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Citizenship, Race, and Statehood

Kristina M. Campbell

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ABSTRACT

This Article will discuss the interplay between citizenship, race, and ratification of statehood in the United States, both historically and prospectively. Part II will discuss the development and history of the Insular Cases and the creation of the Territorial Incorporation Doctrine ("TID"), focusing on the Territory of Puerto Rico and how the issues of citizenship, race, and statehood have evolved in shadow of empire as a result. Part III will look back on the admission to the Union of New Mexico and Arizona—the forty-seventh and forty-eighth states—and discuss the substantial difficulties these territories had in getting admitted for statehood due to their majority non-white, Spanish-speaking populations. This section also reflects on the de facto requirement of whiteness as a prerequisite for statehood as exemplified by the larger struggle for territorial statehood in the West, and the detrimental impact that the culture of white supremacy has had on the ability of territories to achieve full membership in our society. Part IV will examine the factors surrounding the admission of our fiftieth State, Hawai'i, and the impact that its large Native Hawaiian and other Asian/Pacific Islander population had on its quest for statehood. This part will also examine the strategic reasons that the United States pursued statehood for Hawai'i, due to its location in the South Pacific and the need to defend the West Coast of the United States after World War II and the Korean War. Part V discusses the unique status of the District of Columbia which, while not a territory, is a modern corollary to the issues of colonialism, race, and statehood that the territories have historically faced when seeking admission to the Union. Finally, the Article concludes with a discussion about the inability of United States citizens who are

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residents of the United States territories to elect voting members to Congress and reflects on how this disenfranchisement of majority-minority territories has prevented the United States from becoming a truly representative democracy.

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I. INTRODUCTION

"*States are not made, nor patched; they grow*."[1]

The power to admit new states to the Union is granted to Congress by Article IV of the United States Constitution.[2] It would seem, to a casual observer of American democracy, that territories of the United States would be likely—if not presumptive—candidates for admission to statehood. However, territories of the United States have historically faced a long, difficult road to statehood in Congress.[3] Although the specific reasons for Congressional opposition to territorial statehood are varied, there is a common thread that runs through the travails of the territories in their quest for statehood—the supremacy of whiteness as an implicit prerequisite for full membership in the Union.[4]

At the heart of the question of the rights of territorial residents is their entitlement to full membership in the Union as *jus soli* citizens under the Fourteenth Amendment of the United States Constitution.[5] As in the case of Puerto Rico, the United States government has long maintained that persons born in the United States territories are not constitutionally entitled to United States citizenship.[6] This position is based on the fact that because Puerto Rico became subject to United States sovereignty under the Treaty of Paris of 1898,[7] "the citizenship status of the Puerto Rican people was subject to the will of Congress,

1. JOHN MASEFIELD, THE EVERLASTING MERCY 52 (1911).

2. U.S. CONST. art. IV, § 3, cl. 1 ("New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.").

3. *See* Roger J. Bell, *Admission Delayed: The Influence of Sectional and Political Opposition in Congress on Statehood for Hawaii*, 6 HAWAIIAN J. HIST. 45, 45 (1972) ("[F]ew territories were admitted to statehood immediately upon fulfilling these criteria for entry. Most confronted considerable politically-motivated or sectionally-based opposition in Congress to their statehood objectives.").

4. *See* Laura E. Gómez, *Off-White in an Age of White Supremacy: Mexican Elites and the Rights of Indians and Blacks in Nineteenth-Century New Mexico*, 25 CHICANO-LATINO L. REV. 9, 18–21 (2005).

5. The Citizenship Clause of the Fourteenth Amendment provides that "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States . . . ." *See* U.S. CONST. amend. XIV, § 1.

6. *See* Lisa Maria Perez, Note, *Citizenship Denied: The* Insular Cases *and the Fourteenth Amendment*, 94 VA. L. REV. 1029, 1036 (2008).

7. Treaty of Peace Between the United States of America and the Kingdom of Spain, Spain-U.S., art. II, Dec. 10, 1898, 30 Stat. 1754 [hereinafter Treaty of Paris of 1898].

pursuant to Article IX of that Treaty."[8] This interpretation of the interplay between the Citizenship Clause of the Fourteenth Amendment and Congressional supremacy over "[t]he civil rights and political status of the native inhabitants of the territories"[9] in fact left the residents of Puerto Rico stateless for a time following the execution of the Treaty of Paris:

> Although Puerto Ricans were no longer Spanish citizens, Congress made no pronouncements on the issue of citizenship until the Foraker Act of 1900 established the first civil government for Puerto Rico under U.S. federal rule. Under the Foraker Act, persons born in Puerto Rico were governed almost exclusively by federal decree, yet the Act declared them to be only "citizens of Porto Rico." This was an "anomalous" and essentially meaningless citizenship status that did not convey Puerto Ricans any form of sovereignty and was not recognized by other nations. It was not until the Jones Act of 1917 that all "citizens of Porto Rico" were declared to be citizens of the United States.[10]

In addition, Congress is given the authority under the United States Constitution and the Northwest Ordinance to "dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."[11] The Jones Act of 1917[12] and its impact on Puerto Rican citizenship was discussed in *Balzac v. Porto Rico*,[13] one of the cases that makes up of the body of law known as the *Insular Cases*.[14] *Balzac* is known for its decision reasserting the Supreme Court's opinion in *Downes v. Bidwell*[15] that persons born in Puerto Rico had no constitutional right to United States citizenship.[16] The grant of

8. *See* Perez, *supra* note 6, at 1036 n.20 ("Article IX of the treaty provided that '[t]he civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by the Congress.'" (alteration in original) (quoting Treaty of Paris of 1898, *supra* note 7, at art. IX)).

9. *Id.* (quoting Treaty of Paris of 1898, *supra* note 7, at art. IX).

10. *Id.* at 1036–37. Perez further observes that "the grant of citizenship was only derivative, as the Jones Act did not make birth in Puerto Rico the rule for acquisition of U.S. citizenship." *Id.* at 1037.

11. ROGER BELL, LAST AMONG EQUALS: HAWAIIAN STATEHOOD AND AMERICAN POLITICS xv (1984) (citing U.S. CONST. art. IV, § 3, cl. 2).

12. Jones Act, ch. 145, 39 Stat. 951 (1917) (codified as amended at 8 U.S.C. § 1402).

13. 258 U.S. 298, 305–08 (1922).

14. *See infra* Part II.A.

15. 182 U.S. 244 (1901).

16. *See Balzac*, 258 U.S. at 313 ("[W]e find no features in the [Jones] Act of . . . 1917 from which we can infer the purpose of Congress to incorporate Porto Rico into the United States with the consequences which would follow."). In *Downes*, the Supreme Court stated

citizenship to the residents of a territory was thus held to be indicative of the incorporation of that territory, a practice that became known as the Territorial Incorporation Doctrine ("TID").[17] This understanding of the relationship between Congress and the territories has been characterized "as a matter of Congressional largesse rather than constitutional command."[18]

The TID's combination of constitutional authority and congressional discretion has led to the development of a complicated—and constitutionally suspect[19]—interpretation of the law of citizenship as applied to the territories. Thus, the Supreme Court's decision in the *Balzac* case—perhaps more than any other—exemplifies the jurisprudence that evolved in the *Insular Cases*. Additionally, the treatment of Puerto Rico after its annexation by the United States at the conclusion of the Spanish-American War in 1898 is indicative of how the United States government views the civil rights of territorial residents. Indeed, when viewed through the tripartite lens of citizenship, race, and statehood, it is easy to see how the law of the territories have developed in a manner that virtually guarantees second-class citizenship for individuals born in the United States territories, notwithstanding their statutory grants of United States citizenship at birth.[20]

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that "the practical interpretation put by Congress upon the Constitution has been long continued and uniform to the effect that the Constitution is applicable to territories acquired by purchase or conquest, only when and so far as Congress shall so direct." 182 U.S. at 278–79.

17. *See infra* Part II.A.1.

18. Perez, *supra* note 6, at 1041.

19. *See, e.g.*, Carlos R. Soltero, *The Supreme Court Should Overrule the Territorial Incorporation Doctrine and End One Hundred Years of Judicially Condoned Colonialism*, 22 CHICANX-LATINX L. REV. 1, 1 (2001) ("Can the United States' Bill of Rights coexist with colonial rule? Do the guarantees in the Bill of Rights limit what the federal government may do, consistent with the Constitution, in its territories? Is the current state of constitutional law in U.S. territories coherent?").

20. *See, e.g.*, Riley Edward Kane, Note, *Straining Territorial Incorporation: Unintended Consequences from Judicially Extending Constitutional Citizenship*, 80 OHIO ST. L.J. 1229, 1231 (2019) ("*Fitisemanu v. United States*, the most recent action involving the national/citizen distinction, is currently underway in the Federal District Court for the District of Utah. John Fitisemanu and his co-plaintiffs currently live in Utah but were born in American Samoa, and as a result, they are U.S. nationals and did not become U.S. citizens at birth. The plaintiffs assert their national status unfairly causes them 'unique obstacles' in obtaining work, accessing government benefits, and sponsoring the immigration of family members, and demeans them as second-class Americans. The plaintiffs seek a decision extending the Fourteenth Amendment's guarantee of citizenship to American Samoans.") (footnotes omitted) (citing Fitisemanu v. United States, 426 F. Supp. 3d. 115 (D. Utah 2019), *rev'd*, 1 F.4th 862 (10th Cir. 2021).

II. PUERTO RICO: AMERICAN EMPIRE

The power of the Congress of the United States over the territories is "general and plenary."[21] *To the Congress is committed, by the Constitution, the admission of new States into the Union.*[22]

The issue of race and language was always at the forefront of the territorial rights debate. Not only were the newly annexed territories physically separated from the continental mainland of the United States, but they were also "populated by established communities whose inhabitants differed from the dominant stateside societal structure with respect to their race, language, customs, cultures, religions, and even legal systems."[23] Indeed, "[i]n 1898, Spanish was the official language of Puerto Rico and the vernacular of all of its native inhabitants. It was also the official language of the Philippines, with a substantial number of native inhabitants speaking [Spanish] to some degree in their vernacular, particularly in the cities."[24]

United States Circuit Judge Juan R. Torruella has opined that "the obvious belief in racial superiority that supported the 'manifest destiny' policies expressed by the controlling political factions—is crucial to understanding how the *Insular Cases* became the law of the land despite constitutional and historic precedents that augured a different outcome."[25] Judge Torruella has also argued that the decision announced in the *Insular Cases* involving TID "is as invidious a doctrine as that which the same Supreme Court announced in *Plessy v. Ferguson.*"[26]

21. Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1, 42 (1890); *see also* Simms v. Simms, 175 U.S. 162, 168 (1899); Dorr v. United States, 195 U.S. 138, 140 (1904).

22. U.S. CONST. art. IV, § 3, cl. 1.

23. Juan R. Torruella, *Ruling America's Colonies: The* Insular Cases, 32 Yale L. & POL'Y REV. 57, 62–63 (2013) [hereinafter *Ruling America's Colonies*] (footnotes omitted). "In 1900, out of a total population of seventy-six million in the United States, 87.9% were white, 11.6% were black, and 0.5% were of other races." *Id.* at 63 n.22 (citing FRANK HOBBS & NICOLE STOOPS, U.S. CENSUS BUREAU, DEMOGRAPHIC TRENDS IN THE 20TH CENTURY 77 figs.3.3 & 3.4 (2002)).

24. *Id.* at 63 n.23.

25. *Id.* at 64.

26. *See* Soltero, *supra* note 19, at 1; *see also* Neil Weare, *Why the* Insular Cases *Must Become the Next* Plessy, HARV. L. REV. BLOG (Mar. 28, 2018), https://blog.harvardlawreview.org/why-the-insular-cases-must-become-the-next-plessy/ ("[The] comparison between the *Insular Cases* and *Plessy* has force at a number of levels. As a legal matter, *Plessy* invented a legal doctrine of 'separate but equal' which provided constitutional cover for America's system of racial segregation. T*he Insular Cases*, fueled by the same racial impulses as *Plessy*, devised a new category of 'unincorporated' territories, providing a constitutional justification for ruling the populations of overseas

A. The Insular Cases*: "Political Apartheid"*[27]

The *Insular Cases* are a series of United States Supreme Court cases decided between 1901 and 1922 that interpreted the constitutional status of the insular territories of the United States.[28] In the *Insular Cases*, the United States Supreme Court interpreted the following language of Article IX of the Treaty of Paris ending the Spanish-American War of 1898: "[t]he civil rights and political status of the native inhabitants of the territories . . . ceded to the United States shall be determined by the Congress." [29] The Supreme Court's interpretation of this language answered the fundamental constitutional question concerning the status of the territories: "[D]oes the Constitution follow the flag[?]"[30] And, in the case of Puerto Rico, was it "excluded from the term 'United States' simply because it was a territory rather than a State?"[31]

Because Puerto Rico is an "unincorporated" territory, it is not part of the United States in the Constitutional sense.[32] In addition to Judge

territories without regard to traditional constitutional limitations or democratic principles.").

27. Juan R. Torruella, *The* Insular Cases: *The Establishment of a Regime of Political Apartheid*, 29 U. PA. J. INT'L L. 283 (2007) [hereinafter *The Establishment of a Regime of Political Apartheid*].

