Asserting Plenary Power Over the "Other": Indians, Immigrants, Colonial Subjects, and Why U.S. Jurisprudence Needs To Incorporate International Law

Natsu Taylor Saito†

I. HUMAN RIGHTS AND THE CONTRADICTIONS WITHIN U.S. LAW

> There is a nexus between the abolition or the diminution of [the precepts of American slavery jurisprudence] as advocated by the slavemasters in power in the American colonial and antebellum periods and the efforts in this decade to advocate universal human rights for all. The more we appreciate the extraordinary injustice of the original precepts, the more persistent we will be in eradicating the vestiges of those precepts in the United States and the equivalent denigration throughout the world.[1]

Nelson Mandela reminded a joint session of the United States Congress in 1990 that "[t]o deny any person their human rights is to challenge their very humanity."[2] Human rights law is a subset of international law designed to pro-

† Professor of Law, Georgia State University College of Law. I'm grateful to the Yale Black Law Students Association for organizing this symposium and to the editors of the *Yale Law and Policy Review*. My thanks to Kathleen Cleaver, Andrea Curcio, Brian Nichols, and Sharon Venne for thoughtful suggestions, and particularly to Ward Churchill for insights into the plenary power doctrine and for the inspiration to do this work.

1. A. LEON HIGGINBOTHAM, JR., SHADES OF FREEDOM: RACIAL POLITICS AND PRESUMPTIONS OF THE AMERICAN LEGAL PROCESS 206 (1996).

2. *Id.* at 205.

tect certain fundamental rights of individuals and of ethnic, religious, racial, and national minorities within states. It also encompasses the rights of peoples to self-determination.[3] Since World War II the major world powers have acknowledged that these universal principles of human rights must be accepted as binding on all states, because the domestic laws that protect the rights of "insiders" often fail to protect those regarded as "Other" within the polity.[4] The colonial legacy of the arbitrary imposition of state boundaries upon indigenous nations in almost every part of the world makes international human rights law particularly important.[5]

The United States portrays itself as a nation of laws,[6] laws that give optimal protection to human rights and democratic processes, laws that apply equally to all "citizens" and "fairly" to all others within its jurisdiction. However, its international reputation is that of a state reluctant to ratify human rights agreements and unwilling to accept the jurisdiction of international decision-making bodies.[7] The United States typically responds that it does not need to bind itself to international human rights instruments because it has a legal system that provides not only full justice but *more* protection than international law. In fact, it urges other states to accept U.S. law as the model for universally applicable international law and legal structures.[8]

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3. *See infra* text accompanying notes 273-280.

4. *See* Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather than States*, 32 AM. U. L. REV. 1, 12 (1982) ("[I]t is well known that the legal enforcement system is less effective against those who are powerful than . . . those who are poor and weak."). On the "Other," see HOMI K. BHABHA, THE LOCATION OF CULTURE 66-84 (1994); TZVETAN TODOROV, THE CONQUEST OF AMERICA: THE QUESTION OF THE OTHER 3-5 (Richard Howard trans., Harper & Row 1987).

5. Bernard Neitschmann, *The Fourth World: Nations Versus States*, *in* REORDERING THE WORLD: GEOPOLITICAL PERSPECTIVES ON THE TWENTY-FIRST CENTURY 225-242 (George J. Demko & William B. Wood eds., 1994); *see also* Father Robert Araujo, *Sovereignty, Human Rights, and Self-Determination: The Meaning of International Law*, 24 FORDHAM INT'L L.J. 1477 (2001) (arguing for recognition of the sovereignty of nations as well as states). *See generally* HUGH SETON-WATSON, NATIONS AND STATES: AN ENQUIRY INTO THE ORIGINS OF NATIONS AND THE POLITICS OF NATIONALISM (1977) (distinguishing nations and states, both historically and politically).

"Nation" as used here refers to "the geographically bounded territory of a common people as well as to the people themselves. A nation is a cultural territory made up of communities of individuals who see themselves as 'one people' on the basis of common ancestry, history, society, institutions, ideology, language, territory, and, often, religion." Nietschmann, *supra*, at 226.

Despite the common conflation of the terms, a nation is distinct from a state, which Nietchmann defines as "a centralized political system within international legal boundaries recognized by other states. Further, it uses a civilian-military bureaucracy to establish one government and to enforce one set of institutions and laws. . . . This system is imposed on many preexisting nations and peoples." *Id.* at 227.

6. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).

7. *See* M. Christian Green, *The "Matrioshka" Strategy: US Evasion of the Spirit of the International Covenant on Civil and Political Rights*, 10 S. AFR. J. HUM. RTS. 357 (1994); Johan D. van der Vyver, *American Exceptionalism: Human Rights, International Criminal Justice, and National Self-Righteousness*, 50 EMORY L.J. 775 (2001).

8. *See* LOUIS HENKIN, THE AGE OF RIGHTS 65-80 (1990). *See generally* Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT'L L. 341 (1995) (noting the damaging effect of U.S. reservations to multilateral treaties); Elizabeth A. Reimels, Comment, *Playing for Keeps: The United States Interpretation of International Prohibitions Against the Juvenile Death Penalty—The U.S. Wants to Play the International Human Rights Game, But Only If It*

It is generally assumed that the protections, procedural and substantive, offered under U.S. law are those embodied in the Constitution and the body of statutory and judicial law that has emerged under its aegis. Whether the U.S. Constitution, particularly the Bill of Rights, adequately protects those universal human rights acknowledged in international law has generated significant debate.[9] There is, however, a larger problem with the United States's assertion that the rights protected under international law are adequately protected by its domestic law, because a large sector of persons and groups under U.S. jurisdiction, and therefore governed by U.S. law, are excluded from most or all of the protections of the Constitution by virtue of what is called the "plenary power" doctrine.

"Plenary" means full, or complete, and application of the doctrine means that U.S. courts, rather than assessing the constitutionality of governmental action, defer to the "political" branches of government, Congress and the executive.[10] The plenary power doctrine is used primarily with respect to those groups recognized in international law to be most vulnerable: those over whom the government exercises complete power, but who are deemed by that same government to be "outsiders." Thus, the plenary power doctrine, though rarely discussed in general constitutional jurisprudence, is core U.S. law relating to American Indian nations,[11] immigrants,[12] and colonized territories such as Puerto Rico and Guam.[13]

Makes the Rules, 15 EMORY INT'L L. REV. 303 (2001) (noting importance of U.S. compliance with human rights treaties and problems arising out of failure to enforce international law in domestic courts).

9. Questions are raised, for example, over the U.S. practice, deemed constitutional, of executing juveniles and the mentally retarded. *See, e.g.*, AMNESTY INTERNATIONAL, UNITED STATES OF AMERICA: RIGHTS FOR ALL 112-15 (1998).

10. In her thorough analysis of plenary power in "federal Indian law," Newton explains that the term has been used to mean (1) exclusive power, (2) power capable of preempting state law, and (3) unlimited power, with respect to Indians. Nell Jessup Newton, *Federal Power over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195, 196 n.3 (1984). *See also* DAVID E. WILKINS, AMERICAN INDIAN SOVEREIGNTY AND THE U.S. SUPREME COURT: THE MASKING OF JUSTICE 25-27 (1997) (describing the origins of the term in the context of Indian law); Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255; Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545 (1990).

11. It is important to note that use of the term "tribe" is problematic both because of its association with animal groupings and "primitive or nomadic peoples," *see, e.g.*, WEBSTER'S DELUXE UNABRIDGED DICTIONARY 1949 (2d ed. 1983), and because it has been used to obfuscate the fact that Indian peoples comprise nations.

12. I am using the term "immigrants" in its general sense to mean non-U.S. citizens coming to the U.S., not as it is used in immigration law to refer specifically to those non-citizens who have been granted lawful permanent resident status. *See* 8 U.S.C. § 1101(a)(15) (1994). Most of the cases referencing the plenary power doctrine deal with the law governing admission and expulsion of non-citizens. While this is somewhat different than the law governing the rights and obligations of non-citizens residing in the United States, that law is also undergirded by the plenary power doctrine. See *infra* text accompanying notes 121-148.

13. These territories currently include Puerto Rico, the Northern Marianas, "American" Samoa and the "U.S." Virgin Islands. Despite U.S. assertions that these territories are "freely associated" with the United States, they are commonly recognized as colonies. See *infra* text accompanying notes 175-190. Hawai'i is also a directly colonized territory, but its forced "incorporation" into the United States has

A cursory look at the common roots, functioning, and purposes of the doctrine in U.S. immigration, Indian, and colonial law reveals significant human rights problems. Thus, "plenary power" is the legal rationale for allowing the federal government to turn Indian reservations into radioactive wastelands while simultaneously robbing indigenous peoples of billions of dollars of royalties from their oil, gas, and other natural resources;[14] the interception of Haitian refugees on the high seas and the indefinite imprisonment of Mariel Cubans, and now many Muslims and Arab Americans, not accused of any crime;[15] and the refusal to hold a binding referendum on Puerto Rico's future and the continued bombing of the island of Vieques.[16]

Nothing in the Constitution explicitly gives the government such power. Explanations and justifications of the exercise of plenary power are confused and sometimes contradictory, but they boil down to the notion that it is an extraconstitutional power, inherent in sovereignty, which the United States government acquired upon becoming a recognized state.[17] Thus, the theory goes, the government's powers are limited by the Constitution with respect to domestic policy—its relations with its political subdivisions and its citizens—but unlimited in its dealings with outsiders or its control over its domestic population in the context of defending against outside threats.[18]

Are there no limits on the exercise of this power? Justifications for the doctrine invoke the need to deal effectively with other sovereigns, so one would suppose that its exercise would be limited by the response of those other sovereigns and, presumably, by the international law that governs relations between sovereigns. But, in fact, plenary power is used with respect to those Others over whom the United States exercises essentially complete control, in situations in which the United States neither respects their sovereignty nor ex-

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situated it somewhat differently with respect to the plenary power doctrine and I do not attempt to incorporate it into this overview. *See generally* ISLANDS IN CAPTIVITY: THE RECORD OF THE INTERNATIONAL TRIBUNAL ON THE RIGHTS OF INDIGENOUS HAWAIIANS (Sharon Venne & Ward Churchill eds., forthcoming 2002), *at* http://www.southendpress.org; Michael Caroll, *Every Man Has a Right to Decide His Own Destiny: The Development of Native Hawiian Self-Determination*, 33 J. MARSHALL L. REV. 639 (2000); John M. Van Dyke et al., *Self-Determination for Nonself-Governing Peoples and Indigenous Peoples: The Cases of Guam and Hawai'i*, 18 U. HAW. L. REV. 623 (1996).

