Native Nation Resistance to the Machinations of Settler Colonial Democracy

*Nazune Menka**

"I come from an island
and you come from a continent,
yet let us gather today,
and share our stories of hurt,
our stories of healing. . . .
I hope the stories we share . . .
will carry us towards sovereign horizons."
-Craig Santos Perez (*CHamoru*)[1]

Abstract

This Essay's publication coincides with the centennial commemoration of the Indian Citizenship Act of 1924, which offers an opportunity to revisit the historical and contemporary ways the concept of citizenship has been used to both increase Indigenous legibility and refute the project of empire. Through a review of the history of territorial incorporation, statehood, federal recognition, and citizenship, I examine the machinations of settler colonialism that seek to eliminate, contain, and assimilate Native Nations and Indigenous Peoples into the federal polity. Seeking to concretize this examination—and to respond to calls to broaden the scope of Indigeneity and the field of Indigenous Peoples Law in the United States—I focus on historical and contemporary examples of Indigenous resistance to these machinations in the Alaskan, Hawaiian, American Samoan, and Guåhan contexts. Despite the machinations of settler colonialism proffering doctrinal differences via the "law of the territories" and "federal Indian law," Indigenous resistance in these contexts illuminates more similarities than differences and elucidates a desire for full sovereignty and self-determination, a sovereignty that is anything but sui generis.

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* Nazune Menka (*Denaakk'e & Lumbee*) is currently serving as the Executive Director of the Center for Indigenous Law & Justice at UC Berkeley School of Law. Beginning in July 2024 she will be an Associate Professor of Law and Faculty Director of the Center for Indian Law & Policy at Seattle University School of Law. Special thanks to James Campbell (*CHamoru*), Kirsten Matoy Carlson, Seth Davis, Kevin Escudero, Derek Kauanoe (*Kānaka Maoli*), J.V. Langkilde (*Samoan*) and to the Harvard Civil Rights-Civil Liberties editorial team, especially Harold Ekeh and Kennedy Green, for their leadership and guidance.

[1] Craig Santos Perez, *Interwoven*, *in* Native Voices: Indigenous American Poetry, Craft and Conversations, 439, 440–42 (Dean Rader & C. Marie Fuhrman eds., 2019).

Introduction

This Essay aims to further our understanding of the "machinations" of settler colonialism and the shared issues and nuances facing Native Nations in the Pacific Rim as they resist settler colonial democracy and seek to actualize self-determination and sovereignty. Settler colonialism provides a framework to analyze the intersections of structural racism, law, and colonization and illuminates how the United States engages in strategies of elimination, displacement, containment, and the conceptual disappearance of Indigenous and non-Indigenous racialized or othered communities.[2] I refer to these strategies as "machinations" of settler colonialism in recognition that the policies and laws of the federal government during the eras of elimination, removal, assimilation, territorial incorporation, and termination were concerted, and intentional, efforts.[3]

As a theory, settler colonialism posits that if racialized power and privilege in the United States are rooted in the historic and ongoing colonization of Native Nations, then, to achieve justice, we must begin to decolonize those legal systems. Decolonization is, at its core, about increasing the ability of Indigenous Peoples to achieve greater measures of self-determination and sovereignty.[4] Ultimately, decolonization is a self-determination and sovereignty process led by Indigenous Peoples' visions and goals. From the perspective of a legal scholar, seeking to understand and support these visions of Indigenous self-determination is the work of decolonization. Accordingly, this Essay identifies both the machinations of settler colonialism and the decolonial visions of self-determination in the context of the

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[2] *See generally* Natsu Taylor Saito, Settler Colonialism, Race, and the Law Why Structural Racism Persists 57–78 (2020).

[3] *See* Fletcher, *infra* note 29 and accompanying text.

[4] Nazune Menka, *Decolonizing the Legal Academy (is the Future)*, *in* Integrating Doctrine and Diversity Beyond the First Year 397, 401–02 (Nicole P. Dyszlewski et al. eds. 2024) (summarizing scholarship to draw the conclusion that decoloniality is a process of self-determination led by the people, and that it requires acknowledging and respecting Indigenous worldviews, cosmologies, and values).

United States' territorial acquisition of Alaska and its doctrinal connections to Hawai'i, Guam (Guåhan),[5] and American Samoa illuminating how the Constitution has been interpreted to both recognize and restrict assertions of Indigenous sovereignty.

From 1867 to 1898, the United States incorporated Alaska, Hawai'i, Guåhan, American Samoa, and Puerto Rico as territories.[6] Thus, this period in history is instructive for illuminating both the machinations employed by the United States and Indigenous resistance to the project of empire. Territorial incorporation through the lens of Indigenous Peoples and Native Nations can be seen as both a strategy of elimination and as a strategy to assimilate and contain. By analyzing the incorporation of Indigenous Peoples into the federal polity and the changing nature of jurisprudence in Indigenous Peoples Law, we see how various strategies of Indigenous resistance can at times shift *toward* modalities more readily cognizable and acceptable to settler colonial democracy, and at other times shift *away* from such modalities.[7]

Despite this current era of federal policy being one of fostering self-determination, Indigenous Peoples and Native Nations are forced to fiercely advocate for increased measures of self-governance and legibility of citizenship in the federal polity, in part because the Indigenous experience in Alaska, Hawai'i, and the territories has long been deemed "different."[8] But an analysis of the machinations of settler colonialism and Indigenous resistance, in these contexts, illuminates more similarities than differences.

Indigenous Peoples and Native Nations must navigate the machinations of settler colonialism by surviving eras of elimination and assimilation, and advocating to become legible within the United States legal landscape. For example, in federal Indian law, Native Nation sui generis sovereignty and its attendant benefits center around questions of who is perceived as legible, recognizable, and cognizable by the federal polity.[9] Becoming legible requires the federal government to "recognize" a Native Nation's political sovereignty through judicial, congressional, executive, or other federal action. With such federal recognition, Native Nations become legible as

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[5] *See* Kevin Escudero, *An Indigenous Futurity Approach to Decolonization: Navigating Imperial Borders and Indigenous Sovereignty during the Emergence of the COVID-19 Pandemic in Guåhan*, 23 J. Asian Am. Studies 3, 459–60 (2020) (noting CHamoru scholar Tiara Na'puti uses Guåhan instead of Guam and CHamoru instead of Chamorro to decolonize terminology).

[6] This Essay focuses on the Pacific Rim and Alaska thus, it does not delve into the Puerto Rican experience outside of a brief mention of the Insular Cases. Similarly, the experiences of other nation-states, considered to be territories of the United States or the freely associated states, also provide insight into these issues of legibility and settler colonial democracy, but are beyond the scope of this Essay.

[7] For reasons I think are clear in this Essay, instead of "federal Indian law" I prefer to use the more inclusive to refer to this subject area as "Indigenous Peoples, Law, and the United States" and have shortened it to "Indigenous Peoples Law" in this Essay.

[8] *See e.g.,* Landreth & Dougherty, *infra* note 114, at 330–33.

[9] *See* discussion *infra* Part I.

polities rather than racialized communities, and their assertions of inherent sovereignty over internal affairs (such as Tribal citizenship, placing land into trust, and developing robust Tribal courts and systems of governance) are then granted constitutional deference as sui generis political sovereigns.[10]

However, in *Rice v. Cayetano*,[11] the Supreme Court held that limiting voting for the board of the Office of Hawaiian Affairs (OHA) to Native Hawaiians (Kānaka Maoli) was race-based and therefore unconstitutional.[12] The *Rice* Court should have held such an election constitutionally valid as a political measure in furtherance of Indigenous self-determination.[13] Recently, the *Rice* holding was extended in *Davis v. Guam*[14] where the Guamanian territorial government sought to conduct a plebiscite vote of CHamorus currently residing on the island to determine their interest on whether to remain a territory, seek statehood, or become fully independent.[15] Sans the sui generis sovereignty afforded to Native Nations within the contiguous United States, Indigenous Peoples in the territories and Hawai'i are confined to being defined as racial communities rather than being recognized as political institutions.

Similarly, the terms of the discussion on the recognition of individual Indigenous Peoples within the federal polity centers on U.S. citizenship. For example, this year's centennial commemoration of the 1924 Indian Citizenship Act[16] provides an opportunity to further our understanding of assimilation as a machination of settler colonial democracy. By situating the Act within the era of assimilation we see that Indigenous advocacy for citizenship, was at the time, a response to the dynamics of settler colonialism and was perceived as a remedy that would increase self-determination, rather than limit it.[17] However, American Samoa's territorial government has recently, in *Fitisemanu v. United States*[18] and *Tuana v. United States*,[19] gone on the record to reject the extension of U.S. citizenship to the territory due to the limitations such citizenship might impose on Samoan culture.[20] By situating citizenship within the history of assimilation, and the fairly recent *Rice* and *Davis* Court jurisprudence where Indigenous measures of

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[10] *Id.*

[11] 528 U.S. 495 (2000).

[12] *Id.* at 499.

[13] See *infra* text accompanying notes 143–63.

[14] 932 F.3d 822 (9th Cir. 2019).

[15] See *infra* text accompanying notes 164–82.

[16] 8 U.S.C. § 1401 (b) (providing birthright citizenship to "a person born in the United States to a member of an Indian, Eskimo, Aleutian, or other aboriginal tribe: Provided, That the granting of citizenship under this subsection shall not in any manner impair or otherwise affect the right of such person to tribal or other property").

[17] See *infra* text accompanying notes 52–61.

[18] 1 F.4th 862 (10th Cir. 2021).

[19] 788 F.3d 300 (D.C. Cir. 2015).

[20] *See infra* notes 85–86, 183–204 and accompanying text.

self-determination were held to be race-based rather than political (and therefore unconstitutional), the American Samoan refusal of U.S. citizenship seems reasonably justifiable.[21]

It necessarily follows that federal recognition, land or cultural rights, U.S. citizenship, and voting rights are useful proxies for increasing our understanding of how Indigenous resistance influences the realization of Indigenous self-determination. Indeed, broadening the scope of Indigenous Peoples Law illuminates the breadth and depth of settler colonial machinations and provides opportunities for Indigenous legal scholars and Indigenous communities to "develop coherent theories about citizenship, sovereignty, and self-determination."[22] The Indigenous decolonial visions that emerge from connecting the Indigenous experiences with the U.S. project of empire in the Pacific, point to a desire for full sovereignty and self-determination, a sovereignty that is anything but sui generis.

Part I of this Essay provides background on the field of Indigenous Peoples Law including an overview of the doctrine of plenary power in both Indian affairs and the law of the territories. Part II examines the initial interactions Alaska Native Nations have had with the United States and traces key experiences bringing them within the federal polity of Indian affairs. Part III discusses the legal history of Hawai'i, Guahan, and American Samoa and the importance of bringing *Rice*, *Fitisemanu*, and *Davis* into discussion with Indigenous Peoples Law. In conclusion, I offer that by bringing Indigenous experiences with the project of empire in the Pacific into conversation with one another we: 1) increase our understanding of how settler colonial democracy has historically operated; 2) increase our understanding of how settler colonial democracy historically impacted and contemporarily impacts Indigenous experiences and resistance; and 3) increase our understanding of whether sui generis sovereignty truly furthers self-determination.

I. Indigenous Peoples, Law, and the United States

Indigenous Peoples and Native Nations have existed in what is now known as the United States[23] since time immemorial. More than 574[24] Native Nations exist within the United States' territorial boundaries, embodying

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[21] *See infra* notes 143–82 and accompanying text.

[22] Rebecca Tsosie, *The Politics of Inclusion: Indigenous Peoples and U.S. Citizenship*, 63 UCLA L. Rev. 1692, 1698 (2016).