28. Reference to the *Insular Cases* generally includes the following Supreme Court decisions: Balzac v. Porto Rico, 258 U.S. 298 (1922); Ocampo v. United States, 234 U.S. 91 (1914); Ochoa v. Hernandez y Morales, 230 U.S. 139 (1913); Dowdell v. United States, 221 U.S. 325 (1911); New York *ex rel.* Kopel v. Bingham, 211 U.S. 468 (1909); Kent v. Porto Rico, 207 U.S. 113 (1907); Grafton v. United States, 206 U.S. 333 (1907); Trono v. United States, 199 U.S. 521 (1905); Rassmussen v. United States, 197 U.S. 516 (1905), *abrogated by* Williams v. Florida, 399 U.S. 78 (1970); Mendezona y Mendezona v. United States, 195 U.S. 158 (1904); Kepner v. United States, 195 U.S. 100 (1904); Gonzales v. Williams, 192 U.S. 1 (1904); Dorr v. United States, 195 U.S. 138 (1904); Hawai'i v. Mankichi, 190 U.S. 197 (1903); Pepke v. United States (The Diamond Rings), 183 U.S. 176 (1901); Dooley v. United States, 183 U.S. 151 (1901); Goetze v. United States, 182 U.S. 221 (1901); Huus v. N.Y. & P.R. Steamship Co., 182 U.S. 392 (1901); Downes v. Bidwell, 182 U.S. 244 (1901); Dooley v. United States, 182 U.S. 222 (1901); De Lima v. Bidwell, 182 U.S. 1 (1901); Crossman v. United States, 105 F. 608 (C.C.S.D.N.Y. 1900), *rev'd sub nom.* Goetze v. United States, 182 U.S. 221 (1901); and Armstrong v. United States, 182 U.S. 243 (1901). Perez, *supra* note 6, at 1034 n.13 (citing Efrén Rivera Ramos, *Deconstructing Colonialism: The "Unincorporated Territory" as a Category of Domination*, *in* FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION, AND THE CONSTITUTION 104, 105 n.4 (Christina Duffy Burnett & Burke Marshall eds., 2001)).

29. Treaty of Paris of 1898, *supra* note 7, at art. IX.

30. *See Ruling America's Colonies*, *supra* note 23, at 64.

31. *Id.* at 66.

32. Perez, *supra* note 6, at 1029 ("[Pursuant] to the doctrine of territorial incorporation established in the *Insular Cases*, Puerto Rico is an 'unincorporated' territory, and as such, it does not form part of the United States within the meaning of the Constitution. As a result, persons born in Puerto Rico are not 'born in the United States' under the Fourteenth Amendment and are not constitutionally entitled to citizenship. Because they enjoy only

Torruella's argument that the decision in the *Insular Cases* is on par with *Plessy* in the annals of bad decisions by the Supreme Court, the TID announced in the *Insular Cases* has also been analogized to the Court's 1857 decision in *Dred Scott v. Sandford*[33]:

> In response to *Dred Scott*, the Fourteenth Amendment constitutionalized the common law doctrine of *jus soli*, which provides that all persons born on U.S. territory and not subject to the jurisdiction of another sovereign are native-born citizens, regardless of race. Pursuant to this interpretation of the Citizenship Clause, persons born in Puerto Rico have been "born in the United States" since the ratification of the Treaty of Paris. By retroactively narrowing the scope of the term "United States," the Supreme Court took advantage of the unique geographical circumstances of the insular territories and prevented their inhabitants from obtaining equal citizenship. *Thus, the doctrine of territorial incorporation reasserts* Dred Scott*'s race-based approach to citizenship and should be overruled.*[34]

So why have the *Insular Cases* been compared to two of the Court's most notoriously racist decisions? At least in the case of Puerto Rico and the other unincorporated United States territories, the answer lies in the Court's creation of the TID.[35]

1. *Downes v. Bidwell* and the Territorial Incorporation Doctrine

One of the primary holdings in the *Insular Cases* is what has become known as the TID.[36] Legal scholars generally agree that the concept of TID was first announced by Justice White in his concurrence in the Court's 1901 decision in *Downes v. Bidwell*.[37] In *Downes*, Justice White

statutory citizenship, Congress arguably is able to expatriate most Puerto Ricans if the island is declared independent.").

33. 60 U.S. 393 (1857), *superseded by* U.S. CONST. amend. XIV; Frederic R. Coudert, *The Evolution of the Doctrine of Territorial Incorporation*, 60 AM. U.L. REV. 801, 811, 841 (1926).

34. Perez, *supra* note 6, at 1029 (emphasis added).

35. *See generally* Coudert, *supra* note 33.

36. *See id.* at 802, 806.

37. 182 U.S. 244, 311–21, 339 (1901) (White, J., concurring); *see, e.g.*, Ross Dardani, *Citizenship in Empire: The Legal History of U.S. Citizenship in American Samoa, 1899–1960*, 60 AM. J. LEGAL HIST. 311, 326–27 (2020) ("Justice Edward Douglas White's concurring and precedent-setting opinion in *Downes* 'is still cited in territorial matters as the authoritative answer to the question of the Constitutional status of the territories'" (quoting ARNOLD H. LEIBOWITZ, DEFINING STATUS: A COMPREHENSIVE ANALYSIS OF UNITED STATES TERRITORIAL RELATIONS 23 (1989))).

argued that there should be a difference in the constitutional status of incorporated and unincorporated United States territories.[38] And such a difference in constitutional treatment of the territories is not insubstantial—because Puerto Rico was not incorporated, the Bill of Rights, among other important constitutional protections, did not apply to its citizens.[39]

Justice White's view, and the TID itself, is an extension of Professor Abbott Lawrence Lowell's interpretation of the constitutional status of United States territories, which argued that while certain territories could be annexed by the United States, other territories could "be so acquired as not to form part of the United States."[40] But how is this distinction made between the various territories, and which factors should be relied upon when applying the TID? Among the most troubling aspects of Justice White's concurrence—in which he conceives the fundamental premise underlying all of the *Insular Cases*—is the prejudiced, colonialist, and white supremacist attitudes toward native residents of the territories.

In justifying the use of the TID, Justice White "premised his adoption of the incorporation test in *Downes* on the right of the American people to determine whether the inhabitants of an acquired territory were sufficiently 'civilized' to allow admission of their native lands as 'component constituents of the Union which composed the United States.'"[41] Using the colonialist language of the day, Justice White thus concluded that Puerto Rico was "foreign to the United States in a domestic sense" because it had not been incorporated by Congress.[42] The words Justice White chose to use in his concurrence describing the native peoples of the territories, such as "savage" and "uncivilized,"[43] reflect the

38. *See Downes*, 182 U.S. at 299 (White, J., concurring).

39. *See id.* at 341–42.

40. Abbott Lawrence Lowell, *The Status of Our New Possessions—A Third View*, 13 HARV. L. REV. 155, 176 (1899).

41. *See* Perez, *supra* note 6, at 1040–41 (first quoting *Downes*, 182 U.S. at 279–80 (Brown, J., majority opinion); and then quoting *Downes*, 182 U.S. at 326 (White, J., concurring)).

42. *Downes*, 182 U.S. at 341–42 (White, J., concurring).

43. *Id.* at 302, 306. Justice White's concurrence in *Downes* is replete with racially offensive slurs describing the native inhabitants of the territories. *Id.* ("[I]f the conquered are a fierce, savage, and restless people, he may, according to the degree of their indocility, govern them with a tighter rein, so as to curb their 'impetuosity, and to keep them under subjection.' . . . Take a case of discovery. Citizens of the United States discover an unknown island, peopled with an uncivilized race, yet rich in soil, and valuable to the United States for commercial and strategic reasons."). Justice Brown's majority opinion contains similarly offensive language. *Id.* at 287 (Brown, J., majority) ("There seems to be no middle ground between this position and the doctrine that if their inhabitants do not become, immediately upon annexation, citizens of the United States, their children thereafter born, whether

racist and discriminatory beliefs underlying his legal doctrine of how and when full constitutional protections must be extended to territorial residents.

The white supremacist jurisprudence in *Downes* is also revealed by Justice Brown's invention of a distinction between those who are "subject to the jurisdiction" of the United States and those who are "*of*" the United States in his majority opinion.[44] This difference, put more plainly, holds that non-white people are not entitled to full membership in our Republic due to the fact that they do not share the same "Anglo-Saxon" race and culture as the British settler colonists who led the American War of Independence:

> There are certain principles of natural justice inherent in the Anglo-Saxon character, which need no expression in constitutions or statutes to give them effect . . . . [S]ome cases . . . may bring about conditions which would render the annexation of distant possessions desirable. If those possessions are inhabited by alien races, differing from us in religion, customs, laws, methods of taxation, and modes of thought, the administration of government and justice, according to Anglo-Saxon principles, may for a time be impossible; and the question at once arises whether large concessions ought not to be made for a time, that ultimately our own theories may be carried out, and the blessings of a free government under the Constitution extended to them.[45]

Justice White's concurrence also embraces Justice Brown's view that Anglo-Saxon culture is virtuous in a way that is not shared by other races and cultures, and that native inhabitants of conquered territories may not be deserving of the same sort of rights and liberties as those "*of*" the United States—white settlers.[46]

Thus, the *Downes* case set the stage for the future of the citizens in Puerto Rico as a subject of the American Empire—people that are less-than full citizens of the United States through a grant of a secondary form of citizenship by the grace of Congress,[47] but not afforded the gold-

savages or civilized, are such, and entitled to all the rights, privileges and immunities of citizens. If such be their status, the consequences will be extremely serious.").

44. *Id.* at 278, 282–83 (Brown, J., majority opinion).

45. *Id.* at 280, 286–87.

46. *See id.* at 306 (White, J., concurring).

47. *See* Charles R. Venator-Santiago, *The Law that Made Puerto Ricans U.S. Citizens, yet Not Fully American*, ZÓCALO PUB. SQUARE (Mar. 6, 2018), https://www.zocalopublicsquare.org/2018/03/06/law-made-puerto-ricans-u-s-citizens-yet-not-fully-

standard form of constitutional citizenship under the Fourteenth Amendment.

B. Constitutional Colonialism

After the Court's decision in *Downes*, which has been summarized as holding that "the Constitution [f]ollows the [f]lag. . . but [d]oesn't [q]uite [c]atch [u]p with [i]t"[48] the question posed by Justice White's concurrence in that same decision was whether the territories may be treated differently under the Constitution based on whether they have been incorporated by Congress.[49] In 1904, the Supreme Court embraced Justice White's theory of TID in the *Downes* concurrence with its ruling in *Dorr v. United Sates*.[50] In *Dorr*, Justice Harlan stated that the Constitution was "the supreme law of the land," but the territories were "not part of the 'land.'"[51] Scholar Ross Dardani has described the decisions in the *Insular Cases* as the "[c]onstitutional [l]egitimation of U.S. [e]mpire":

> The initial decisions of the *Insular Cases* were decided at the turn of the twentieth century. They materialized in a society in which white supremacy was a[s]cendant [sic] and Jim Crow's "separate but equal" policy had been deemed constitutional by the Supreme Court, yet they remain the seminal decisions informing U.S. territorial doctrine both in the unincorporated areas and beyond.[52]

From the outset, the constitutional treatment of United States territories was akin to the way the British Empire harvested and

american/ideas/essay/ ("Congress replaced the Jones Act with the Nationality Act of 1940. It extended a statutory form of birthright or *jus soli* citizenship to Puerto Rico that was anchored in the Citizenship Clause of the Fourteenth Amendment. According to the Nationality Act of 1940, birth in Puerto Rico was now tantamount to birth in the United States. Since 1940, Congress has enacted several laws that affirm the Nationality Act's citizenship provisions for Puerto Rico and grant all persons born in the island U.S. native-born citizenship status.").

48. Pedro A. Malavet, *"The Constitution Follows the Flag . . . but Doesn't Quite Catch Up with It": The Story of* Downes v. Bidwell, *in* RACE LAW STORIES 111, 111 n.1 (Rachel F. Moran & Devon W. Carbado eds., 2008) ("This is the quoted response of then Secretary of War Elihu Root when—after hearing a reading of the five opinions of the Supreme Court in the *Downes* case—confused reporters asked how the Justices had replied to the question 'Does the constitution follow the flag?'").

49. *See Downes*, 182 U.S. at 287–88 (White, J., concurring).

50. 195 U.S. 138, 142–43 (1904).

51. *Id.* at 155 (Harlan, J., dissenting).

52. Dardani, *supra* note 37, at 323 (footnotes omitted).

maintained its colonial regime.[53] Dardani argues that after 1898, the *Insular Cases* created "a new form of U.S. territorial policy" by combining traditional elements of both British colonialism and imperialism.[54]

1. *Balzac v. Porto Rico*[55]

The Court's 1922 decision in *Balzac v. Porto Rico* presents a very significant limitation to the constitutional rights of territorial citizens. In a unanimous decision, the Court held that because Puerto Rico is not *of* the United States, it is outside of the protection of certain portions of the Constitution, including the Sixth Amendment.[56] With this decision, the Supreme Court reaffirmed TID in a way that had repercussions not just for the residents of Puerto Rico, but for all inhabitants of the various United States territories.

The decision in *Balzac v. Porto Rico* is important in the *Insular Cases* jurisprudence because the Supreme Court held that Puerto Rican citizenship was "a matter of Congressional largesse rather than constitutional command."[57] The Court rejected the plaintiff's claim in *Balzac* that because section 5 of the Jones Act declared "citizens of Porto Rico" to be United States citizens, the Territory of Puerto Rico had thus been incorporated into the United States[58]:

53. *Id.* at 318–20, 324 ("The main strategy of this new territorial policy would be for the United States to shift 'from absorbing new territories into the domestic space of the nation to acquiring foreign colonies and protectorates abroad.'" (quoting AMY KAPLAN, THE ANARCHY OF EMPIRE IN THE MAKING OF U.S. CULTURE 2 (2002))).

54. *Id.* at 324 ("The main difference between U.S. colonialism and imperialism before 1898 was the intent the United States had for the territory in question. U.S. colonialism was premised on acquiring territory that was understood to be on a path toward statehood, while U.S. imperialism was based on temporary occupation of a territory, which establishes U.S. sovereignty over an area but with no intention of having that territory become a state." (emphasis omitted)).

55. 258 U.S. 298 (1922).

56. *Id.* at 304–05 ("We have now to inquire whether that part of the Sixth Amendment to the Constitution, which requires that in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, applies to Porto Rico. . . . It is well settled that these provisions for jury trial in criminal and civil cases apply to the Territories of the United States. . . . But it is just as clearly settled that they do not apply to territory belonging to the United States which has not been incorporated into the Union.").

57. Perez, *supra* note 6, at 1041.

58. *Balzac*, 258 U.S. at 307 ("The section of the Jones Act which counsel press on us is section 5. This in effect declares that all persons who under the Foraker Act were made citizens of Porto Rico and certain other residents shall become citizens of the United States, unless they prefer not to become such.").