It is also a significant doctrine in U.S. military law, a subject beyond the scope of this Article, but one where I suspect we would find similar dynamics at work. *See generally* Parker v. Levy, 417 U.S. 733 (1974) (holding that an officer's statements urging black enlisted men to refuse to obey orders to go to Vietnam was unprotected speech); Captain John A. Carr, USAF, *Free Speech in the Military Community: Striking a Balance Between Personal Rights and Military Necessity*, 4 A.F. L. REV. 303 (1998). One finds parallels, too, in the law governing the treatment of U.S. prisoners. *See* Ira Bloom, *Prisons, Prisoners, and Pine Forests: Congress Breaches the Wall Separating Legislative from Judicial Power*, 40 ARIZ. L. REV. 389 (1998) (criticizing expanded congressional powers under the Prison Litigation Reform Act and the Anti-Terrorism and Effective Death Penalty Act).

14. *See infra* text accompanying notes 171-174.

15. *See infra* text accompanying notes 127-148.

16. *See infra* text accompanying notes 181-186.

17. *See infra* text accompanying notes 42-44, 86-95, 114.

18. *Id.*

tends the usual protections of domestic or international law.

The harsh consequences of the plenary power doctrine are generally ignored or dismissed as aberrations,[19] perhaps because—like the law of slavery—it is exercised over relatively powerless Others.[20] Examination of the plenary power doctrine as a whole, however, reveals that it is not an exception to a general rule of conformity to human rights law, but a systematic denial of both domestic and international protections to those who most need them. Expanding on Oliver Wendell Holmes's observation that the law is a seamless web,[21] Judge A. Leon Higginbotham, Jr. illustrated that American jurisprudence, past and present, can only be fully understood by incorporating the precepts of the law of slavery. Race-related law, he said, cannot be dismissed as aberrational without misconstruing the fundamental nature of American law and society.[22] This approach can be usefully extended to the law governing those not explicitly enslaved, but subjugated as Other under U.S. law—the people in external colonies, those subject to internal colonial rule,[23] and those explicitly recognized as subjects of another sovereign. A full understanding of American law must incorporate the exercise of plenary power as well as the law that operates within the framework of the Constitution.

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19. In attempting to justify the United States's failure to honor its treaties with Indian Nations, Chief Justice Marshall said that, "the relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist nowhere else," Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 16 (1831) and this characterization has generally been accepted. *See, eg.*, FRANCIS PAUL PRUCHA, AMERICAN INDIAN TREATIES: THE HISTORY OF A POLITICAL ANOMALY 1-2 (1994). In his excellent analysis of the plenary power doctrine in immigration law, Hiroshi Motomura notes that "[i]mmigration law, as it has developed over the past one hundred years under the domination of the plenary power doctrine, represents an aberrational form of the typical relationship between statutory interpretation and constitutional law." Motomura, *supra* note 10, at 549. While I believe Motomura is using "aberration" in a descriptive rather than normative way, the characterization of that which is extraconstitutional as aberrational is common and tends to minimize the critical function played by the plenary power doctrine in American jurisprudence.

20. Even when the application of plenary power has been considered in the context of one field, it has not been considered in this larger context. A May 2001 Westlaw search revealed that of the approximately 500 law review articles referencing plenary power *and* both immigration and Indian law, none did a comparative analysis. However, for a forthcoming analysis encompassing these subjects, see T. ALEXANDER ALEINIKOFF, SEMBLANCES OF SOVEREIGNTY: THE CONSTITUTION, THE STATE, AND AMERICAN CITIZENSHIP (forthcoming 2002).

21. HIGGINBOTHAM, *supra* note 1, at 199.

22. *See generally id.*; A. Leon Higginbotham, Jr., *The Ten Precepts of American Slavery Jurisprudence: Chief Justice Roger Taney's Defense and Justice Thurgood Marshall's Condemnation of the Precept of Black Inferiority*, 17 CARDOZO L. REV. 1695 (1996); A. Leon Higginbotham, Jr., *Violence in America: "Contracts," Myths and History*, 36 B.C. L. REV. 899 (1995); A. Leon Higginbotham, Jr., *Fundamental Rights and the Constitution: A Heavenly Discourse*, *in* AFRICAN AMERICANS AND THE LIVING CONSTITUTION IN THE TWENTY-FIRST CENTURY 289 (John H. Franklin & Genna R. McNeil eds., 1995).

23. By "colonial" I generally mean a relationship in which one nation is subordinated by another for economic, political or strategic gain. See text accompanying note 286 *infra* for additional indices of colonial status. While territories such as Puerto Rico or Guam are generally recognized as colonies despite U.S. claims to the contrary, the reality of Indian nations and Hawai'i as U.S. colonies has been obfuscated by the notion that colonies must be outside the territorial boundaries claimed by a state. *See infra* text accompanying note 291.

Excellent, in-depth critiques of the plenary power doctrine exist in each of the fields of law I discuss in this Article. My purpose here is to give an overview—undoubtedly oversimplifying many specific applications of the doctrine—to help us see in broad strokes its significance in the functioning of American law as a whole. Part II looks at the origins of the plenary power doctrine in the Supreme Court cases dealing with American Indian nations, immigrants, and overseas territories in the late 1800s, when the United States had consolidated itself as a settler state on the North American continent and was considering imperialist expansion overseas. Part III examines how the doctrine continues to justify judicial deference to essentially unfettered congressional and executive control over the lives of those subject to plenary power, and the destructive consequences of such deference.

The solution to the human rights problems created by the exercise of plenary power is often presumed to be the extension of full constitutional protections to the subject groups; in other words, the assimilation of the Other into the mainstream of the body politic. The legal system nominally took this route with respect to African Americans, over whom complete plenary power was authorized by law until the Reconstruction amendments. However, as Judge Higginbotham and many other scholars have documented, formal legal equality has not for the most part resulted in the actual protection of African-American human rights. In addition, assimilationist solutions aggravate violations of peoples' rights to self-determination. Part IV considers these issues and suggests that a "civil rights" or intraconstitutional resolution is inadequate to protect those currently subject to plenary power.

Part V argues that international law provides a viable solution to these problems. The Constitution explicitly recognizes treaties as part of the "supreme law of the land,"[24] and many scholars have put forth compelling arguments for why, within a constitutional framework, international law should be fully recognized and enforced by domestic courts. Nonetheless, the Supreme Court has developed a jurisprudence that explicitly allows domestic law and policy to violate international law without finding it to be unconstitutional.[25]

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24. U.S. CONST. art. VI, § 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties . . . shall be the supreme Law of the Land"); *see also* The Paquete Habana, 175 U.S. 677, 700 (1900) ("International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination.").

25. This includes judicially developed doctrines such as the "last in time" rule under which courts will enforce a later-enacted federal statute even where it conflicts with a treaty, *see* Whitney v. Robertson, 124 U.S. 190 (1888); the "self executing treaty" doctrine under which some treaties will not be enforced without implementing legislation, *see* Foster v. Neilson, 27 U.S. (2 Pet.) 253 (1829); the "political question" doctrine justifying judicial deference to actions of the executive or legislative branches of the government, *see* Baker v. Carr, 369 U.S. 186 (1962); and the "act of state" doctrine under which courts refrain from judging the actions of other sovereignties, *see* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964); Underhill v. Hernandez, 168 U.S. 250 (1897).

These judicially created doctrines prevent U.S. courts from being a forum in which violations of

Because the Court has explicitly found the peoples affected by the plenary power doctrine to be outside the protection of the Constitution, although clearly under the jurisdiction of the United States, their only effective legal protection lies in the enforcement of international law. Part VI concludes by advocating a "metaconstitutional" approach which acknowledges that American jurisprudence does, in fact, extend beyond the Constitution and provides for the incorporation and enforcement of universal principles of international law.

II. ORIGINS OF THE PLENARY POWER DOCTRINE: THE 19TH CENTURY CASES

> It would mean that the United States may acquire territory by cession, conquest or treaty, and that Congress may exercise sovereign dominion over it, outside of and in violation of the Constitution. . . . Thus will be engrafted upon our republican institutions . . . a colonial system entirely foreign to the genius of our Government and abhorrent to the principles that underlie and pervade the Constitution. . . . [W]e will have two governments over the peoples subject to the jurisdiction of the United States, one existing under a written Constitution, creating a government with authority to exercise only powers expressly granted . . . ; the other, existing outside of the written Constitution, in virtue of an unwritten law to be declared from time to time by Congress, which is itself only a creature of that instrument.[26]

The U.S. Supreme Court initially articulated the doctrine allowing the "political" branches of government plenary power over immigrants, Indian nations, and U.S. colonial "possessions" in a series of decisions announced between 1886 and 1903. By the late 1800s the United States had consolidated control over the territory now identified as the forty-eight contiguous states. The U.S. had taken the northern half of Mexico in 1848;[27] the Civil War had successfully prevented southern secession and the sweeping social changes initiated during Reconstruction had been rolled back.[28] By 1869 the east and west coasts were connected by the transcontinental railroad and virtually all Indian land was in settler hands as a result of the making and breaking of treaties, ongoing military campaigns and the extermination of civilian populations. Howard Zinn reports that in "[t]he year of the massacre at Wounded Knee, 1890, it was officially declared by the Bureau of the Census that the internal frontier was closed."[29]

The powers of the state—legislative, executive and judicial—now turned to two broad areas of concern: the place of those deemed Other within American

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international law can effectively be redressed and thus violate the principle of customary international law, articulated in Article 27 of the Vienna Convention on the Law of Treaties, that a "party may not invoke the provisions of its internal law as justification for its failure to perform a treaty." Vienna Convention on the Law of Treaties, May 23, 1969, art. 27, 1155 U.N.T.S. 331, 339.

26. Hawaii v. Mankichi, 190 U.S. 197, 239-40 (1903) (Harlan, J., dissenting), *quoted in* Efren Rivera Ramos, *The Legal Construction of American Colonialism: The Insular Cases (1901-1922)*, 65 REV. JUR. U.P.R. 225, 318-19 (1996).

27. *See* RODOLFO ACUÑA, OCCUPIED AMERICA: A HISTORY OF CHICANOS 5-133 (3d ed. 1988).

28. *See* HOWARD ZINN, A PEOPLE'S HISTORY OF THE UNITED STATES 124-289 (1980).

