was altered in the 1930s when, as a result of the Japanese activity in the Pacific, Samoa's strategic location became crucial. Not unlike the change in Puerto Rico's status during the exact same period, in 1951, the United States' military control in Samoa was altered via the President's executive order to the Department of the Interior removing the Navy as the administrating authority of Samoa.⁴⁰⁶ This resulted in a civilian

397. *Id.*

398. *Id.*

399. *Id.*

400. *Id.*

401. *Id.*

402. Thornbury, *supra* note 283, at 1102.

403. *Id.*

404. *Id.*

405. LEIBOWITZ, *supra* note 7, at 449.

406. *See generally* JOHN WESLEY COULTER, THE PACIFIC DEPENDENCIES OF THE

government that, although “American in appearance . . . [was and remains] illusory.”⁴⁰⁷ Samoa’s government is illusory because it does not have full legislative authority. Its enactments and resolutions have no binding authority since they are simply recommendations made to the governor.⁴⁰⁸ Furthermore, the Secretary of the Department of the Interior has appointment power over virtually every member of the government in the territory, including the judiciary.⁴⁰⁹

Presently, American Samoa is still an unorganized and unincorporated territory. Much like Puerto Rico, Guam, and the U.S. Virgin Islands, as an unincorporated territory, pursuant to the Insular Cases, the residents of Samoa are only entitled to the fundamental rights of the United States Constitution. The colonial relationship between the United States and American Samoa is purported to be one which preserves indigenous culture.⁴¹⁰ However, a substantial indigenous population has no relevance with respect to the protections to which “persons” within the jurisdiction are entitled. As with the post-Spanish-American War conquests, American Samoa only has the fundamental rights guaranteed in the Constitution.⁴¹¹ The lack of equality and opportunities provided to most United States citizens goes further than the textual boundaries of the Constitution.

Much like the other United States possessions, American Samoa is economically dependent on the United States. For instance, one of the largest employers in American Samoa is the American Samoan government.⁴¹² In addition, twenty-eight percent of the total work force in American Samoa is employed by only two canneries.⁴¹³ The unemployment rate in 1993 was sixteen percent and the average per capita income in 1993 was \$5000.⁴¹⁴ However, the income tax laws are a mirror image of those enforced in the United States.⁴¹⁵

UNITED STATES 101 (1957).

407. Thornbury, *supra* note 283, at 1101 (emphasis added).

408. *Id.* at 1102.

409. King v. Morton, 520 F.2d 1140, 1159 (D.C. Cir. 1975).

410. Bank of Hawaii, *American Samoa Economic Report*, available at <http://www.boh.com/econ/pacific/amsamoa.pdf> (April, 1997).

411. *Id.* at 9.

412. *Id.* at 12–13; see also *American Samoa*, at <http://www.cia.gov/cia/publications/factbook/geos/aq.html> (last visited Mar. 28, 2002).

413. Bank of Hawaii, *supra* note 410, at 12.

414. *Id.* at 12; see also *American Samoa*, at <http://www.cia.gov/cia/publications/factbook/geos/aq.html> (last visited Mar. 28, 2002).

415. Bank of Hawaii, *supra* note 410.

VI. POST-WORLD WAR II COLONIAL ENDEAVORS

A. *Micronesia and the Northern Mariana Islands*

“There are only 90,000 people out there. Who gives a damn?”⁴¹⁶

“[A]nd Micronesia would become the newest, the smallest, the remotest non-white minority in the United States political family—as permanent and as American, shall we say, as the American Indian.”⁴¹⁷

As in the past, after World War II, the United States acquired new territories from other colonial powers. Micronesia has had four colonial rulers: Spain, Germany, Japan, and the United States.⁴¹⁸ The islands that comprise Micronesia or the Trust Territory of the Pacific⁴¹⁹ consist of three archipelagoes: the Marshall,⁴²⁰ the Carolines,⁴²¹ and the Marianas. The

416. DONALD F. MCHENRY, *MICRONESIA: TRUST BETRAYED* 87 (1975) (Henry A. Kissinger, as quoted by Walter Hickel).

417. *Id.* (quoting Lazarus Salii). Lazarus Salii was elected as chairman of the Micronesian Political Status Commission in 1967. *Id.* at 89.

418. *Id.*

419. The Territory is divided into 7 districts: (1) Marshall Island District, (2) Palau District, (3) Ponape District, (4) Rota District, (5) Saipan District, (6) Truk District, and (7) Yap District. The islands comprising the Trust Territory are scattered in clusters over the vast expanse of the Western Pacific Ocean. The 2,141 individual land areas within the Trust Territory comprise ninety-seven distinct island units grouped in three archipelagos, the Marianas, the Carolines and the Marshalls. To these, early explorers gave the name “Micronesia” (Tiny Isles). Micronesia, which covers a combined land area of only 687 square miles, is scattered over some 3 million square miles of ocean. North and south it extends 1,300 miles from Farallon de Pajaros at the upper tip of the Mariana chain downwards to Kapingamarangi Atoll in the Caroline Islands, while east and west it spreads over approximately 2,765 land miles from Mili Atoll in Marshall Islands to Tobi in the Western Carolines. At its center, Micronesia is some 3,500 miles west of Honolulu and 1,500 miles east of Manila.

U.S. DEPT. OF STATE, *NINTH ANNUAL REPORT TO THE UNITED NATIONS ON THE ADMINISTRATION OF THE TRUST TERRITORY OF THE PACIFIC ISLANDS* (1956).

420. *See also* COULTER, *supra* note 406, at 291.

The Marshall Islands can truly be called the ends of the earth, for each day begins at the 180th meridian a little east of them, and they are among the last islands in the world to see its close . . . they consist of thirty-four low-lying coral atolls and single islands arranged roughly in two parallel chains running from north-northwest to south-southeast. The easternmost row, called the Radak (‘towards the dawn’) Chain, comprises fourteen atolls and two single islands. The westernmost row, called the Ralik (‘towards the sunset’) Chain, is composed of fifteen atolls and three single islands. Two of the northern atolls of the Ralik Chain, Eniwetok and Ujeland, lie somewhat out of line to the westward, and so isolated from the rest that the Japanese used to administer them from Ponape in the Eastern Carolines rather than with the rest of the Marshalls.

Caroline Islands are between the Marshall Islands and the Philippines. The five large island groups are Kusaie, Ponape, Truk, Yap, and Palau.⁴²² The Mariana Islands are north of Guam. Like Guam, they are home to the indigenous Chamorro people. They are comprised of fifteen islands that include Saipan, Rota, Tinian, Aguijan, and Farallon de Medinilla.⁴²³

Spain took control of the islands in the late 1600s and encountered numerous problems with imposing Christianity on the inhabitants of the islands.⁴²⁴ By at least one account, Spain was responsible for reducing the population of one group, “the Chamorros of the Mariana Islands, from 50,000 in the 17th century to 4,000 by the early 18th century.”⁴²⁵ In 1885, Germany seized control of the Marianas from Spain.⁴²⁶ The United States later, in 1898, acquired the Philippines and Guam after the Spanish-American War.⁴²⁷ Germany then purchased the remaining islands from Spain in 1899.⁴²⁸ Japan seized German holdings at the outbreak of World War I, and later administered the islands “under a League of Nations Mandate.”⁴²⁹ Japan is credited with developing the territory extensively, “particularly in the production of agricultural and fishery products. Large and flourishing Japanese communities were built, complete with the necessary roads and other public works facilities.”⁴³⁰ Finally, the United States captured the islands during World War II, and continues to administer the islands under the United Nations Trusteeship system.⁴³¹ Since the end of World War II, the United States has maintained a “unique relationship”⁴³² with a group of islands in the Pacific known as Micronesia. However, the majority of Americans are not aware of these “members of the American family.”⁴³³ The prevalent perception

Id. This is significant because when nuclear testing was conducted on Eniwetok, the inhabitants were placed on Ujelang. D. Michael Green, *America's Trusteeship Dilemma and its Humanitarian Obligations*, 9 TEX. INT'L L.J. 19, 34 (1974).