> The *Insular Cases* revealed much diversity of opinion in this Court as to the constitutional status of the territory acquired by the Treaty of Paris ending the Spanish War, but the *Dorr* case shows that the opinion of Mr. Justice White of the majority, in *Downes v. Bidwell*, has become the settled law of the [C]ourt. . . . The question before us, therefore, is: Has Congress, since the Foraker Act of April 12, 1900 (31 Stat. 77), enacted legislation incorporating Porto Rico into the Union? Counsel for the plaintiff in error give, in their brief, an extended list of acts, to which we shall refer later, which they urge as indicating a purpose to make the island a part of the United States, but they chiefly rely on the Organic Act of Porto Rico of March 2, 1917 (38 Stat. 951 [Comp. St. §§ 3803a–3803z]), known as the Jones Act . . . The act is entitled "An act to provide a civil government for Porto Rico and for other purposes." It does not indicate by its title that it has a purpose to incorporate the island into the Union. It does not contain any clause which declares such purpose or effect. While this is not conclusive, it strongly tends to show that Congress did not have such an intention.[59]

In determining that Puerto Rico had not been incorporated into the United States through the Jones Act, the Court once again relied on the alleged supremacy of individuals of "Anglo-Saxon origin" and the supposed inherent differences of the native people of the territories:

> Congress has thought that a people like the Filipinos, or the Porto Ricans, trained to a complete judicial system which knows no juries, living in compact and ancient communities, with definitely formed customs and political conceptions, should be permitted themselves to determine how far they wish to adopt this institution of Anglo-Saxon origin, and when.[60]

The racist and patronizing language of the *Balzac* decision, in which the citizens of the Philippines and Puerto Rico are described as living in "compact and ancient communities,"[61] underscores the argument that the decisions in the *Insular Cases* create an unequal and lesser form of membership in our Union for territorial citizens that is based on racial stereotypes. On the issue of territorial citizenship, the application of these biases is not just hurtful—it is harmful and serves to justify the

59. *Id.* at 305–06.
60. *Id.* at 310.
61. *Id.*

denial of civil rights to the citizens of Puerto Rico. The Court in *Balzac* referred to the territories as "distant ocean communities"[62] and used the physical distance of the territories from the continental mainland of the United States to justify the limited application of the Federal Constitution to the territories.[63]

Indeed, in denying territorial citizens the full protection of the Constitution, the Court in *Balzac* purported to be respecting the cultural norms and traditions of the territorial citizens. But again, relying on its previous decision in *Dorr*, the colonialist language used by the Court belies its assertions:

> [I]f the United States shall acquire by treaty the cession of territory having an established system of jurisprudence, where jury trials are unknown, but a method of fair and orderly trial prevails under an acceptable and long-established code, the preference of the people must be disregarded, their established customs ignored, and they themselves coerced to accept, in advance of incorporation into the United States, a system of trial unknown to them and unsuited to their needs. We do not think it was intended, in giving power to Congress to make regulations for the territories, to hamper its exercise with this condition.[64]

The argument in *Balzac* that the citizens of the territories would be "coerced to accept . . . a system of trial unknown to them and unsuited to their needs"[65] is not only protectionist, but also, as Judge Torruella

62. *Id.* at 311.

63. *Id.* at 308–09. The majority decision in *Balzac* takes pains to emphasize that if territorial residents wanted to avail themselves of the full protection of the United States Constitution, they are free to move and subject themselves to the jurisdiction of the continental United States:

> It became a yearning of the Porto Ricans to be American citizens, therefore, and this act gave them the boon. What additional rights did it give them? It enabled them to move into the continental United States and becoming residents of any state there to enjoy every right of any other citizen of the United States, civil, social and political.

Id. at 308. For a skeptical criticism of this assertion, see *The Establishment of a Regime of Political Apartheid*, *supra* note 27, at 327 ("Last but not least is the absurdity of the *Balzac* ruling when one considers Taft's conclusion that upon moving to the U.S. mainland, Puerto Ricans ipso facto acquired the full rights of U.S. citizens, including 'the responsibilities of jurors' and participation in 'popular government,' yet in that same opinion Taft considered that these same activities were beyond their comprehension while in Puerto Rico. One cannot but ponder as to how this magical transformation was accomplished.").

64. *Balzac*, 258 U.S. at 310 (quoting Dorr v. United States, 195 U.S. 138, 148 (1904)).

65. *Id.*

argues, "without any basis in the record or the facts," and asserts that the decision in the case was "a predetermined outcome" due to Justice Taft's racial and political biases.[66]

As Justice Black said in *Reid v. Covert*, "neither the [decisions in the *Insular Cases*] nor their reasoning should be given any further expansion."[67] He continued:

> The concept that the Bill of Rights and other constitutional protections against arbitrary government are inoperative when they become inconvenient or when expediency dictates otherwise is a very dangerous doctrine and if allowed to flourish would destroy the benefit of a written Constitution and undermine the basis of our government. *If our foreign commitments become of such nature that the Government can no longer satisfactorily operate within the bounds laid down by the Constitution, that instrument can be amended by the method which it prescribes. But we have no authority, or inclination, to read exceptions into it which are not there.*[68]

Unfortunately, Justice Black's warning about the *Insular Cases* was not heeded. As such, Puerto Ricans and other territorial citizens are left with the system of constitutional colonialism that this jurisprudence created in the early twentieth century. As the people of Puerto Rico look forward to the future and contemplate their rights as territorial citizens, an additional unresolved issue looms on the horizon—the pursuit of statehood.

C. Contemporary Puerto Rico, the Continuing Struggle for Equality, and the Pursuit of Statehood

"It hurts to say [Puerto Rico] is a colony because we know that colonies are violent and do not prosper . . . [b]ut it is our reality . . . it is the only reality I have ever known."[69]

In recent years, Puerto Rico has faced unprecedented challenges. The biggest of these challenges was Hurricane Maria, which devastated the

66. *The Establishment of a Regime of Political Apartheid*, *supra* note 27, at 326.
67. 354 U.S. 1, 14 (1957).
68. *Id.* (emphasis added) (footnotes omitted).
69. Christina Colón, *Will Puerto Rico Become the 51st State?*, SOJOURNERS (Aug. 2021), https://sojo.net/magazine/august-2021/will-puerto-rico-become-51st-state (first alteration in original) (quoting Ishbel Cora Rodríguez, a student at the University of Puerto Rico in San Juan).

island when it made landfall on September 20, 2017.[70] The catastrophic damage wrought on Puerto Rico by Hurricane Maria—which was the deadliest hurricane in Puerto Rican history since 1899,[71] and "the third costliest hurricane" ever in the United States[72] —was made worse by the United States government's dereliction of duty in providing for the safety and recovery of the Puerto Rican people.[73] It is estimated that 2,975 people were killed as a result of the hurricane, many of those due to government negligence and mismanagement of the aftermath of the disaster.[74] Indeed, the callous attitude toward the suffering and pleas for assistance of Puerto Ricans by then-President Donald J. Trump was epitomized when he threw paper towels to a church crowd begging for help in San Juan in October 2017, which he later falsely defended as welcomed and celebrated by the Puerto Rican people.[75]

70. *E.g.*, Alexa Lardieri, *Hurricane Maria Makes Landfall in Puerto Rico*, U.S. NEWS & WORLD REP. (Sept. 20, 2017), https://www.usnews.com/news/national-news/articles/2017-09-20/hurricane-maria-makes-landfall-in-puerto-rico.

71. *See Puerto Rico: A Tale of Two Hurricanes*, DAILY WORLD (Sept. 22, 2018), https://www.thedailyworld.com/opinion/puerto-rico-a-tale-of-two-hurricanes/ ("The 120-year epic tragedy of Puerto Rico can be told as a tale of two hurricanes. The one fresh in our memory is Maria, which reached Puerto Rico a year ago. The other was Hurricane San Ciriaco in 1899, which devastated the island just after it became part of the United States.").

72. *See* Nicole Acevedo, *Puerto Rico Sees More Pain and Little Progress Three Years After Hurricane Maria*, NBC NEWS (Sept. 20, 2020), https://www.nbcnews.com/news/latino/puerto-rico-sees-more-pain-little-progress-three-years-after-n1240513 ("Hurricane Maria resulted in about $90 billion in damage, making it the third costliest hurricane in U.S. history.").

73. *See id.* ("Three years later, there's frustration that crises have only compounded—there have been a series of destructive earthquakes and, more recently, the coronavirus pandemic—while the Trump administration and island officials haven't made any real progress updating the island's antiquated electrical grid and rebuilding destroyed houses. 'If you put somebody in power, here in Puerto Rico or in the U.S., that's not prepared to lead, it's going to cost you lives, and it's going to cost you progress,' said Miguel Soto-Class, founder and president of the Center for a New Economy, a nonpartisan think tank. 'I don't think it's an exaggeration to talk about this as a life-or-death issue, because that's exactly what we're seeing.'").

74. *See* Ray Sanchez, *How Puerto Rico's Death Toll Climbed from 64 to 2,975 in Hurricane Maria*, CNN (Aug. 29, 2018, 2:56 PM), https://www.cnn.com/2018/08/29/us/puerto-rico-growing-death-toll/index.html ("The island government raised the official death toll to 2,975 on Tuesday after maintaining for months that 64 people had died as a result of the storm.").

75. *See* Daniella Silva, *Trump Defends Throwing Paper Towels to Hurricane Survivors in Puerto Rico*, NBC NEWS (Oct. 8, 2017, 4:16 PM), https://www.nbcnews.com/politics/politics-news/trump-defends-throwing-paper-towels-hurricane-survivors-puerto-rico-n808861 ("President Donald Trump defended throwing paper towels into a crowd of Puerto Ricans at a relief center in the hurricane-ravaged territory earlier this week and lauded federal relief efforts. 'They had these beautiful, soft towels. Very good towels,' Trump told Mike Huckabee during an interview Saturday with Christian network Trinity Broadcasting . . . 'And I came in and there was a crowd of a lot of people. And they were screaming and

As a result of Puerto Rican citizens being treated "like second-class citizens" in the federal government's response to Hurricane Maria,[76] a renewed push for Puerto Rican statehood began to gather steam.[77] Of course, the statehood debate for Puerto Rico has been occurring since it became a United States territory in 1898.[78] And since the beginning, the issue of race and culture of the territories has been at the forefront of the considerations for whether or not to grant Puerto Rico statehood:

> As legal scholar José A. Cabranes explains, white American legislators thought granting statehood to Puerto Rico would force the United States to admit the Philippines, which was another U.S. territory at the time, as well asendanger [sic] the interests of white laborers and farmers, and increase racial mixing within the U.S. Instead, they granted Puerto Rico "unorganized territory" status and offered Puerto Ricans limited self-governance without U.S. citizenship.[79]

In the twentieth century, white legislators' concern about how territorial statehood would detrimentally affect "the interests of white laborers and farmers" and cause "racial mixing within the U.S." was a common refrain in Congress when considering the statehood of U.S. territories.[80] And, once again, the racist depiction of territorial natives as

they were loving everything. I was having fun, they were having fun,' he added. 'They said, "Throw 'em to me! Throw 'em to me Mr. President!" . . . Trump previously sad [sic] he received nothing but 'thank yous' after his visit to Puerto Rico on Tuesday.").

76. Brett Samuels, *Ocasio-Cortez: Hurricane Maria Response Shows Puerto Ricans are 'Treated Like Second-Class Citizens'*, HILL (Sept. 16, 2018, 09:27 AM), https://thehill.com/homenews/sunday-talk-shows/406892-ocasio-cortez-hurricane-maria-response-shows-puerto-ricans-are ("Democratic congressional candidate Alexandria Ocasio-Cortez (N.Y.) said Sunday that the Trump administration's response to Hurricane Maria last year shows that Puerto Ricans are treated 'like second-class citizens.' 'What we saw in Puerto Rico was a mass death of 3,000 people. It was the worst humanitarian crisis in modern American history and many, many people impacted by this storm point to government inaction as the cause of death,' Ocasio-Cortez, a self-identified democratic socialist, said on CNN's 'State of the Union.'").

77. *See* Alexia Fernández Campbell, *Puerto Rico is Asking for Statehood. Congress Should Listen.*, VOX (Aug. 31, 2018, 3:20 PM), https://www.vox.com/2018/8/31/17793362/hurricane-maria-puerto-rico-statehood.

78. *See* Erin Blakemore, *Why Puerto Rico has Debated U.S. Statehood Since its Colonization*, NAT'L GEOGRAPHIC (July 24, 2020), https://www.nationalgeographic.com/history/article/puerto-rico-debated-statehood-since-colonization?cmpid=int_org=ngp::int_mc=website::int_src=ngp::int_cmp=amp::int_add=amp_readtherest.

79. *Id.*

80. *Id.*; *see also* José A. Cabranes, *Citizenship and the American Empire*, 127 U. PA. L. REV. 391, 420 (1978) ("Representative Newlands of Nevada, who had dissented in Committee, noted, the Republican majority feared 'the establishment of a precedent which [would] be invoked to control our action regarding the Philippines later on; such action

"uncivilized" hindered the ability of territories like Puerto Rico and the Philippines to pursue statehood:

> Race, civilization, distance, and economic considerations formed the basis for the distinction made in Congress between Puerto Rico and the Philippines. Expressions of concern about the annexation of Oriental peoples were commonplace. The statement by Representative Dalzell that he was unwilling "to see the wage-earner of the United States, the farmer of the United States, put upon a level and brought into competition with the cheap half-slave labor, savage labor, of the Philippine Archipelago" was greeted by loud applause in the House. Other congressmen echoed his sentiments.[81]

Like the Arizona and New Mexico Territories' bids for statehood,[82] whether a majority of the population of Puerto Rico was non-white was a critical issue in Congress' statehood deliberations.[83] The debate over the racial composition of the citizens of Puerto Rico was hotly debated and contrasted with the alleged heritage of the citizens of other United States territories like the Philippines:

> Its people are, in the main, of Caucasian blood, knowing and appreciating the benefits of civilization, and are desirous of casting their lot with us. . . . How different the case of the Philippine Islands, 10,000 miles away . . . . The inhabitants are of wholly different races of people from ours—Asiatics, Malays, negroes and mixed blood. They have nothing in common with us and centuries can not assimilate them. . . . They can never be

embracing not simply one island near our coast, easily governed, its people friendly and peaceful [*i.e.*, Puerto Rico], but embracing an archipelago of seventeen hundred islands 7,000 miles distant, of diverse races, speaking different languages, having different customs, and ranging all the way from absolute barbarism to semicivilization.'" (alterations in original)).