29. *Id.* at 290. *See generally* DAVID SVALDI, SAND CREEK AND THE RHETORIC OF EXTERMINATION (1989).

society, and the extent to which the United States would follow the path of European imperialism and continue to expand overseas. Between 1886 and 1903 the Supreme Court addressed these issues in seminal decisions regarding immigrants, starting with the *Chinese Exclusion Cases*[30]; Indians, from *United States v. Kagama*[31] through *Lone Wolf v. Hitchcock*[32]; and colonial subjects, in the *Insular Cases* beginning with *Downes v. Bidwell.*[33] In addition to articulating the plenary power doctrine in these cases, the Supreme Court also decided *Plessy v. Ferguson*,[34] which will be considered in Part IV as part of the intra-constitutional alternative to the plenary power doctrine.

A. *Immigrants*

As a sparsely populated and fairly weak settler state, for nearly a century the United States encouraged immigration from northern and western Europe.[35] After occupation of what became the "lower forty-eight" states, tensions emerged between those who wanted to encourage international trade and the importation of cheap labor, especially after the abolition of slavery, and those who wanted to protect "American" (i.e., "white") workers. In 1868, the United States and China agreed in the Burlingame Treaty to expand trade and to guarantee unfettered migration, citing the "inherent and inalienable right of man to change his home and allegiance, and . . . the mutual advantage of free migration."[36] However, after the transcontinental railroad was completed in 1869, leaving many Chinese unemployed, the country entered a depression and pressure mounted on Congress to restrict immigration.[37] In 1875, Congress passed an act excluding "convicts and prostitutes," a restriction which could have been race- and nationality-neutral but for the presumption that Chinese women were prostitutes.[38] In 1882, Congress suspended the immigration of all Chinese

30. 130 U.S. 581 (1889).

31. 118 U.S. 375 (1886).

32. 187 U.S. 553 (1903).

33. 182 U.S. 244 (1901).

34. 163 U.S. 537 (1896).

35. There was no federal regulation of immigration until 1875, but there were attempts by individual states to restrict immigration. *See generally* Gerald Neuman, *The Lost Century of Immigration Law (1776-1875)*, 93 COLUM. L. REV. 1833 (1993).

36. Burlingame Treaty, July 28, 1868, U.S.-P.R.C., 16 Stat. 739, T.S. No. 48; *see also* THOMAS A. ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 180-81 (4th ed. 1998).

37. *See* SELECT COMMISSION ON IMMIGRATION AND REFUGEE POLICY [SCIRP], U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST, STAFF REPORT (1981), *reprinted in* ALEINIKOFF ET AL., *supra* note 36 at 152, 158. *See generally* ENTRY DENIED: EXCLUSION AND THE CHINESE COMMUNITY IN AMERICA, 1882-1943 (Sucheng Chan ed., 1991).

38. Act of March 3, 1875, ch. 141, 18 Stat. 477 (1875). The initial waves of Chinese immigration consisted of men, recruited to work in the mines and on the railroads. By the 1870s, those who had survived were ready to send for wives and establish families. Given the anti-miscegenation laws and sentiments of the time, this restriction effectively consigned these men to permanent bachelor communities and ensured that that generation of Chinese, at least, would not reproduce itself in America. *See* RONALD TAKAKI, STRANGERS FROM A DIFFERENT SHORE: A HISTORY OF ASIAN AMERICANS 121-27

workers for ten years,[39] and in 1884, it required all Chinese residents leaving the United States to obtain certificates of re-entry.

Chae Chan Ping, who had lived in the United States for twelve years, obtained such a certificate and went to China to visit his family. In 1888, just before his return, Congress enacted legislation precluding the entry of *all* Chinese laborers, regardless of whether they held certificates. Chae Chan Ping challenged the 1888 law as a violation of the Burlingame Treaty and a violation of due process.[40] Writing for the Court, Justice Field noted that the statute conflicted with the treaty but would nonetheless be enforced under the "last in time" rule.[41] Addressing the constitutional question, Field said that Congress had the power to regulate immigration, a power not explicitly referenced in the Constitution, and that the courts would not intervene because that power emanated from the government's prerogatives over national security, territorial sovereignty, and self-preservation. Reflecting the common perception of immigrants as Other, Justice Field noted that if Congress "considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security . . . its determination is conclusive upon the judiciary."[42]

Three years later the Court upheld an immigration officer's exclusion of a Japanese woman, Nishimura Ekiu, without a hearing, on the grounds that she was likely to become a "public charge."[43] Justice Gray wrote, "It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe."[44] The Court then extended plenary power from substantive to procedural immigration matters with the perplexing statement that while would-be immigrants possessed some due process rights, they extended only so far as Congress should declare.[45]

Congress extended the ban on Chinese workers in 1892 and provided that a worker already in the United States could stay only if he obtained a certificate of residency based on the testimony of a credible white witness. In 1893, the

(1989).

39. In 1880, the United States had convinced China to amend the Burlingame Treaty by allowing the U.S. to "regulate, limit or suspend" the immigration of additional Chinese laborers while promising that those who were already in the United States could "go and come of their own free will." *See* Motomura, *supra* note 10, at 550.

40. Chae Chan Ping v. United States, 130 U.S. 581, 589-90 (1889).

41. *Id.* at 600. Under the "last in time" rule, if there is an irreconcilable conflict between a treaty obligation and a federal statute, federal courts will enforce that which is most recent. *See infra* note 254.

42. *Id.* at 606.

43. Nishimura Ekiu v. United States, 142 U.S. 651, 662 (1892).

44. *Id.* at 659.

45. *Id.* at 660 ("As to [foreigners], the decisions of executive or administrative officers, acting with powers expressly conferred by Congress are due process of law.").

Supreme Court rejected the claims of Fong Yue Ting and two other Chinese laborers who, everyone agreed, were long-term residents but had no white witnesses to testify.[46] Justice Gray extended Congress's plenary power from the exclusion of those first arriving to the deportation of permanent residents[47] and refused to characterize deportation as punishment that would trigger heightened constitutional scrutiny.[48] Three dissenters argued that some constitutional protections should apply, but no one questioned Congress's right to exclude on the basis of race or nationality.[49]

The plenary power doctrine in immigration law is premised explicitly on the notion that the political branches of the federal government are responsible for the nation's security and for its relations with other sovereigns. Thus, the fact that those subject to this plenary power are not U.S. citizens—tellingly designated "aliens" in immigration law—is key to their identification as Other. However, in other areas of the law, citizenship is intertwined with the exercise of plenary power in complex and confusing ways and warrants some examination.

Citizenship is only mentioned once in the Constitution, in its directive to Congress to enact "an uniform Rule of Naturalization."[50] Congress did so promptly in 1790, limiting naturalized citizenship to "free white persons."[51] In *Dred Scott* the Supreme Court clarified that persons of African descent, whether enslaved or "free," were emphatically *not* U.S. citizens,[52] and a series of "prerequisite" cases determining "whiteness" for naturalization purposes established that neither Indians nor Asians could be naturalized.[53] Thus, until 1868, racial restrictions ensured a fairly close correlation between "citizens" and those protected by the Constitution.

The Fourteenth Amendment's declaration that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof" are citizens was clearly intended to apply to African Americans. In 1898, at the same time that Congress was considering additional immigration restrictions,[54] a divided

46. Fong Yue Ting v. United States, 149 U.S. 698 (1893).

47. *Id.* at 713-14, 723-24.

48. *Id.* at 733-34.

49. *Id.* at 732-763.

50. U.S. CONST. art. I, § 8, cl. 4.

51. Naturalization Act of 1790, 1 Stat. 103 (repealed by the Act of January 19, 1795, which reenacted most of its provisions, including its racial restrictions).

52. Scott v. Sanford, 60 U.S. (19 How.) 393 (1857).

53. *See generally* IAN F. HANEY LOPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE (1996); Natsu Taylor Saito, *Alien and Non-Alien Alike: Citizenship, "Foreignness," and Racial Hierarchy in American Law*, 76 OR. L. REV. 261 (1997).

54. CHARLES A. LOFGREN, THE PLESSY CASE: A LEGAL HISTORICAL INTERPRETATION 98 (1987). In 1896, just before the Supreme Court decided *Plessy*, Senator Henry Cabot Lodge had introduced a bill to add a literacy test to existing immigration restrictions, arguing that it would favor the English and Northern/Western Europeans, keeping out Eastern/Southern Europeans and "Asiatics." *Id.*

Supreme Court held in *United States v. Wong Kim Ark*[55] that "all persons" included not only those deemed "white" or "black," but also those of "Mongolian" descent. Thus, although Asians could not become naturalized citizens until the mid-1900s,[56] their children did become U.S. citizens by virtue of birth "in the territory."

On the other hand, in 1884 the Supreme Court held in *Elk v. Wilkins*[57] that Indians were not citizens by birth:

> Indians born within the territorial limits of the United States, members of, and owing immediate allegiance to, one of the Indian tribes, (an alien though dependent power,) although in a geographical sense born in the United States, are no more "born in the United States and subject to the jurisdiction thereof," . . . than the children of subjects of any foreign government born within the domain of that government.[58]

Subsequently, however, in its efforts to "assimilate" Indians, Congress passed statutes imposing U.S. citizenship on Indians whether they wanted it or not.[59] Residents of U.S. territorial possessions have at times been designated "U.S. nationals" rather than citizens and although most are now designated citizens, they do not have all the rights of "full" citizens.[60] As a result of all these developments, those subjected to the plenary power doctrine may or may not be U.S. citizens, but nonetheless are consistently treated as "outsiders" both in popular consciousness and in U.S. jurisprudence.[61]

B. *Indian Nations*

The plenary power doctrine is a cornerstone not only of immigration law,

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55. United States v. Wong Kim Ark, 169 U.S. 649 (1898).

56. In 1870, after passage of the Fourteenth Amendment, eligibility was extended to "persons of African descent." Act of July 14, 1870, ch. 255, sec. 7, 16 Stat. 254. Restrictions with respect to Asians were not completely eliminated until 1952. Immigration and Nationality Act, ch. 477, 66 Stat. 163 (1952).

57. Elk v. Wilkins, 112 U.S. 94 (1884).

58. *Id.* at 102.

59. The General Allotment Act, sec. 6, 24 Stat. 388 (1887), declared all Indians born within the territorial limits of the United States to whom allotments had been made to be citizens. Citizenship was imposed on all Indians pursuant to acts passed in 1924 (43 Stat. 253, June 2, 1924) and 1940 (Nationality Act of 1940, 54 Stat. 1172, Oct. 14, 1940). *See generally* Robert B. Porter, *The Demise of the Ongwehoweh and the Rise of the Native American: Redressing the Genocidal Act of Forcing American Citizenship upon Indigenous Peoples*, 15 HARV. BLACKLETTER J. 107 (1999).