[23] I recognize that Native Nations within the United States are bifurcated by the borders of both Canada and Mexico, *see* Angela R. Riley & Kristen A. Carpenter, *Decolonizing Indigenous Migration*, 109 Calif. L. Rev. 63 (2021) (providing a brief history of Latinx Indigenous migration at what is now known as the U.S.-Mexico border); Sheryl Lightfoot, *Haudenosaunee Passports and Decolonizing Borders*, *in* Indigenous Peoples and Borders 332, 334 (Sheryl Lightfoot & Elsa Stamatopulou eds., 2024) (describing how the U.S.-Canada border was drawn by treaties between European nations and slices "right through Indigenous Nations, cutting them in half").

[24] Indian Entities Recognized by and Eligible to Receive Services From the United States Bureau of Indian Affairs, 89 Fed. Reg. 944 (Jan. 08, 2024) (to be codified at 25 C.F.R. pt. 83).

vast and varied cultural, legal, and epistemological institutions. There are, of course, many more Native Nations that have not been able to meet the requirements for—or do not wish to seek recognition from—state or federal governments.[25] Furthermore, Indigenous Peoples located in what are now American Samoa and Guåhan have largely been excluded from the field of Indigenous Peoples Law and this Essay seeks to join the cadre of scholars seeking to remedy that exclusion.[26]

A. Native Nations as Within "Indian" Affairs

While a comprehensive history of settler colonial machinations is beyond the scope of this Essay, a brief review of federal common law and sources of positive law illuminates the similarities between what I refer to as "sui generis sovereigns" and the machinations of settler colonial democracy that continue to render full self-determination for Native Nations illusive.[27] The United States' history of regulating "Indian affairs"[28] is incredibly complex and consists of treaties, federal laws, common law, executive orders, judicial decrees, and more. Lending to that complexity are the conflicting policy eras impacting the field, which have vacillated from diplomacy to genocide and from termination to self-determination.[29]

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[25] Federal recognition requires Native Nations to plead their case for Indigeneity to the federal government and can require evidence that often presents insurmountable challenges, such as proving linguistic or cultural continuity, which given federal government "Indian" policies on removal, assimilation, and termination can be difficult to overcome; *see e.g.*, Melody K. MacKenzie, *Ke Ala Loa - The Long Road: Native Hawaiian Sovereignty and the State of Hawai'i*, 47 Tulsa L. Rev. 621, 623 (2013) (noting the "uncertain future of federal recognition for Native Hawaiians"); Danielle V. Hiraldo*, If You Are Not at the Table, You Are on the Menu: Lumbee Government Strategies under State Recognition*, 7 Native American And Indigenous Studies 1 (2020) (describing the complex issues of federal and state recognition as both problematic *and* important to Tribal governance).

[26] *See, e.g.,* Maggie Blackhawk, *Foreword: The Constitution of American Colonialism*, 137 Harv. L. Rev. 1 (2023) (calling for a recognition of colonialism within constitutional discourse); James T. Campbell, Aurelius's *Article III Revisionism: Reimaging Judicial Engagement with the* Insular Cases *and "The Law of the Territories,"* 131 Yale L. J. 2542, 2548–49 (2022) (arguing for developing a conversation between "Federal Indian law and the law on the territories on shared questions of Indigenous recognition and the limits of federal power vis-à-vis self-government or sovereignty"); Addie C. Rolnick, *Indigenous Subjects*, 131 Yale L.J. 2652, 2688–2721 (2020) (tracing how race jurisprudence continues to be a threat to Indigenous rights especially in the territories).

[27] I adopt the language the Court used in *Morton v. Mancari* to describe the unique or sui generis legal status of the Bureau of Indian Affairs and its use of Indian preference. *See* Morton v. Mancari, 417 U.S. 535, 554 (1974); *see also* Michalyn Steele, *Congressional Power and Sovereignty in Indian Affairs*, 2018 Utah L. Rev. 307, 309 (2018) (describing the status of Tribes in the American legal landscape as sui generis).

[28] *What is the BIA's History?*, Bureau of Indian Affairs, (Jan. 12, 2021), https://www.bia.gov/faqs/what-bias-history [https://perma.cc/KJ6H-E4BZ] (describing the history of the use of the term "Indian Affairs" which goes at least as far back as the 1775 Continental Congress' Committee on Indian Affairs).

[29] *See, e.g.,* Matthew L.M. Fletcher, *The Supreme Court and Federal Indian Policy*, 85 Neb. L. Rev. 121 (2006) (detailing the historic impact legislative and executive policy has had on the field).

Indigenous epistemologies illustrate an inextricable link between cultural identity, place, and wellbeing.[30] It is therefore unsurprising that the United States' settler colonialism has operated to break down Indigenous cultural institutions and Indigenous communal connections to land to prop up its own claims to territorial sovereignty. Indigenous lands, Indigenous human rights, and Indigenous sovereignties are front and center in the federal government's settler colonial efforts to constrain, contain, and assimilate Indigenous Peoples into the federal polity with some semblance of consistency.

In attempting to address the issue of how Indigenous lands could be acquired, the federal government asserted its territorial sovereignty against other colonial nation-states to claim exclusive authority over the right to legally acquire lands from Native Nations.[31] To address the issue of quelling title to Indigenous lands, which undergirded the entire settler colonial project, the government asserted itself as the sole proprietor of issuing compensable title, which could only be gained from federal recognition of a Native Nation's title to land.[32]

However, engaging in pre-constitutional diplomacy and advocacy for self-determination, Native Nations in the eastern United States were influential in creating a robust federal constitutional framework based on inherent Tribal sovereignty and political recognition that serves as the foundation for the field of Indigenous Peoples Law today.[33]

B. Constitutional Balancing of Sovereignty & Federal Plenary Power

The Constitution's Supremacy Clause provides that both federal laws and "all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land[.]"[34] Because treaties—and later statutes, executive orders, and other treaty substitutes—are the mechanisms by which the legal relationship between Native Nations and the federal government are established, the Supremacy Clause continues to have a substantive impact in Indigenous Peoples Law. The Commerce Clause, however, is also important, providing Congress the power "[t]o regulate

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[30] *See, e.g.,* Tsosie, *supra* note 22, at 1745.

[31] *See* Joseph William Singer, *Well Settled?: The Increasing Weight of History in American Indian Land Claims*, 28 Ga. L. Rev. 481, 490–95 (1994) (discussing how the Court's holding in *Johnson v. M'Intosh*, 21 U.S. 543, (1823) was intended to regulate and prevent wars among European nations and not generally meant to apply to relations between Native Nations and colonizing nations).

[32] *See* Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 278 (1955) (requiring Native Nations receive Congressional recognition of "permanent rights in the land" for a compensable taking to have occurred).

[33] *See, e.g.,* Gregory Ablavsky & Tanner Allread, *We the (Native) People?: How Indigenous Peoples Debated the Constitution*, 123 Colum. L. Rev. 243, 249–250 (2023) (providing Native Nations were instrumental in pre- and post-Constitutional debates).

[34] U.S. Const. art. VI.

Commerce . . . with the Indian tribes." [35] The centralization of settler colonial regulation of trade and commerce with Native Nations predates the Constitution and encompasses a plethora of substantive matters, all of which were required to establish, foster, and maintain peaceable relations.[36] Thus, the Commerce Clause arguably establishes both federal plenary power in Indian Affairs (centralizing the relationship within the federal government) and the trust responsibility to Native Nations (maintaining peaceable relations). This balance is evidentiary in the first cases involving Native Nations seeking federal intervention from state intrusion into Tribal sovereignty in the 1830s.

Justice Marshall in the *Cherokee Cases*,[37] recognizing the precarity both the federal government and Native Nations were facing at the time, balanced these constitutional requirements by affirming inherent Tribal sovereignty with the requisite federal supremacy of treaties and statutes.[38] Sheltering Native Nations from state (Georgia) intrusion into their internal affairs, the United States asserted a duty of protection to Native Nations.[39] Considered "domestic dependent nations"[40] akin to "[t]ributary" [41] states by the Supreme Court in 1831 and 1832, as "quasi-sovereign tribal entities" in 1974,[42] and "as self-governing sovereign political communities" in 1978,[43] Native Nations occupy a unique interstitial space in the federal polity. This space holds some room for assertions of inherent sovereignty by Native Nations, but it holds much more room for Congressional plenary power.[44] In determining the limits of Indigenous sovereignty, the Supreme Court deemed Native Nations as polities retaining their inherent sovereignty, but simultaneously considered them intra-territorially dependent.[45]

This sui generis or unique sovereignty is a liminal space that has been reserved for Native Nations within the federal polity since the founding of the United States. Any such inherent sovereignty, however, can be (and often

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[35] U.S. Const. art. I, § 8.

[36] *See* Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 Yale L.J. 1011, 1022–32 (2015) (providing an in-depth analysis of what "trade" with Native Nations meant in the early federal republic and the need for exclusive federal power over it).

[37] Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831); Worcester v. Georgia 31 U.S. (6 Pet.) 515 (1832).

[38] Ablavsky & Allread, *supra* note 33, at 288 (discussing *Worcester v. Georgia* and its endorsement of a Native reading of the Constitution).

[39] *See, e.g.,* Matthew L.M. Fletcher, *The Dark Matter of Federal Indian Law: The Duty of Protection,* 75 Me. L. Rev. 306, 311–13, 323–25 (2023) (outlining a some of the original and contemporary history of the duty of protection).

[40] *Cherokee Nation*, 30 U.S. at 17.

[41] *Worcester*, 31 U.S. at 520.

[42] Morton v. Mancari, 417 U.S. at 554.

[43] United States v. Wheeler, 435 U.S. 313, 322–323 (1978).

[44] *See* Seth Davis, *American Colonialism and Constitutional Redemption*, 105 Calif. L. Rev. 1751, 1779–85 (2017) (describing how colonialism is tied to plenary power, which authorizes Congress to limit self-determination).

[45] *See Cherokee Nation*, 30 U.S. (5 Pet.) 1 (1831); *see also Worcester*, 31 U.S. (6 Pet.) 515.

is) abrogated by federal action to the contrary—usually through explicit Congressional action[46] or through implicit divestiture by the federal courts.[47] Conversely, the opposite is also true, Congress may explicitly affirm such inherent sovereignty and enact remedial and restorative law for the benefit of Native Nations.[48]

Congress's track record of wielding its plenary power in accordance with the federal duty of protection and in support of inherent Tribal sovereignty has been inconsistent, to say the least. The Supreme Court, who unmoored its use of plenary power from Justice Marshall's constitutional balancing act, has not historically fared much better. As a result, this balancing act was quickly overrun by an absolutist Congress whose views of plenary power went unchecked by the Supreme Court (which failed to ensure adherence to the Constitution, and in the case of Native Nations to ensure the duty of protection).[49] Congressional and judicial plenary power has often operated as a sword, explicitly and implicitly divesting Indigenous sovereignty. Congress enacted laws to remove Native Nations from ancestral territories, to subsume criminal jurisdiction in Indian Country, and to terminate the political relationship between Native Nations and the federal government.[50]

Laws governing citizenship and Indigenous Peoples were rooted in the federal government's belief that cultural assimilation would solve the "Indian problem."[51] Congress enacted the Dawes Act[52] as a tool of assimilation and for the purposes of breaking up communally held Tribal lands, opening those lands up to white settlement.[53] The Dawes Act aimed to shift Tribal culture and economy towards individual property ownership and an

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[46] *See, e.g.*, Indian Appropriations Act of 1871, 25 U.S.C. § 71 (ending treatymaking with Native Nations); *see also* Lone Wolf v. Hitchcock, 187 U.S. 553 (1903) (upholding Congressional abrogation of a treaty without Tribal consent).

[47] *See* Maggie Blackhawk, *On Power & Indian Country*, Women & Law, 39-54 (2020) (joint publication of the top sixteen law reviews) (describing how Native Nations leverage legal channels to mitigate the effects of colonialism such as the Supreme Court's implicit divestiture in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978)).

[48] *See* Haaland v. Brackeen, 599 U.S. 255, 280 (2023) (upholding Congress's power to enact the Indian Child Welfare Act).