81. Cabranes, *supra* note 80, at 421 (footnotes omitted).

82. *See infra* Part III.

83. *See* Cabranes, *supra* note 80, at 422 ("The relatively tender treatment accorded to the Puerto Ricans may be partially explained by the representations made in Congress concerning the racial composition of the island. For example, Representative Payne readily accepted questionable census reports showing that whites—'generally full-blooded white people, descendants of the Spaniards, possibly mixed with some Indian blood, but none of them [of] negro extraction'—outnumbered by nearly two to one the combined total of Negroes and mulattoes." (alteration in original) (footnote omitted)).

> clothed with the rights of American citizenship nor their territory admitted as a State of the American Union . . . .[84]

Thus, while current Congressional opposition to Puerto Rican statehood is not quite as nakedly racist as it was in the twentieth century,[85] the issues of race and language remain at the forefront of Puerto Rico's bid for statehood.

Despite this continuing division in Congress, shortly after the inauguration of President Biden in early 2021, United States Senator Robert Menendez of New Jersey and United States Representative Nydia Velázquez of New York introduced the Puerto Rico Self-Determination Act of 2021 in the Senate and House, respectively.[86] The purpose of the Act is described as: "[t]o recognize the right of the People of Puerto Rico to call a status convention through which the people would exercise their natural right to self-determination, and to establish a mechanism for congressional consideration of such decision, and for other purposes."[87]

84. *Id.* at 424–25. The racist sentiment in Congress against the Filipino people, in particular, is startling. *See, e.g.*, 33 CONG. REC. 3613, 3616 (1900) (statement of Sen. Bate) (stating that some Filipinos were "physical[] weaklings of low stature, with black skin, closely curling hair, flat noses, thick lips, and large, clumsy feet," and further stated, "[l]et us not take the Philippines in our embrace to keep them simply because we are able to do so. I fear it would prove a serpent in our bosom. Let us beware of those mongrels of the East, with breath of pestilence and touch of leprosy. Do not let them become a part of us with their idolatry, polygamous creeds, and harem habits.").

85. 33 CONG. REC. 2172 (1900) (statement of Rep. Gilbert) (cautioning against "open[ing] wide the door by which these negroes and Asiatics can pour like the locusts of Egypt into this country").

86. Puerto Rico Self-Determination Act of 2021, S. 865, 117th Cong. (2021), https://www.congress.gov/bill/117th-congress/senate-bill/865; Puerto Rico Self-Determination Act of 2021, H.R. 2070, 117th Cong. (2021), https://www.congress.gov/bill/117th-congress/house-bill/2070.

87. Puerto Rico Self-Determination Act of 2021, S. 865. The Bill contains the following findings by Congress:

> (1) In 1898, the United States defeated the Spanish Kingdom in the Spanish-American War and acquired by conquest Puerto Rico, Guam, and the Philippines pursuant to the Treaty of Paris.
> (2) In 1900, Congress established a civilian government on the island through the Foraker Act. Among other points, that Act established an "executive council" consisting of various department heads and a presidentially appointed civilian governor.
> (3) The Foraker Act also established the Resident Commissioner position to represent island interests in Congress. These duties came to include nonvoting service in the House of Representatives.
> (4) In 1901, the Supreme Court's decisions in Downes v. Bidwell and its progeny held that for purposes of the Constitution's Uniformity Clause, Puerto Rico was not part of the United States and subject to the plenary powers of Congress, which in turn established a colonial relationship. Justice White, in concurrence, opined that

The Puerto Rican Self-Determination Act was immediately the subject of controversy and criticism.[88] Academics immediately criticized the Bill, arguing in a letter to members of Congress that the proposed convention process was inadequate:

> In a letter sent Monday to a group of bipartisan congressional leaders, the academics, led by Columbia Law School's Christina Ponsa-Kraus, said the Puerto Rico Self-Determination Act, which was introduced by Rep. Nydia Velázquez (D-N.Y.), "disserves its purported goal perpetuating the pernicious myth that [multiple sovereignty] options exist. They do not."
>
> "There are two, and only two, real self-determination options for Puerto Rico: statehood and independence. Yet the Puerto Rico Self-Determination Act defies constitutional reality by calling upon Puerto Ricans to define other non-territorial options. There are no other non-territorial options," reads the letter, which also was signed by professors at Harvard Law School.[89]

Congress has discretion to decide whether and when to incorporate a territory into the United States.
(5) Congress recognized Puerto Rico's authority over matters of internal governance in 1950 with the passage of the Puerto Rico Federal Relations Act of 1950 (Public Law 81–600), providing for a constitutional government for the island which was adopted by Congress as a compact for the people of Puerto Rico and the subsequent ratification of the island's constitution in July 1952.
(6) On November 18, 1953, the United Nations recognized Puerto Rico as a self-governing political entity under the United Nations General Assembly Resolution 748.
(7) The political status of Puerto Rico is of significant interest to communities both on and off the island, including diaspora groups that continue having strong cultural ties and socioeconomic ties to Puerto Rico.
(8) The United States has a legal duty to comply with Article 1 of the International Covenant on Civil and Political Rights, which establishes that all peoples have the right to self-determination and "by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development".
(9) The status convention provides a deliberative, comprehensive, and uninterrupted space of dialogue that can define the future of Puerto Rico.

Id. § 2.

88. *See* Rafael Bernal, *Top Academics Slam Puerto Rico Self-Determination Act*, THE HILL (Apr. 12, 2021, 5:47 PM), https://thehill.com/homenews/house/547790-top-academics-slam-puerto-rico-self-determination-act.

89. *Id.* The signatories argue that the limited options for Puerto Rico going forward do not include the kind of convention process proposed in the Self-Determination Act. *Id.* ("The U.S. Constitution provides three options for Puerto Rico: statehood, territory or independence. Neither a convention nor act of Congress can change that basic fact. Only a

A competing statehood bill, the Puerto Rico Statehood Admission Act, was introduced in Congress by Florida Representative Darren Soto and Puerto Rico Resident Commissioner Jenniffer González-Colón on March 2, 2021.[90] The Bill is described as one that "establishes a process for the admission of Puerto Rico into the union as a state, on an equal footing with all other states, based on a majority vote of the people of Puerto Rico."[91] If passed, the Act "would require Congress to vote whether to admit Puerto Rico as a state and on passage order one final plebiscite of Puerto Rican voters to accept or decline Congress's offer of statehood."[92]

The academics who wrote to Congress in support of the Puerto Rico Statehood Admission Act argued that:

> In the 123 years since the United States annexed Puerto Rico, Congress has never offered Puerto Ricans the choice to become a state. Instead, the United States has allowed Puerto Rico to languish indefinitely as a U.S. territory, subjecting its residents to U.S. laws while denying them voting representation in the government that makes those laws.[93]

Despite this, President Biden and leaders in Congress have continued to be reluctant to take a firm stand in support of Puerto Rican statehood.[94]

Unfortunately, the issue of Puerto Rican statehood not only remains controversial in the United States Congress—it is a divisive issue in Puerto Rico itself. When the possibility of statehood for Puerto Rico was raised in 2020 by a yes-or-no referendum in the territory, more than half of the Puerto Ricans who voted supported statehood.[95] But, as At-Large

constitutional amendment can do that,' said Rep. Darren Soto (D-Fla.), who authored a statehood bill that's also up for consideration in Congress.").

90. Puerto Rico Statehood Admission Act, H.R. 1522, 117th Cong. (2021), https://www.congress.gov/bill/117th-congress/house-bill/1522; Bernal, *supra* note 88 ("[The] bill was introduced by Sen. Martin Heinrich (D-N.M.) in the Senate.").

91. Congressional Research Service, *Summary: H.R. 1522–Puerto Rico Statehood Admission Act*, CONGRESS.GOV, https://www.congress.gov/bill/117th-congress/house-bill/1522 (last accessed Jan. 3, 2022).

92. Bernal, *supra* note 88.

93. *Id.*

94. *Id.* ("Many Democrats, including [Senate Majority Leader Charles] Schumer and President Biden, have in the past spoken in favor of statehood, only to backtrack later as a nod to progressives, who generally support more sovereignty for the island rather than permanent union with the United States.").

95. *See* José Bernardo Márquez, *A One-Sided Statehood Bill for Puerto Rico is Anything but Democratic*, NEWSWEEK (June 25, 2021, 7:30 AM), https://www.newsweek.com/one-sided-statehood-bill-puerto-rico-anything-democratic-opinion-1603918 ("In a yes-or-no

Puerto Rican Representative José Bernardo Márquez explains, the issue of statehood is one that also divides the people of Puerto Rico:

> Members of the pro-statehood New Progressive Party (NPP), including Puerto Rico's governor and resident commissioner (its non-voting representative in Congress), argue that vote should settle Puerto Rico's status dilemma. That's why they are pushing for Congress to approve an admission bill that would make Puerto Rico a state. But the reality is far more complex, as the recent congressional hearing on Puerto Rico's status showed. Their position obscures the failings of the multiple plebiscites legislated by the NPP in recent years, not one of which has garnered democratic consensus as a fair and open process for Puerto Rico's self-determination . . . As an American, I believe that equality for Puerto Rico and all the territories makes us a more perfect Union. Statehood for predominantly brown, Spanish-speaking Puerto Rico would be a victory for a United States of America rooted in true democratic constitutionalism, and not on historically exclusionary racial and cultural politics.[96]

Unfortunately, Representative Márquez's belief that "[s]tatehood for predominantly brown, Spanish-speaking Puerto Rico would be a victory for a United States of America" is not shared by a segment of our current Congress. [97] Although this is a critical moment for Puerto Rican statehood, the same issues of race, language, and culture remain obstacles in the twenty-first century. [98] Only time will tell whether

referendum on statehood held last November, 52.5 percent of Puerto Ricans supported making Puerto Rico a state.").

96. *Id.*

97. *Id.*; Jonathan Chait, *The Senate is America's Most Structurally Racist Institution*, INTELLIGENCER (Aug. 10, 2020), https://nymag.com/intelligencer/2020/08/senate-washington-dc-puerto-rico-statehood-filibuster-obama-biden-racist.html ("[I]t is not just conservatives who believe that states must always be admitted in partisan pairs. Two years ago, Rhode Island senator Sheldon Whitehouse, a Democrat, confessed not to care at all about D.C. statehood: 'I don't have a particular interest in that issue. If we got one one-hundredth in Rhode Island of what D.C. gets in federal jobs and activity, I'd be thrilled.' And, he said, while he sympathized with Puerto Rico's case, he opposed it *because it would help his party*. 'Puerto Rico is actually a better case because they have a big population that qualifies as U.S. and they are not, as D.C. is, an enclave designed to support the federal government,' Whitehouse said. 'The problem of Puerto Rico is it does throw off the balance so you get concerns like, who do [Republicans] find, where they can get an offsetting addition to the states.'" (alteration in original)).

98. *See* Chait, *supra* note 97 ("The Senate is affirmative action for white people. If we had to design political institutions from scratch, nobody—not even Republicans—would be able to defend a system that massively overrepresented whites. And yet, while we are

members of Congress will ultimately decide to move beyond the old tropes of white supremacy concerning territorial statehood from the twentieth century, or continue to embrace the antiquated and racist colonial ideals that have kept Puerto Rico and other non-continental territories in the stranglehold of the United States empire.

III. "WHITE BY LAW"[99]: THE NEW MEXICO AND ARIZONA TERRITORIES AND THE TERRITORIAL WEST

"It is an extraordinary fact about the United States that its western territories became states, parts of the union on an equal footing with older states. But that fact can overshadow the territorial purgatory that future states occupied for long periods."[100]

In January 1912 and February 1912, respectively, the New Mexico Territory and the Arizona Territory were admitted to statehood as the forty-seventh and forty-eighth states in the Union.[101] The Treaty of Guadalupe Hidalgo, ending the war between the United States and Mexico, was signed on February 2, 1848.[102] As a result of the Treaty, Mexico ceded the majority of the modern American Southwest, and most of California, to the United States.[103] The Mexican Cession also included most of modern-day Arizona, Nevada, and New Mexico.[104]

Although the New Mexico Territory had been part of the Union since the end of the Mexican-American War in 1848, the bid for territorial statehood was long and slow. This was due in large part to the fact that native Mexicans and American Indians vastly outnumbered the white settlers in the territory.[105] "Because the Gadsden Treaty and the Treaty of Guadalupe Hidalgo guaranteed United States citizenship to Mexican citizens in the acquired territories, all Mexicans who acquired citizenship as a result of the treaties were considered white under United States law,

yanking old *30 Rock* episodes and holding *White Fragility* struggle sessions in boardrooms, a massive source of institutionalized racial bias is sitting in plain sight.").

99. *See* IAN HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE (Richard Delgado & Jean Stefancic eds., 10th ed. 2006).

100. Daniel Immerwahr, *The Greater United States: Territory and Empire in U.S. History*, 40 DIPLOMATIC HIST. 373, 384 (2016).

101. *Territories to Statehood, the Southwest: Topics in Chronicling America*, LIBR. OF CONG., https://guides.loc.gov/chronicling-america-southwest-territories (last visited Jan. 3, 2022).

102. THE UNITED STATES AND MEXICO AT WAR: NINETEENTH–CENTURY EXPANSIONISM AND CONFLICT 437 (Donald S. Frazier ed., 1998).

103. *See id.* at 438.

104. *See id.*

105. Gómez, *supra* note 4, at 18–21.

and could therefore vote in the . . . Territory."[106] However, the Anglo settlers in the territory did not view the darker-skinned mestizo residents of the territory to be white.[107] This led the territory to confront a troubling question in its quest for statehood: How to get members of Congress to agree to admit a territory with a large—if not majority[108]—non-white population?