60. See *infra* text accompanying notes 177-184, 188.

61. *See* Vine Deloria, Jr., *The Application of the Constitution to American Indians, in* EXILED IN THE LAND OF THE FREE: DEMOCRACY, INDIAN NATIONS, AND THE U.S. CONSTITUTION 282, 282 (Oren R. Lyons & John C. Mohawk eds., 1992) ("American Indians have been forced to live within a political/legal no man's land from which there seems to be no possibility of extrication."). S*ee generally* Richard Delgado and Jean Stefancic, *Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills?*, 77 CORNELL L. REV. 1258 (1992); Ediberto Roman, *Members and Outsiders: An Examination of the Models of United States Citizenship as Well as Questions Concerning European Union Citizenship*, 9 U. MIAMI INT'L & COMP. L. REV. 81 (2000/2001); William R. Tamayo, *When the "Coloreds" Are Neither Black Nor Citizens: The United States Civil Rights Movement and Global Migration*, 2 ASIAN L.J. 1 (1995).

but also of what is called federal Indian law.[62] By the time Congress officially suspended treaty making in 1871, the United States had entered into approximately 400 ratified and another 400 unratified treaties with Indian nations.[63] Initially, there was no doubt that these were agreements with independent sovereigns. Indeed, the newly emergent United States, militarily weak and anxious to appear legitimate in a community of nations that did not look kindly upon colonies declaring their independence, wanted both the specific benefits embodied in the treaties and the recognition of legitimacy they implied.[64] Siegfried Wiessner says,

> [T]here is no credible way to interpret out of existence the fact that the budding new player in the international arena of the 18th and 19th century, the United States, for whatever reason, did enter into treaties of friendship and alliance on a perfectly level playing field with the Indian nations. It treated them with the same respect, extending to them the same courtesies as to other nations of the then overwhelmingly European international legal order.[65]

As its relative military power grew, however, the U.S. government imposed its will on the hundreds of indigenous nations it encountered with increasing frequency, violating both its own treaties and more generally applicable international law.[66] The domestic jurisprudence rationalizing such actions emerged from a trilogy of opinions authored by Justice Marshall in the 1820s and '30s: *Johnson v. McIntosh*,[67] *Cherokee Nation v. Georgia*,[68] and *Worcester v. Georgia*.[69] Although these cases continue to be cited to support the complete subordination of Indian nations, Marshall's assertions actually were much more lim-

62. The term "federal Indian law" is a misnomer because Indian nations have had and continue to have their own law which is quite distinct from that of the United States. *See* WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW 1 (1998) ("'Indian Law' might be better termed 'Federal Law About Indians.'"). For a description of some actual Indian law, *see*, ROBERT A. WILLIAMS, JR., LINKING ARMS TOGETHER: AMERICAN INDIAN TREATY VISIONS OF LAW AND PEACE, 1600-1800 (1999).

63. See CHARLES J. KAPPLER, INDIAN AFFAIRS: LAWS AND TREATIES (1940-41) for a compilation of ratified treaties, and VINE DELORIA, JR. & RAYMOND J. DEMALLIE, DOCUMENTS OF AMERICAN INDIAN DIPLOMACY; TREATIES, AGREEMENTS, AND CONVENTIONS, 1775-1979 (1999), for documents omitted by Kappler. In the years since 1871, the U.S. has entered into hundreds of agreements that acknowledge some degree of Indian sovereignty. It continues to acknowledge indigenous sovereignty when it directly benefits U.S. interests, as do its agreements with federally approved and funded "tribal governments" to permit the extraction of radioactive materials or the storage of hazardous wastes on Indian reservations. *See generally* WARD CHURCHILL, *Geographies of Sacrifice: The Radioactive Colonization of Native North America*, *in* STRUGGLE FOR THE LAND: NATIVE NORTH AMERICAN RESISTANCE TO GENOCIDE, ECOCIDE AND COLONIZATION 239-92 (1999).

64. *See* Vine Deloria, Jr., *Self-Determination and the Concept of Sovereignty*, *in* ECONOMIC DEVELOPMENT IN AMERICAN INDIAN RESERVATIONS 22-28 (Roxanne Dunbar Ortiz & Larry Emerson eds., 1979).

65. Siegfried Wiessner, *American Indian Treaties and Modern International Law*, 7 ST. THOMAS L. REV. 567, 591 (1995).

66. *See generally* DAVID E. WILKINS, AMERICAN INDIAN SOVEREIGNTY AND THE U.S. SUPREME COURT: THE MASKING OF JUSTICE (1997); ROBERT A. WILLIAMS, JR., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT 287-333 (1990); Wiessner, *supra* note 65, at 584.

67. Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543 (1823).

68. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831).

69. Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

ited.[70]

In repudiating Georgia's claim to jurisdiction over Cherokee lands, Marshall acknowledged in *Worcester* that

> [f]rom the commencement of our government, congress has passed acts to regulate trade and intercourse with the Indians; which treat them as nations, respect their rights, and manifest a firm purpose to afford that protection which treaties stipulate. All these acts, and especially that of 1802, which is still in force, manifestly consider the several Indian nations as distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guarantied by the United States.[71]

Nonetheless, Marshall's assertion in *Cherokee Nation* that Indian nations were neither independent foreign countries nor states of the union, consigning them to the legal twilight zone of "domestic dependent nations" whose "relation to the United States resembles that of a ward to his guardian"[72] has been used to justify continued assertion of plenary power by Congress. Nell Newton says,

> Both *Johnson* and the *Cherokee Cases* were concerned with upholding federal supremacy in Indian affairs over states and individuals. The federal goal was to obtain cessions of land and to ensure peace . . . by promises of protection from outsiders meddling with Indian land or sovereignty. From these two concepts—property interest and guardianship—the Court in the late nineteenth century gradually developed a guardianship power over Indian tribes, which it frankly acknowledged to be

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70. *See* Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381 (1993) (arguing that Marshall struck a relatively coherent balance between colonialism and constitutionalism that is overlooked by contemporary commentators); Helen W. Winston, *"An Anomaly Unknown:" Supreme Court Application of International Law Norms on Indigenous Rights in the Cherokee Cases (1831-32)*, 1 TULSA J. COMP. & INT'L L. 339 (1994) (analyzing the cases in the context of international law as articulated by Hugo Grotius and Emmerich de Vattel).

In *Johnson* Marshall used the "doctrine of discovery" to justify U.S. occupation of Indian lands, but he recognized that the doctrine only gave the "discovering" colonial power a preemptive right to obtain the land either by purchase from a willing indigenous seller or by lawful conquest. *Johnson*, 21 U.S. at 587; *see also* Newton, *supra* note 10, at 209, 248. As Newton points out, this doctrine was dramatically misstated by Chief Justice Taney, author of the *Dred Scott* opinion, in *United States v. Rogers*, 45 U.S. (4 How.) 567 (1846) (claiming that the doctrine negated Indian ownership interests in their land and subjected them to U.S. political authority).

Marshall said in *Johnson*, "Conquest gives a title which the Courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be, respecting the original justice of the claim which has been successfully asserted." *Johnson*, 21 U.S. (8 Wheat) at 588. One of the many problems with this argument is the fact that most of the Indian land had not been taken by conquest, yet Marshall did not restrict his argument to those indigenous nations that had been "conquered." In fact, he extended it to all Indians in the territories to which the United States envisioned itself as extending—nations that had not as of yet seen, or perhaps even heard, of white settlers, much less the United States government. Marshall clarified in *Worcester* that "conquest" was only legitimate in the context of a "just" war which, in turn, required Indian aggression. 31 U.S. (6 Pet.) at 545-547; *see also* Newton, *supra* note 10, at 248. International law at that time recognized a right of conquest, but only under particular terms, most of which the United States had not complied with. See *infra* text accompanying notes 287-306.

71. 31 U.S. (6 Pet.) at 556-57.

72. 30 U.S. (5 Pet.) at 17.

extraconstitutional.[73]

The United States proceeded to forcibly remove not only the Cherokee, but virtually all eastern Indian nations, onto reservations west of the Mississippi River in clear violation of its treaty obligations. By the 1880s, most indigenous resistance had been crushed and Euroamerican settlers pressed for complete control not only of the land and resources but also of the people on reservations. The Major Crimes Act of 1885[74] was a significant step toward settler control, asserting federal jurisdiction for the first time over certain crimes committed by Indians on reservations, whether or not within the boundaries of a state. The Supreme Court upheld the Act in *United States v. Kagama*,[75] saying that the United States could exercise such authority over Indians and that constitutionally such power rested with the federal, not state, government. The *Kagama* Court first declared that Indian nations had not been truly sovereign since the *Cherokee Cases* of the 1830s, but were "semi-independent" with limited authority over their "internal and social relations."[76] Acknowledging that the Constitution did not explicitly delegate jurisdiction over Indian affairs to the federal government, the Court fell back on the notion that such power must be inherent, relying on cases that dealt with Congress's power to regulate territories that had not yet become states, and drawing on Justice Marshall's earlier pronouncement that "[t]he right to govern may be the inevitable consequence of the right to acquire territory."[77]

The year after *Kagama*, the government moved to break up what remained of Indian land and political organization through the Allotment Act, "extinguishing Indian tribal lands, allotting the same in severalty among those entitled to receive them, and distributing Indian tribal funds."[78] Although the Supreme Court had held in *Elk v. Wilkins* that Indians were not citizens by virtue of the Fourteenth Amendment, the Allotment Act required any individual who accepted allotted land to accept U.S. citizenship as well. Despite tremendous Indian resistance, the federal government took collectively held lands, allotted the worst portions to individuals and sold the "surplus" to white settlers, a process that resulted in the loss of about two-thirds of Indian-held land.[79]

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73. Newton, *supra* note 10, at 207 (internal citations omitted).

74. Indian Appropriation Act of 1885, ch. 341, 23 Stat. 362, 385 (1885).

75. 118 U.S. 375 (1886).

76. *Id.* at 381-82.

77. *Id.* at 380 (quoting American Ins. Co. v. Canter, 26 US (1 Pet) 511, 542 (1828)).

78. Seminole Nation v. United States, 78 Ct. Cl. 455, 466 (1933).

79. BLUE CLARK, *LONE WOLF V. HITCHCOCK*: TREATY RIGHTS & INDIAN LAW AT THE END OF THE NINETEENTH CENTURY 2 (1994) ("After removal from their homelands earlier in the century, allotment was the most traumatic federal policy affecting Indian people."). *See also* DAVID E. WILKINS, AMERICAN INDIAN SOVEREIGNTY AND THE U.S. SUPREME COURT: THE MASKING OF JUSTICE 64-117 (1997). In other challenges to the Allotment Act, the Court held that the plenary power allowed Indian property, even land held in fee simple, to be "subject to the administrative control of the government," Cherokee Nation v. Hitchcock, 187 U.S. 294, 308 (1902), due to the Indians' "condition of dependency," Stephens v. Cherokee Nation, 174 U.S. 445, 488 (1899).