421. See COULTER, *supra* note 406, at 187.

422. *Id.* at 179.

423. *Id.* at 162.

424. MCHENRY, *supra* note 416, at 5.

425. *Id.*

426. *Id.*

427. *Id.*

428. *Id.*

429. *Id.*

430. *Id.*

431. *Id.*

432. See generally McKibben, *supra* note 271, at 259.

433. Justice White coined the term “American Family” when he created the

has been described:

How is one to become concerned about a people so limited in numbers that they could be fitted into the Rose Bowl,⁴³⁴ though they are scattered over an ocean area the size of the United States? With all our problems at home and abroad, how can we worry about a hundred thousand lotus eaters on their picturesque atolls⁴³⁵ which total only 700 square miles.⁴³⁶

In the case of Micronesia, the remoteness of these islands enables the United States international policy to fester. The subordinate status of these people is in no small part a product of American xenophobia.⁴³⁷ This mindset contradicts the doctrine of equality of citizenship⁴³⁸ that is the fruit of our American heritage. The treatment of these people is grounded in the belief that the “territories [of Micronesia are] inhabited by backward and underprivileged people.”⁴³⁹ The term “lotus eaters”⁴⁴⁰ captures this sentiment. “[F]or years, Washington judged the islanders [of Micronesia], because of their color⁴⁴¹ and culture, too backward to

categories of territories. See *Downes v. Bidwell*, 182 U.S. 244, 339–42 (1901).

434. Given the increased population growth since 1969, the inhabitants of Micronesia would now exceed the capacity of this collegiate stadium. *THE WORLD ALMANAC AND BOOK OF FACTS 2000*, at 879 (1999).

435. “The atolls are, in the main, typical coral atolls, ordinarily consisting of an oval or irregular ring of small islets surrounding a lagoon. They include the two largest atolls in the world, Kwajalein and Namonuito.” COULTER, *supra* note 406, at 164.

436. Philip W. Quigg, *Coming of Age in Micronesia*, 47 *FOREIGN AFF.* 493, 493 (1969).

437. Xenophobia is a “fear and hatred of strangers or foreigners or of anything that is strange or foreign.” *WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED* 2644 (1986).

438. “Accordingly, the doctrine [of equal citizenship] ‘forbids the organized society to treat people as members of an inferior or dependent caste, or as non-participants.’” Román, *supra* note 8, at 5 (quoting Kenneth L. Karst, *Citizenship, Race, and Marginality*, 30 *WM. & MARY L. REV.* 1, 1 (1988)).

439. Francis B. Sayre, *Legal Problems Arising from the United Nations Trusteeship System*, 42 *AM J. INT’L L.* 263, 263 (1948). It should be noted that the author, Sayre, while not expressing the official views of the United States Government, was the United States Representative in the Trusteeship Council, President of the Council, and Alternate United States Representative to the Second Session of the General Assembly. *Id.*

440. The term “lotus-eaters” refers to Homer’s *The Odyssey*. In this Greek myth, Odysseus on his journey found a group of people in a state of ‘lethargic forgetfulness’ induced by their constant meal of lotus. The term has hence been used to describe indolent, dreamy and fruitless people. See *Odyssey*, in *ENCYCLOPEDIA AMERICANA* 641–42 (Grolier Inc. 1993); see also COULTER, *supra* note 406, at 347.

Life for most of these attractive, brown-skinned Micronesian peoples is simple and primitive. . . . Few natives today seek a change which involves any particular effort on their part for, free from individual poverty or want, they prefer the idle, happy life which they have always known. They do not wish increased economic returns at the price of hard work. They regard their way of living as superior to ours.

Id.

441. See COULTER, *supra* note 406, at 169.

Physically the average Micronesian is of medium stature—five feet four inches

rule themselves.”⁴⁴² Today, the United States contends that Micronesia is free and sovereign.⁴⁴³

At the end of the First World War . . . President Woodrow Wilson, in his address of February 11, 1918, declared that “peoples and provinces are not to be bartered about from sovereignty to sovereignty as if they were mere chattels and pawns in a game . . . but every territorial settlement involved in this war must be made in the interest and for the benefit of the population concerned. . . .”⁴⁴⁴

Yet, at the San Francisco conference after World War II “[t]he United States demanded that the Trust Territory be designated a strategic area under the supervision of the United Nations Security Council. This was unprecedented.”⁴⁴⁵ It was possible because, “[o]n a global scale, the United States had a tremendous amount of influence in shaping the post war global reality. . . . [T]he United States [succeeded because it had] made it a priority to neutralize Micronesia as a strategic threat to the United States.”⁴⁴⁶ In fact, at least one writer has reported that the CIA had a twenty-eight million dollar base on the Island of Saipan that was used between 1951 and 1962 for training Chinese nationalists.⁴⁴⁷ The presence of this base, of course, meant restricting entry into the Mariana Islands for security reasons.⁴⁴⁸ This, in effect, “meant closing Micronesia, for the Marianas were Micronesia’s port of entry, its most immediate link to

to five inches for the males—with brown skin, straight to wavy hair, relatively little face and body hair, and rather high cheekbones. People in the western and central district—Palau, Ponape, and Truk—tend to have slight Mongoloid characteristics. By contrast, those in the Marshalls to the east resemble somewhat their Polynesian neighbors, with longer and narrower hands and faces and narrower noses and lips. Of these various combinations, which characterize the island groups, there are many examples of intermediate mixtures.

Id.; see also *id.* at 296 (“The Marshallese, somewhat like the Polynesians in racial characteristics, in general have brown skins slightly darker than those of the Samoans. Most of them have straight black hair; the hair of the others ranges from wavy to curly.”).

442. The “[i]slands in the group known as the Marshalls were discovered by Spain in 1529.” COULTER, *supra* note 406, at 170.

443. See S.C. Res. 683, U.N. SCOR, 45th Sess., 2792d mtg., at 12, U.N. Doc. S/PV. 2792 (1990); see also S.C. Res. 683, U.N. SCOR, 45th Sess., Supp., at 2, U.N. Doc. S/RES/683 (1990).

444. Sayre, *supra* note 439, at 264.

445. McKibben, *supra* note 271, at 267.

446. Hyun S. Lee, *Post Trusteeship Environmental Accountability: Case of PCB Contamination on the Marshall Islands*, 26 DENV. J. INT’L L. & POL’Y 399, 403 (1998).