A. New Mexico Territory

It is beyond dispute that the long delay between the end of the Mexican-American War in 1848 and statehood for New Mexico in 1912 was due to the significant concerns raised by those in Congress about the territory's large non-white population.[109] Despite these concerns, however, the road to statehood for the New Mexico Territory began with two separate conventions and petitions to Congress in 1856.[110] Substantively, there was no difference between the two petitions. The conventions were held in Mesilla, New Mexico and Tucson, Arizona, respectively.[111] The Mesilla convention, like the competing Tucson convention, petitioned for there to be two separate territories.[112] The only

106. Kristina M. Campbell, *Rising Arizona: The Legacy of the Jim Crow Southwest on Immigration Law and Policy After 100 Years of Statehood*, 24 BERKELEY LA RAZA L.J. 1, 6 (2014). Following the Mexican-American War, citizenship was guaranteed by Treaty to Mexican men. *Id.* However, whiteness as a requirement for United States citizenship was first established in the Naturalization Act of 1790. *See* Naturalization Act of 1790, ch. 3, § 1, 1790 Stat. 103 (repealed 1795). The Act provided that citizenship shall be extended only to white immigrants. *See id.* ("[A]ny alien, being a free white person, who shall have resided within the limits and under the jurisdiction of the United States for the term of two years, may be admitted to become a citizen thereof . . . ."). Thus, because of the requirement in the Naturalization Act that all citizens be white, under the Treaties ending the war Mexican-American men became, as Ian Haney López has notably observed, "white by law." *See* LÓPEZ, *supra* note 99, at 43–44.

107. *See* Campbell, *supra* note 106, at 6.

108. *See* Gómez, *supra* note 4, at 21.

109. *See* THOMAS E. SHERIDAN, ARIZONA: A HISTORY 181 (Joseph C. Wilder ed., rev. ed. 2012) ("[O]pponents [for statehood] argued that neither 'the desert sands of Arizona' nor 'the humble Spanish-speaking people of New Mexico' were ready for statehood.").

110. *See* Johnny D. Boggs, *The Road to Statehood, Southwest Style*, HISTORYNET, https://www.historynet.com/road-statehood-southwest-style.htm (last visited Jan. 3, 2022) ("In the summer of 1856 William Claude Jones, U.S. attorney for New Mexico Territory, called a meeting in Mesilla (near present-day Las Cruces) at which he and 57 others signed a petition to Congress that the territory—which encompassed all of present-day Arizona and New Mexico—be divided into two territories by a boundary running eastwest [sic] along the 34th parallel. Not to be outdone, Tucson in August 1856 held its own meeting, at which 260 signatories requested the territory be divided.").

111. *Id.*

112. *Id.*

real difference was that the Tucson petition called for the second, separate state, to tentatively be called Arizona.[113]

Congress established the New Mexico Territory on September 9, 1850.[114] At its largest, the New Mexico Territory was very large, comprising approximately 235,000 square miles.[115] The grand scope of the territory, as well as the continued Spanish colonial influence of what was formerly Mexico,[116] colored the opinion of those in Congress who were concerned about the influence of the non-Anglo population. Tomas Jaehn of the Fray Angélico Chávez History Library in Santa Fe opines:

> "It took New Mexico 62 years to become a state, and the most prominent stumbling block was, in my opinion, race and language" . . . "Congress tried several times to limit the enabling act language to 'English only,' and it took key congressional officials like Antonio Joseph [in the late 19th century] and, later, A.A. Jones and some 'maneuvering' via the constitution draft to get around this language limitation. Eventually, the U.S. House Committee on the Territories dropped the 'English only' verbiage, and Spanish language and Hispanic culture had its proper place in the state of New Mexico."[117]

The main controversy facing New Mexico on its road to statehood was whether it should be joined with Arizona when seeking admission to the Union as a state. The goal of those in Congress who were in favor of admitting the New Mexico and Arizona Territories as one state—known as "jointure"—was to limit the number of senators from the western part of the United States:

> In the early 1900s Congress considered bringing in four new states—Arizona, New Mexico, Oklahoma and Indian Territory—

113. *Id.* ("Charles Debrille Poston, a Kentucky-born miner based in Tubac, proposed naming the new territory Arizona.").

114. *See* Andrew Glass, *New Mexico and Utah Organized as Incorporated U.S. Territories, Sept. 9, 1850*, POLITICO (Sept. 9, 2015, 8:14 AM), https://www.politico.com/story/2015/09/this-day-in-politics-sept-9-1850-213308#:~:text=Twitter-,New%20Mexico%20and%20Utah%20organized%20as%20incorporated%20U.S.%20territories%2C%20Sept,9%2C%201850.

115. Boggs, *supra* note 110 ("[New Mexico Territory] include[ed] parts of present-day Colorado and Nevada. Tucson and Yuma were some 500 and 700 miles, respectively, from the territorial capital in Santa Fe.").

116. *See id.* ("Despite New Mexico's status as an American territory, much of it remained Mexican. A Mexican garrison remained in Tucson until 1856—two years after ratification of the Gadsden Purchase. Even as Mexican troops filed out of town that March, Virginian Bill Kirkland led a party to unfurl the U.S. flag atop Edward Miles' mercantile.").

117. *Id.*

> but then decided "jointure" to be a better option, with a better chance of passing, "the political goal," Mark B. Thompson writes, "being a limitation on the number of U.S. senators representing the wide open spaces of the American West." Oklahoma Territory and Indian Territory, which had been divided into two territories in 1890, would join and enter the Union as one state (which happened in 1907 when Oklahoma became the 46th state). Under the plan Arizona and New Mexico would also rejoin in an attempt to secure state status.[118]

In November 1906, "New Mexicans voted 26,195–14,735 for jointure, but Arizonans rejected the measure, 16,265–3,141."[119] With jointure off the table, both the New Mexico and Arizona Territories held constitutional conventions again in 1910.[120] In both constitutional conventions, the issues of race and civil rights became of paramount importance:

> Thirty-five of New Mexico's 100 delegates to the constitutional convention were Hispanic. They made certain the constitution protected citizens' right to vote regardless of "religion, race, language or color." It further ensured that Hispanic children could not be denied public-school education and would "enjoy perfect equality with other children in all public schools." Although some wanted additional measures—voting rights for women in all elections (not just school elections) and less protection for special-interest groups—on January 21, 1911, New Mexicans ratified the constitution, 31,742–13,399.[121]

After Arizona ratified its constitution in February 1911, Congress passed a joint resolution admitting New Mexico and Arizona as states in August 1911, and New Mexico became the forty-seventh state in the Union on January 6, 1912.[122] However, a full understanding of New Mexico's struggle to achieve statehood requires a closer look at the issues of white supremacy boiling under the surface from the beginning.

118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.*
122. *See id.*

1. Whiteness as a *De Facto* Requirement for Territorial Statehood in the West

The quest for statehood was generally not a short or easy one for the United States territories.[123] But the length of time it took New Mexico to achieve statehood—62 years—was an exceptional length of time, even in comparison to other western territories.[124] The reason it took New Mexico so long to achieve statehood seems to be obvious when it is compared to other majority-white territories that quickly gained statehood—the white supremacist attitude of Congress regarding full membership in our Union for non-white peoples prevented territories with substantial non-white populations, like New Mexico, from achieving statehood until a majority-white population could be achieved.[125]

Thus, it should not be surprising that historians have determined that a primary reason for this delay was the "multi-lingual and multi-cultural" nature of the New Mexico Territory:

> Why . . . did Congress not admit New Mexico as a state sooner? Many historians have identified racism as a key factor in the delay. In 1848 when the Mexican North was ceded to the United States, New Mexico contained the highest Mexican population in the whole region. Because the population grew slowly in the state, it maintained a majority of Hispano and Native American residents into the twentieth century. The territorial government was designed to handle this multi-lingual and multi-cultural reality. The legal system, for example, provided Spanish interpreters and published all laws in both English and Spanish. Members of Congress and the American population at large worried that such a "foreign" people would not make good American citizens.[126]

123. *See* Kathleen Ferris, *Racism as An Impediment to Statehood*, UNM DIGITAL REPOSITORY (Sept. 9, 2011), https://digitalrepository.unm.edu/cgi/viewcontent.cgi?article=1002&context=nmstatehood2 ("[C]onsider the length of territorial status for . . . states in the West: Colorado-15 years, Nevada-14 years, Utah-46 years, Montana-25 years, Wyoming-22 years, Idaho-44 years.").

124. *Id.* ("New Mexico spent an unusually long period as a territory, 62 years in total."); *see also* Immerwahr, *supra* note 100, at 384 ("On average, places that began as territories on the continent took *forty-five years* to achieve statehood.").

125. *Cf.* Immerwahr, *supra* note 100, at 384 ("Passage to statehood *did* come quickly in some cases, such as gold-rush California. California filled with whites and transitioned from military rule to statehood in two years.").

126. Ferris, *supra* note 123.

The concern that the citizens of the New Mexico Territory were too "foreign"—even though those that were born in the territory were United States citizens at birth[127]—demonstrates the implicit, and sometimes explicit, culture of white supremacy concerning the admission of new states to the Union.[128] Indeed, when considered along with other non-majority white territories whose bid for statehood languished for years,[129] it is hard not to conclude that whiteness was—and, I argue, still is—a *de facto* requirement for statehood.

a. Indian Territory, White Settler Colonialists, and Oklahoma Statehood

Like New Mexico, Oklahoma is another western territory that faced a long road to statehood because of its majority non-white population.[130] Yet the reasons for Oklahoma's struggle to achieve statehood, while also grounded in a white supremacist philosophy of citizenship, is unique because of its status as Indian land. As scholar David Immerwahr explains:

> The reason for Oklahoma's long period of territorial subjugation is that, for the majority of the nineteenth century, it wasn't Oklahoma but "Indian Territory," a legally defined but unorganized all-Indian territory within the United States. At its establishment in 1834, Indian Territory extended from the top of present-day Texas to the Canadian border and from the Mississippi to the Rockies. The Jackson administration proposed carving out a large portion of Indian Territory for eventual admission to the union as an all-Indian state. Congress rejected the proposal, though, partly to avoid the prospect of Indian representatives in the Capitol. With time, Indian Territory was whittled down to Oklahoma. After thousands of whites poured

127. *Id.*

128. *See id.* ("In our time, we see this reluctance to admit New Mexico as a state based on the language and culture of some of its residents as blatant discrimination. Nonetheless, it was a real problem for those who wished to make New Mexico a state. Some New Mexico politicians thought placing restrictions on the citizenship and voting rights of Hispanos and Native Americans was the best way to curry political favor and achieve statehood.").

129. *See* Immerwahr, *supra* note 100, at 384–85 ("Oklahoma . . . languished as a territory for 104 years between annexation and statehood" until it finally gained statehood in 1907.).

130. *Id.*

> into the territory, many in breach of federal law, it was eventually admitted as a white-majority state in 1907.[131]

The history of how Oklahoma became a majority-white territory sufficient to satisfy the xenophobic concerns of Congress is a particularly complicated and brutal one. In 1887, the Dawes General Allotment Act ("Dawes Act")[132] stripped the indigenous people of Oklahoma of their land so that it could be settled by white colonists.[133] The Dawes Act "authorized the government to break up the tribal lands and allot them to individual Native Americans in parcels of 40, 80, and 160 acres. Only Native Americans who accepted the land could become U.S. citizens and any remaining land would be made available for public sale."[134]

In the 1880s, the United States government began implementing a policy called allotment, which was "a system designed to force Native assimilation into white culture by dividing their traditional communal lands overseen by tribal governments into small, individually owned properties."[135]

Even prior to the allotment system, the government began moving tribes within the Indian Territory to make way for white settlers to occupy their land:

> During the time of Andrew Jackson, the government moved the Five Tribes to Indian Territory along with scores of other tribes. After the 1866 Reconstruction Treaties with the Five Tribes, federal negotiators set up reservations in the western part of the Territory for southern plains tribes and reserved the central part—the "unassigned lands"—for tribes in Kansas and tribes to be relocated in the future. Ultimately, something like 67 tribes

131. *Id.* It appears that this reference to white settlers who came to Oklahoma "in breach of federal law" refers to the activities of the so-called "Sooners," white settlers who squatted on Indian land during the Oklahoma Land Rush of 1889. *See* Jenny Ashcraft, *Boomers and Sooners: The Oklahoma Land Rush of 1889*, NEWSPAPERS.COM: FISHWRAP (Sept. 11, 2020), https://blog.newspapers.com/boomers-and-sooners-the-oklahoma-land-rush-of-1889/.

132. *See Dawes General Allotment Act*, ENCYCLOPAEDIA BRITANNICA (Dec. 4, 2019), https://www.britannica.com/topic/Dawes-General-Allotment-Act.

133. Ashcraft, *supra* note 131.

134. *Id.*

135. Erin Blakemore, *Sequoyah, the U.S. State that Almost Existed*, NAT'L GEOGRAPHIC (Aug. 25, 2020), https://www.nationalgeographic.com/history/article/sequoyah-american-state-almost-existed [hereinafter *Sequoyah, the U.S. State that Almost Existed*] ("White settlers . . . sought to take over the area they called the Unassigned Lands, a two-million-acre swath of central Oklahoma the U.S. had forced the Muscogee and Seminoles—who had sided with the Confederacy during the Civil War—to cedemore [sic] than a decade earlier. Would-be settlers known as the Boomers squatted on the land and, after years of lobbying, the federal government agreed to open it to white settlement in 1889.").