Allotment was challenged in *Lone Wolf v. Hitchcock*,[80] a suit brought by a Kiowa band chief who accepted an allotment under coercion and then tried to halt the assignment of allotments.[81] According to Lone Wolf, the Allotment Act violated (1) the 1867 Treaty of Medicine Lodge, which provided that any alienation of Kiowa land required the consent of three-quarters of the nation's adult men and (2) Fifth Amendment due process. On the Fifth Amendment claim the Court projected the reasoning of *Kagama* back to the "beginning" of U.S. jurisprudence with the counter-factual argument that "[p]lenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government."[82] With respect to the treaty claim, the Court relied on the domestic rule that when a statute is in irreconcilable conflict with a treaty, the last in time will be enforced. The case thus acknowledges Indian nations as separate sovereignties with whom the United States treated and illustrates that U.S. courts have interpreted the Constitution to allow governmental actions that clearly violate international law.

The application of the plenary power doctrine to uphold the Allotment Act meant, in practical terms, that between 1887 and 1934 Indian nations lost 90 million acres of reservation land, more than two-thirds of their former holdings.[83] Kiowa, Comanche, and Apache landholdings went from just under 160 acres per capita in the 1880s to 17 acres in 1934.[84] According to Blue Clark:

> Loss of land, lack of rental and lease income, and few marketable skills left the Kiowa deeply impoverished by the 1920s, with an unemployment rate among Kiowa males above 60 percent, establishing a pattern that persists down to the present. The Lone Wolf decision cast a whole people into an economic coma. All the Indians became a casualty.[85]

Plenary power over Indian nations is alternately attributed to (1) the "Indian Commerce Clause," (2) the federal government's control over "territories" that are not states, and (3) powers "inherent in sovereignty"—the United States' sovereignty, of course. None of these actually give the government such power. First, the only explicit constitutional reference to Indian affairs gives Congress the power to "regulate Commerce with foreign Nations, and among the several

80. 187 U.S. 553 (1903).

81. CLARK, *supra* note 79, at 2.

82. *Lone Wolf*, 187 U.S. at 565.

83. *Hearings on H.R. 7902 Before the House Committee on Indian Affairs*, 73d Cong., 2d Sess. 16 (1934) (memorandum of John Collier), *reprinted in* DAVID H. GETCHES ET AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW 73-75 (1979).

84. CLARK, *supra* note 79, at 95.

85. *Id.* at 96. The government's attorney in the *Lone Wolf* case, Willis Van Devanter, was subsequently appointed to the Supreme Court by President Taft in 1911. *Id.* at 101. He was the author of *United States v. Nice*, 241 U.S. 591 (1916), which held that an enfranchised Indian could still be subject to the plenary power of Congress. WILKINS, *supra* note 79, at 25 ("*Nice* served to seal the status of tribal Indians in perpetual legal and political limbo.").

States, and with the Indian Tribes."[86] This is a recognition that Indian nations are separate from the United States, and thus entities *with* whom the United States can have commerce, not a delegation of power *over* Indians.[87]

Second, even if "the right to govern may be the inevitable consequence of the right to acquire territory,"[88] what is the source of the right to acquire? Federal jurisdiction over territories is said to come from Article IV, which says that "Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."[89] This does not address how territory can be acquired, or whether the United States can hold territory it does not intend to incorporate into the Union. In any case, territory can only be lawfully acquired under international law—the law recognized by Justice Marshall and other jurists of the day—by treaty or by conquest in a "just" war.[90] In this case, a just war could only have been waged in response to unprovoked aggression by the Indian nations, and none of the military campaigns waged against Indian nations fit this description.[91] Thus, to the extent that the United States acquired territory lawfully, it was by treaty.

Third, the Constitution provides that only the President, with the concurrence of two-thirds of the Senate, can enter into treaties,[92] and treaties are by definition agreements between sovereign entities.[93] As a result, recognition of U.S. sovereignty over lawfully acquired territory requires concomitant recogni-

86. U.S. CONST. art. I, § 8, cl. 3.

87. It is, in fact, a delegation of power that the government has over U.S. citizens. The history of the clause clearly indicates that its purpose was to ensure that relations with Indians nations were handled by the federal government, not the states, notwithstanding Justice Stevens' pronouncement that "the central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs." Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 192 (1989). *See also* Robert N. Clinton, *Redressing the Legacy of Conquest: A Vision Quest for a Decolonized Federal Indian Law*, 46 ARK. L. REV. 77, 119-20 & 119 n.139 (1993).

88. American Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511, 542 (1828).

89. U.S. CONST. art. IV, § 3, cl. 2.

90. As discussed *supra* note 70, the discovery doctrine did not justify the taking of land, but only clarified the relative rights of the colonizing powers to negotiate with the indigenous owners.

91. *See* WARD CHURCHILL, *Perversions of Justice: Examining the Doctrine of U.S. Rights to Occupancy in North America*, *in* WARD CHURCHILL READER (forthcoming 2002) (on file with author) (applying the theory to the U.S. context); MICHAEL WALZER, JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS 58-63 (2d ed. 1992) (describing the "legalist paradigm" of aggression as a justification for war). *See generally* ROBERT A. WILLIAMS, JR. , THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST (1990). For the U.S. government's position, see generally FELIX S. COHEN, HANDBOOK ON FEDERAL INDIAN LAW (reprint 1981) (1942).

92. U.S. CONST. art. II, § 2, cl. 2 gives the President the "Power, by and with the Advice and Consent of the Senate to make Treaties."

93. The Vienna Convention on the Law of Treaties defines a treaty as any "international agreement governed by international law and concluded in written form between one or more states." Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations, March 21, 1986, art. 2, sec. 1(a), 25 I.L.M. 543. In addition, the Constitution forbids states to enter into treaties and, therefore, the federal government cannot enter into treaties with states or, presumably, any other of its own political subdivisions. *See* U.S. CONST. art. I., § 10, cl. 1. ("No State shall enter into any Treaty, Alliance, or Confederation . . . .").

tion of the sovereignty of the nations from whom the territory was obtained.[94]

Thus, each of the commonly accepted justifications for the exercise of plenary power over Indian nations falls apart under scrutiny. A more honest explanation is the Supreme Court's conclusion in *Kagama* that authority over Indians "must exist in [the federal] government, because it never has existed anywhere else, because the theatre of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the tribes,"[95] an argument remarkably close to "might makes right."

C. *External Colonies*

The government soon extended plenary power arguments based on the acquisition of territory to external colonies.[96] By the end of the nineteenth century, a primary political question was whether the United States would continue to expand, becoming an explicitly imperialist power like the European nations it was emulating.[97] In 1893, following a plan that had been quite successful in Texas,[98] American business interests backed by the Marines overthrew the Hawaiian monarchy and installed a republican government which the United States quickly recognized.[99] Eventually, of course, Hawai'i was incorporated into the United States, making it a territory that remains colonized but with a domestic legal status distinct from that of unincorporated territories explicitly subject to the plenary power.[100]

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94. However, the United States' willingness to disregard international law was articulated clearly in the 1870 *Cherokee Tobacco* case, upholding a congressional decision to pass an act in violation of a treaty "as if the treaty were not an element to be considered." The Cherokee Tobacco, 78 U.S. 616, 621 (1870). *See also* CLARK, *supra* note 79, at 14.

95. United States v. Kagama, 118 U.S. 375, 384-85 (1886).

96. For a thorough compilation of the history, law, and current status of U.S. territories, see ARNOLD H. LEIBOWITZ, DEFINING STATUS: A COMPREHENSIVE ANALYSIS OF UNITED STATES TERRITORIAL RELATIONS (1989).

97. McKinley's election in 1900 was generally perceived as a mandate for imperialism. *See* STUART CREIGHTON MILLER, "BENEVOLENT ASSIMILATION": THE AMERICAN CONQUEST OF THE PHILIPPINES, 1899-1903, at 21-27 (1982); Christina Duffy Burnett & Burke Marshall, *Between the Foreign and the Domestic: The Doctrine of Territorial Incorporation, Invented and Reinvented, in* FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION, AND THE CONSTITUTION 4 (Christina Duffy Burnett & Burke Marshall eds. 2001).

98. *See* ACUÑA, *supra* note 27, at 9-12, 25-53 (describing the "invasion" and "colonization of Texas").

99. When the U.S. did not immediately annex Hawai'i, Roosevelt called it "a crime against white civilization." ZINN, *supra* note 28, at 293. Hawai'i was annexed in 1898, pursuant to a joint resolution of Congress known as the Newlands Resolution, 30 STAT. 750 (July 7, 1898). *See* HAUNANI-KAY TRASK, FROM A NATIVE DAUGHTER: COLONIALISM AND SOVEREIGNTY IN HAWAI'I 16 (2d ed. 1998) ("Once the Republic of Hawai'i declared itself on July 4, 1894, the "Americanization" of Hawai'i was sealed like a coffin."); Chris K. Iijima, *Race Over Rice: Binary Analytical Boxes and a Twenty-First Century Endorsement of Nineteenth Century Imperialism in* Rice v. Cayetano, 53 RUTGERS L. REV. 91, 103-108 (2000). *See generally* Lisa Cami Oshiro, *Recognizing Na Kanaka Maoli's Right to Self-Determination*, 25 N.M. L. REV. 65 (1995).

100. Although Congress officially "apologized" for the illegal overthrow of the Hawaiian govern-

During this time, Cuba, Puerto Rico, and the Philippines were successfully waging wars of independence against Spanish colonialism. In 1898, with Spain close to defeat, the United States stepped in and quickly claimed victory in what "John Hay, the American Secretary of State, later called 'a splendid little war.'"[101] As a result, rather than gaining their independence, Cuba, Puerto Rico, Guam and the Philippines were "ceded" by Spain to the United States pursuant to a treaty providing that "[t]he civil rights and political status of the native inhabitants . . . shall be determined by the [United States] Congress."[102] Despite the fear that Cuba would become "another black republic" like Haiti,[103] Congress had passed a resolution declaring that Cuba would not be annexed, so control there was exercised through military and then economic means.[104] The United States did, however, take direct possession of Puerto Rico, Guam, and the Philippines.