447. MCHENRY, *supra* note 416, at 57.

448. *Id.*

the outside. Under these circumstances, efforts at economic development through tourism there or elsewhere were hamstrung.”⁴⁴⁹

Thus, the United States had “virtually unlimited power in Micronesia for as long as it wishe[d]—although such is not the objective spelled out therein.”⁴⁵⁰ Under article 6 of the Trusteeship Agreement, the United States had the duty to

foster the development of such political institutions as are suited to the Trust Territory and shall promote the development of the inhabitants of the Trust Territory towards self-government or independence as may be appropriate to the particular circumstances of the Trust Territory and its peoples and the freely expressed wishes of the peoples concerned; and to this end shall give to the inhabitants of the Trust Territory a progressively increasing share in the administrative services in the Territory; shall develop their participation in government; shall give due recognition to the customs of the inhabitants in providing a system of law for the Territory; and shall take other appropriate measures toward these ends.⁴⁵¹

Furthermore, the agreement declares, the United States must “promote the economic advancement and self-sufficiency of the inhabitants, and to this end shall regulate the use of natural resources; encourage the development of fisheries, agriculture and industries; protect the inhabitants against the loss of their lands and resources; and improve the means of transportation and communication.”⁴⁵²

The United States’ disregard for Micronesian wishes further confirmed that the right to self-determination for the citizens of the Trust Territory was “mockery.”⁴⁵³ Similar to the scenerio faced by post-Spanish-American War acquisitions of Guam and Puerto Rico, the United States’ approach towards Micronesia was based on the fact that the people of Micronesia “*have no alternative between abysmal poverty in independence and being steamrolled into something they do not want to be by a well-meaning but heavy-handed America.*”⁴⁵⁴ And while economic dependence was an everyday factor in Micronesia life, those

who realize that independence is not economically feasible . . . assert[ed] that “only if we are independent will we be able to negotiate with you Americans as equals. Basically, our real estate is all you want and all we have to sell [read ‘lease’] and we’re determined to get a fair price for it.”⁴⁵⁵

The economic dependency of the region was of concern to the United Nations when it reprimanded the United States because “[n]o precise goals to be achieved over a given period in the field of the Territory’s

449. *Id.*

450. Mink, *supra* note 6, at 182.

451. *Id.* at 183.

452. *Id.* at 183–84.

453. Quigg, *supra* note 436, at 505.

454. *Id.* at 508 (emphasis added).

455. *Id.* at 503.

economic advancement have been laid down by the Administration; and there is no co-ordinated plan for economic development.”⁴⁵⁶ “The Mission is convinced that a definite, urgent and well co-ordinated effort is called for immediately to revitalize the Territory’s economy in general and to expand the scope of economic activity.”⁴⁵⁷

The Mission [saw] no reason to delay the introduction of a well-planned long-term development programme on the ground that [the] people are not ready for it; they are not only ready for such a programme, but, for the most part, are already somewhat impatient. *In commerce and in related fields where techniques can be easily acquired*, Micronesians, with the requisite assistance, have proven their ability and capacity.⁴⁵⁸

But economic dependency was not an accidental byproduct of the American administration. The policy was that “[a]s long as Micronesia remains economically dependent on the United States, the United States laws and policies [would] be influential.”⁴⁵⁹ Anthony M. Solomon, the Chairman of President Kennedy’s survey team, visited the islands in 1963 and wrote a report concerning United States financial aid to Micronesia. “The thrust of *The Solomon Report* is that by increasing United States financial aid, loyalty of the Trust Territory will be assured via the resultant economic dependency.”⁴⁶⁰ In April of 1971, a group of Micronesian students at the University of Hawaii obtained the *Solomon Report* and distributed it. The *Young Micronesian* described the recommendations as “a ruthless five-year plan to systematically Americanize Micronesia into a permanent association in clear and conscious defiance of its trusteeship obligations.”⁴⁶¹ While the United States’ bureaucracy delayed and argued about holding a plebiscite, the Micronesians, “despairing of ever seeing a United States status commission, took matters into their own hands and created their own status commission.”⁴⁶² However, “all the delay had its impact on the Micronesians too, for the longer they waited, the more dependent they became on United States money and the more difficult it was for them to

456. *Report of the United Nations Visiting Mission to the Trust Territory of the Pacific Islands, 1961*, U.N. TCOR, 27th Sess., Supp. No. 2, at 19 (1961) [hereinafter U.N. 1961].

457. *Id.* at 13.

458. *Id.* at 20.

459. Metelski, *supra* note 6, at 182. Metelski’s article argues that the United States should use its economic influence to forge a unified Micronesia. *See generally id.*

460. *Id.* at 165 n.17.

461. MCHENRY, *supra* note 416, at 19.

462. *Id.* at 23.

consider going it alone as an independent country.”⁴⁶³

“The Marshallese eventually adopted their own Constitution in 1979. The principles of free association established in 1978 led to fruition in 1982 with the signing of the Compact of Free Association.”⁴⁶⁴ The Commonwealth status of the Northern Marianas is also currently an issue. The Northern Marianas’ disagreement with the United States stems from interpretation of its negotiated and approved agreement. While the Northern Marianas had allegedly been guaranteed self-government, the United States has taken steps to control internal matters, leading the Northern Marianas to appeal both in the United States and to the United Nations Security Council.⁴⁶⁵

In exchange for the United States’ continued presence in Micronesia, the islands would remain under the economic mantle of Washington. This trade off verifies the observation of Edmund Burke, that “[t]he people never give up their liberties but under some delusion.”⁴⁶⁶ In the case of Micronesia, the delusion was autonomy and economic stability. Thus, in response to the United Nation’s condemnation of United States administration of the territories, the United States provided a modicum of autonomy by allowing the territories to organize governments and establish constitutions. This went hand in hand with the status induction of these quasi-sovereigns as freely associated states and commonwealths. However, while accepted by the United Nations as a state of autonomy, compact status has been criticized as being a progression toward, but not a realization of self-determination.⁴⁶⁷

This criticism is vindicated by the United States’ postcompact relations with the “nations” of Micronesia. In 1986, the United States signed and implemented Compacts of Free Association with the Federated States of Micronesia and the Republic of the Marshall Islands.⁴⁶⁸ The Compacts of Free Association are joint congressional executive agreements that are

463. *Id.* at 24.

464. In the intervening twelve years since the Compact was implemented, the Marshall Islands have seen a large number of cancer cases. Giff Johnson, *Study Calls Marshall Islands’ Cancer Rate Extreme*, PAC. ISLANDS REP., Mar. 22, 1999, at <http://www.converge.org.nz/pma/a230399b.htm>. A Nuclear Claims Tribunal awarded more than a half billion dollars to the Bikinians in 2001 “for damages done to their islands and their people during the nuclear testing on Bikini.” *Bikini Atoll: Reparations for Damages*, at <http://www.bikiniatoll.com/repar.html> (last visited Mar. 28, 2002).

465. See generally Victoria King, Comment, *The Commonwealth of the Northern Mariana Islands’ Rights Under United States and International Law to Control Its Exclusive Economic Zone*, 13 U. HAW. L. REV. 477 (1991).

466. THE GREAT THOUGHTS 59 (George Seldes, compiler) (1985).

467. *Empire Forgotten*, *supra* note 7, at 1161. While discussing the compact status of Puerto Rico, the concept that United Nations recognition does not beget autonomy is equally applicable to the status of Micronesia.