> inhabited the Territory. Not all of the land was allocated, however. The federal government cleared title for mostly unoccupied lands in the center of the state and this is the land that the government opened for settlement in 1889 with the first land run.[136]

White settler colonialists then began coming to Oklahoma and occupying the so-called "Unassigned Lands:"[137]

> In 1889, as many as 50 thousand settlers poured into Oklahoma hoping to stake claim to a portion of nearly two million acres opened for settlement by the U.S. Government. Many had campaigned the federal government to open the land for settlement and were known as Boomers. The land, formerly occupied by Native Americans, was considered Unassigned Lands after the federal government forcibly relocated many Native American tribes. On April 22, 1889, at noon sharp, a bugle sounded, and hopeful settlers surged across the territory line. The number of settlers surpassed available land and they soon realized that some snuck into Oklahoma ahead of the April 22nd open date. This gave them a leg up on the law-abiding settlers and first in line for the most desirable land. Those early homestead seekers were known as Sooners.[138]

In 1890, the Oklahoma Territory was created from the Unassigned Lands and other western parts of the Indian Territory.[139] Once the white settler population was greater than the native Indian population, Congress passed the Curtis Act in 1898, abolishing the territory's sovereign tribal governments and paving the way for Oklahoma statehood.[140] Finally, Congress passed the Oklahoma Enabling Act in 1906[141] and Oklahoma was admitted to statehood on November 16,

136. Mack Burke, *Examining the Origin of 'Boomer Sooner'*, NORMAN TRANSCRIPT (May 7, 2016), https://www.normantranscript.com/news/examining-the-origin-of-boomer-sooner/article_ee627ccf-ae4c-5894-84f6-823073e47ab2.html.

137. *See Sequoyah, the U.S. State that Almost Existed*, *supra* note 135.

138. *See* Ashcraft, *supra* note 131.

139. *See id.*; *see also* Oklahoma Organic Act, ch. 182, 26 Stat. 81 (1890).

140. *See* M. Kaye Tatro, *Curtis Act (1898)*, OKLA. HIST. SOC'Y, https://www.okhistory.org/publications/enc/entry.php?entry=CU006 (last visited Jan. 3, 2022); Paul Frymer, *The Politics of D.C. Statehood Follow a Well-Worn Path. Here's Why*, WASH. POST (July 6, 2020), https://www.washingtonpost.com/politics/2020/07/06/politics-dc-statehood-follow-well-worn-path-heres-why/.

141. Dianna Everett, *Enabling Act (1906)*, OKLA. HIST. SOC'Y, https://www.okhistory.org/publications/enc/entry.php?entry=EN001 (last visited Jan. 3, 2022).

1907.[142] Once again, the culture of white supremacy had played a key role in the fate of territorial statehood—a philosophy that continued in the admission of the subsequent territories seeking statehood.

B. Arizona Territory

Arizona achieved independent territorial status in 1863.[143] Professor Paul Frymer has reflected on the role of race in the admission of the Arizona and New Mexico Territories to statehood in the early twentieth century:

> The conversation in Congress was, "Was the state white? Was there a majority white population? Was there a large enough white population that spoke English?" All of these types of terminology were applied to what was largely an indigenous and formerly Mexican population.[144]

It is not generally well known outside of the historical scholarship community that the Arizona Territory was part of the Confederate States of America for a time.[145] Thus, before achieving independent territorial status in the United States in 1863, the Confederate Territory of Arizona was declared during the Civil War on August 1, 1861.[146]

The Confederate Territory of Arizona was created in August 1861 after the proposal to establish the Arizona Territory also called for cessation from the Union.[147] After the Confederate Army won the Battle of Mesilla in July 1861, Confederate troops occupied Tucson, and on

142. *Sequoyah, the U.S. State that Almost Existed*, *supra* note 135 ("Congress passed the Oklahoma Enabling Act of 1906. This new law settled the debate over statehood by inviting representatives to write a state constitution, choose a capital, and move forward with a state that combined both Oklahoma and Indian Territories. On November 16, 1907, Oklahoma became the nation's 46th state.").

143. Andrew Glass, *Arizona Organized as a Separate Territory: Feb. 24, 1863*, POLITICO (Feb. 24, 2016, 12:28 AM), https://www.politico.com/story/2016/02/arizona-organized-as-separate-territory-feb-24-1863-219596.

144. Barbara Sprunt, *Simmering Disputes Over Statehood Are About Politics and Race. They Always Have Been*, NPR (Aug. 21, 2020, 4:36 PM), https://www.npr.org/2020/08/21/902334807/simmering-disputes-over-statehood-are-about-politics-and-race-they-always-have-b.

145. *See The American Civil War in Texas: A Sesquicentennial Timeline*, TEX. STATE LIBR. & ARCHIVES COMM'N, https://www.tsl.texas.gov/lobbyexhibits/civil-war-timeline (May 20, 2016).

146. *Id.* ("**August 1, 1861** – Confederate forces having seized control of most federal forts in the Arizona Territory, John R. Baylor declares himself governor of the territory, but fighting continues.").

147. *See* WILLIAM S. KISER, TURMOIL ON THE RIO GRANDE: HISTORY OF THE MESILLA VALLEY, 1846–1865, at 176–77 (2011).

February 14, 1862, Confederate President Jefferson Davis formally recognized the Confederate Territory of Arizona by proclamation.[148] However, President Abraham Lincoln signed the Organic Act into law on February 24, 1863, which created the free—non-slave—Arizona Territory of the United States, with Tucson as its capital.[149]

Following the reclamation of the Arizona Territory by the United States from the Confederacy,[150] efforts turned quickly toward the goal of statehood. However, like other United States territories, the majority of the population of Arizona in the late nineteenth and early twentieth centuries was non-white.[151] Although all Mexican men living in the Arizona Territory who acquired citizenship after the end of the Mexican-American War were legally considered "White men,"[152] white settlers in the Arizona Territory did not view the mestizo and Indian natives of the territory as "white."[153] This led to a protracted battle with opposing goals—to limit the civil rights of non-white citizens living in the Arizona Territory while also somehow managing to convince the United States Congress that the majority of the territorial population was white.[154]

Professor Thomas Sheridan has described this battle for statehood as one that "shape[d] the kind of state Arizona would inevitably become."[155] Like other United States territories striving for statehood, race and language were once again sticking points for the white settlers in the Arizona Territory and members of the United States Congress. White settlers claimed that Spanish-speaking citizens were a threat to the prosperity of the Arizona Territory because their lack of English endangered the safety of workers in the territory.[156] However, as

148. *See* B. Sacks, *The Creation of the Territory of Arizona*, 5 J. SW. 109, 115–18 (1963).

149. Campbell, *supra* note 106, at 5; *see also* ANDREW E. MASICH, THE CIVIL WAR IN ARIZONA: THE STORY OF THE CALIFORNIA VOLUNTEERS, 1861–1865, at 261 (2006).

150. *See* Campbell, *supra* note 106, at 5 ("[D]espite the reclamation of the Arizona Territory by the Union, the territory continued to be represented in the Confederate Congress until the end of the Civil War in 1865.").

151. *Id.* at 5–6.

152. *See id.* at 6 ("Because the Gadsden Treaty and the Treaty of Guadalupe Hidalgo guaranteed United States citizenship to Mexican citizens in the acquired territories, all Mexicans who acquired citizenship as a result of the treaties were considered White under United States law . . . .").

153. *See* KATHERINE BENTON-COHEN, BORDERLINE AMERICANS: RACIAL DIVISION AND LABOR WAR IN THE ARIZONA BORDERLANDS 30 (2009).

154. *See* Campbell, *supra* note 106, at 6–7, 12 ("[L]egislatures with significant Mexican-American populations began to interpret their laws in such a way that only provided "White Mexicans" constitutional rights, thus prohibiting Mexicans of Indian and African descent (who were commonly called mestizos or mulattoes) from voting, holding public office, practicing law, testifying in court cases involving Whites, or serving on juries.").

155. *See* SHERIDAN, *supra* note 109, at 181.

156. *Id.* at 183.

Professor Sheridan notes, this claim was "a racist assumption with no basis" in reality.[157] Nonetheless, these "racist assumption[s]" about the non-white citizens had a detrimental impact on the aspirations of the Arizona Territory and would continue throughout the territorial quest for statehood.

When the Arizona Territory was first presented to Congress for potential statehood in 1902—along with New Mexico and Oklahoma—it was derided as "a mining camp" that was "too sparsely populated to be granted statehood independently." [158] The leader of the Senate Committee on Territories, Republican Senator Albert Beveridge of Indiana, was opposed to statehood for the Arizona Territory because of its lack of a majority-white population.[159] In 1909, in an effort to suppress the suffrage of the territory's non-white population, the territorial legislature "passed a law that prohibited the voter registration of individuals who could not read a portion of the United States Constitution and write his name." [160] Nonetheless, statehood for the Arizona Territory remained out of reach, its white settlers unable for the time being to satisfy the members of the Congress that its citizenry was sufficiently white.

If there was any doubt as to what was required for Arizona to be granted statehood, the progress that the New Mexico Territory was making based on the increase in its white population put that to rest in 1912 when "[a]s one advocate of statehood [in Congress] put it: 'Americans are coming in there by the thousands every year. The entire increase of population … is what we would call Americans. There is no increase by immigration among the Mexicans.'"[161]

When Arizona finally became the forty-eighth state on February 14, 1912,[162] in many ways its long, complicated, and conflicted relationship with race, culture, and membership was just beginning. In the end, the lessons that can be learned from the Arizona Territory's fraught path to

157. *Id.*

158. Keridwen Cornelius, *Arizona's Path to Statehood*, AZCENTRAL (Apr. 11, 2015, 9:18 AM), https://www.azcentral.com/story/travel/local/history/2015/04/11/arizona-path-statehood/25486399/.

159. *Id.*; *see* Frymer, *supra* note 140 ("Sen. Albert Beveridge (R-Ind.), the head of the Senate Committee on Territories, consistently opposed [New Mexico] statehood because the territory lacked a white majority.").

160. Campbell, *supra* note 106, at 18.

161. Frymer, *supra* note 140.

162. *See* Scott Craven, *How Phoenix Celebrated Arizona's Statehood in 1912*, AZCENTRAL (Feb. 12, 2016, 7:21 AM), https://www.azcentral.com/story/news/local/phoenix/2016/02/12/how-phoenix-celebrated-arizonas-statehood-1912/80191944/ ("On Wednesday, Feb. 14, 1912, Phoenix residents awoke to a banner headline in *The Arizona Republican*: 'The 48th State Steps Into the Union Today.'").

statehood are reminiscent of both previous and continuing struggles to define what makes a people "American" enough to be granted full citizenship and all its accordant rights and privileges. And, as we would later see with the subsequent admissions of Alaska and Hawai'i as the forty-ninth and fiftieth states in 1959,[163] while the issues of race and culture that were paramount in the statehood journey of Arizona have not waned, other strategic considerations ultimately trumped legislative concerns about maintaining majority-white populations in the several states during the Cold War.[164]

IV. THE STRATEGIC EXCEPTION: HAWAI'I

"For many of Hawaii's non-white peoples, especially those of Japanese descent who had borne the brunt of hostility and suspicion, statehood was much more than a guarantee of unqualified political rights: by the 1940s it had become an emotive symbol of genuine acceptance into the wider American society."[165]

In many ways, Hawai'i's ascension to statehood should not have been surprising—after all, Hawai'i had been a territory of the United States since 1898.[166] The Kingdom of Hawaii had been annexed when white settler colonialists from the United States overthrew the Hawaiian monarchy in 1893,[167] despite the native Hawaiian population's failed opposition to the annexation.[168] Settler colonialism in Hawai'i began in the 1820s, when Christian missionaries arrived and began imposing their religion and culture on the native Hawaiian population.[169]

163. *The Last Time Congress Created a New State*, NAT'L CONST. CTR. (Mar. 12, 2021), https://constitutioncenter.org/blog/the-last-time-congress-created-a-new-state-hawaii ("In January 1959, Alaska became the 49th state, which accelerated the Hawaii statehood process. On March 11, 1959: the Senate voted 75-15 in favor of the Admissions Act, with the House approving the same bill in a 323 to 89 vote on March 12, 1959.").

164. *See supra* Part IV.

165. *See* BELL, *supra* note 11, at xii.

166. *See Annexation of Hawaii, 1898*, U.S. DEP'T OF STATE, https://2001-2009.state.gov/r/pa/ho/time/gp/17661.htm (last visited Jan. 3, 2022).

167. *See* BELL, *supra* note 11, at ix.

168. *See* NOENOE K. SILVA, ALOHA BETRAYED: NATIVE HAWAIIAN RESISTANCE TO AMERICAN COLONIALISM 123–25 (2004).

169. *See* Alice Kim, *Christian Missionaries in Hawaii*, HAW. DIGIT. NEWSPAPER PROJECT, https://sites.google.com/a/hawaii.edu/ndnp-hawaii/Home/historical-feature-articles/christian-missionaries-in-hawaii (last visited Jan. 3, 2022) ("On March 30, 1820, Hawaii would witness the dawn of Christianity and the most influential religious group in Hawaii. After 164 days of traveling through the United States and sailing through the Pacific Ocean in the *Thaddeus*, fourteen missionaries (seven mission couples) would arrive in Hawaii, landing at Kawaihae and Kailua-Kona, Big Island. . . . In Hawaii, the

The Organic Act passed by Congress in 1900 granted Hawai'i the legal right to eventual statehood,[170] and the first bill for Hawaiian statehood was introduced in Congress in 1920.[171] After World War II, a great deal of the population of Hawai'i was in favor of statehood[172]:

> [S]upport for statehood was increasingly synonymous with enthusiasm for truly representative government . . . . Supported largely by the descendants of Asian immigrants, who had long been denied equality in island life, the Democrats fervently believed that equality as a state in the Union would pave the way for genuine democracy and equality of opportunity at home.[173]

However, the deep anti-Asian sentiment in the United States in the nineteenth century, along with the large Japanese population in Hawai'i, complicated Hawai'i's bid for statehood in Congress after World War II.[174] These complications ultimately led to the creation of the Hawai'i Statehood Commission in 1947, which proponents of Hawaii's admission to the Union hoped would curb the racist and xenophobic arguments against Hawaiian statehood gathering strength in Congress.[175]

A. The Hawai'i Statehood Commission and Anti-Asian Sentiment,

missionaries converted Hawaiian people to the Christian faith, developed the written form of Hawaiian, discouraged many Hawaiian cultural practices, introduced their Western practices, and encouraged the spread of English. One of the most powerful converts, Queen Kaahumanu, embraced Christianity, imposed it to the rest of the kingdom, and banned Hawaiian religious practices.").