In the Philippines, indigenous resistance to American occupation was very strong. In what was frequently described as an "Indian war"[105] with official directives to kill all males over the age of ten, American troops massacred the population of entire villages and burned them to the ground, tortured and murdered prisoners of war, raped women, and looted.[106] This was done in the name of the "pacification" and "benevolent assimilation" of a people described in the report of a commission headed by William Howard Taft and praised highly by both Theodore Roosevelt and Supreme Court Justice Brown, as

> weaklings of low stature, with black skin, closely-curling hair, flat noses, thick lips, and large, clumsy feet. In the matter of intelligence they stand at or near the bottom of the human series, and they are believed to be incapable of any considerable degree of civilization or advancement.[107]

The question became the status of these "territories" under U.S. law, and lawmakers turned to their colonial experience with Indians for legal as well as military precedent. Clark notes,

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ment, the U.S. continues to disregard Native Hawaiian rights to self-determination, a subject beyond the scope of this article. *See generally supra* note 13.

101. ZINN, *supra* note 28, at 302; Jose A. Cabranes, *Some Common Ground*, *in* FOREIGN IN A DOMESTIC SENSE, *supra* note 97, at 39.

102. Treaty of Peace between the United States of America and the Kingdom of Spain, Dec. 10, 1898, U.S.-Spain, art. IX, 30 STAT. 1754. *See* Jose Trias Monge, *Plenary Power and the Principle of Liberty: an Alternative View of the Political Condition of Puerto Rico*, 68 REV. JUR. U.P.R. 1 (1999).

103. ZINN, *supra* note 28, at 296 (quoting Winston Churchill and noting that this sentiment was shared by American leaders).

104. *See* Mark S. Weiner, *Teutonic Constitutionalism*, *in* FOREIGN IN A DOMESTIC SENSE, *supra* note 97, at 64.

105. *See* MILLER, *supra* note 97, at 196-218.

106. *See Id.* at 196-218; ZINN, *supra* note 28, at 306-11. The purported justification for such atrocities, as with the atrocities committed against Indians, was that these were not "civilized peoples," and therefore the rules of civilized warfare did not apply but "[i]n the Philippines, Americans often seemed very much like their own worst image of the Malay savage: a people without law." Weiner, *supra* note 104, at 73.

107. Weiner, *supra* note 104, at 66.

> *Lone Wolf* occurred just at the peak of American patriotic fervor over acquisition of new overseas territories from Spain. . . . The decree summarized America's approach to island peoples acquired in the takeover of Spanish colonial possessions after 1898. The subject status of the ward in *Lone Wolf* became the colonial status of the overseas dependent of the Insular Cases . . . . A process of colonial political incorporation and land expropriation on ocean possessions such as the Hawaiian Islands similar to the American Indian experience rapidly took place, leaving the native populace subordinate and increasingly landless.[108]

Speaking in the Senate on how the United States was to govern the Philippines, Henry Cabot Lodge, a leading advocate of racially restrictive immigration policies, reached back to Justice Marshall's decisions justifying federal Indian policy in the *Cherokee* cases. According to Clark, Lodge "summarized imperialists' views when he stated that national Supreme Court decisions declared 'the United States could have under its control . . . a "domestic dependent nation,"' thereby solving for all time in his mind 'the question of our constitutional relations to the Philippines' and other territories."[109]

A similar policy was followed in Puerto Rico, which the United States took as a "territory" without significant military resistance. In 1901 the Supreme Court directly confronted the meaning of this territorial status in *Downes v. Bidwell*,[110] a challenge to U.S. duties on Puerto Rican goods levied at fifteen percent of duties on similar "foreign" goods. Was Puerto Rico part of the United States and, if so, didn't the Commerce Clause preclude any duties at all?

Downes and the other *Insular Cases* decided between 1901 and 1922, were said to "have caused more turmoil on the Supreme Court than any other case since *Dred Scott*."[111] *Downes* generated five separate opinions in what is sometimes characterized as a debate over whether the Constitution "follows the flag."[112] Justice Brown, who had authored the majority opinion in *Plessy v. Ferguson* just five years earlier,[113] wrote "for the Court" though no other jus-

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108. CLARK, *supra* note 79, at 101-102.

109. *Id.* at 102 (citing Cong. Rec. vol. 33, pt. 3, 56th Cong., 1st Sess., Senate, 7 March 1900, p. 2618). Similarly, President McKinley instructed U.S. officials in the Philippines to "adopt the same course" used in dealing with American Indians, permitting only very limited and closely supervised local self-government. *Id.* at 103.

110. Downes v. Bidwell, 182 U.S. 244 (1901).

111. Cabranes, *supra* note 101, at 42 (quoting Frederic R. Coudert, *The Evolution of the Doctrine of Territorial Incorporation*, 60 AM. L. REV. 801, 840 (1926)). While there is some dispute over which cases constitute the "Insular Cases," there is general agreement that they start with *Downes* and go through *Balzac v. People of Porto Rico*, 258 US. 298 (1922), which held that the Jones Act, Pub. L. No. 64-368, 39 Stat. 951 (1917), which conferred U.S. citizenship but not representation on Puerto Ricans, did not "incorporate" Puerto Rico into the United States. For an excellent in-depth analysis of these cases, *see* Rivera Ramos, *supra* note 26; *see also* EFREN RIVERA RAMOS, THE LEGAL CONSTRUCTION OF IDENTITY: THE JUDICIAL AND SOCIAL LEGACY OF AMERICAN COLONIALISM IN PUERTO RICO 71-142 (2001).

112. For critiques of this phrasing, see FOREIGN IN A DOMESTIC SENSE, *supra* note 97, at 32 n.44.

113. Mark Weiner notes that Justice Henry Billings Brown begins his autobiography with the statement, "I was born of a New England Puritan family in which there has been no admixture of alien

tice joined his opinion. He held that Congress had complete discretion over whether to extend the Constitution to the territories and was bound only to recognize the "natural" rights of the inhabitants. Efren Rivera Ramos summarizes Justice Brown's opinion:

> "The power to acquire territory by treaty," he affirmed, "implies not only the power to govern such territory, but to prescribe upon what terms the United States will receive its inhabitants, and what their status shall be in what Chief Justice Marshall termed the 'American Empire.'" In sum, the plenary power of Congress arose from the inherent right to acquire territory, the Territorial Clause, the treaty-making power and the power to declare and conduct war. The Constitution applied to the territories only to the degree that it was extended to them by Congress. As to the probability of despotism resulting from such plenary power, the inhabitants of the new territories should not fear: "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 or to secure dependencies against legislation manifestly hostile to their real interests."[114]

Justice White, concurring, said that the applicability of the Constitution rested on whether a particular territory had been "incorporated" into the United States; if it were "unincorporated," the inhabitants possessed only certain "fundamental" rights. With masterful legal sleight of hand he said,

> while in an international sense Porto Rico was not a foreign country, since it was . . . owned by the United States, it was foreign to the United States in a domestic sense, because the island had not been incorporated into the United States, but was merely appurtenant thereto as a possession.[115]

Justice White's distinction between incorporation and possession allowed the Court to rationalize the "owning" of external territory and the concomitant control of its peoples without constitutional restrictions on the treatment of citizens or the disposition of U.S. territory. Judge Cabranes says, "[i]t is fair to say that it was devised in order to make colonialism possible."[116] The dissenters characterized both White's and Brown's positions as theories of extraconstitutional governmental power. Justice Harlan warned, "It will be an evil day for American liberty if the theory of a government outside of the supreme law of the land finds lodgment in our constitutional jurisprudence. No higher duty rests upon this court than to exert its full authority to prevent all violation of the principles of the Constitution."[117] Nonetheless, the plenary power doctrine had already done just that in immigration and Indian law, and was now firmly en-

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blood for two hundred and fifty years." Weiner, *supra* note 104, at 69.

114. Rivera Ramos, *supra* note 26, at 246-47 (citing *Downes*, 182 U.S. at 280). Justice Brown went on to reassure us that the fact that the Court had only once overturned Congressional action in the territories is evidence that Congress can be counted on to act in good faith—that instance being *Dred Scott*, in which Justice Taney held the Missouri Compromise invalid on the ground that Congress could not prevent citizens from taking their property from one U.S. jurisdiction to another. *Id.* at 280.

115. *Downes*, 182 U.S. at 341-42.

116. Cabranes, *supra* note 101, at 43.

117. *Downes*, 182 U.S. at 382.

sconced in "territorial law" as well.[118]

III. PLENARY POWER TODAY: THE DOCTRINE AND THE DESTRUCTION

> Federal Indian law does not deserve its image as a tiny backwater of law . . . . [F]ew areas, if any, are more fundamental to an assessment of the normative and institutional components of American law. Indeed, federal Indian law is rooted in the most basic of propositions about the American constitutional system: it is inescapably the product both of the colonization of the western hemisphere by European sovereigns and of the corresponding displacement of indigenous peoples.[119]

The cases establishing the plenary power doctrine, from the *Chinese Exclusion Cases* to *Kagama* and *Lone Wolf* to the *Insular Cases*, might just be historical anomalies, except that they continue to be called on to justify the legalized subordination of the Other as U.S. jurisprudence struggles to balance its image of itself as a nation of laws with its desire to maintain structures of colonization.[120] This Part looks at ways in which the plenary power doctrine continues to exert a powerful influence on U.S. law.

A. *Immigrants*

While legal sanction of racial animus, such as that which fueled Chinese exclusion, is generally presumed to be a thing of the past, the plenary power doctrine that grew out of those cases is alive and well. No intervening legal decisions have prohibited immigration laws that discriminate on the basis of race, ethnicity, national origin, or religion, and the doctrine continues to be invoked to exclude those perceived as Other.[121] The contemporary due process rights of non-citizens who have not been officially admitted to the United States are still

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118. Reflecting the consensus among the Justices that Puerto Ricans were distinctly Other, Jose Trias Monge says that the plenary power doctrine articulated in *Downes* "flowed from the holding in *Plessy v. Ferguson*." Trias Monge, *supra* note 102, at 4. Even Justice Harlan said in his dissent that "[w]hether a particular race will or will not assimilate with our people, and whether they can or cannot with safety to our institutions be brought within the operation of the Constitution, is a matter to be thought of when it is proposed to acquire their territory by treaty. A mistake in the acquisition of territory . . . cannot be made the ground for violating the Constitution . . . ." *Downes*, 182 U.S. at 384 (Harlan, J., dissenting).

As Blue Clark notes, "[i]n chambers, it may have been Justice William Moody's lurid story graphically depicting the consequences of twelve tattooed savage chieftains filing into a jury room, resting their spears and war trophies against the wall, and deliberating evidence in a jury trial that swept the other Justices along into supporting White's Insular Doctrine." CLARK, *supra* note 79, at 104, citing Robert B. Highsaw, *Edward Douglas White: Defender of the Conservative Faith* (1981).

119. Frickey, *supra* note 70, at 383.

120. *See* Frickey, *supra* note 70, at 383.