[49] *See* United States v. Kagama, 118 U.S. 375, 382–85 (1886) (holding the Major Crimes Act was a constitutional assertion of power because the Constitution is silent to the federal government's relations with Tribes within its borders, because Tribes owe all their powers to federal statutes which can be altered at any time by Congress, and because Tribes are wards of the nation there is federal duty of protection and therefore federal power to enact laws).

[50] *See* Indian Removal Act, ch. 148, 4 Stat. 411 (May 28, 1830) (providing the President may assure the tribe or nation that the U.S. will forever secure and guaranty the exchanged lands but that the lands shall revert to the U.S. if the "Indians become extinct").

[51] Hoover Comm'n on Org. of the Exec. Branch of the Gov't, Recommendations on Federal Indian Policy, H.R. Doc. No. 129, 1st Sess., at 63 (1949) (recommending integrating "the Indians into the rest of the population as the best solution of 'the Indian Problem.'").

[52] *See* Dawes General Allotment Act, 25 U.S.C. §§ 331–358.

[53] *See* Tsosie, *supra* note 22, at 1717.

agrarian lifestyle.[54] In western law the notion of property ownership was historically linked to whiteness and the right to participate in the democracy.[55] Illustrative of this, the Dawes Act required Native Nation citizens who received allotments to sever ties to their Native Nations in exchange for conferral of U.S. citizenship. Similarly, Alaska Natives successfully lobbied the Alaska territorial legislature in 1915 for citizenship rights, but they were required to totally abandon "any tribal customs or relationship[s]."[56] Citizenship was also included in treaties and provided for in various other federal laws resulting in piecemeal citizenship, an issue exacerbated by a plethora of other statutes and treaties conferring citizenship to some Native Nation citizens while rendering others illegible.

The 1924 Indian Citizenship Act (Act) has been simultaneously criticized and heralded by historical and legal scholars.[57] Critics document the Act as a means of assimilating Native Nations into the federal polity and ignoring Native Nation sovereignty.[58] While this critical perspective and characterization is certainly valid and illuminates the lack of Native Nation consent to U.S. citizenship, such a characterization flattens the nuances surrounding the Act's passage.

The Society of American Indians (SAI), who supported the Act, was engaging in a larger strategy to achieve full participation in the American project of democracy and to correct a perceived inequity.[59] After World War II, many Native Nation citizens returned home to the United States or their respective Native Nation communities, having served their country, but found themselves disenfranchised. SAI, according to Professor K. Tsianina Lomawaima, "grappled with the ambiguous status of Native individuals and nations and saw citizenship as a cure for both, wagering everything on the alleged promises of liberty, autonomy, and self-determination attached to the concept at the time."[60] Such beliefs were widespread and understandable. Alaska Native advocacy groups' and SAI's beliefs that, given the circumstances at the time,

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[54] *See* David Getches, Charles F. Wilkinson, Kristen A. Carpenter, Robert A. Williams & Matthew L.M. Fletcher, Cases and Materials on Federal Indian Law 168 (7th ed. 2017).

[55] *See generally* Cheryl Harris, *Whiteness as Property*, 106 Harv. L. Rev., 1709 (1993).

[56] Native Indians, citizens under provisions of Section 6, Chapter 119, 24 Stat. L (1915) (requiring "native Indian[s]" to adopt "the habits of a civilized life" and be examined to determine "the general qualifications of the applicant as to an intelligent exercise of the obligations of suffrage, a total abandonment of any tribal customs or relationship, and the facts regarding the applicant's adoption of the habits of a civilized life.")

[57] *See* K. Tsianina Lomawaima, *The Mutuality of* Citizenship *and* Sovereignty: *The Society of American Indians and The Battle to Inherit America*, 25 Stud. Am. Indian Literatures 2, 333 (2013), *see* Riley & Carpenter, *supra* note 23 (noting the rejection of citizenship by some Indigenous Peoples at the time of the Act), at 88; Tsosie, *supra* note 22, at 1711–18 (noting the Iroquois Confederacy resistance to being incorporated into the federal polity by the Act).

[58] *Id.*

[59] *See* Torey Dolan, *Congress' Power to Affirm Indian Citizenship Through Legislation Protecting Native American Voting Rights*, 59 Idaho L. Rev. 47, 65 (2023).

[60] Lomawaima, *supra* note 57, at 343.

citizenship would increase self-determination illustrates that navigating the shifting machinations of settler colonialism requires not only incessant advocacy and resistance, but a hypervigilant awareness of such machinations.

However, changes in public policy and sentiment eventually shifted Congressional action toward less overt mechanisms of assimilation[61] and ultimately towards the current self-determination and nation-to-nation building era. This current era, originating alongside the international decolonization movement post-WWII and the United States civil rights and American Indian movements, saw Congress enact restorative measures into law. Native Nations successfully advocated for reparative laws such as the Indian Child Welfare Act (ICWA)[62] and laws to increase Tribal governance such as the Indian Self Determination and Education and Assistance Act (ISDEAA).[63] More recently, laws returning land back to Native Nations and increased inclusion in federal infrastructure laws continue to have a positive impact on Native Nations. In this sense, Congress has become more of a shield in the last several decades, providing recognition and legibility for Native Nations with the capacity to successfully lobby it in their favor.

Advocacy to shift the Supreme Court's jurisprudence toward recognizing the policy of self-determination has proved more difficult. Legal scholarship plays a vital role in increasing the Court's understanding of the Constitution vis-à-vis Indigenous Peoples and Native Nations. It has taken legal history scholars decades to increase the awareness of the impact Native Nations had on the development of the legal institutions in the pre- and early-Republic.[64] In recent years, this work has contributed to the Supreme Court's return to (in some instances) Justice Marshall's constitutional balancing act in the *Cherokee Cases*. In *McGirt v. Oklahoma*,[65] the Court affirmed the supremacy of treaties with Native Nations and in *Haaland v. Brackeen*,[66] it affirmed the power of Congress to enact laws for the benefit

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[61] *See* Indian Reorganization Act of 1934, 48 Stat. 904 (1934); 25 U.S.C. § 5101 (ending the policy of allotment and establishing a formula for organizing Tribal governments modeled after the structure of the federal government); *see also* H.R. Con. Res. 108, 83d Cong. (1953) (establishing Congressional policy to terminate the relationship with "Indians" and abolish Bureau of Indian Affairs offices).

[62] *See* Nazune Menka & Laura Spitz, *Using Vulnerability Theory to Reconceive the Relationships Between the Native Nations, the United States, and the States*, *in* Law, Vulnerability, And The Responsive State: Beyond Equality And Liberty 243 (Martha Fineman & Laura Spitz eds., 2024) (discussing ICWA being enacted in 1978 as remedial legislation to address previous federal and state assimilationist policies and practices of removal that resulted in an in the separation of Indian children from their families).

[63] *See* 25 U.S.C.§§ 5301–5423.

[64] *See, e.g.*, Maggie Blackhawk, *Foreword: The Constitution of American Colonialism*, 137 Harv. L. Rev. 1, 8–9 n.31 (2023) (recognizing some of the scholars who have engaged in legal history discourse on the Constitution and colonialism).

[65] 140 S.Ct. 2452, 2459 (2020) (holding Congress has never abrogated the Treaty with the Creeks and therefore much of eastern Oklahoma remains a reservation for the purposes of the Major Crimes Act).

[66] 599 U.S. 255, 280 (2023) (holding, in part, that Congress' power to enact the ICWA was "consistent with Article I" of the Constitution).

of Native Nations (e.g., ICWA). But we've also recently seen the Court, in *Oklahoma v. Castro-Huerta*,[67] implicitly divest inherent Tribal sovereignty by holding. under the General Crimes Act, that Oklahoma has concurrent jurisdiction in Indian Country along with the federal government.[68] This abrogated the centuries-old principle restricting states from asserting jurisdictional authority in Indian Country that Justice Marshall's constitutional jurisprudence in *Worcester v. Georgia* supported.[69] Thus, it is not only Congress that dons a sword and a shield, but also the judiciary.

Native Nations have always had to tread lightly when navigating federal plenary power but over the course of time they have successfully shifted the use of that power, albeit incrementally, toward furthering self-determination. This is what is truly exceptional about the field of Indigenous Peoples Law. To reconcile the doctrines of inherent Tribal sovereignty and federal plenary power Indigenous Peoples Law advocates work to cabin federal plenary power by ensuring it has a nexus with the federal duty of protection and the federal policy of Native Nation self-determination. Indigenous Peoples in the territories and Hawai'i are advocating in a similar fashion but face constitutional limitations under the Fourteenth and Fifteenth Amendments due to the judiciary's conflation of ancestry and race and its refusal to recognize the political status of Indigenous Peoples beyond the contiguous United States.[70]

C. The Insular Cases as Outside of "Indian" Affairs

Sui generis sovereignty could arguably be viewed as applying to both "federally recognized" Native Nations, to Kānaka Maoli, and to Indigenous Peoples in territories given the historical connections to colonialism and their presence within the federal polity. But Indigenous Peoples in the territories are not recognized as polities afforded such sui generis sovereignty, at least not in the eyes of the judiciary. Part of the rationale the settler colonial nation-state has historically employed, and that serves as the foundational legal doctrine for this refusal of recognition, is the doctrine of territorial incorporation and the racialization that undergirds it.

Motivated towards colonial incorporation of the territories by promises of economic returns and military strength, much as it was in the acquisition of Alaska and Hawai'i,[71] the United States did not readily account for the

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[67] 597 U.S. 629 (2022).

[68] *Id.* at 656.

[69] *See* Gregory Ablavsky, *Too Much History: Castro-Huerta and the Problem of Change In Indian Law*, 2022 Sup. Ct. Rev. 293, 295 (2023).

[70] *See* Rolnick, *supra* note 26, at 2754–55 (arguing that the use of "political citizenship, kinship, and culture" should augment the understanding of race in Indigenous Peoples Law which might provide greater constitutional protection of Indigenous sovereignty).

[71] See *infra* Parts II and III.

democratic rights afforded Indigenous Peoples or others residing in the territories but was quickly forced to do so.

Initially, congressional debates informing the *Insular Cases*[72] centered heavily around racist points of view on whether U.S. citizenship should be extended to Indigenous Peoples in the Philippines,[73] whether the Constitution applied to the territories, and whether the territories were destined for statehood. In *Downes v. Bidwell*, the 1901 seminal insular case, the Supreme Court established that Congress could create, and hold there indefinitely, an indeterminate legal status for colonial territories where constitutional protections to its territorial residents didn't apply.[74] The Court left the power to decide when a territory should be fully incorporated into the "American family"[75] and when the "civil rights and political status of the native inhabitants" will be afforded to them to Congress.[76] In determining whether duties applied to goods imported from Puerto Rico the *Downes* Court initiated a line of questioning that continues today: is a territory "within" the United States for the purposes of Constitutional provisions or statutory applicability of citizenship, which the *Downes*, and subsequent courts, have held does not "naturally and inevitably extend[] to [residents of] an acquired territory."[77] Distinguishing between whether a territory was "incorporated" or "unincorporated" rested upon whether it was intended for statehood at the time of acquisition.[78] If it was intended for statehood, it was an "incorporated territory" and the Constitution applied, but if it was not intended for statehood, it was "unincorporated" and only certain constitutional provisions applied "by [their]own terms."[79]

In the *Insular Cases*, the Supreme Court, ultimately "pulled from thin air a new doctrine for territorial expansion—the doctrine of territorial incorporation"[80] drawing not from "any recognized legal principle, but from

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[72] *See* Juan Torruella, *Ruling America's Colonies: The* Insular Cases, 32 L. & Pol'y Rev. 57, 58 (2013) (listing six 1901 Supreme Court cases generally considered to comprise the *Insular Cases* in footnote 3).

[73] Juan Torruella, *The* Insular Cases*: The Establishment of a Regime of Political Apartheid,* 29 U. Pa. J. Int'l L. 283, 297–300 (2007).

[74] 182 U.S. 244 (1901).

[75] *Id.* at 339.