170. *See* Hawaiian Organic Act, ch. 339, 31 Stat. 141 (1900).

171. *See* HAW. STATEHOOD COMM'N, HAWAII STATE ARCHIVES 1 (1947–59).

172. *See* BELL, *supra* note 11, at xiii ("[A] plebiscite indicated that more than two-thirds of Hawaii's electorate favored statehood.").

173. *Id.* at xii.

174. *See* Eleanor C. Nordyke & Y. Scott Matsumoto, *The Japanese in Hawaii: A Historical and Demographic Perspective*, 11 HAWAIIAN J. HIST. 162, 168 (1977); *see* BELL, *supra* note 11, at x, xii–xiv ("Until 1959, when it was belatedly accepted as a state, Hawaii remained a semi-colonial appendage of the United States.").

175. *See* HAW. STATEHOOD COMM'N, *supra* note 171, at 1; *see infra* Part IV.A.

1947-1959

As early as 1937, the fact that most of Hawai'i's population was non-white was a stumbling block for ratification of statehood in Congress.[176] This opposition led to the passage of Act 115, S.L.H. 1947, which "authorized the establishment of the Hawaii Statehood Commission to 'actively support and press the movement for statehood.'"[177] While the Statehood Commission was tasked with the goal of gaining statehood for Hawai'i, it was also from the outset given the responsibility of "protecting against discriminatory legislation, preventing discrimination against American citizens of the Territory, correcting false information, and promoting the genral [sic] interest and welfare of the Territory of Hawaii."[178]

The "discrimination" and "false information" that the Hawaii Statehood Commission needed to combat was the anti-Asian sentiment brewing in Congress in opposition to Hawai'i's bid for statehood.[179] From the very beginning, race was the primary obstacle to getting Congressional approval for Hawai'i statehood:

> Hawaii presented Congress with an unprecedented dilemma: it raised unavoidably the question of equality under the nation's Constitution for a noncontiguous area with an essentially nonwhite population. . . . Hawaii's status within the Union, as well as its unique racial composition and ambiguous Americanization, provoked deep controversy, even hostility, in Washington. In particular, its diverse ethnic composition and tolerant social practices challenged the patterns of race relations imposed in many mainland states, notably those still segregated.[180]

176. *See* Sarah Miller Davenport, *Racists in Congress Fought Statehood for Hawaii, but Lost that Battle 60 Years Ago*, THE CONVERSATION (Mar. 18, 2019, 6:45 AM), https://theconversation.com/racists-in-congress-fought-statehood-for-hawaii-but-lost-that-battle-60-years-ago-113499 ("By 1937, however, the statehood campaign had stalled on the back of a congressional investigation that called into question the loyalty of the islands' Japanese population, Hawaii's largest ethnic group. According to one statehood opponent, the very idea of statehood was 'preposterous,' since people of Japanese descent in Hawaii held allegiance to Japan, 'which they could not disavow if they would, and would not if they could.'").

177. *See* HAW. STATEHOOD COMM'N, *supra* note 171, at 1.

178. *Id.*

179. *Id.*; Davenport, *supra* note 176.

180. *See* BELL, *supra* note 11, at xiii–xiv.

President Truman's Civil Rights Commission of 1946 played a large role in the creation of the Hawaii Statehood Commission.[181] It was this connection to the larger American Civil Rights Movement that helped Hawai'i ultimately gain enough support in Congress to be the only state admitted to the Union with an undisputed non-white majority citizenry in 1959.[182]

B. Hawaiian Statehood as a Civil Rights Issue

The struggles of Hawai'i to gain statehood are inextricably related to racial equality and the larger Civil Rights Movement of the twentieth century in the United States.[183] Much like Jim Crow, the roots of the opposition to Hawai'i statehood came from the segregated South.[184] The white supremacist attitude of Southern Senators opposed to Hawaiian statehood is exemplified in the comment of Florida Senator George Smathers, who argued that statehood for Hawai'i "threatened 'our high standard of living' and 'the purity of our democracy.'" [185] As Texas Representative W.R. Poage stated, the main reason for Southern opposition to Hawai'i statehood was the balance of racial political power:

181. *See* Bell, *supra* note 3, at 49. ("Truman appointed a special Civil Rights Commission in 1946. It subsequently recommended that Congress enact substantive civil rights legislation to ensure the equal political rights of minorities . . . . Implementation of this comprehensive civil rights program, Truman emphasised [sic], demanded not only the granting of full citizenship rights to minority groups in existing states, but immediate statehood for Hawaii. Statehood was essential if all United States citizens were to enjoy full and equal civil rights.").

182. *See id.* at 46–47, 49 ("[E]ven if Truman had not explicitly classified statehood for Hawaii as an aspect of his civil rights program, the two issues would nonetheless have become fused when considered by Congress. Indeed, the developing relationship between the issues was evidenced during Congressional debate on Hawaii prior to Truman's call for passage of comprehensive civil rights legislation in 1948."); *Statehood for Hawaii: Hearing on S. 49, S. 51, and H.R. 3575 Before the Comm. on Interior and Insular Affs.*, 83d Cong. 402 (1954) (statement of Rep. Howard W. Smith).

183. *See* BELL, *supra* note 11, at xiii ("An understanding of Hawaii's long-frustrated bid for statehood demands an appreciation of the ways in which it impinged on wider national controversies. These disputes determined its fate in Congress, especially during the war against Japan, the cold war, and the drive for desegregation and civil rights during the 1940s and 1950s.").

184. *See* Davenport, *supra* note 176 ("The base of opposition to statehood in Congress was Southern Democrats. To them, Hawaii was a dangerous portent of an interracial future.").

185. *Id.* In opposition to Hawai'i statehood, Senator Smathers also commented: "Perhaps we should become the United States of the Pacific, and finally should become the United States of the Orient . . . ." *Id.*

"[T]he proposal for Hawaii statehood might result in 'two more votes in the Senate' for civil rights."[186]

As historian Roger Bell has explained, Southern Democrats for whom racial segregation was a way of life saw Hawaiian statehood as a threat to that:

> [A] majority of Southern Congressmen interpreted Hawaiian statehood as a factor which might irrevocably reduce the right of Southern states to determine domestic racial policies and practice by adding voting strength to the growing "liberal", anti-segregationist bloc in the Senate. Thus, to a majority of Southerners, Hawaii statehood constituted a direct threat to their sectional interests.[187]

Southern Democrats did not shy away from expressing their anti-Asian sentiment when talking about why Hawai'i should not be granted statehood. Georgia Congressman Prince Hulon Preston, Jr. argued that Hawaiian residents of Japanese descent, in particular, were unworthy of full membership in the United States on account of their race:

> [W]hat does [the Hawaii bill] do? It makes citizens with equal rights with you and me of 180,000 Japanese people who reside in Hawaii. It gives those people the same rights you and I have, we, the descendants of those who created, fought, and maintained this country. . . . When you give those people the same rights we have today you will have [two] Senators speaking for those 180,000 Japanese . . . ."[188]

The white supremacist ideology of Virginia Congressman Howard W. Smith was even more explicit as a reason for his opposition to Hawaiian statehood. In 1954, while testifying in the Statehood for Hawaii Hearings in the United States Senate, Representative Smith stated:

> I know it is considered very bad form to mention race, and one is considered out of date and old-fashioned if he has any ideas that this country is still America for Americans and is the country built by the Caucasian race. . . . We have never had a State

186. *Id.*; *see also* Bell, *supra* note 3, at 51 ("[A] Texas newspaper argued that statehood would 'give Hawaii the right to exercise two Senators worth of self-determination on the South.'").

187. Bell, *supra* note 3, at 51.

188. 93 CONG. REC. 7937 (1947).

> admitted into the Union that was not predominantly Caucasian.[189]

It is in this turbulent environment that Hawai'i's statehood ambitions were considered by the United States Congress. And while Hawai'i was not the first United States territory with a majority non-white population to seek statehood,[190] the concurrent issues of the day served as an obstacle to Hawaiian statehood. Conflict over "minority rights in wartime, states' rights . . . racial equality, and relative party strengths in Congress" were major civil rights issues that distracted from, and deterred, the success of Hawai'i's statehood campaign.[191] Ultimately, "[s]tatehood [for Hawaii] was withheld until it was finally extricated from these deep national conflicts"[192] —including anti-statehood campaigns from within Hawai'i itself.

C. Hawaiians Against Statehood: Campbell v. Stainback

In 1946, Territorial Senator Alice Kamokila Campbell, daughter of nobility of the Kingdom of Hawaii, testified "against statehood given before a visiting Congressional committee chaired by Representative Henry Larcade of Louisiana."[193] The United States House Committee on Territories conducted hearings for Hawai'i statehood from January 7 to January 17, 1946, where Senator Campbell spoke in opposition to Hawaiian statehood.[194] The following year, in September 1947, Senator Campbell founded the Anti-Statehood Clearing House, which worked to

189. *Statehood for Hawaii: Hearing on S. 49, S. 51, and H.R. 3575*, *supra* note 182 (statement of Rep. Howard W. Smith). Additionally, Congressman Smith later argued that if Hawai'i was admitted as a state, "the vote of one Chinaman in Hawaii would be worth as much as votes of 31 citizens of New York when it comes to electing Senators." *Hawaiian Statehood*, CQ ALMANAC, https://library.cqpress.com/cqalmanac/document.php?id=cqal53-1368798 (last visited Jan. 3, 2022).

190. *See supra* Part III.

191. BELL, *supra* note 11, at xiii.

192. *Id.*

193. John S. Whitehead, *The Anti-Statehood Movement and the Legacy of Alice Kamokila Campbell*, 27 HAWAIIAN J. HIST. 43, 48 (1993). "Mrs. Campbell served in the territorial Senate as the Democratic senator for Maui-Moloka'i from 1942 to 1946." *Id.* Kamokila Campbell's mother, Abigail Kuaihealani Maipinepine Campbell, descended from the Kalanikini line of Maui chieftains. *See id.* at 47; Kapiikauinamoku, *Lunalilo's Dynasty Is Represented by Amalus*, *in* THE STORY OF MAUI ROYALTY 105, 105 (1956).

194. *Statehood: Timeline*, HAW. DIGIT. NEWSPAPER PROJECT, https://hdnpblog.wordpress.com/historical-articles/statehood/ (last visited Jan. 3, 2022) ("On the last day [of the hearings], Territorial Senator Alice Kamokila Campbell spoke against statehood fifty-three years after the overthrow of the Hawaiian monarchy. In her speech, she said, 'I do not feel … we should forfeit the traditional rights and privileges of the natives of our islands for a mere thimbleful of votes in Congress . . . .'").

prevent the efforts of the Hawaii Statehood Commission from succeeding.[195]

On January 7, 1948, President Harry S. Truman advocated statehood for Hawai'i in his State of the Union Address.[196] Following President Truman's promotion of Hawai'i statehood, Senator Campbell filed a lawsuit, *Campbell v. Stainback,* on January 17, 1948.[197] The lawsuit argued against the illegalities of the territorial government's use of public monies to campaign for statehood, and ultimately reached the Supreme Court of the Territory of Hawai'i in 1949.[198] Senator Campbell "questioned the territorial government's use of $200,000 in public funds for the local and national campaign for statehood" and argued that the public funding was being used for "political, rather than for public, purposes."[199] Additionally, Senator Campbell decided to strategically file the lawsuit "to coincide with . . . the fifty-fifth anniversary of the overthrow of the Hawaiian nation."[200]

The main question considered by the Supreme Court of the Territory of Hawai'i in *Campbell v. Stainback* was whether the $200,000 spent under the authority of Act 115 establishing the Hawaii Statehood Commission was "to the exclusion and detriment of citizens and taxpayers" opposed to statehood.[201] As scholar Dean Itsuji Saranillio explains:

> [Senator Campbell's] suit targeted especially the commission's publicity campaign on three main points: "(1) A national or sectional advertising and publicity campaign is not a valid public purpose for which public funds may be expended; (2) lobbying in Washington, D.C., is not a valid public purpose for which public funds may be expended; (3) the grant of unlimited discretion to

195. *Id.*

196. President Harry S. Truman, State of the Union Address (Jan. 7, 1948) (transcript available online at http://www.let.rug.nl/usa/presidents/harry-s-truman/state-of-the-union-1948.php) ("We should also consider our obligation to assure the fullest possible measure of civil rights to the people of our territories and possessions. I believe that the time has come for Alaska and Hawaii to be admitted to the Union as States.").

197. 38 Haw. 310 (1949); *see A Woman Ahead of Her Time*, HAWAIIAN PATRIOTS PROJECT, https://www.kamakakoi.com/hawaiianpatriots/kamokila.html (last visited Jan. 3, 2022).

198. *Campbell*, 38 Haw. at 310–11.

199. *Statehood: Timeline*, *supra* note 194.

200. DEAN ITSUJI SARANILLIO, UNSUSTAINABLE EMPIRE: ALTERNATIVE HISTORIES OF HAWAI'I STATEHOOD 123 (2018).

201. *Id.* (quoting *Campbell*, 38 Haw. at 311).

> an administrative agency in the expenditure of public funds constitutes an invalid delegation of power by the legislature."[202]

The remedy sought by Senator Campbell for these claims was an "injunction to restrain the governor, the attorney general, treasurer and auditor of the Territory and the chairman and members of the Hawaii Statehood Commission from expending public moneys under the provisions of Act 115."[203]

On March 28, 1949, the Supreme Court of the Territory of Hawai'i issued a unanimous decision in Senator Campbell's favor.[204] Writing for the court, Justice Emil C. Peters issued an injunction against the Statehood Commission, stating that:

> The appellees justify the expenditure of public moneys for publicity purposes . . . upon the ground that the purposes thereof subserve the public welfare, are for a "public purpose" and hence a rightful subject of legislation. With this we cannot agree. To accord validity to expenditures for an indiscriminate publicity campaign upon the ground that it is for a public purpose would do violence to that term as juridicially [sic] defined and dignify as "public" what is purely "political."[205]

In its decision in *Campbell*, the Supreme Court of the Territory of Hawai'i ruminated on the powers in the Organic Act, as well as the plenary power of Congress, over the Territories of the United States:

> The Organic Act is silent upon the powers or duties of the local legislature in respect to the exercise by Congress of its superior

202. *Id.* (quoting *Campbell*, 38 Haw. at 311–12). The specific language used by Senator Campbell in her lawsuit was:

> [T]he authority conferred by the Act upon the treasurer and auditor of the Territory and the chairman of the Hawaii Statehood Commission, are "invalid, illegal, discriminatory, contrary to public policy, not conducive to public welfare and are not within the police powers of the Territory of Hawaii in that said moneys so illegally expended and being illegally expended are used to aid private purposes and individuals and are an illegal gift of public moneys to the proponents of statehood for Hawaii and contrary to law; that said illegal expenditures heretofore and now being made are to the exclusion and detriment of citizens and taxpayers of the Territory of Hawaii opposed to statehood for Hawaii."