> In a country that prides itself on following the rule of law, the justifications for colonization uttered by those European explorers and recognized by the Supreme Court itself—to impose Christianity upon the heathen, to make more productive use of natural resources, and so on—do not go down easily in the late-twentieth century. *Id.*

121. Currently, this is often on the basis of perceived political beliefs or associations. *See generally* Philip Monrad, Comment, *Ideological Exclusion, Plenary Power, and the PLO*, 77 CAL. L. REV. 831 (1989).

those expressed in *Knauff v. Shaughnessy*, a 1950 decision echoing *Nishimura Ekiu*: "Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."[122]

In *Knauff*, a slim majority of the Court, citing to *Nishimura Ekiu* and *Fong Yue Ting*, held that the German wife of a U.S. citizen, a woman who had performed "excellent" work as a civilian employee of the U.S. War Department, could be excluded without a hearing upon the assertion of the Attorney General that her admission would be prejudicial to the interests of the United States.[123] Going even further, in 1953, the Court held in *Shaughnessy v. United States ex rel. Mezei*[124] that a permanent resident who had gone to Europe to visit his ailing mother could be held indefinitely on Ellis Island, without a hearing, because the Attorney General had determined on the basis of confidential information that his entry would be "prejudicial to the public interest."[125] The fact that Mezei had lived, in Justice Jackson's words, "a life of unrelieved insignificance" in Buffalo, New York for the past twenty-five years, and had nowhere else to go, was irrelevant.[126]

Federal courts have used these cases, in turn, to justify the indefinite detention of undocumented Cubans who came from the port of Mariel in 1980 and were deemed "excludable" by U.S. immigration authorities; the detention of Haitian refugees pending adjudication of their claims for political asylum; and the subsequent interception and forced return of Haitians found on the high seas. In *Rodriguez-Fernandez v. Wilkinson*, the first significant ruling of this series, the Tenth Circuit Court of Appeals ordered the release of a Mariel Cuban who was clearly excludable under U.S. law but had no other place to go. The court first identified the problem:

> [T]he case law generally recognizes almost absolute power in Congress concerning immigration matters, holding that aliens in petitioner's position cannot invoke the Constitution to avoid exclusion and that detention pending deportation is only a continuation of exclusion rather than "punishment" in the constitutional sense. [. . . Yet, i]n the instant case the detention is imprisonment under conditions as severe as we apply to our worst criminals. It is prolonged; perhaps it is permanent.[127]

It ordered Rodriguez-Fernandez released under the immigration statute, noting that if the statute were construed differently, problems would arise under both the Constitution and international law. First, the court said that indefinite detention was punishment subject to constitutional constraints: "Surely Con-

122. United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950).

123. *Id.*

124. Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206 (1953).

125. *Id.* at 208.

126. Again, to quote Justice Jackson's scathing dissent, "[g]overnment counsel ingeniously argued that Ellis Island is his 'refuge,' whence he is free to leave in any direction except west. That might mean freedom, if only he were an amphibian!" *Id.* at 220.

127. Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382, 1385 (10th Cir. 1981).

gress could not order the killing of Rodriguez-Fernandez and others in his status on the ground that Cuba would not take them back and this country does not want them."[128] It countered Supreme Court precedent from *Fong Yue Ting* to *Mezei* by arguing that "[n]o principle of international law is more fundamental than the concept that human beings should be free from arbitrary imprisonment," citing the Universal Declaration of Human Rights and the American Convention on Human Rights.[129]

Unfortunately, other federal courts of appeal have not followed the Tenth Circuit's attempt to bring those subject to the exercise of plenary power under the protections of international law.[130] In 1984 the Eleventh Circuit, relying on *Fong Yue Ting*, *Nishimura Ekiu*, *Mezei*, and other plenary power "classics" of immigration law, held in *Jean v. Nelson* that non-citizens who have not been admitted continue to "have no constitutional rights with regard to their applications, and must be content to accept whatever statutory rights and privileges they are granted by Congress."[131] The following year the Supreme Court refused to grant certiorari in *Garcia-Mir v. Meese*,[132] which followed *Jean*, noting specifically that claims under international human rights law were inapplicable. As the Eleventh Circuit said in *Garcia-Mir*, "These legal realities may be harsh, but they are that way by design."[133]

The consequences grew harsher in the 1990s. In 1993 the Supreme Court allowed the detention of unaccompanied children in *Reno v. Flores*,[134] upholding an INS policy that resulted in the imprisonment of about 1000 children per year, often in adult facilities, rather than releasing them to non-custodial family members or guardians.[135] In 1996, the Illegal Immigration Reform and Immi-

128. *Id.* at 1387.

129. *Id.* at 1388.

130. Thus, the Fourth Circuit upheld the indefinite detention of "excludable aliens," Palma v. Verdeyen, 676 F.2d. 100 (4th Cir. 1982), and the Second Circuit reversed a district court decision ordering the release of detained Haitians, Bertrand v. Sava, 684 F.2d 204 (2nd Cir. 1982). Similarly, a district court holding unconstitutional the indefinite detention of Mariel Cubans pursuant to the Immigration and Nationality Act was reversed by the Eleventh Circuit. Fernandez-Roque v. Smith, 567 F.Supp. 1115 (N.D.Ga. 1983), *rev'd* 734 F.2d 576 (11th Cir. 1984).

131. Jean v. Nelson, 727 F.2d 957, 968 (11th Cir. 1985). The Supreme Court ruled that the Eleventh Circuit should not have reached the constitutional question, and declined to revisit *Knauff* or *Mezei*. Jean v. Nelson, 472 U.S. 846, 854-55 (1984).

132. Garcia-Mir v. Meese, 788 F.2d 1446 (11th Cir. 1986), *cert. denied sub nom* Ferrer-Mazorra v. Meese, 479 U.S. 889 (1986).

133. Garcia-Mir v. Smith, 766 F.2d 1478, 1484 (11th Cir. 1984). Thus, for example, even though Cuban prisoners have been held in maximum security federal penitentiaries, subjected to strip searches and beatings, and moved arbitrarily from facility to facility, apparently they have no Eighth Amendment rights because INS detention is civil, not criminal, per *Fong Yue Ting* and its progeny. *See* Richard A. Boswell, Book Review, *Throwing Away the Key: Limits on the Plenary Power?*, 18 MICH. J. INT'L L. 689, 702 (1997). For an excellent summary of the plenary power doctrine in this context, see Margaret H. Taylor, *Detained Aliens Challenging Conditions of Confinement and the Porous Border of the Plenary Power Doctrine*, 22 HASTINGS CONST. L.Q. 1087 (1995).

134. Reno v. Flores, 507 U.S. 292 (1993).

135. George Michael C. Ranalli, Casenote, Reno v. Flores*: Plenary Power Over Immigration Alive and Well*, 45 MERCER L. REV. 889, 889 n.1 (1994). In 1990 the INS arrested more than 8,500 nonciti-

grant Responsibility Act (IIRIRA)[136] and the Anti-Terrorism and Effective Death Penalty Act[137] dramatically reduced due process rights and judicial review of immigration decisions, and retroactively rendered permanent residents deportable based on prior criminal convictions.[138]

In 2001 the Supreme Court suggested in *Zadvydas v. Davis*[139] that Congress's plenary power "is subject to important constitutional limitations" that qualify the government's ability to indefinitely detain permanent residents who are to be deported but do not have countries willing to accept them.[140] While this decision has allowed lower courts some discretion to ameliorate the harshest consequences of the 1996 acts,[141] it does not signal a fundamental change in the plenary power doctrine, for the *Zadvydas* opinion cites *Mezei* and the *Chinese Exclusion Cases* with approval and relies more on ambiguity in the statute than on the Constitution to support its conclusion.[142]

Recent cases merge exclusion based on race or national origin with exclusion based on political belief or association, allowing the Immigration and Naturalization Service (INS) to use secret evidence to detain and deport a number of Muslims and persons of Arab descent.[143] Georgetown law professor David Cole, who represented thirteen individuals in such deportation cases, testified before a subcommittee of the House Judiciary Committee that

> [a]t one time the INS claimed that all 13 posed a direct threat to the security of the nation, and that the evidence to support that assertion could not be revealed—in many instances could not even be summarized—without jeopardizing national security. Yet in none of these cases did the INS's secret evidence even *allege*, much less prove, that the aliens had engaged in or supported any criminal, much less terrorist,

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zen minors, roughly 70 percent of whom were unaccompanied. *Id.*

136. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (1996).

137. Anti-Terrorism and Effective Death Penalty Act, Pub. L. No. 104-132, 110 Stat. 1214 (1996).

138. *See generally* Victoria Cook Capitaine, *Life in Prison Without a Trial: The Indefinite Detention of Immigrants in the United States*, 79 TEX. L. REV. 769 (2001); Lucas Guttentag, *Slamming the Courthouse Door: Immigrants and the Right to Judicial Review*, 28 HUM. RTS. 19 (2001); Lisa J. Laplante, *Expedited Removal at the U.S. Borders: A World Without a Constitution*, 25 N.Y.U. REV. L. & SOC. CHANGE 213 (1999); Anne E. Pettit, Note, *"One Manner of Law": The Supreme Court, Stare Decisis and the Immigration Law Plenary Power Doctrine*, 24 FORDHAM URB. L.J. 165 (1996).

139. 533 U.S. 678 (2001).

140. *Id.* at 695, citing INS v. Chadha, 462 U.S. 919, 941-42 (1983).

141. *See, eg.*, Kim v. Ziglar, 276 F.3d 523 (9th Cir. 2002) (relying on *Zadvydas* to find pre-removal mandatory detention unconstitutional as applied to petitioner); Patel v. Zemski, 275 F.3d 299 (3rd Cir. 2001) (citing *Zadvydas* and applying heightened due process scrutiny to pre-removal-order detention of a long-term permanent resident).

142. 533 U.S. at 696 ("Despite this constitutional problem, if Congress has made its intent in the statute clear, we must give effect to that intent.") (citations and internal quotation marks omitted).