468. Arthur John Armstrong & Howard Loomis Hills, *The Negotiations for the Future Political Status of Micronesia (1980–1984)*, 78 AM. J. INT’L L. 484, 485 (1984).

classified as unilateral treaties, in which the United States is granted exclusive military use of the territory belonging to the other party in exchange for United States economic aid.⁴⁶⁹ However, even if this trade off were to be free of economic duress, the agreement would still be invalid because the compact status does not provide the economic stability it promises in that it is only for a limited term.⁴⁷⁰ The agreement also attempts to circumvent colonialism by claiming that the other party has the right to conduct foreign relations. However, this right is limited in that exercise in autonomy is subject to United States approval.⁴⁷¹ Another example of the lack of autonomy of these countries is that, in 1986, President Reagan declared that the trusteeship was no longer in effect in Micronesia, the Marshalls, and the Northern Marshalls, but continued for Palau.⁴⁷² Yet, years later, the United States informed the United Nations that the trusteeships remained in effect.⁴⁷³ Nevertheless, the compacts with Micronesia were accepted by the United Nations as granting autonomy and replacing the trust, which the Reagan Administration had terminated.⁴⁷⁴

As pointed out by former United Nations Ambassador Donald McHenry: "We in a sense almost made them [the Micronesians] a welfare state."⁴⁷⁵ "We served them poorly," said McHenry . . . "[w]e educated people to be political scientists and to sit behind a desk, not to grow tropical fruit and fish. . . . We created a dependency."⁴⁷⁶

But upon examination, this new status of each land is akin to the colonial relationship described earlier. Much like the post-Spanish-American War possessions:

"The parent state alone . . . possesses [the] international personality and has the capacity to exercise international rights and duties." The parent state . . . grant[s] or bestow[s] upon its colony a degree of internal autonomy and even grants autonomy over certain external affairs. These rights, however, are generally considered revocable at the discretion of the parent state.⁴⁷⁷

469. McKibben, *supra* note 271, at 274.

470. *Id.* at 274-75.

471. *Id.*

472. *See* Trask, *supra* note 253, at 8.

473. *Id.*

474. 135 CONG. REC. H9626-03, H9628 (daily ed. May 18, 1989).

475. 137 CONG. REC. E871, E872 (daily ed. Mar. 11, 1991) (statement of Hon. Eni F. H. Falemavaega) (quoting Doug J. Swanson & Ed Timms, *American Empire: The U.S. Territories*, HONOLULU STAR BULL. & ADVERTISER, Sept. 23, 1990).

476. *Id.*

477. *Empire Forgotten*, *supra* note 7, at 1137-38 (quoting ROBERT D. JENNINGS &

As one writer observed: "Beyond [Palau], the long-negotiated covenants with the Northern Marianas, the Marshalls, and the Federated States of Micronesia (FSM) reveal that full decolonization has not occurred," particularly in light of the United States' right to maintain permanent military powers in these areas.⁴⁷⁸

Therefore, irrespective of their new labels, these territories are still neocolonial possessions of the United States. The extent of this cloaked dominion can best be demonstrated by the struggle between the United States and the Republic of the Marshall Islands.

B. *The Marshall Islands*

The Republic of the Marshall Islands is composed of approximately 58,000 people living on twenty-nine coral atolls and islands in the Pacific.⁴⁷⁹ The Marshall Islands entered into the Compact of Free Association with the United States in 1986.⁴⁸⁰

The United States Marshall Islands, like Palau and Micronesia, was obtained by the United States as part of the U.N. Trusteeship Agreement. "Under United States governance, Marshall Islands life has been dominated by the activities of the U.S. military, revolving about the continued use of Kwajalein as a missile testing ground and the continuing bitterness and lawsuits as a result of the U.S. atomic tests from 1946 to 1958."⁴⁸¹

The clash between the United States' security and the best interests of the indigenous people occurred early in the trusteeship's history.⁴⁸² The most telling example of the United States "concern" for the Micronesians is the nuclear testing that the United States conducted on the Marshall Islands. It demonstrates that the United States "presence [in Micronesia was] . . . motivated more by our military needs in the Pacific than by genuine humanitarian concern."⁴⁸³

During the summer of 1946, one full year before the trusteeship's inception, the recently established Atomic Energy Commission (AEC) initiated experimentation in nuclear fission at Bikini Atoll in the Marshalls

ARTHUR WATTS, *OPPENHEIM'S INTERNATIONAL LAW* 275–76 (9th ed. 1993)).

478. Trask, *supra* note 253, at 8.

479. See RMI Embassy, USA, *Marshall Island General Information for Visitors*, at <http://www.rmiembassyus.org/tourinfo.html> (last visited Oct. 28, 2001).

480. See RMI Embassy, USA, *RMI Historical Chronology*, at <http://www.rmiembassyus.org/hischron.html> (last visited Oct. 28, 2001).

481. LEIBOWITZ, *supra* note 7, at 601.

482. Green, *supra* note 420, at 33 ("The United States Delegation Chairman's post-conference assertion to President Truman that native interests could be preserved while safeguarding the administering Power's security objectives seems far-fetched on its face, and as future events unfolded, unrealistic as well.")

483. Mink, *supra* note 6, at 185.

with naval cooperation. The experimentation “requir[ed] dislocation of one hundred sixteen residents to Kili, an unsuitable island far to the south where they experienced environmental difficulties.”⁴⁸⁴ These hydrogen bomb experiments, known as “Operation Crossroads,”⁴⁸⁵ “involved [the transfer of] 167 people in Bikini Atoll.”⁴⁸⁶ According to the United Nations, “[t]he Bikini people agreed to place their atoll at the disposal of the United States Government as a site for experiments in nuclear fission and to be resettled elsewhere.”⁴⁸⁷ However, the natives who had their land taken for the construction of naval bases contend that there was no consent involved in United States’ relocation. They note:

Within a few days after the landings [of U.S. troops,] our people were evacuated from their villages on Mogmog, Asoer, Falalop, Potongros, and Sorlen Islands and put on Fassarai Island on the opposite side of the lagoon. . . . They did not understand what was going to happen, and they did not know how long they would be away.⁴⁸⁸

The people of Bikini supposedly agreed:

Rongerik atoll, to which they were transferred, proved inadequate to support them and they were temporarily transferred to Kwajalein and then permanently settled on the island of Kili. Bikini had an extensive lagoon with good anchorage for ships and much greater land area than Kili, to which sea communications are difficult as it has no lagoon or anchorage for ships. Kili, however, is in the south, with much heavier rainfall and richer soil than Bikini. Here there are no extensive reefs and lagoons to furnish an abundance of fish, and the cultivation of food plants, which did not exist on Bikini, must be learned.⁴⁸⁹

Meanwhile:

In 1947, by executive agreement and with the approval of Congress, the United

484. Green, *supra* note 420, at 34.

485. Lee, *supra* note 446, at 405 (“The very first of these hydrogen bomb experiments took place on Bikini Atoll in the Marshall Islands in 1946. The experiments that took place in 1946 were referred to as ‘Operation Crossroads.’”).

486. U.N. 1961, *supra* note 456, at 33.

487. *Report on the Trust Territory of the Pacific Islands*, U.N. TCOR Visiting Mission to Trust Territories in the Pacific, 8th Sess., Supp. No. 2, at 14, U.N. Doc. T/897 (1951) [hereinafter U.N. 1951].

488. Mink, *supra* note 6, at 188 (quoting a Letter from Yap Outer Island Students at the University of Guam to Representative Cornelius E. Gallagher, Chairman of the Subcommittee on International Organizations and Movements, and member of the foreign affairs committee (Sept. 13, 1970)).

489. U.N. 1951, *supra* note 487, at 14; see also *Report on the Trust Territory of the Pacific Islands*, U.N. TCOR Visiting Mission to Trust Territories in the Pacific, 1956, 18th Sess., Supp. No. 3, at 26, U.N. Doc. T/1278 (1956) [hereinafter U.N. 1956] (reporting that the attempt to move them from Kili to Jaluit was unsuccessful).