[76] *Id.* at 280 (relying on the Treaty of Paris language that prescribed the terms upon which the U.S. would receive territory inhabitants and comparing it to the Cession for Alaska noting that Alaska Natives were excluded from citizenship until Congress acted on the matter).

[77] *See* Tuaua v. United States, 788 F.3d 300, 306–311 (D.C. Cir. 2015) (citing *Downes* for the proposition that the Citizenship Clause is ambiguous as to whether "in the United States" encompasses the territories and therefore it would be "impractical and anomalous" to judicially impose citizenship over the democratic prerogatives of the American Samoan people themselves).

[78] Northern Mariana Islands v. Atalig, 723 F.2d 682, 688 (9th Cir. 1984) (supporting the proposition that an unincorporated territory is not intended for statehood and citing *Downes v. Bidwell*).

[79] *See* Fitisemanu v. United States, 1 F.4th 862, 875 (10th Cir. 2021); *Atalig*, 723 F.2d at 688.

[80] Juan Torruella, *To Be or Not to Be: Puerto Ricans and Their Illusory U.S. Citizenship*, 29 Centro J. 108, 115 (2017).

the Justices' varied concerns about the racial and ethnic makeup of islands newly acquired after the Spanish-American War."[81] This racialization argument, basing refusal to extend citizenship, statehood or incorporated territoriality on race, is quintessentially settler colonial in nature. Such "dynamics of difference" aim to create permanent systems of privilege and subordination using race.[82] These dynamics of difference have been used to politically and legally separate Indigenous Peoples in the territories and Hawai'i from benefitting from the sui generis sovereignty afforded to Native Nations residing within the states. The use of race is evident in both historical and contemporary case law as I discuss here and in Part III.

The *Insular Cases* continue to be widely criticized as representative of American racism and constitutional anti-canon,[83] but have yet to be overturned. Legal scholars have both advocated for doing away with the doctrine of territorial incorporation and questioned whether overturning the *Insular Cases* is prudent without a plan forward.[84] Nonetheless, the cases continue to guide judicial interpretation of the Constitution and affirm congressional plenary power over the recognition of Indigenous Peoples' civil and political rights.[85]

As is often the case in Indigenous Peoples Law, the issues of citizenship and recognition are not amenable to simplistic generalizations. In *Fitisemanu v. United States* three citizens of American Samoa sued the United States seeking a declaratory judgment that they were entitled to birthright citizenship. The Tenth Circuit attempted to repurpose the *Insular Cases* to "preserve the dignity and autonomy of the peoples of America's overseas territories."[86]

First it determined citizenship was not a fundamental individual right, then it upheld the *Insular Cases* logic that Congress retained the power to grant citizenship in the matter, and lastly, it refused to grant citizenship over the objections of the intervening American Samoan government. The *Fitisemanu* court focused on American Samoan governmental consent and the precarity that citizenship might bring to traditional Samoan ways of life including communal land ownership.[87]

I think *Fitisemanu* brings us back to the idea that Indigenous advocacy can, and does, shape assertions of federal plenary power. Because settler

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[81] Campbell, *supra* note 26, at 2549.

[82] Natsu Taylor Saito, *supra* note 2, at 154–65 (summarizing how the dynamics of difference are perpetuated by federal plenary power over Native Nations, the Territories and matters of national security and immigration).

[83] Campbell, *supra* note 26, at 2551–52.

[84] *Id*. at 2557–59.

[85] *See* Fitisemanu v. United States, 1 F.4th 862, 877 (10th Cir. 2021) (providing "Congress has always wielded plenary authority over the citizenship status of unincorporated territories, a practice that itself harked back to territorial administration in the nineteenth century").

[86] *Id.* at 870.

[87] *See* discussion *infra* Part III.

colonialism has historically focused on the assimilation of Native Nations, or in the case of the territories, determining whether Indigenous Peoples are assimilable and suitable for incorporation into the "American family," viewing *Fitisemanu*, and any other case, in its historical context is important. I bring in this context in Parts II (Alaska Native legal history) and III (Hawai'i, Guåhan, and American Samoa legal history).

II. Alaska Native Nations

Legal history is critical to understanding how Indigenous visions of self-determination have responded to settler colonial legal systems over time and provides context for contemporary decolonial visions of self-determination and their challenges discussed in Part III. In this Part, I submit that Alaska Native Nation experiences navigating the machinations of settler colonialism, specifically military occupation, territorial administration, statehood, and Congressional plenary power provide lessons for Indigenous Peoples similarly resisting colonial rule. These lessons, illuminated by the history of how sui generis sovereignty and federal recognition have evolved in the Alaska Native Nation context, illustrate how Indigenous Peoples must engage in continual advocacy to limit the impact of settler colonial assertions of plenary power, and how state authorities resist federal recognition of Indigenous self-determination.

Each Native Nation's experience with the federal government has been influenced to varying degrees by applicable treaties, statutes, compacts, deeds of cession, and executive order agreements.[88] And while no one Native Nation's experience exactly mirrors another's, emergent themes and lessons arise from analyzing both the United States "project of empire"[89] and Native Nation resistance to that assertion of empire. From 1867 to 1898 the United States incorporated as territories Alaska, Hawai'i, Guåhan, American Samoa, and Puerto Rico. This period in history illuminates both the machinations employed by the United States and Indigenous resistance to the project of empire. Amidst a mixture of shifting economies and geopolitical gaming[90] the United States viewed Alaska, Hawaii, Guåhan, and American Samoa—acquisitions on the Pacific Coast—as an opportunity

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[88] *See, e.g.,* Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin, 599 U.S. 382, 143 S. Ct. 1689, 1709 (2023) (J. Gorsuch dissenting) (describing the similar foreign/domestic dichotomy that exists between the Insular Territories and Native Nations as they are both "foreign to the United States, in a domestic sense.").

[89] Aziz Rana*, How We Study the Constitution: Rethinking the Insular Cases and Modern American Empire*, Yale L.J. Forum. 312–34 (Nov 2. 2020).

[90] Honorable Charles Sumner of Massachusetts on the Cession of Russian America to the United States (Washington: Printed at the Congressional Globe office, 1867), at 11–16 https://babel.hathitrust.org/cgi/pt?id=uiuo.ark:/13960/t9086cf0p&view=1up&seq=15 [https://perma.cc/8NY2-PL9L] (noting five reasons to ratify the treaty of cession with Russia: the advantages of the Pacific Coast; the extension of dominion; the extension of Republican institutions; the anticipation of Great Britain (to annex Alaska); and the amity of Russia).

to simultaneously expand the republic, increase trade, and assert dominion over other colonial nation-states.[91]

This initial period of history illustrates similarities in both U.S. governance and Indigenous resistance and response. When incorporating territories into the federal polity it was common practice to establish interim governments by appointing the military to administer, oversee, and outright rule the territories. Military governance, with varying amounts of tyranny, dominated the long periods between territorial incorporation and the establishment of civil governments in Alaska, Guåhan, and American Samoa. Importantly, it was Indigenous resistance to military rule that catalyzed Congress to establish civilian forms of government via the Alaska and Guåhan organic acts and via executive order in the case of American Samoa.

A. Alaska Native Nations as Within "Indian Affairs"

In 1867 the United States "purchased" the land and islands comprising what is now known as Alaska calling it a "visible step in the occupation of the whole North American continent" for $7.2M.[92] Despite the rich history of treatymaking that existed up until Congress unilaterally ended the practice in 1871, the "purchase" of Alaska from Russia occurred without any knowledge or consent from Alaska Native Nations, calling into question the validity of such an acquisition in the first instance.[93] The Treaty of Cession with Russia mentions Alaska Natives ("uncivilized native tribes") only to assert they would be subject to Congressional plenary power and to deny them naturalization.[94]

Not surprisingly, Alaska Natives questioned the right European nation-states had to buy and sell their ancestral lands, "land, which is ours and belonged to our forefathers since time immemorial."[95] The Tlingit[96] who had been dealing with European settlers for over a century,[97] and who had consistently resisted Russian settlement,[98] understandably refused to

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[91] *Id*. at 11–16.

[92] *Id*. at 13.

[93] James Thomas Tucker, Natalie A. Landreth & Erin Dougherty Lynch, "*Why Should I Go Vote Without Understanding What I Am Going to Vote for?" The Impact of First Generation Voting Barriers on Alaska Natives*, 22 Mich. J. Race & L. 327, 329 (2017).

[94] Treaty Concerning the Cession of Russian Possessions in North America, U.S.-R.F., Mar. 30, 1867, 15 Stat. 539, T.S. No. 301, at Art. III [entered into force June 20, 1867].

[95] Thomas R. Berger, Village Journey: The Report of the Alaska Native Review Commission 77 (1985).

[96] I note that many Native Nations are going through a process of language reclamation and that Lingít is the current accepted linguistic spelling.

[97] Rosita K. Worl, Tlingit At.oow Tangible and Intangible Property 122 (May 17, 1998) (Ph.D. dissertation, Harvard University) (on file with the Harvard University Library).

[98] *See* Ian R. Stone, *ANÓOSHI LINGÍT AANÍ KÁ: RUSSIANS IN TLINGIT AMERICA: THE BATTLES OF SITKA, 1802 AND 1804. Nora Marks Dauenhauer, Richard Dauenhauer, and Lydia T. Black (Editors). 2008. Juneau: Sealaska Heritage Institute; Seattle and London: University of Washington Press. xlix + 491p, illustrated, soft cover. ISBN 978-0-295-98601-2.*

recognize the United States purchase of their ancestral lands and assertions of U.S. territorial sovereignty. As was the practice in asserting sovereignty over territorial acquisitions, the United States appointed the military to administer the government in Alaska. Illustrative of the initial intentions of the settler colonial state, between 1869 to 1885, in response to conflicts between Tlingit and the United States, the Army violently attacked several Tlingit villages.[99] Now a lesser-known instance of unwarranted United States-sanctioned violence against Native Nations the Army's occupation of Alaska only ended due to nationwide media attention resulting in Congress removing the Army from Alaska in 1877.[100]

Tlingit resistance was extraordinarily dynamic. Working within the legal systems to protest the sale of Alaska and assert Tlingit ownership rights as early as 1899, the Tlingit formed an alliance, hired a lawyer, and sent a clan leader to Washington, D.C.[101] This advocacy resulted in, Congress passing a jurisdictional act in 1935, granting the Tlingit and Haida Indians the right to sue the United States.[102] Alaska Native aboriginal land rights had not been addressed by Congress except for a brief mention in the 1884 Organic Act of Alaska reserving power over such decisions for Congress.[103] In 1959 the federal court of claims in *Tlingit and Haida Indians of Alaska v. United States* affirmed the existence of aboriginal title of use and occupancy and set the stage for future Alaska Native land claims.[104] The *Tlingit* court held "that a large area of land and water in southeastern Alaska was actually taken

£19.00; $US35.00., 46 Polar Rec. 1, 89–90 (2010) (reviewing Anóoshi Lingít Aaní Ká: Russians In Tlingit America: The Battles Of Sitka, 1802 and 1804 (Nora M. Dauenhauer, Richard Dauenhauer, & Lydia T. Black eds., 2008)); *see also* Alexander Vasilyevich Zorin, Chief Curator of Collections, Kursk State Regional Museum of Archaeology, Native American Heritage Month Lecture Series at Sealaska Heritage: The Russian-Tlingit Conflict of 1802-1804: Origins, Course, Results (Nov. 8, 2021).

[99] Zachary Jones, "Search For and Destroy": *US Army Relations with Alaska's Tlingit Indians and the Kake War of 1869*, 60 Ethnohistory 1, 2–3 (2013). In addition to, what has misleadingly been referred to as the Kake War of 1869, the U.S. Army attacked Tlingit villages in Sitka, Wrangell, and Angoon. Now a lesser-known instance of unwarranted U.S. sanctioned violence against Native Nations, at the time and for several years after, the nationwide media attention was what eventually resulted in Congress acting to remove the Army from Alaska in 1877.