Campbell, 38 Haw. at 311.

203. *Campbell*, 38 Haw. at 311.

204. *Id.* at 315.

205. *Id.* at 315, 327.

> supervisory legislative control of the Territory. And the only legal justification for the creation of the Hawaii Statehood Commission and the conference upon it of the powers and duties enumerated in section 2, paragraphs 1, 2, 3 (so far as it affects the Federal Government), 5 (so far as it applies to congressional legislation) and 6 of the Act is, in our opinion, the right of petition as the legislative representative of the citizens of Hawaii. To create an agency to represent the citizens of Hawaii upon these subjects before the Congress of the United States and such officers of the Federal Government as may be involved upon federal legislation pending or proposed affecting Hawaii is, in the final analysis, the exercise of the right of petition reposed in the citizen and asserted by the legislative representative of the citizen.[206]

As the United States Supreme Court did in the *Insular Cases*, the Supreme Court of the Territory of Hawai'i made a distinction in *Campbell* between fundamental rights and procedural or remedial rights, which do not apply in the territories:

> It is the sacred and inalienable right of the citizen to petition those in governmental authority for a redress of grievances. . . . The First Amendment to the Federal Constitution assumes the existence of the right and protects the citizen against its encroachment by Congress. Hence it is that citizens of the Territory may, without interference, petition the Congress of the United States for statehood and for redress against discriminatory legislation. This right of petition may be exercised independently by private citizens or by their legislative representatives. Petitions by the legislature of the Territory by resolution duly adopted, memorializing and petitioning Congress upon general subjects upon which that body has power to legislate and in which the citizens of the United States locally resident have a deep interest, have not been uncommon. It could hardly be seriously argued that written petitions requesting congressional legislation upon subjects to which we have adverted might not be legally circulated among and signed by individual citizens of this Territory and when so signed forwarded to the National Congress for consideration. By the Act in question the legislature of the Territory, within its powers to

206. *Id.* at 316.

> legislate upon all rightful subjects of legislation of the Territory, acted as the legislative representative of the citizens.[207]

In the end, the strategic exception of Hawai'i after TID was announced in the *Insular Cases* was not enough to quell the white supremacist philosophy of territorial statehood. The racist body of law that developed concerning the suitability of majority non-white populations in the territories continues today—more than seventy years after the admission of our fiftieth state—and clouds the horizon when contemplating the likelihood of statehood for other contemporary statehood aspirants with substantial non-white populations.

V. THE DISTRICT OF COLUMBIA: FEDERAL COLONIALISM

The official list of territories of the United States does not include the District of Columbia.[208] Although the District of Columbia was initially named the "Territory of Columbia" in September 1791,[209] it was re-named the District of Columbia in 1871 pursuant to James Madison's argument in *Federalist No. 43* that the capital city of the United States should be a federal district.[210] Nonetheless, the District of Columbia has a great deal in common with the official territories of the United States. As of 2021, the five official territories of the United States are American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, and the United States Virgin Islands.[211] In addition to not being given representation in the United States Congress,[212] like the territories, the

207. *Id.* at 316–19.

208. *See* Daniel A. Cotter, *Territories of the United States*, CONSTITUTING AM., https://constitutingamerica.org/territories-of-the-united-states-guest-essayist-daniel-a-cotter/#:~:text=Currently%2C%20the%20United%20States%20has,and%20the%20U.S.%20Virgin%20Islands (last visited Jan. 3, 2022).

209. John Stewart, *Early Maps and Surveyors of the City of Washington, D.C.*, *in* RECORDS OF THE COLUMBIA HISTORICAL SOCIETY 53 (1899).

210. *See* Daniel Ganninger, *Why Is It Called the District of Columbia?*, MEDIUM (July 7, 2020), https://medium.com/knowledge-stew/why-is-it-called-the-district-of-columbia-42c09a97529; THE FEDERALIST NO. 43 (James Madison); Becky Little, *Why Isn't Washington, D.C. a State?*, HISTORY (Apr. 22, 2021) https://www.history.com/news/washington-dc-statehood-reconstruction.

211. Cotter, *supra* note 208.

212. Meagan Flynn & Julie Zauzmer Weil, S*upreme Court Agrees D.C. Not Entitled to Congressional Voting Representation*, WASH. POST (Oct. 4, 2021, 5:18 PM), https://www.washingtonpost.com/dc-md-va/2021/10/04/supreme-court-dc-congress-vote/.
The Constitution gives Congress the power to "exercise exclusive Legislation in all Cases." U.S. CONST. art. I, § 8.

majority of the population of the District of Columbia is also non-white.[213] Unlike all of the other territories, however, residents of the District of Columbia have always been United States citizens, without need for statutory permission,[214] and may cast ballots to elect the President of the United States in the federal election every four years.[215]

There is also the issue of differential treatment by the United States Constitution regarding how and when territories and the District of Columbia can be admitted for statehood:

> There are a number of legal obstacles to D.C. statehood, to be sure, which differ from those that encumber U.S. territories. For D.C., at least three provisions of the U.S. Constitution are implicated. As former Sen. Russ Feingold (D-Wisc.) wrote recently for The Hill, Article IV, Section 3 of the Constitution provides that "New States may be admitted by the Congress into this Union," which has occurred 37 times in the nation's history—most recently in 1959, with the addition of Alaska and Hawaii. Article 1, Section 8, clause 17 authorizes Congress to "exercise exclusive Legislation in all Cases whatsoever, over [the] District (not exceeding ten Miles square)," and deems it "the Seat of Government of the United States." Finally, the 23rd Amendment gives D.C. a "number of electors of President and Vice President equal to the whole number of Senators and representatives in Congress to which the District would be entitled if it were a State."[216]

Although "the House Committee on Oversight and Reform voted to pass H.R. 51, which would grant statehood to the people of the District of Columbia" in April 2021, "there is nothing in the original Constitution that gives obvious 'textualist' grounds for a conservative-leaning

213. *Race Data for City: District of Columbia*, DC HEALTH MATTERS, https://www.dchealthmatters.org/demographicdata?id=130951&sectionId=940 (last updated Jan. 2021). In 2021, 42.31% of the population in the District of Columbia identified as white, with the remainder identifying as another race or as two or more races. *Id.*

214. *FAQ*, STATE OF WASHINGTON, D.C., https://statehood.dc.gov/page/faq (last visited Jan. 3, 2022). Residents of American Samoa are United States nationals, not United States citizens. *See* Amanda Pampuro, *American Samoans Are Not Born into US Citizenship*, COURTHOUSE NEWS SERV. (June 16, 2021), https://www.courthousenews.com/american-samoans-are-not-born-into-us-citizenship/.

215. In 1961, the 23rd Amendment to the Constitution gave D.C. residents a say in the presidential election. U.S. CONST. amend. XXIII, § 1.

216. Kimberly Wehle, *Not Granting DC and Puerto Rico Statehood Would be Anti-Democratic*, HILL (May 18, 2021, 11:30 AM), https://thehill.com/opinion/campaign/554055-not-granting-dc-and-puerto-rico-statehood-would-be-anti-democratic?amp/ (quoting U.S. CONST. art. 1, § 8, cl. 17).

Supreme Court to strike down Congress's authority to legislate D.C. statehood."[217] Indeed, "[u]ntil 1801, D.C. residents had voting rights through Maryland and Virginia . . . [and] nothing in the Constitution retracts that right expressly."[218] Thus, while the District of Columbia does not have the same "imperial problem" as Puerto Rico,[219] by virtue of the decisions in the *Insular Cases*, neither Congress nor the Article III courts have sustained the claim that the citizens of the District of Columbia have a constitutional right to full representation in our democracy.[220]

Of course, the District of Columbia is not only unique because it is a federal district rather than a territory, but its issues are also distinct from those of the territories in other ways. The fact that territorial citizens may not vote in presidential elections, but the citizens of the District of Columbia may is, of course, perhaps the most obvious difference.[221] But once again, the racist history of the annexation of several United States territories—specifically Guam, the Philippines, Cuba, and Puerto Rico—is perhaps the most daunting when considering the possibility of admission to statehood:

> [F]rom the moment the U.S. annexed Guam, the Philippines, Cuba, and Puerto Rico, statehood was out of the question. Racist conceptions of island peoples as inferior, savage, and strange foreclosed the possibility of statehood in the absence of white settler colonies. But white Americans did not want to move to these "primitive" islands. With statehood off the table, the question facing the United States became how to effectively

217. *Id.*

218. *Id.*

219. *See* LANNY THOMPSON, IMPERIAL ARCHIPELAGO: REPRESENTATION AND RULE IN THE INSULAR TERRITORIES UNDER U.S. DOMINION AFTER 1898, at 24 (2010).

220. *See, e.g.*, Adams v. Clinton, 90 F. Supp. 2d 35, 55–56 (D.D.C. 2000) (holding that "constitutional text, history, and judicial precedent bar us from accepting plaintiffs' contention that the District of Columbia may be considered a state for purposes of congressional representation under Article I.").

221. *See* Autumn Bordner, *D.C. and Puerto Rico Are Not the Same.*, LEGAL PLANET (June 29, 2020), https://legal-planet.org/2020/06/29/dc-and-puerto-rico-are-not-the-same/ ("With passage of the D.C. statehood bill in the House of Representatives last Friday, variations on this statement have been gaining traction as a liberal rallying cry. Because they are not states, neither D.C. nor Puerto Rico have voting representation in Congress. The votes of Puerto Rico's 3.2 million citizens also do not count in U.S. presidential elections (thanks to a constitutional amendment, D.C. citizens have been able to vote for President since 1961).").

> maintain dominance over its strategically important new possessions without fully bringing them into the Union.[222]

As noted previously, although there are similarities between the treatment of the territories in the continental United States and the *de facto* requirement that the majority of the citizens of the territorial population be white,[223] continental territories were put on a path to presumptive statehood that the others—with the exception of Hawai'i—were not.[224] The culture of white supremacy in Congress concerning statehood does not only prohibit the provision of full membership to the territorial "alien races,"[225] but extends to the struggle for statehood to the District of Columbia—a federal district where the citizenry is a majority-minority jurisdiction.[226]

VI. CONCLUSION

As historian Paul Frymer has noted, the modern quest for statehood by territorial and federal colonial protectorates of the United States not only "fits into this long historical pattern," but coincides with a larger moment of historical and racial reckoning:

> In the aftermath of George Floyd's killing, Americans are having an exceptional collective moment of self-reflection and historical recognition of the nation's often exclusionary and racist past. Protesters and politicians alike are taking down statues and

222. *Id.*

223. *See supra* Part III.A.1.

224. *See supra* Part IV; Bordner, *supra* note 221 ("The United States claimed Puerto Rico along with Guam, Cuba, and the Philippines as spoils of the Spanish American War. At that time, annexed territories on the continent were automatically placed on a 'path to statehood.' The Constitution applied in full in these territories and their inhabitants were extended U.S citizenship and voting rights. Then, once territories were sufficiently 'American' in character—meaning enough Native people had been exterminated or dispossessed and enough white people had settled there—the territories would be granted full statehood. Hawai'i, which was annexed the same year as Puerto Rico, but which already was home to a substantial class of white capitalists, was placed on the path to statehood the same as territories on the continent.").

225. *Id.* ("[A]pplying the Constitution in Puerto Rico would lead to an absurd result: It would mean that territorial inhabitants, whether 'savage or civilized' would be 'entitled to all the rights, privileges and immunities of citizens.' This could not be. Clearly, the 'alien races' of the territories did not deserve the benefits of 'Anglo-Saxon principles of government.'" (quoting Downes v. Bidwell, 182 U.S. 244, 279, 287 (1901)).

226. *See* Nadra Kareem Nittle, *Which 4 States Have the Most People of Color?*, THOUGHTCO. (Mar. 21, 2021), https://www.thoughtco.com/states-with-majority-minority-populations-2834515.

> removing famous historical figures from buildings and communities.[227]

As Stacey Plaskett, Congressional Delegate from the U.S. Virgin Islands, has powerfully reflected, citizens of the United States territories deserve equal protection of our laws.[228] Congresswoman Plaskett argues that territorial citizens "deserve nothing less than the full rights of citizenship, including the right to vote."[229] She also points out that this unequal treatment is just one more manifestation of our culture of white supremacy—noting that "[m]ore than 98 percent of these territorial residents are racial or ethnic minorities . . . a fact that cannot be a mere coincidence as our continuing disenfranchisement extends well past the century mark."[230]

The issues of citizenship, race, and statehood, when viewed through the lens of the racist TID and the white supremacist legacy of the *Insular Cases*, make a powerful case for the abolition of these doctrines as we consider the current statehood bids of Puerto Rico and the District of Columbia, as well as the potential admission of the other United States territories in the future. If the United States is to become a truly representative democracy, the inclusion of the territories as full members of our society is essential to begin righting the wrongs of the past and extending equal protection of the law to our fellow citizens and nationals of the territories.

227. *See* Frymer, *supra* note 140.

228. *See* Stacey Plaskett, *The Second-Class Treatment of U.S. Territories Is Un-American*, ATLANTIC (Mar. 11, 2021), https://www.theatlantic.com/ideas/archive/2021/03/give-voting-rights-us-territories/618246/.

229. *Id.*

230. *Id.*