States entered into the Trusteeship Agreement with the United Nations. The President's authority over foreign affairs, which derives from the executive treaty-making power in the United States Constitution, provided the source of power. Together with the United Nations Charter, the Trusteeship Agreement, which is an international treaty and a bilateral contract between the United States and the Security Council, dictates the terms of the trusteeship."⁴⁹⁰

On July 23, 1947, five days after the trusteeship agreement became effective, the AEC established its Pacific Proving Ground, declaring later that year its selection of Eniwetok Atoll for further experimental detonation of nuclear armament.⁴⁹¹ "The Atomic Energy Commission justified its choice of Enewetak Atoll and the resettlement of its inhabitants, on the basis that it had the fewest inhabitants and 'it [was] isolated and there [were] hundreds of miles of open seas in the direction in which winds might carry radioactive particles.'"⁴⁹² Subsequently, "[t]he second displacement involving the 137 inhabitants of Eniwetok Atoll" took place. The agency resettled the inhabitants on the Marshallese atoll of Ujelang.⁴⁹³

The third transfer took place in 1954 when the people of Uterik and Rongelap were affected by radioactive fallout⁴⁹⁴ from the tests held during that year. Immediately following the incident, "154 people living on Uterik and 82 living on Rongelap were transferred to other islands."⁴⁹⁵ The fallout was caused by "an unexpected shift of the prevailing winds over Bikini Atoll which carried radioactive fallout from a hydrogen device exploded there in 1954 to the neighboring atolls of Rongerik, Rongelap, and Utrik."⁴⁹⁶ The test explosion's magnitude was underestimated by a factor of one half.⁴⁹⁷

The Uterik people, who were less affected by the radiation, were returned to their home island during 1954 after the Administration declared that the island was safe from radioactive contamination. The people of Rongelap, who were more heavily exposed to radiation, returned to their home island in June 1957 from Ejit island in the Majuro Atoll, where they were taken care of by the Administration from the time of their transfer until their return.⁴⁹⁸ However, later, the administration

490. McKibben, *supra* note 271, at 265–66.

491. Green, *supra* note 420, at 34.

492. Lee, *supra* note 446, at 406 (quoting Press Release No. 70, The Atomic Energy Commission (Dec. 1, 1947)).

493. Green, *supra* note 420, at 34.

494. "This thermonuclear accident exposed two hundred thirty-six Marshallese residents of the three atolls and twenty-three crew members of an adjacent fishing vessel, *Fukuryu Maru* (Me Lucky Dragon)." Green, *supra* note 420, at 35.

495. U.N. 1961, *supra* note 456, at 33.

496. Green, *supra* note 420, at 34.

497. *Id.* at 34–35.

498. U.N. 1961, *supra* note 456, at 3.

changed its conclusion regarding the safety of the islands and, since “Rongelab and Uterik are now radioactive, their inhabitants are being kept on Kwajalein⁴⁹⁹ for an indeterminate length of time.”⁵⁰⁰ Sadly, the people of the islands

were well acquainted with the United States attitude toward the use of Trust Territory land, in the forced evacuations in the Marshall Islands, such as that of Bikini atoll, Eniwetok, and Kwajalein to allow their use for nuclear weapons and missile testing. These uses were classic examples of colonialism—unjust and poorly compensated seizure of land, and inept and insensitive resettlement of the population. Families were taken off their native lands, paid paltry sums and put on remote islands which were so different from their own that it often required an entire change in their life style; from highly arable land to an area so barren that nothing could grow, or from an island rich in inshore fisheries to one which required deep sea fishing because it lacked a reef.⁵⁰¹

Finally, in 1954, a thermonuclear explosion on Bikini resulted in injury to at least 249 Marshallese, and further, has resulted in cases of thyroid cancer and leukemia.⁵⁰² Though the extent of injury is still unknown, the United States set up a fund of \$150 million to compensate all those injured by nuclear testing. The \$150 million limit on the fund has been challenged and the challenge rejected by U.S. courts stating: “[T]he executive’s power to extinguish claims before the courts through espousal and settlement has been held to be a valid exercise of the foreign relations power.”⁵⁰³

Although “[t]he sole *connecting link* between the peoples of the various groups [in Micronesia] is the control of the United States Government as Administrating Authority,”⁵⁰⁴ the United States was determined to create a federation in Micronesia. This plan of Micronesian unification was the only manifestation of self-determination that the United States was willing to accept. It was a concept that the Micronesians repudiated.

In a petition to the United Nations visiting mission, the people of the Marshall islands noted:

We understand and appreciate the American ideal of “One People” but we are a separate country from Ponape with our own separate customs and culture

499. The island of KawaJalein is only used by the military. See Lee, *supra* note 446, at 407.

500. Lee, *supra* note 446, at 407.

501. Mink, *supra* note 6, at 196.

502. LEIBOWITZ, *supra* note 7, at 603.

503. *Id.* at 604.

504. U.N. 1951, *supra* note 487, at 2 (emphasis added).

and language and have no more desire to be classed with or merged with the Ponapeans than France has desire to merge with Germany or China with Japan. We feel that it is unfair to us as a people to be lumped together with other groups of Micronesian peoples as one people. We are proud of our race and our heritage and resent and fear any attempt to merge us culturally or otherwise with other peoples with the resultant loss of our own culture and individuality.⁵⁰⁵

The administration ignored the fact that “since the inhabitants of each island group are proud of their language, history, and culture, they resist being integrated politically and socially with the members of the other groups.”⁵⁰⁶ From the western perspective, these people were all the same. Democracy was only relevant in that the Micronesians might “gain political experience which will serve them well if and when a common Micronesian government becomes a practical possibility.”⁵⁰⁷

The idea of a unified Micronesia was diametrically opposed to the desires of the Micronesian people and the people of the Marshall Islands. The only unification that the people desired was with Guam and it was denied because it was not what the United States had planned for Micronesia. The people of the Northern Marianas noted:

It is our fervent hope that all of the islands of the Northern Marianas be incorporated into the United States of America either as a possession or as a territory, preferably as a territory. It is our desire that someday these islands may be considered a part of the United States and its people attain American citizenship.⁵⁰⁸

American citizenship was desired because

the people of Guam are to be accorded American citizenship and that that island is to become a Territory of the United States. Inasmuch as all of these islands are of the same Island Group, and inasmuch as we are socially, culturally, biologically, geographically, economically and politically associated with Guam and the Guamanians, we feel that such close ties would justify our request to the Congress of the United States.⁵⁰⁹

Ironically, while disregarding the Micronesian and Marshallese pleas, the United Nations recognized that “the people of the Trust Territory are ready to choose their future [regarding] the form of self-government or independence.”⁵¹⁰ They observed “that throughout [the negotiations], the Micronesians have exhibited an intelligent and capable approach in

505. Letter to the United Nations Visiting Mission 3 (Feb. 18, 1953) (on file with author).

506. COULTER, *supra* note 406, at 349.

507. U.N. Visiting Mission to Trust Territories in the Pacific: Report on the Trust Territory of the Pacific Islands, U.N. TCOR, 12th Sess., Supp. No. 3, at 7, U.N. Doc. T/1077 (1953).

508. U.N. 1951, *supra* note 487, at 19.

509. *Id.*

510. U.N. 1961, *supra* note 456, at 11.

their negotiating position.”⁵¹¹ They further noted that “the people of the Territory are already willing, enthusiastic and capable of undertaking programmes[,] provided the necessary funds and technical assistance are made available.”⁵¹²

Nevertheless, the United States’ dereliction towards Micronesian self-determination was not moved by these observations because it was not based on their ability or comprehension of the democratic process. The United States judged the Micronesians by race, not by their actions.