[100] *Id*. at 3; *see also* Joaqlin Estus, *Air Force General explores century-late apology for US bombing of Tlingit villages*, ICT News (Feb. 17, 2020) https://ictnews.org/news/air-force-general-explores-a-century-late-apology-for-us-bombing-of-tlingit-villages (describing the intergenerational trauma the bombings spawned, the inter-cultural conflicts that led up to the events, and the inaccurate portrayal of the events in the military's historical accounts).

[101] Worl, *supra* note 97, at 75.

[102] Tlingit and Haida Indians of Alaska v. United States, 177 F. Supp. 452, 454 (Ct. Cl. 1959).

[103] Anderson, *Katie John Litigation, infra* note 138, at 851 (the Act provided "Indians or other persons…shall not be disturbed in their possession of any lands actually in their use or occupation…but the terms under which such persons may acquire title … is reserved for future legislation by Congress).

[104] Anderson, *Alaska Native Rights*, *infra* note 112, at 19-21.

without compensation and without the consent of the Indians"[105] and that the United States was liable for "failure and refusal to protect the rights of Indians in such lands and waters through the administration of its laws[.]"[106] Thus, Tlingit resistance could be argued to have catalyzed the inclusion of Alaska Native Nations as within the federal Indian Affairs polity, but a plethora of other federal actions also supported this inclusion.

As early as 1869, representatives of the United States argued that Alaska Natives were subject to laws enacted to regulate affairs with Native Nations in the contiguous U. S., often citing *Worcester*, the Supremacy Clause and the Indian Commerce Clause.[107] Congress also applied the Trade and Intercourse Act of 1873 to Alaska Natives, enacted the Alaska Allotment Act of 1906 to provide Alaska Natives title to traditionally used and occupied lands, and amended the Indian Reorganization Act (IRA) to include Alaska Native Nations.[108] Alaska Native legibility in the federal polity as part of, the then-territory of, Alaska was heavily influenced by their advocacy and resistance.

Alaska Native advocacy leaned into democratic participation with the creation of civil rights advocacy groups, such as the Alaska Native Brotherhood and Alaska Native Sisterhood, who successfully advocated for the election of the first Alaska Native territorial representative in 1929[109] and the enactment of the first anti-discrimination bill in 1945.[110] Alaska's delegate to Congress met with fifteen Athabaskan Tribal chiefs from the Tanana Chiefs Conference (TCC) in 1915 discussing issues of land, impacts to traditional hunting areas, governance, and economic and educational opportunities.[111] This history, coupled with Alaska Native Nations being recognized as Tribal governments throughout their interactions with the United States and the territory of Alaska, brought Alaska Native Nations into the federal Indian Affairs polity.

Thus, by working within the machinations of settler colonialism, lobbying Congress, meeting with delegates, and initiating litigation, Alaska Natives secured a place within the Indian affairs sphere of the polity. Such legibility is not without its issues. As I provide in the following section, recognition, Tribal sovereignty, settlement of land claims, and traditional hunting and fishing rights intersect in unique ways that provide insight into

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[105] *Tlingit and Haida Indians of Alaska*, 177 F. Supp. at 468.

[106] *Id.*

[107] *See, e.g.*, U.S. Dep't of War, Jurisdiction of the War Department Over the Territory of Alaska, H.R. Exec. Doc. No. 135, 44th Cong., 1st Sess., 5 (1876); *see also* U.S. Dep't of the Interior, Solicitor Opinion M-36975 on Governmental Jurisdiction of Alaska Native Villages Over Land and Nonmembers (Jan. 11, 1993), at 128 [hereinafter the 1993 M-Opinion].

[108] *Id*. at 47.

[109] William Schneider, The Tanana Chiefs: Native Rights and Western Law, 58 (2018).

[110] Hensley & Starkey, *infra* note 163, at 132.

[111] *See generally* Schneider, *supra* note 109.

issues facing Indigenous Peoples in the territories. Namely, that federal plenary power, whether affirmed through incorporation into the Indian affairs polity or via the law of the territories, continues to limit Indigenous self-determination.

B. ANCSA: The Sword & Shield of Plenary Power

Within the traditional framework of Indigenous Peoples, Law, and the U.S., assertions of self-determination are very much connected to Native Nation's legibility as federally recognized Tribes. But even federally recognized Tribes, such as Alaska Native Nations, continue to face threats to their self-determination and inherent sovereignty.

Congress enacted laws creating governmental provisions for Alaska and granted it statehood in 1958.[112] While the Alaska Statehood Act required the state to disclaim any right to the property of Alaska Natives (including fishing rights), required that such property remained under the "absolute jurisdiction and control of the United States[,]" and required this disclaimer be codified in the Alaska Constitution, it left the issue of Alaska Native land claims largely unreconciled.[113] Alaska Native protests over the state selection of lands and the discovery of oil in the late 1960s created the political will for Congress to act.[114] To quiet title and make way for the Trans-Alaska pipeline,[115] Congress enacted The Alaska Native Land Claims Settlement Act of 1971 (ANCSA).[116]

ANCSA was not recognition-focused legislation, but it did have to establish some way to identify who could participate in the settlement.[117] To do so, using the 1970 census, ANCSA recognized the existence of over 200 Alaska Native Villages,[118] and included a one-quarter blood quantum requirement to determine who would be eligible shareholders.[119]

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[112] Robert T. Anderson, *Alaska Native Rights, Statehood, and Unfinished Business*, 43 Tulsa L. Rev. 17, at 24–29 (2007); Alaska Statehood Act, Pub. L. No. 85-508, 72 Stat. 339 (1958).

[113] Anderson, *Katie John Litigation*, *infra* note 138, at 854.

[114] Mitchell Forbes, *Beyond Indian Country: The Sovereign Powers of Alaska Tribes Without Reservations*, 40 Alaska L. Rev. 1, 176 (2023) (providing "Alaska Native villages protested the state selecting lands, Secretary of Interior Stewart Udall imposed a freeze on further grants of public lands until the claims of Alaska Natives were settled").

[115] Natalie Landreth & Erin Dougherty, *The Use of the Alaskan Native Claims Settlement Act to Justify Disparate Treatment of Alaska's Tribes*, 36 Am. Indian L. Rev. 321, 322 (2012) (describing three factors for settlement of Alaska Native land claims-the discovery of oil on the North Slope, the nation's energy crisis, and the Alaska Federation of Natives advocacy).

[116] 43 U.S.C. §§ 1601–1629h.

[117] *See* 1993 M-Opinion, *supra* note 107, at 4 (noting that while ANSCA was the most comprehensive statute to address Alaska Native issues the primary purpose was the resolution of Native claims to the land).

[118] 43 U.S.C. §1602 (defined in part as a "tribe, band, clan, group, village, community, or association in Alaska …comprised of more 25 or more Natives").

[119] 43 U.S.C. §1602(b) ("Native" means a citizen of the United States who is a person of one-fourth degree or more Alaska Indian (including Tsimshian Indians not enrolled in the Metlakatla

ANCSA attempted to socially engineer a solution to the perceived problems plaguing reservations in the lower 48 states, but it created its own set of unique problems. The act "extinguished" all aboriginal title in "exchange" for $962.5M and 45 million acres to be managed by twelve regional corporations (Alaska Native Corporations or ANCs) and several village corporations, to which Alaska Natives would receive corporate stock.[120] The Alaska Federation of Natives (AFN) was formed to provide a voice on the settlement in Congress, but despite governmental promises to AFN leaders,[121] ANCSA extinguished traditional hunting and fishing rights.[122]

This extinguishment continues to be viewed as "one of the largest unintended consequences and unresolved [impacts] of ANCSA.".[123] Furthermore, ANCSA purported to be legislation "for a fair and just settlement of all claims by Natives and Native groups of Alaska…" "with maximum participation by Natives in decisions affecting their rights and property."[124] However, despite forming coalitions such as the AFN to ensure participation in ANCSA, Alaska Native leaders reported being excluded from deliberations in Congress.[125]

Notably, ANCSA was silent as to the inherent sovereignty of Tribal governments.[126] When Congress amended the IRA in 1936 to include Alaska Native Nations, many reorganized, adopting constitutions and governance systems to further their self-determination.[127] Despite this, and the plethora of Congressional action and the historic and continued involvement of the Bureau of Indian Affairs (BIA) in Alaska,[128] the state of Alaska refused

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Indian Community) Eskimo, or Aleut blood, or combination thereof…. It also includes, in the absence of proof of a minimum blood quantum, any citizen of the United States who is regarded as an Alaska Native by the Native village or Native group of which he claims to be a member and whose father or mother is (or, if deceased, was) regarded as Native by any village or group.")

[120] Landreth & Dougherty, *supra* note 115, at 321.

[121] Landreth & Dougherty, *supra* note 115, at 322.

[122] 43 U.S.C. § 1603(b).

[123] Megan Sullivan, *Can Indigenous subsistence rights still be protected in Alaska?*, Alaska Public Media (Oct. 14, 2021), https://alaskapublic.org/2021/10/14/subsistence-is-absolutely-critical-to-our-survival-can-indigenous-subsistence-rights-still-be-protected-in-alaska/ [https://perma.cc/4ZB3-E9MU].

[124] 43 U.S.C. § 1601.

[125] Holding Our Ground, *Part 11: From Hunter, Fisher, Gatherer to Corporate Director,* W. Media Concepts, Inc., at 10:15–11:00, (1985) http://www.ankn.uaf.edu/curriculum/ancsa/holdingourground/Holding11.html [https://perma.cc/R3UH-SSKS] (an interview with Don Wright, the second AFN President, providing "We would stand in the halls of Congress before a subcommittee room or a committee room and wait and wonder, while representatives of the State of Alaska, senators and congressmen, cut deals behind closed doors that we knew nothing about and had no control over. I was told by the White House that a bill would pass and that we had no say from that day forward. I didn't believe that. I thought we could change it. I thought there was true democracy, that there was true justice").

[126] Landreth & Dougherty, *supra* note 115, at 324.

[127] Forbes, *supra* note 114, at 179.

[128] 1993 M-Opinion, *supra* note 107, at 40 n.113 (noting the transfer of jurisdiction over Alaska Natives from the Bureau of Education to the BIA in 1931).

to acknowledge the inherent sovereignty of Alaska Native Nations.[129] In 1991, the Ninth Circuit's review of an Alaska state supreme court decision attempted to settle the matter. In *Native Village of Venetie IRA Council v. Alaska*,[130] two Tribal citizens sued the state of Alaska to force recognition of Tribal court adoption decrees.[131] The district court held that Alaska Native villages could not assert concurrent Tribal jurisdiction over child custody matters.[132] The Ninth Circuit reversed, resting the arguments on well-founded principles of sui generis sovereignty, holding that Native Nations are "independent political communities qualified to exercise powers of self-government, not by virtue of any delegation of powers, but rather by reason of their original tribal sovereignty."[133] In 1994, Congress enacted the Federally Recognized Indian Tribe List Act to provide a regularly updated and published list of Native Nations eligible for the "special programs and services provided by the United States to Indians because of their status as Indians."[134] Two hundred and twenty-nine Alaska Native Nations have been included on this list since its inception.[135]

None of its long legal history has prevented the state of Alaska from continuing to, under certain gubernatorial administrations, attempt to undermine Alaska Native Nation sovereignty. Wielding ANCSA's language extinguishing aboriginal title, the state of Alaska has sought to limit Alaska Native Tribal sovereignty, not only over retention of traditional hunting and fishing rights,[136] but also over jurisdictional restoration of ancestral lands.[137]

In the most recent iteration of this, the state has sued the DOI's Assistant Secretary of Indian Affairs Bryan Newland for granting the Tlingit and Haida Central Council's application to place land into trust. Alaska claims placing land into trust is in violation of ANCSA and limits the State's sovereign jurisdiction in Alaska, which provides that "the State of Alaska's sovereignty over lands within its borders should not be determined by the

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[129] Native Village of Venetie I.R.A. Council v. Alaska, 687 F. Supp. 1380, 1382 (D. Alaska 1988), *rev'd,* 918 F.2d 797 (9th Cir. 1990), *opinion withdrawn and superseded on denial of reh'g*, 944 F.2d 548 (9th Cir. 1991), and *aff'd in part*, *rev'd in part*, 944 F.2d 548 (9th Cir. 1991).