Yet, Micronesian self-determination could not, despite our bigotry, be ignored in perpetuity. “In 1966 the Congress of Micronesia passed a petition requesting that President Johnson establish a commission ‘to consult the people of Micronesia and to ascertain their wishes and views and to study and critically assess the political alternatives open to Micronesia.’”⁵¹³ “In 1967 the President ‘complied’ with the Micronesian request by asking the United States Congress to authorize a Status Commission with the ultimate objective of staging a plebiscite among the people by June 30, 1972. This Commission was to have eight Presidentially—appointed members.”⁵¹⁴ However, the “Legislation to establish the Presidential Commission fortunately never passed the U.S. Congress.”⁵¹⁵

The United States Congress established a Future Political Status Commission to identify and report on the political options for Micronesia. The Commission submitted two reports. The first, in 1968, discussed alternatives without making a recommendation. The second, in 1969, recommended that Micronesia become self-governing and associated freely with the United States or, in the alternative, that it become independent.⁵¹⁶ However, the United States had already committed itself to bringing the trust territory into a permanent relationship with the United States.⁵¹⁷ In 1969, notwithstanding the Commission’s recommendation,

511. Metelski, *supra* note 6, at 169.

512. U.N. 1961, *supra* note 456, at 19.

513. Mink, *supra* note 6, at 198.

514. *Id.* at 199.

515. *Id.*

516. McKibben, *supra* note 271, at 270.

517. A widespread view in Washington, especially in the Defense Department, is that independence is not a realistic option and that it would therefore be dishonest to offer it. The State Department rightly points out that we are legally obligated by treaty with the United Nations to offer the alternative of independence, and that the U.N. will insist upon it, however impractical.

Quigg, *supra* note 436, at 503.

the United States offered to make Micronesia a territory pursuant to the Territorial Clause. The Congress of Micronesia rejected this offer, as it did the following year's offer of commonwealth status.⁵¹⁸ The question is, therefore, similar to other territories of the United States—whether the people of Micronesia will be given a meaningful choice. That is, “will the plebiscites be valid as an expression of the wishes of the people if they contain only the alternatives of accepting or rejecting the package presented them by the negotiators?”⁵¹⁹ These proposals produced a response from Micronesian Senator Salii that aptly expresses the analysis here pertaining to all United States island territories.

I have always thought that Micronesia belonged to Micronesians and that the Micronesians had the right to rule their home islands. *I have never believed that the fact that other nations fought wars in our islands and waters and negotiated agreements, mandates, trusteeships among themselves when they were finished fighting ever affected the fact that we were Micronesians and this was our home* The commonwealth status would make us a [permanent part of the United States] political family. But we are Micronesians and not Americans. We can be friends of America as America indeed has sometimes befriended us. *But what is being offered to us is not friendship and it is not partnership. It is ownership, friendly ownership for the time being, but ownership nonetheless.*⁵²⁰

Thus, the Marshallese experience with the United States under the United Nations Trusteeship Agreement has been dismal at times, and the nuclear testing which took place there continues to affect people's lives today.

C. Palau⁵²¹

Palau and the Federated States of Micronesia are located in the Pacific approximately 4450 miles southwest of Hawaii.⁵²² Palau is composed of

518. McKibben, *supra* note 271, at 270–71.

The approach of the United States delegation was essentially to present a blueprint offer of traditional Commonwealth status. The Micronesian Delegation, on the other hand, set forth certain principles it desired to *negotiate*. The results of the talks constituted a stalemate with the United States failing to negotiate and the Micronesians rejecting their proposals.

Metelski, *supra* note 6, at 168.

519. MCHENRY, *supra* note 416, at 47.

520. Mink, *supra* note 6, at 203–04 (quoting remarks by Senator Lazarus Salii, Chairman of the Political Status Delegation, Congress of Micronesia, during a Senate debate on political status, as reported in an editorial in the *Honolulu Advertiser*, August 27, 1970) (emphasis added). Senator Salii became the biggest advocate of the compacts for free association; he was also president of Palau.

521. It appears that the indigenous people of the territory refer to this land as Belau. See Trask, *supra* note 253, at 1. Because verification of this difference in names is pending, the term Palau will be used herein. No disrespect is intended to the indigenous people.

522. Hinck, *supra* note 252, at 918.

8 major, and 252 smaller islands.⁵²³ Thus, though Palau is not part of the Federated States of Micronesia, it is located in the Pacific region known as Micronesia.⁵²⁴

Also, like Micronesia and the Marshall Islands, Palau was obtained after World War II as part of the trusteeship system of the United Nations. As Micronesia covers an area approximately the size of the United States, controlling the Micronesia region, including Palau, allows the United States to essentially control the western Pacific.⁵²⁵ Since World War II, the primary threat seen in the area was the expansion of the Soviet Union, and control of the region was important to preventing the former U.S.S.R. from expanding.⁵²⁶

Much of Micronesia, including Palau, was a major battle field during World War II. During the war, the United States seized all islands previously under Japanese control, incurring high civilian and troop casualties. Given the high cost of liberating Micronesia and given its strategic location, some inside the U.S. government called for the outright annexation of the islands in the interest of national security.⁵²⁷

However, Dwight D. Eisenhower had this to say about Palau and Micronesia:

We have here islands that in many instances are nothing but sandspits. They are of very little economic value. Our sole interest in them is security. But they are the spots on that great ocean surface that to-day provide a capacity and an ability for a nation that would seek to conduct aggressive operations across that ocean. They would have to use them. So long as we have them, they can't use them, and that means to me, even in their negative denial to someone else, a tremendous step forward in the security of this country.⁵²⁸

Because Palau and the Trust Territories were strategic in nature, the United States could “close areas for reasons of security, prohibit U.N. supervision, erect bases and fortify the islands, exclude American nationals, companies and associations from the restrictions of the most favored nation clause, and control aircraft traffic rights.”⁵²⁹ Today, Palau is still an important strategic area for the United States. Palau is near major shipping routes, and is commonly thought to be a “likely fall-back position if the

523. *Id.*

524. *Id.*

525. *Id.* at 919.

526. *Id.*

527. *Id.* at 919–20.

528. LEIBOWITZ, *supra* note 7, at 487 (quoting *Hearing on S. Res. 143 Before the Senate Comm. on Foreign Relations*, 80th Cong. 18 (1947) (statement of Dwight D. Eisenhower, General of the Army Chief of Staff)).

529. *Id.* at 488.