[130] 687 F. Supp. 1380 (D. Alaska 1988).

[131] *Id.* at 1382.

[132] *Id.* at 1399.

[133] Landreth & Dougherty, *supra* note 114, at 331–32 (internal quotation omitted).

[134] Federally Recognized Indian Tribe List Act of 1994, Pub. L. No. 103-454, 108 Stat. 4791 (codified as amended 25 U.S.C. §§ 479a to 479a-l).

[135] I note that Alaska Native Nations were first included on the list in 1993 before Congress enacted the Federally Recognized Indian Tribe List Act, 58 Fed. Reg. 54364 (Oct. 21, 1993).

[136] *See* Katie John cases, *infra* note 133; *see also* Metlakatla Indian Community v. Dunleavy, 58 F.4th 1034, 1037 (9th Cir. 2023) (holding that the 1891 Act establishing the Metlakatla reservation grants to the Community and its members a non-exclusive right to fish in the off-reservation waters where they have traditionally fished).

[137] Alaska v. Newland, No. 23-CV-00007, (D. Alaska Jan. 17, 2023); *see also* Clarise Larson, *State sues feds over Tlingit and Haida land trust*, Juneau Empire (Jan. 17, 2023) https://www.juneauempire.com/news/state-sues-feds-over-tlingit-and-haida-land-trust/ [https://perma.cc/X8PP-YWJT].

political whims of federal officials."[138] Reclamation of ancestral lands is crucial to the restoration of the wellbeing of Native Nations who have endured centuries of colonialism, and specifically for the Tlingit whose tireless advocacy for self-determination has been well-documented.

The importance of land and the ability to continue a traditional subsistence living is central to Alaska Native resistance and advocacy. Evidentiary of the importance of subsistence to Alaska Native culture, the *Katie John* litigation between the state and the federal government spanning twenty-seven years culminated with the Ninth Circuit Court of Appeals decision in 2013, upholding a federal law providing rural subsistence fishing preference in federal waters.[139] Similar struggles surround Alaska Native democratic participation and voting rights.[140]

Congress and the executive branch historically acted on matters crucial to Alaska Natives including federal recognition, citizenship, and the ability to maintain traditional hunting and fishing or subsistence ways of life. This is further evidenced by the decades-long attempts for five Alaska Native communities to be added to ANCSA.[141] Where those actions have been lacking consent by the people themselves, Alaska Native advocacy is responsive whether through lobbying Congression or utilizing judicial processes. Senator Lisa Murkowski, who recognizes the power of the Alaska Native voting bloc and the increasing economic power of Alaska Native Corporations, has been known for being responsive to Alaska Native advocacy and for introducing responsive legislation in Congress.[142] The Alaska Native Nation experience illustrates the continual advocacy necessary to limit the impact of implicit and explicit attempts to restrict assertions of their inherent sovereignty. The state of Alaska has been threatened by the restoration of Alaska Native Nation governance and their growing economic impact, illustrating how delicate the original constitutional balancing act,

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[138] Complaint at 3, Alaska v. Newland, 3:23-CV-00007 (D. Alaska Jan. 17, 2023).

[139] *See* Robert T. Anderson, *The Katie John Litigation: A Continuing Search for Alaska Native Fishing Rights after ANCSA*, 51 Ariz. St. L. J. 845 (2019); John v. United States (Katie John III), 720 F.3d 1214 (9th Cir. 2013); John v. United States (Katie John II), 247 F.3d 1032 (9th Cir. 2001); State of Alaska v. Babbitt (Katie John I), 72 F.3d 698 (9th Cir. 1995) (referred to as the *Katie John* cases after the Ahtna Athabaskan elder who sought to continue subsistence fishing at traditional sites despite the Alaska State Board regulations closing such fisheries).

[140] *See generally* Tucker et. al., *supra* note 93 (describing the history of voting rights and discrimination against Alaska Natives in Alaska).

[141] The most recent attempt, Senate Bill 1889 would amend ANSCA to create corporations for the communities of Haines, Ketchikan, Petersburg, Tenakee, and Wrangell. Unrecognized Southeast Alaska Native Communities Recognition and Compensation Act, S. 1889, 118th Cong. (2023); *see* Sage Smiley, *Alaska delegation continues to push to add 'landless' Southeast communities to ANSCA*, Alaska Pub. Media (Aug. 04, 2023) https://alaskapublic.org/2023/08/04/alaska-delegation-continues-push-to-add-landless-southeast-communities-to-ancsa/ [https://perma.cc/T3D5-RJQK].

[142] *See* Grace Segers, *The Power of the Native Vote is Reshaping Alaska Politics*, The New Republic (Oct. 28, 2022).

which recognized that inherent Tribal, or sui generis, sovereignty can coexist with federal and state sovereignty, is in practice.

III. Federal Recognition, Citizenship, and Consent

The Alaska Native Nations' experience with recognition and Tribal sovereignty lends itself to both illuminating the successes of bending federal plenary power towards supporting Tribal sovereignty and to the challenges associated with federal recognition, particularly those challenges asserted by the state of Alaska.[143] By analyzing these issues and connecting them to: 1) the hesitancy to engage in the federal recognition process by Kānaka Maoli during the consideration of the Akaka bills post *Rice*; 2) the ability of CHamorus to vote on measures of self-determination in *Davis*; and 3) the hesitancy to become full U.S. citizens by American Samoa seen in *Fitisemanu,* we see that applying sui generis sovereignty and broadening Indigenous Peoples Law to these issues might provide greater measures of self-determination and a fuller more robust sense of democracy.

Perhaps more importantly, there continue to be concerns surrounding whether it is desirable, or even necessary, for Indigenous Peoples or Native Nations to be "recognized" by the federal government as sui generis sovereigns, or as U.S. citizens. These concerns raise questions about settler colonial containment and assimilation that are central to the future of Indigenous self-determination and self-governance. Placing a spotlight on issues of federal recognition is one of the most important cases involving Indigenous rights in Hawai'i: *Rice v. Cayetano*.[144]

A. Federal Recognition & Rice v. Cayetano

The Hawaiian monarchy was the seat of diplomacy in the Pacific before the United States imperial efforts to annex it were successful.[145] Treaties between the United States and Hawai'i between 1826 to 1875 recognized the sovereignty of Hawai'i and provided for international alliance and reciprocity.[146] Despite these treaties, and despite the existence of a well-established and formalized Hawai'i government based on both Kānaka Maoli and western principles, "members of the business community, primarily Americans

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[143] The conflation of Tribal governments and Alaska Native Corporations by Congress in the CARES Act presents another set of challenges that will likely continue to complicate issues of federal recognition and assertions of Tribal sovereignty, particularly over territorial jurisdiction and ancestral lands. *See* Yellen v. Confederated Tribes of Chehalis Reservation, 594 U.S. 338, 347–51(2021).

[144] 528 U.S. 495 (2000).

[145] *See* Kamanamaikalani Beamer, No MAkou Ka Mana Liberating the Nation 64–101 (2014); *see* MacKenzie, *supra* note 25 (recounting the early history of the Hawaiian monarchy's interactions with other nation-states and issues surrounding land and cultural sovereignty).

[146] Native Hawaiian Law: A Treatise, 268–69 (Melody Kapilialoha MacKenzie, Susan K. Serrano & D. Kapua'ala Sproat eds., 2015).

and Europeans," plotted to overthrow the Hawaiian monarchy.[147] Hawai'i was subsequently annexed by the U.S. Congress, without a vote by Kānaka Maoli or other citizens, via the Joint Resolution of Annexation in 1898, and established as a territory in 1900 by the Hawaiian Organic Act.[148]

Congress was not, much as in Alaska, silent on Kānaka Maoli issues while Hawai'i was a territory. Responding to territorial concerns on the "deteriorating social and economic conditions of the Hawaiian people," Congress set aside 203,000 acres of government and crown lands to be leased to Kānaka Maoli of not less than fifty percent aboriginal blood to encourage agricultural use in 1921.[149] Provisions recognizing this special relationship and duty to Kānaka Maoli were included in Hawai'i's enabling act in 1959 and these provisions were specifically required to be adopted into the state's constitution. The Hawaii Admission Act required the state to hold the ceded lands "as a public trust for the support of the public schools and other public educational institutions, for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act [of] 1920" (HHCA).[150]

When the state of Hawai'i updated its constitution in 1978, Kānaka Maoli leaders successfully advocated for the creation of a state entity that would "use income from the land taken from the illegal overthrow" of the Hawai'ian monarchy to benefit Kānaka Maoli.[151] The state constitutional amendments established the creation of the Office of Hawaiian Affairs (OHA) for the benefit of both Kānaka Maoli, as defined in the HHCA, and for those with any blood quantum.[152] There is a clear nexus between the establishment of OHA, the inclusion of trust lands for the benefit of Kānaka Maoli in the state constitution, the federal government's action establishing Hawaiian homesteads in 1920, and the historical unceded crown lands. In *Rice v. Cayetano*, the Supreme Court acknowledged this nexus but did not go so far as to explicitly state there is an established trust responsibility or duty of protection to Kānaka Maoli.[153]

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[147] *Id*. at 20.

[148] *Id*. *at* 626–28.

[149] Melody K. MacKenzie, *Ke Ala Pono—The Path of Justice: The Moon Court's Native Hawaiian Rights Decisions*, 33 U. Hawai'i L. Rev. 447, 467 (2011) (describing how the Hawai'i state supreme court has interpreted cases involving Native Hawai'ians, the public land trust, and the Office of Hawaiian Affairs to recognize historical injustice and the need for redress).

[150] Native Hawaiian Law, *supra* note 146, at 32 (citing Hawaii Admission Act, Pub. L. No. 86-3, §§4, 5 (f), 73 Stat. 4, 5–6 (1959)).

[151] Office of Hawaiian Affairs, *About* Office of Hawaiian Affairs, https://www.oha.org/about/#:~:text=OHA%20works%20to%20improve%20the,the%20funding%20of%20community%20programs; *see* Troy J. H. Andrade, Hawai'i '78: *Collective Memory and the Untold Legal History of Reparative Action for Kanaka Maoli*, 24 U. PA. J.L. & Soc. Change 85 (2021) (recounting the legislative history of the 1978 Hawai'i constitutional amendments that created OHA).

[152] Native Hawaiian Law, *supra* note 146, at 34.

[153] *Rice v. Cayetano*, 528 U.S. 495, 521–22 (2000) (the Court assumed, from the lower courts, the validity of the underlying administrative structure and trusts of OHA).

In *Rice v. Cayetano*, a settler Hawaiian citizen was denied the right to vote in an OHA trustee election. The *Rice* majority determined OHA's election of trustees, as a state election, was subject to the Fourteenth Amendment, and the act of limiting voting in the OHA trustee election to Kānaka Maoli, as defined by their ancestry, violated the Fifteenth Amendment. The Fifteenth Amendment prohibits denying the right to vote based on race.[154] The majority, in holding OHA's elections were race based, declined to recognize the special, political, relationship between Kānaka Maoli and the United States as synonymous with the special relationship that exists between Native Nations and the federal government. It distinguished *Morton v. Mancari*[155] from *Rice* because in *Mancari* the BIA's "Indian" preference was at issue and, in *Rice*, at issue was a state election for public officials.[156] In *Mancari* the BIA's preferential hiring of "Indians" was determined to be constitutional because the preference was granted "to Indians not as a discrete racial group, but, rather, as members of quasi-sovereignty tribal entities whose lives and activities are governed by the BIA in a unique fashion. . . [and] the preference [was determined to be] reasonably and directly related to a legitimate, nonracially based goal."[157] Similarly, the *Rice* dissent recognized that the colonial history of Hawai'i should afford Indigenous Peoples compensation for past wrongs, that under *Mancari* preferential treatment can be tied rationally to the fulfillment of Congress's unique obligation to Indigenous Peoples, and that OHA was an instrument for implementing the federal trust responsibility to "a once sovereign Indigenous people."[158] Lending credence to the establishment of a special, political trust relationship with Kānaka Maoli and the dissent's argument, Congress has enacted over 150 statutes for the benefit of Kānaka Maoli.[159]

In response to the *Rice* decision several bills were introduced to Congress by the late Senator Daniel Akaka that would have afforded federal recognition to Kānaka Maoli, but none were enacted.[160] The Department of the Interior (DOI) took up the federal recognition issue in 2014 and hosted consultation sessions on implementing a federal rule to establish "Procedures for Reestablishing a Government-to-Government Relationship with the Native Hawaiian Community."[161] However, the Kānaka Maoli community has been divided on federal recognition, debating whether it is prudent to become a nation-within-a-nation or to continue to seek politically

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[154] U.S. Const. amend. XV, § 1.

[155] 417 U.S. 535 (1974).

[156] *Rice*, 528 U.S. at 519–20.

[157] 417 U.S. 535, 554 (1974).

[158] *Rice*, 528 U.S. at 536–37, 548 (Stevens J., dissenting) (Ginsburg J. dissenting) (Justice Ginsburg joining in Part II of Justice Stevens dissent and writing separately).

[159] 43 C.F.R. pt. 50.1 (2016).

[160] Native Hawaiian Law, *supra* note 146, at 312.

[161] *See* 43 C.F.R. pt. 50 (2016).

separate sovereignty.[162] In 2016, the DOI finalized the rulemaking, setting the stage for a process for federal recognition, should Kānaka Maoli decide it is in their best interest to pursue it.[163] Providing a process via a federal regulation does not force Kānaka Maoli to engage in federal recognition, but it provides the option. Of course, becoming incorporated into the federal polity comes with the attendant issues of federal plenary power as seen in Alaska, although Hawai'i's state constitution may provide more amenable conditions for shared sovereignty.[164] Notably, the effects of *Rice* continue to impact Indigenous Peoples beyond Hawai'i.

B. Outside of Indian Affairs: Davis v. Guam

Guåhan was annexed by the United States via the Treaty of Paris at the end of the Spanish American war in 1898.[165] Less than two weeks after the Treaty of Paris was signed, President William McKinley issued Executive Order No. 108-A assigning administrative authority of Guåhan to the U.S. Navy.[166] Over the next several decades, from 1901 to 1950, Guåhan petitioned Congress eight times requesting an end to military rule and the establishment of a civil government.[167] The petition in 1901 asked for Congress to take action to establish "a permanent government in this island that will enable us to mold our institutions to the American standard, and prepare ourselves and our children for the obligations and enjoyment of the rights and privileges to which, as loyal subject of the United States, we feel ourselves rightfully entitled."[168] The 1901 petition also called the U.S. military rule "highly repugnant," and provided "fewer permanent guarantees of liberty and property rights" than when under Spanish occupation.[169]

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[162] *See* Anita Hofschneider, *Biden Raises Hopes for Native Hawaiians Seeking Federal Recognition*, Honolulu Civil Beat (Jan. 26, 2021) https://www.civilbeat.org/2021/01/biden-raises-hopes-for-native-hawaiians-seeking-federal-recognition/ [https://perma.cc/3J7U-BPC6].

[163] 43 C.F.R. pt. 50 (2016).

[164] *See* William Hensley & John Starkey, *Alaska Native Perspectives on the Alaska Constitution*, 35 Alaska L. Rev. 2, 134 (2018) (describing the historic interpretation and the exclusion of Alaska Native subsistence rights through the "common use" and equal protection of natural resource use clauses of Article VIII of the Alaska state constitution and contrasting them to the Hawai'i state constitution's explicit protection of Indigenous subsistence and traditional use rights).

[165] Treaty of Peace Between the United States and Spain, (Dec. 10, 1898) S. Treaty Doc. No. 57-182 (1902).

[166] United States v. Government of Guam, No. CV 17-00113, 2018 WL 6729629, at *2 (D. Guam Dec. 21, 2018).

[167] Davis v. Guam, 932 F.3d 822, 825 (9th Cir. 2019); *see* Smithsonian National Portrait Gallery, 1898 U.S. Imperial Visions and Revisions, Petition Relating to Permanent Government for Island of Guam https://1898exhibition.si.edu/node/172 [https://perma.cc/GCJ6-Z89C].

[168] John D. Long, U.S. Department of the Navy, A Petition From Inhabitants of Guam Relating to a Permanent Government, H. R. Doc. No. 419, 1st Sess., at 3, (1902), https://www.guampedia.com/1901-petition/ [https://perma.cc/R7FZ-N478].

[169] *Id*. at 2.

Despite these repeated petitions to Congress requesting the establishment of a commission to study the "situation and needs of [the] people" Guåhan residents remained under military governance until 1950[170] when CHamoru resistance and national media attention forced the transfer of control to the DOI[171] along with the subsequent enactment of Guam's organic act.[172] The Immigration and Nationality Act (INA) was passed two years later and replaced the citizenship provisions in the organic act, providing citizenship to all Guåhan residents who were born after the INA's enactment.[173] The Guåhan-United States relationship restricts their Congressional representative from voting on the House floor,[174] and restricts Guåhan participation in federal elections. These restrictions led to a resurgence of resistance in the 1970s that resulted in the establishment of two commissions focused on decolonization and self-determination.[175] The purpose of the Commission on Decolonization is to educate the people of Guåhan on options for political sovereignty, such as statehood, independence or free association, in preparation for a political status plebiscite.[176] However, in *Davis v. Guam* the ability for Guåhan legislature to organize the CHamoru for a vote on their political evolution towards self-government was restricted for violating the Fifteenth Amendment.[177]

In *Davis*, the Ninth Circuit relied upon *Rice* to determine that Guåhan's legislature may not restrict voting to "the Native inhabitants of Guam" when seeking to determine the "official" preference regarding the political relationship with the United States.[178] The plebiscite was not a vote for choosing between statehood, independence, or free association, but was a measure to gauge the will of the people. Determining that the language in the law in question was a proxy for race, Guåhan was not allowed to proceed with the vote.[179] Julian Aguon, the CHamoru attorney representing Guåhan in the Ninth Circuit, summarizes the impact of the case providing,

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[170] Except for a period of Japanese occupation during WWII from 1941-1944. *See Davis*, 932 F 3d at 825.

[171] Exec. Order No. 10077, 14 Fed. Reg. 5523 (Sep. 7, 1949), as amended by Exec. Order No. 10137, 15 Fed. Reg. 4241 (Jun. 30, 1950); *see* Anne P. Hattori, Righting Civil Wrongs: The Guam Congress Walkout of 1949 (1995) (M.A. thesis, University of Hawai'i at Manoa), https://scholarspace.manoa.hawaii.edu/items/4ca69f26-eb4a-47fc-98e6-c59764818c0d [https://perma.cc/3VTE-HQPE].

[172] Michael P. Perez, *Contested Sites: Pacific Resistance in Guam to U.S. Empire*, 27 Amerasia 97, 98 (2001).

[173] Davis v. Guam, 932 F.3d 822, 826–27 (9th Cir. 2019).

[174] Campbell, *supra* note 26, at 2549.

[175] *Davis*, 932 F.3d at 826–27; Escudero, *supra* note 5, at 460 (describing the commissions formed after a civil government was established including the Commission on Self-Determination and the Commission on Decolonization).

[176] Commission on Decolonization, Government of Guam, https://decol.guam.gov/ [https://perma.cc/5UEL-UXDS].

[177] *Davis*, 932 F.3d at 826.

[178] *Id.* at 824.

[179] *Id.* at 824–25.

"[i]t will now be even more difficult to determine the collective desire of a colonized people because we cannot even name those people in order to ask them."[180]

As Guåhan grapples with amending the law to avoid further constitutional violations, CHamoru resistance and advocacy continue to push back against the machinations of settler colonial democracy. The Commission on Decolonization's Independence Task Force provided a statement to the press in 2020 in response to the case: "This fight for justice is far from over. We cannot allow this denial or this case in general to hinder this pursuit of sovereignty and justice for the CHamoru people of Guåhan[.]"[181] Developing over several decades, the contemporary CHamoru movements for self-determination and decolonization were restricted by the Bill of Rights included in Guam's Organic Act that extended the Fourteenth and Fifteenth Amendments to Guåhan.[182] The use of race to deem "unincorporated" territories unfit for statehood and the use of race by the *Davis* Court over 100 years later to restrict Indigenous measures of self-determination illustrate how settler colonialism continually shifts to restrict self-determination. The sui generis sovereignty afforded Native Nations requires inclusion within the federal polity via federal recognition, but CHamoru have an opportunity to retain greater sovereignty should they vote for independence from the United States.[183] In this sense, CHamoru may be better situated to restore full sovereignty rather than work within the sui generis sovereignty that might be afforded them should they elect to move towards statehood.

Conversely, American Samoan advocacy and resistance has shaped the settler colonial relationship in a more deliberate manner. By ensuring Samoan customs were included in their Instruments of Cession and by intervening in American Samoan citizenship cases, the American Samoan Government has influenced the judiciary's reading of the *Insular Cases* to include American Samoan consent.

C. Refusing Citizenship: Fitisemanu v. United States

American Samoa was "voluntarily" ceded after the Tripartite Convention in Berlin in 1889 between Britain, Germany, and the United

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[180] Julian Aguon, The Properties of Perpetual Light 65 (2021) (the lead litigator in *Davis v. Guam* providing reactions to the case).

[181] Steve Limtiaco, *Independence task force: Davis case not the end of sovereignty pursuit*, Pacific Daily News (May 7, 2020), https://www.guampdn.com/news/local/independence-task-force-davis-case-not-the-end-of-sovereignty-pursuit/article_0ac957c4-7f95-506a-93d1-1f1ced5ec53e.html [https://perma.cc/4NMT-WXJ5].

[182] See 48 U.S.C.A. § 1421b(u).

[183] Joseph P. Bradley, An Analysis of the Economic Impact of Guam's Political Status Options vii (2000) (providing independence from the U.S. "would significantly loosen the ties between Guam and the United States, but would provide the greatest latitude to the people of Guam in defining and pursuing their own destiny . . .").

States.[184] American Samoa's experiences with military rule plagued the newly formed American Samoan territory, much like in Guåhan and Alaska. Dissimilarly, Samoan leadership ensured their unique customary land tenure rights would endure cession by the United States. When the Instruments of Cession were signed by Samoan *matais* (chiefs) in 1900 and 1904, they preserved the Samoan right to continue their customary land tenure, providing "for the preservation of the rights and property of the inhabitants of said Islands"[185] and "also that the rights of the Chiefs in each village and of all people concerning their property according to their custom shall be recognized."[186] These protections were limited, however, as the United States failed to institute a territorial government in American Samoa, leaving the military to administer governance.[187] During the interim period, between 1900 and 1929, the United States Navy administered governance instituting martial law and a totalitarian form of government. The Navy appointed leadership to legislative and executive functions with Samoan leadership cabined to a position as Secretary of Native Affairs.[188] Taxation, miscegenation laws forbidding interracial marriage between Navy personnel and Samoans,[189] and the restrictions against Samoan participation in government, led to Samoan resistance, which took the form of protests and demonstrations by Samoan matai who were then punished by imprisonment by the Navy's government.[190]

This resistance (the Mau movement) sought to further Samoan land rights, self-determination, and cultural identity, and along with advocacy by the Committee of the Samoan League, eventually led Congress to ratify the Deeds of Cession and establish a congressional commission on governance

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[184] J.V. Langkilde, American or Samoan: Understanding Samoan Opposition to U.S. Citizenship 5 (Nov. 22, 2022) (unpublished manuscript) (on file with author) (describing the Instruments of Cession as disingenuously citing the need to restore order that the U.S. had a role in upsetting in Samoa); *see* Fitisemanu v. United States, 1 F.4th 862, 866 (10th Cir. 2021) (noting recent scholarship has questioned the traditional view that the relationship between American Samoa and the United States has been largely amicable and that rather it has been "built more on domination than friendship").