United States is ever displaced from its two . . . military bases in the Philippines.”⁵³⁰ Furthermore, the islands of Palau “have exploitable mineral deposits (phosphate and gold) and a coral shelf which is an internationally famous diving attraction.”⁵³¹ Furthermore, though the Republic of Palau is certainly more economically secure than most of Micronesia, the competitive nature of the politics in Palau has led to a struggle between Palau and the United States.⁵³²

Palau has also been treated in much the same manner as Micronesia and the Marshall Islands. “During the early years of the trusteeship, political and economic development progressed slowly in the Trust Territory.”⁵³³ However, during the sixties, Palau began to make the journey to self-determination.⁵³⁴ Palau, along with the other trust territories, held a constitutional convention.⁵³⁵ and attempted to pass its own constitution in 1975. Unfortunately, “[t]he three-quarters majority [required by the Palauan Constitution to ratify a free association agreement with the U.S.] has been impossible to obtain to date.”⁵³⁶ In fact, there has been a constant struggle between Palau and the United States regarding certain clauses in the proposed constitutions.⁵³⁷ The Palauans wanted a “nuclear-free constitution” that would not allow nuclear weapons inside the territorial boundaries of Palau, and further, opposes the selling of land to foreign entities.⁵³⁸ The nuclear free constitution was opposed by the United States, which insisted that their naval operations be excluded from the constitutional ban. One authority on the subject noted that after several referenda results demonstrated the Palauan refusal to change their constitution, the political crisis escalated into violence.⁵³⁹ One Palauan president was assassinated, one committed suicide, and some activists were killed.⁵⁴⁰ The United States completed negotiations with the Republic of Palau on August 26, 1982.⁵⁴¹

The several failed attempts at reaching an agreement between the United States and Palau resulted in a 1985 compact, which was beneficial to United States interests.⁵⁴² The Compact was approved by Congress and signed by President Reagan in 1986; however, it was not

530. Hinck, *supra* note 252, at 919.

531. LEIBOWITZ, *supra* note 7, at 622.

532. *Id.* at 622–23.

533. Hinck, *supra* note 252, at 922–23.

534. *Id.* at 921.

535. *Id.*

536. LEIBOWITZ, *supra* note 7, at 623.

537. *See generally* Hinck, *supra* note 252.

538. *Id.* at 923–25.

539. Trask, *supra* note 253, at 7.

540. *Id.*

541. H.R. REP. NO. 188, at 3 (1987).

542. LEIBOWITZ, *supra* note 7, at 624.

actually implemented until 1994.⁵⁴³ The delay was a result of conflict, which existed between the compact and Palau's constitution.⁵⁴⁴ The compact requires the United States to not use Palau for nuclear purposes, including storing nuclear weapons in Palauan territory.⁵⁴⁵ The United States could send its nuclear ships to the territory.⁵⁴⁶ Because the agreement did not receive the seventy-five percent needed for approval under the Palauan Constitution, the Supreme Court of Palau invalidated the compact, but in 1994, it was implemented by the United States.⁵⁴⁷

The constitutional struggle in Palau has also resulted in economic strife for the small nation.⁵⁴⁸ One writer notes a U.S. General Accounting Office report on the conflict, which found that from August 1985 to August 1988, the Reagan Administration was involved in the territory's economic wars.⁵⁴⁹ According to this depiction of the report, the United States government refused to monitor expenditure of federal funds in the territory, overlooked serious charges of intimidation and reprisals against Palauans opposed to the compact, and actually "encouraged the economic deterioration and political chaos in Balau [the name indigenous people use for the territory] in the hopes that such a climate would be favorable to passage of the compact."⁵⁵⁰

Palau and the Marshall Islands had specifically rejected commonwealth status as offered by the United States.⁵⁵¹ Palau, instead, "sought and obtained the status of a Freely Associated State" (FAS).⁵⁵²

It is believed that there are four major distinctions to be made between a commonwealth and a FAS.⁵⁵³ A FAS may be distinguished from a commonwealth by:

- (1) unilateral ability of the FAS to end the relationship;
- (2) the lack of U.S. citizenship of the FAS residents;
- (3) the capacity of the FAS to engage in world

543. William Branigin, *Independence for Palau Ends U.S. Sovereignty over Pacific Islands*, WASH. POST, Oct. 2, 1994, at A30.

544. 135 CONG. REC. H9626-03, H9628 (daily ed. May 18, 1989).

545. LEIBOWITZ, *supra* note 7, at 624-25.

546. *Id.* at 625.

547. Branigin, *supra* note 543, at A30.

548. Trask, *supra* note 253, at 7.

549. *Id.*

550. *Id.* at 8.

551. *Id.* at 67.

552. *Id.*

553. *Id.*

affairs as an international sovereign with very limited restraint; and (4) the capacity in the FAS to have one's own fiscal and monetary system.⁵⁵⁴

Notwithstanding these distinctions, the level of subordination of the people of Palau is demonstrated in a petition asking, "that the manufactur[ing of] alcoholic beverages be forbidden in Palau."⁵⁵⁵ The Palauans began their plea as follows:

We, the people of Palau, are still very handicapped in body and soul because we lack many things in our country. . . .

And so, now for the second time, we ask the Americans who govern us to listen to our plea, for we are foresaken [sic]. There is no peace in the houses where there is drinking.⁵⁵⁶

Similarly the Micronesians of Saipan carefully stated in their petition:

We are indeed grateful for the generous aid which we have received from the United States Government since the capture of Saipan in 1944 by American Forces. In *mentioning* these problems we *in no way* wish to disparage the continuing efforts of the United States Navy Civil Administration in our behalf. We appreciate greatly the help that the Civil Administration has given us. We do wish to emphasize, however, that the problems outlined below must be solved if the people of Saipan are to build a sound economy in the future, and if we are to provide for the welfare of our children.⁵⁵⁷

Because of the large number of people employed by the government (over seventy-five percent), Palau is still economically dependent on the United States.⁵⁵⁸ The United States is also affecting the culture of Palau. The majority of the people in Palau speak Palauan and a "high rate of literacy is found in younger age groups today," and the young people predominantly speak English as a second language, while older adults

554. *Id.*

555. UN 1951 *supra* note 487, at 18.

556. *Id.*

557. *Id.* at 20 (emphasis added).

558. See, e.g., *Compacts of Free Association with the Marshall Islands, Federated States of Micronesia, and Palau Joint Oversight Hearing Before the Committee on Resources and Subcommittee on Asia and the Pacific of the Committee on International Relations House of Representatives*, 105th Cong. (1958) (statement of Hersey Kyota, Palau Ambassador to the United States), available at <http://commodocs.house.gov/committees/resources>.

Mr. Chairman, another very important issue which still remains unresolved is the U.S. Government financial obligation to the former trust territory prior service trust fund. The Congress, as you may be aware, appropriated initial funding of \$8 million for this program, with a remaining balance of \$19 million to be appropriated later. The U.S. Government has not fulfilled this obligation yet after numerous requests from the government of the former TPI. The program, as you can imagine, is experiencing problems in meeting regular payments to the beneficiaries. I understand, however, that some Members of Congress have indicated their willingness to fulfill this obligation over a period of several years. We welcome that, Mr. Chairman.

Id. at 64.

speak Japanese.⁵⁵⁹ Though Japanese is necessary for economic development in the tourism industry, English may be seen as required for political reasons.⁵⁶⁰

The governmental structure of the trust territory of the Pacific Islands comprises a High Commissioner, appointed by the President of the United States of America, a headquarters staff and a district organization in each of the six districts which come under the jurisdiction of the Department of the Interior (the Rota, Palau, Yap, Truk, Ponape, and Marshall Islands Districts). The High Commissioner possesses executive and legislative powers as laid down in the code of the trust territory. The seventh district, Saipan, is administered under the authority of the Commander-in-Chief of the United States Pacific Fleet, at Honolulu, and under that of the Commander of the Naval Forces in the Marianas, at Guam.⁵⁶¹

And yet, despite the administrative changes, the United States continued to do "what all colonial powers have done, assumed that we knew what was best for our wards, without much regard for their own preferences."⁵⁶²

On the one hand, we profess[ed] to respect and to preserve tradition and custom, while on the other we attempt[ed] to bring to the natives that which we judge to be best in our own culture, and which, therefore, we think must be best for them. This frequently lead[s] . . . to embarrassing situations, especially among members of a staff who have had little or no previous experience with native populations.⁵⁶³

This attitude and the later acceptance of free association with the United States resembles a form of "colonialism by consent."⁵⁶⁴ This cultural hegemony is evident in the Micronesian attitude towards American rule. "The Palauans [for example,] were awed by American might. 'What do you call these Americans who destroy all that the Japanese built and bring the Japanese to their knees in such a short period of time?' a Palauan asked. [Another Palauan answered,] 'You call them 'sir.'"⁵⁶⁵ It thus may be the case, as one writer observed, "for America's Pacific colonies,

559. LEIBOWITZ, *supra* note 7, at 632–33.

560. *Id.* at 633.

561. U.N. 1956, *supra* note 489, at 3.

562. Quigg, *supra* note 436, at 507.

563. COULTER, *supra* note 406, at 369.

564. *See Empire Forgotten*, *supra* note 7, at 40.

565. M.A. Farber, *The Forgotten Eden*, CONDE NAST TRAVELER, April 1999, at 111, 118.

U.S. control has meant land dispossession, economic dependency, cultural exploitation, and in many cases, death and disease.”⁵⁶⁶

VII. PROPOSALS VERSUS PROSPECTS

As this Article has demonstrated, the island territories that exist under the United States flag all suffer from a lack of autonomy. Given their strategic importance as well as their manageable economic cost, it appears unlikely the United States will soon terminate its relationship with these lands. Given the decades long failure to fully incorporate these members of the American family, it is also unlikely the United States will fully incorporate these lands and their people. Moreover, given the territories’ interests in maintaining their distinct identities while at the same time continuing to be associated with the United States, it is unlikely many will demand statehood anytime soon. Their lands, thus, will not become states at any time in the near future. Finally, considering the United States’ increasing global influence and leadership, it is unlikely it will be pressured into changing a relationship in a fashion not in its own best interest. Change will likely occur only if the United States decides that its own economic and strategic interests no longer necessitates the maintenance of the relationships.

The prospects for the actualization of self-determination for these lands are bleak. The United States may eventually allow for some of the territories to follow the paths of the federated states of Micronesia, Palau, and the Marshall Islands and become internationally recognized sovereign countries. However, as this Article illustrates, recognized sovereignty does not necessarily equate to the actualization of sovereignty.

The United States, if faced in the future with economic strife, may perhaps be further motivated to allow more territories to become “independent.” The fact that the inhabitants of some territories, such as Puerto Rico, already see themselves as United States citizens considerably complicates the prospect of independence. Thus, it appears that irrespective of title, the United States will maintain these lands and their people within its sphere of influence.

As for the proposal this Article seeks to promote, the length and complexity of this undertaking hopefully demonstrates the difficulty in arriving at an easily identified solution. Century long colonial struggles by several distinct countries and millions of their inhabitants are not easily resolved. Nevertheless, there are certain procedural steps that can be undertaken which may promote the realization of self-determination.

566. Trask, *supra* note 253, at 9.

The United States should be true to its rhetoric and promote democratic efforts in these lands to achieve autonomy. It is not enough to promote self-determination for other powers' colonies. The subordination of citizens and nationals is not only inconsistent with this country's revolutionary beginning, it is also inconsistent with this country's liberal Republican form of governance, as well as repugnant to the country's representations concerning equality and justice. Thus, the proposals for the beginning of a process that may lead to change are as follows.

First, the United States, preferably by legislative act or at least by executive order, should establish a process for the undertaking of final binding referenda in each of the United States colonial territories. In order to ensure that individual parties within each land do not misrepresent the relationship with the United States, such as the procommonwealth party has done in Puerto Rico,⁵⁶⁷ the United States must explicitly be involved in the electoral process by identifying publicly and repeatedly the actual relationship between the territory and the United States. This must include disclosure of the incorporated versus unincorporated territory dichotomy and the resulting disenfranchisement that exists as a result of the distinction. The agenda should also include disclosure of the nature of statutory citizenship, including the possibility of revocability, and the difference between independence and statehood.

Second, as commonwealth or free association was never intended to be a final resolution to self-determination,⁵⁶⁸ the choice of a temporary and diluted form of self-determination under free association may lead to further ambiguity on the status issue. As the United Nations General Assembly recognized in Resolution 1541, when it referred to free association: "peoples . . . retain . . . the freedom to modify the status of [the] territory through the expression of their will by democratic means and through constitutional processes."⁵⁶⁹ Thus, this status option, because it is not a final option, should be questioned.

Finally, the United Nations should be involved in each territory's status referenda so as to ensure free and open elections. The United Nations may also serve to check undue influence by any group,

567. Román, *supra* note 8, at 28.

568. See G.A. Res. 1541, U.N. GAOR, 15th Sess., Supp. No. 16, 948th plen. mtg. at 29, U.N. Doc. A/4684 (1960).

569. *Id.*

including the United States. This issue should not be considered a domestic one. It is an international one and the United Nations should have binding authority, but no one country's veto power, such as that held in the security council, should be recognized.

In addition to the procedural steps to change, there should be substantive changes. As Professor Malavet suggests with respect to Puerto Rico's future, "it would be illegitimate to require the Puerto Ricans to make a decision [concerning their status] in the context of continued colonial rule."⁵⁷⁰ Thus, although earlier works of the lead author avoided the political status question, the status question is also the colonial.

As such, the commonwealth, freely associated, or other status options that retain the hallmarks of colonialism through United States influence over the territories must be terminated. While proposals such as bilateral compacts sound appealing,⁵⁷¹ the history of the United States relationship with the post-World War II acquisitions of Micronesia, Palau, the Marshall Islands, and the Northern Mariana Islands demonstrates that such compacts do not ensure autonomy.

Statehood is considered a means to attain self-determination. Yet statehood may be seen as the culmination of colonialism, particularly when the majority of the territorial people want to maintain their identities as distinct people. Independence for these nations is the option that is consistent with self-determination and maintains the distinctiveness of these people. Independence is the just and egalitarian option that neither the United States nor the island people may choose.

VIII. CONCLUSION

Despite the press releases mentioned in the beginning of this Article, as we all know, Al Gore did not win the presidential election.⁵⁷² While that point was not news, what is newsworthy is that millions of United States citizens and nationals who happen to live on the United States island territories do not and have not ever had the right to decide this country's or their own territory's future. They are disenfranchised yet few see them that way. The hegemonic tools of citizenship, international status, and economic dependency have well served the United States' empire building. This Article exposes the similarities in the plight of these people, many who believe themselves to be

570. Malavet, *supra* note 22, at 95.

571. *Id.* at 99.

572. Cf. JAKE TAPPER, DOWN & DIRTY: THE PLOT TO STEAL THE PRESIDENCY (2001) (describing the controversy in Florida during the 2001 Presidential election).

American, and it also examines the genius and evolution of American colonialism. In an era when colonialism is deemed repugnant to human dignity, perhaps this Article may be a step toward ending United States colonialism, but more likely it is an effort to continue the debate.⁵⁷³

573. Este artículo es escrito con mucho respecto y cariño para mi pueblo. La patria preciosa de mi pueblo se llama Borinquen. El lugar de donde vino mi bella cultura; una cultura noble, de cariño, respeto y valor. Este hijo de jibaritos sencillos y de taínos bravos, sueña que un día verá su patria y pueblo libre. [This article is written with a great deal of respect and kindness for the lead author's people. The country of his people is called Borinquen. It is the land of his beautiful culture; a noble culture filled with kindness and valor. This son of peaceful farmers and brave indigenous warriors dreams of the day his land is free.]