[185] Instrument of Cession Signed on April 17, 1900, by the Representatives of the People of Tutuila, Apr. 17, 1900 [hereinafter Treaty of Cession of Tutuila] https://history.state.gov/historicaldocuments/frus1929v01/d853 [https://perma.cc/SEL7-RV4Y].

[186] Instrument of Cession Signed July 14, 1904, by the Representatives of the People of the Islands of Manua, https://history.state.gov/historicaldocuments/frus1929v01/d855 [https://perma.cc/K557-6VY5].

[187] Exec. Order No. 125-A, Places the Tutuila islands under control of the Navy Department (1900).

[188] Langkilde, *supra* note 183, at 10 (citing United States Navy, Tutuila, *General orders issued by Naval Governor, and documents relative thereto*, 17 [entered into force January 1, 1903]).

[189] Ross Dardani, *Citizenship in Empire: The Legal History of U.S. Citizenship in American Samoa, 1899-1960*, 2020 Am. J. Legal Hist. 60, 331 (2020).

[190] Langkilde, *supra* note 184, at 13 (citing *American Samoa: Hearings before the Commission Appointed by the President of the United States In Accordance with Public Resolution No. 89*, 70th Cong. 330 (1930)).

in 1928.[191] The commission recommended Samoans be granted U.S. citizenship resulting in a proposed organic act being introduced into Congress.[192] Notably, the proposed bill, in response to the commission's recommendations included pathways to dual citizenship where U.S. citizens could also be citizens of American Samoa.[193] But Congress never enacted this organic act for American Samoa due to declining political will in Congress.[194] American Samoans were also not included in the INA and currently are the only territorial residents classified as U.S. nationals.[195] While a proposal to grant citizenship was introduced in Congress in 1950, Samoan *matai* requested any such proposal be delayed for a decade, citing concerns over the potential for Samoan land tenure laws to be deemed unconstitutional should citizenship be granted.[196] These concerns expressed by Samoan matai in the 1950s continue, as evidenced by *Fitisemanu* and its predecessor *Tuana v. United States*.[197]

As discussed briefly in Part I, in *Fitisemanu*, American Samoan nationals living in the state of Utah sued the United States for a declaratory judgment affirming their birthright citizenship under the Citizenship Clause. The Tenth Circuit declined to interpret the Constitution as extending citizenship to American Samoa, providing that historically "citizenship generally came from some kind of ad hoc legal procedure—'treaties, acts of Congress, administrative rulings, and judicial decisions'—rather than as an automatic individual right guaranteed by the Constitution, and in the case of the territories "every extension of citizenship to inhabitants of an overseas territory has come by an act of Congress."[198] In terms of precedent supporting this interpretation, the court relied on the *Insular Cases* framework for the proposition that determining fundamental rights requires ascertaining "which guarantees of the Constitution should apply in view of the particular circumstances, the practical necessities, and the possible alternatives which Congress had before it."[199] Utilizing this standard, called the "impracticable and anomalous" standard, the court determined "the expressed preferences of the American Samoan people, and the potential disruption of their way

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[191] Dardani, *supra* note 189, at 329–36 (2020).

[192] *Id.* at 336, 343.

[193] *Id.*at 339.

[194] *Id*. at 341-45.

[195] Fitisemanu v. United States, 1 F.4th 862, 865 (10th Cir. 2021) (describing American Samoa as one of several unincorporated territories but the only territory where birthright citizenship has not been granted by Congress).

[196] Langkilde, *supra* note 184, at 1–2, (citing David Chappell, *The Forgotten Mau: Anti-Navy Protest in American Samoa, 1920-35*, 69 Pac. Historical Rev.217, 218 (2000)).

[197] 788 F.3d 300 (D.C. Cir. 2015).

[198] *Fitisemanu*, 1 F.4th at 868.

[199] *Id.* at 879.

of life" counseled against judicially imposing citizenship on contemporary American Samoa.[200]

Concerns expressed by the American Samoan Government over whether citizenship, and its attendant constitutional provisions, would disrupt the American Samoan way of life (*fa'a* Samoa), including the traditional matai chief social structure, communal land ownership, and communal regulation of religion, were practical considerations given weight by the court. Given the judiciary's holdings in *Rice v. Cayetano* and *Davis v. Guam*, where Kānaka Maoli and CHamoru Peoples were denied the right to hold elections for Indigenous self-determination under the Fifteenth (and in *Rice* also the Fourteenth) Amendment, the concerns of the American Samoan Government are valid. If a citizenship model was applied to American Samoa, would Samoan law restricting the sale of community land to anyone with less than fifty percent Samoan ancestry be subject to the Fourteenth Amendment?[201] Would the communal regulation of religion be subject to the free exercise clause? Arguably, these are issues that may only arise should statehood become a reality in American Samoa's future, but the American Samoan Government's concerns for *fa'a* Samoa's future, should citizenship be applied, recognize the "unpredictable" constitutional ramifications that could occur.[202]

By giving priority to the preference against citizenship expressed by the intervening American Samoan Government, the court recites foundational principles of governmental consent drawing upon the Federalist Papers[203] and the settler colonial prerogative to withdraw from the British empire and to create independent governments in America.[204] Recognizing the irony in this history, the *Fitisemanu* court afforded respect for the principle of democratic consent, noting it "should be at its zenith in the case of the territories born from American imperial expansion, a project that was always in significant tension with our aspirations toward representative democracy."[205]

The advocacy of the American Samoan Government resulted in the *Fitisemanu* court reframing the *Insular Cases* to foster a more nuanced application of the law of the territories, while it reiterated that Congress was the appropriate body to grant citizenship, the principle of democratic consent also played an important role in the court's decision-making. *Fitisemanu*

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[200] *Id.*

[201] *See* Shelley v. Kraemer, 334 U.S. 1, 20 (1948) (determining that enforcing racially restrictive property covenants would constitute a state action and violate the equal protection clause of the Fourteenth Amendment).

[202] Brief of Respondent-American Samoa Government at 18, Fitisemanu v. United States, 143 S.Ct. 362 (2022) (No. 21-1394).

[203] *Fitisemanu*, 1 F.4th at 879 (citing Alexander Hamilton's The Federalist No. 22 for the premise that the "fabric of American empire ought to rest on the solid basis of the consent of the People").

[204] *Id.*

[205] *Id.* at 880.

reiterates the dynamic nature of settler colonialism and the importance of Indigenous advocacy and resistance to it.

Conclusion

What the history of the United States' project of empire in the Pacific illuminates is at least three-fold. First, Indigenous Peoples and Native Nations have resisted the project of empire since contact with colonial nation-states, and that resistance has been as dynamic as the project of empire itself. By connecting the Indigenous experiences in Alaska, Hawai'i, Guåhan, and American Samoa we increase our understanding of how settler colonial democracy has historically operated, including how military rule spurned Indigenous resistance, which then catalyzed the creation of civil governments. Additionally, the centennial of the 1924 Indian Citizenship Act lends itself to understanding how settler colonial democracy has historically and contemporarily impacted Indigenous resistance, illuminating how dynamic such Indigenous resistance must be. During the assimilation era, citizenship was seen by some as a measure that would increase individual legibility within the federal polity and therefore seen as a measure to increase Indigenous self-determination. Contemporaneously, however, American Samoans have refused citizenship due to the *Rice* and *Davis* court's holdings that failed to recognize certain state or territorial voting measures as political acts by Native Nations seeking self-determination.

Second, this dynamic resistance has impacted the form and function of federal plenary power in Indian affairs, often but not consistently, in service of Native Nation sovereignty. Alaska Native Nations continue to fiercely advocate for self-determination through lobbying Congressional representatives, through initiating and responding to litigation that seeks to undermine such self-determination, and operating within the federal polity of Indian affairs to reclaim ancestral lands. While Alaska Native Nations are within Indian affairs, their experience with Congress during the enactment of ANSCA was limited and led to the loss of subsistence hunting and fishing rights, which are still not fully restored. Adding to this substantial injury is how the state of Alaska continues to, under certain gubernatorial administrations, sue Alaska Native Nations who seek to retain and reclaim traditional ways of life and ancestral lands.

And third, these experiences serve as warnings to Indigenous Peoples within the federal polity, whether they are in Hawai'i or deemed a territory, leading to substantial, and reasonably justifiable, distrust of settler colonial democracy. Resistance to seeking federal recognition, refusal of U.S. citizenship, and the desire to self-organize should be supported by the federal government's policy supporting Native Nation self-determination.

The *Fitisemanu* court worked within the established framework of the doctrinally problematic *Insular Cases* to focus on democratic consent, and Alaska Native Nations have continued to reclaim their sui generis sovereignty

by working to shape plenary power to further their self-determination. Kānaka Maoli have a process established under the DOI's regulatory structure should they decide to politically organize. Should CHamoru pursue statehood they too might be afforded the opportunity to politically organize under a similar DOI process.

Such democratic consent however would do little to provide CHamoru the right to politically organize a vote under territorial law much as it would do little to provide Kānaka Maoli such rights under state law. Post *Rice*, questions surrounding whether to pursue federal recognition that would afford Kānaka Maoli sui generis sovereignty were raised but were contentious given the increasingly common Kānaka Maoli perspective that the United States continues to occupy Hawai'i illegally. This desire for full sovereignty and freedom from settler colonialism is understandable.

Whether to be included in the federal polity and whether sui generis sovereignty is the most desirable option are choices Indigenous Peoples must make for themselves. I've argued elsewhere that shifting the focus away from federal plenary power toward the federal government's trust responsibility might create more collaborative, resilient, and shared governance institutions by and between Native Nations, the federal government and the states.[206] The trust responsibility might also become more robust by requiring the democratic consent of the Native Nation in question, as illustrated by the *Fitisemanu* court and by the DOI promulgation of rules providing an avenue for Kānaka Maoli federal recognition should they desire it. However, "given [that Native Nations] had their own governmental and societal structures prior to and through the United States extending its dominion over them," requiring some sort of federal recognition or act of Congress to vote on measures of self-determination such as the Guåhan plebiscite or the OHA trustee elections, "it seems ironic that the power to decide that governmental status would lie solely in the hands of the colonizer's Congress." [207]

The doctrine of plenary power in both Indian affairs and the law of the territories looms large over Indigenous experiences with settler colonial democracy. Democratic consent, sui generis sovereignty, and the United States trust responsibility to Native Nations are all principles that should inform the use of federal plenary power, the original constitutional balancing act, and shape the relationship between Native Nations and the United States. Ultimately, achieving Indigenous self-determination within settler colonial democracy requires consistent resistance and proactive advocacy.[208]

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[206] Menka & Spitz, *supra* note 62, at 253–59 (arguing that, when viewed through vulnerability theory, the federal government's trust responsibility to Native Nations is a "federal responsibility to confer and build resilience in Indigenous communities" and a project of resilience restoration); *see also generally* Fletcher, *supra* note 39 (providing a history on the federal government's trust responsibility as a duty of protection to Native Nations).

[207] Langkilde, *supra* note 184, at 32.

[208] *See generally* Kirsten Matoy Carlson, *Bringing Congress and Indians Back into Federal Indian Law: The Restatement of the Law of American Indians*, 97 Wash. L. Rev. 725, 737 (2022) (describing how "Tribal advocacy and active participation in the federal legislative process [has]

Only through such continued advocacy might we see a fuller vision of sui generis sovereignty, or perhaps a return to true nation-to-nation sovereignty, which recognizes self-determination for Indigenous Peoples and Native Nations and increases the ability of the United States to achieve its purported dreams of "liberty and justice for all."[209]

encouraged Congress to remake federal Indian law over the past five decades based on foundational principles of federal Indian law").

[209] Pledge of Allegiance 4 U.S.C.A. § 4.