143. *See generally* Natsu Taylor Saito, *Symbolism Under Siege: Japanese American Redress and the "Racing" of Arab Americans as "Terrorists,"* 8 ASIAN L.J. 1, 14-24 (2001); David Cole, *Hanging With the Wrong Crowd: Of Gangs, Terrorists, and the Right of Association*, 1999 S.CT. REV. 203 (1999); Kevin R. Johnson, *The Antiterrorism Act, the Immigration Reform Act, and Ideological Regulation in the Immigration Laws: Important Lessons for Citizens and Noncitizens*, 28 ST. MARY'S L.J. 833 (1997).

activity.[144]

The INS sought to preempt constitutional challenges to its use of secret evidence by invoking Congress's plenary power, citing the *Chinese Exclusion Cases* as well as *Knauff* and *Mezei*.[145] At least one federal court has forced the INS to reveal its evidence and, seeing how flimsy it was, ordered the detainees released.[146] However, the Supreme Court effectively undermined the ability of the courts to force the INS to reveal its evidence by holding in *Reno v. American-Arab Anti-Discrimination Committee*[147] that after the passage of IIRIRA federal courts have dramatically limited jurisdiction to review deportation decisions at all. This was another victory for the plenary power doctrine, one that set the stage for the Justice Department's current assertion that it can indefinitely detain non-citizens of "Middle Eastern origin" in the wake of the attacks on the Pentagon and the World Trade Center.[148]

B. *Indian Nations*

Indians within the United States today are subject to all of the laws governing U.S. citizens and, in addition, to several thousand additional statutes.[149]

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144. *Hearing on the Use of Secret Evidence in Immigration Proceedings and H.R. 2121 Before the House Comm. on the Judiciary, Subcomm. on Immigration and Claims*, 106th Cong (2000), *available at* http://www.house.gov/judiciary/cole0210.html (statement of Professor David Cole, Georgetown University Law Center).

145. *See, e.g.*, Kiareldeen v. Reno, 71 F. Supp. 2d 402, 410 (D.N.J. 1999) (granting writ of habeas corpus).

146. In attempting to deport 22-year-old Fouad Rafeedie, a permanent resident, as he returned from Syria where he had attended a conference affiliated with the Popular Front for the Liberation of Palestine, the INS held no hearing and put forth no evidence, in open court or on the record, claiming that to do so would be "prejudicial to the public interest, safety, or security of the United States." Rafeedie v. INS, 880 F.2d 506 (D.C. Cir. 1989), *remanded to* 795 F. Supp. 13 (D.D.C. 1992). The D.C. Circuit rejected the INS's argument and refused to hear the evidence *in camera*, noting that "Rafeedie—like Joseph K. in *The Trial*—can prevail . . . only if he can rebut the undisclosed evidence against him . . . . It is difficult to imagine how even someone innocent of all wrongdoing could meet such a burden." 880 F.2d at 516. On remand, the district court ordered him released. 795 F. Supp. 13 (D.D.C. 1992). Federal courts also ordered detainees released in *Al Najjar v. Reno*, 97 F. Supp. 2d 1329 (2000) (holding petitioner's due process rights were violated by *ex parte* presentation and reliance on secret evidence, and that mere "association" with a terrorist organization was not sufficient to require detention), and *Kiareldeen v. Reno*, 71 F. Supp. 2d 402 (D.N.J. 1999) (granting writ of habeas corpus), 92 F. Supp. 2d 403 (D.N.J. 2000) (granting attorney's fees).

See also JAMES X. DEMPSEY & DAVID COLE, TERRORISM AND THE CONSTITUTION: SACRIFICING CIVIL LIBERTIES IN THE NAME OF NATIONAL SECURITY 128-37 (1999) (summarizing secret evidence cases); Susan M. Akram, *Scheherezade Meets Kafka: Two Dozen Sordid Tales of Ideological Exclusion*, 14 GEO. IMMIGR. L. J. 57, 73-81 (1999) (summarizing secret evidence cases).

147. Reno v. American-Arab Anti-Discrimination Committee, 525 U.S. 471 (1999). *See generally* John A. Scanlan, American-Arab—*Getting the Balance Wrong—Again!*, 52 ADMIN. L. REV. 347 (2000).

148. *See generally* Farah Brelvi, *Un-American Activities: Racial Profiling and the Backlash after Sept. 11*, 48 FED. LAW. 69 (2001); Rebecca Carr, *Sweeping Anti-Terrorism Powers Questioned*, ATLANTA J. CONST., Nov. 29, 2001, at 10A; Rebecca Carr, *War on Terrorism: Ashcroft: Critics Help the Enemy*, ATLANTA J. CONST., Dec. 7, 2001, at 13A; Lois Romano & David S. Fallis, *Questions Swirl Around Men Held in Terror Probe*, WASH. POST. Oct. 15, 2001, at 1A.

149. *See generally* GETCHES ET AL., *supra* note 83. As Justice Blackmun noted in *County of*

This system of federal law, which imposes a quasi-sovereign status on Indian nations and subjects them to the "trusteeship" of the United States government, embodies the contemporary plenary power doctrine. Robert Clinton states, "Vestiges of the law's historic colonial role in legitimating conquest and expropriation remain imbedded in the doctrines employed today allegedly to protect Indian interests."[150] While this Article cannot address the extensive reach of this doctrine and the concomitant damage to Indian communities, it will briefly describe a few illustrative cases.

In 1955 the Tlingits of Alaska lost their claim to most Alaskan land when the Supreme Court held, in *Tee-Hit-Ton Indians v. United States*,[151] that indigenous land is not protected by the takings clause of the Fifth Amendment or its requirement of just compensation. Reading applicable law exactly backwards, the Court held that aboriginal title would be recognized only if the U.S. government had entered into a treaty or enacted a statute granting an indigenous nation the right to permanently occupy its ancestral land.[152] Justice Reed's opinion misconstrued the *Cherokee Cases* to say they permitted the arbitrary confiscation of indigenous lands without compensation, based on the U.S. conquest of all Indian nations—evidently even those it had never fought.[153] Newton states, "Tee-Hit-Ton reveals a judicial attitude so committed to congressional deference that the Court was willing to engage in the intellectual dishonesty of characterizing the acquisition of Alaska as a conquest to avoid protecting tribal rights."[154] As a result, billions of dollars in oil revenue have gone to the state of Alaska and to oil companies. The Tlingits, on the other hand, remain among the poorest people under U.S. jurisdiction.[155]

In the 1970s the Supreme Court hinted that it might curtail application of the plenary power doctrine to Indians, but this has not happened. In 1973 Justice Marshall announced in *McLanahan v. Arizona State Tax Commission* that the Court "had ceased reliance on the colonial notion of a trusteeship over Indians as an extra-constitutional source of Congressional power over their lives."[156] Nonetheless, five years later, he justified the unilateral extension of much of the Bill of Rights to Indian nations in *Santa Clara Pueblo v. Martinez*

Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation, 502 U.S. 251 (1992), reaching a decision in cases affecting Indian rights requires "wander(ing) the maze of Indian statutes and case law dating back 100 years."

150. Clinton, *supra* note 87, at 109.

151. Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955).

152. *See id.* at 277-78, 285.

153. *See id.* at 278-79; *see also* Newton, *supra* note 10, at 248.

154. Newton, *supra* note 10, at 249.

155. *Id.* at 248 & n.299. In *Tee-Hit-Ton Indians*, Justice Reed noted that if Indian title were to be considered compensable without specific congressional authorization, there would be pending claims aggregating nine *trillion* dollars. 348 U.S. 272, 283 & n.17. *See* David E. WILKINS, AMERICAN INDIAN SOVEREIGNTY AND THE U.S. SUPREME COURT: THE MASKING OF JUSTICE 168-85 (1997).

156. Clinton, *supra* note 87, at 114, *citing* McLanahan v. State Tax Comm'n of Arizona, 411 U.S. 164 (1973).

by stating, "Congress has plenary authority to limit, modify, or eliminate the powers of local self-government which the tribes otherwise possess."[157]

In 1974, in *Mancari v. Morton*,[158] the Supreme Court seemed to be imposing constitutional constraints on plenary power when it engaged in an equal protection analysis of a Bureau of Indian Affairs (BIA) policy giving preferential treatment to Indian employment.[159] However, the Court has used *Mancari* to reinforce rather than curb the exercise of plenary power, citing it in 1977 in *Delaware Tribal Business Committee v. Weeks* to justify deference to congressional decisions regarding the use of Indian funds.[160] Additionally, in *United States v. Antelope*, [161] the Court upheld the application of federal criminal law against an equal protection challenge brought by an Indian who argued that white defendants committing the same act in the same place had the benefit of the more lenient provisions of state law.[162] Newton states, "The Antelope Court announced that all legislation regarding tribal Indians had a legitimate governmental purpose: to govern Indian tribes. Furthermore, under an equal protection challenge, all such legislation would be permissible if not invidiously motivated and not irrational."[163]

Justice Rehnquist's 1978 opinion in *Oliphant v. Suquamish* converted preexisting Indian sovereignty to "delegated sovereignty" (delegated by the U.S. government) and held that Indian nations were precluded from trying non-Indians for crimes committed on reservations unless Congress had expressly delegated such power to them by treaty or by statute.[164] *Oliphant* was extended in 1990 in *Duro v. Reina*, which held that Indian criminal jurisdiction is limited to "tribal members" and not "non-member Indians"[165] despite historical evidence that Indian courts had exercised jurisdiction over non-member Indians since their establishment.[166] Newton states, "Whatever Congress wants, Con-

157. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978). While including language apparently supportive of indigenous sovereignty, the Court concluded by citing *Lone Wolf* for the "extraordinarily broad" authority Congress possesses over Indian matters. *Id.* at 72. *See also* Clinton, *supra* note 87, at 115; Newton, *supra* note 10, at 265.

158. 417 U.S. 535 (1974).

159. The policy was allowed as primarily "political rather than racial in nature." *Id.* at 553 n.24.

160. 430 U.S. 73 (1977). For an argument that both *Weeks* and *United States v. Sioux Nation*, 448 U.S. 371 (1980), represent the emergence of constitutional limitations on Congress' plenary power, see Comment, *Federal Plenary Power in Indian Affairs After* Weeks *and* Sioux Nation, 131 U. PA. L. REV. 235 (1982).

161. 430 US 641 (1977).

162. *Id.*

163. Newton, *supra* note 10, at 280. This analysis was extended from individuals to Indian nations in *Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*, 439 U.S. 463 (1979).

164. 435 U.S. 191 (1978).

165. Duro v. Reina, 495 U.S. 676 (1990).

166. Robert Clinton argues that *Duro*, along with *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 676 (1990), and *Employment Division v. Smith*, 494 U.S. 872 (1990), signal an era in which the federal judiciary will "foster a kind of neo-colonialist control of Indian interests by non-Indian majorities through federal Indian law." Robert N. Clinton, *Peyote and Judicial Political Activism: Neo-Colonialism and the Supreme Court's New Indian Law Agenda*, 38 FED.

gress gets, and *Mancari* and its progeny are now increasingly impressed to serve that end."[167] Blue Clark concludes,

> In spite of judicial whittling away at it, plenary authority remains one of the cornerstones of federal dominance of Indian affairs. Courts currently recognize that plenary power extends over Indian affairs, regulation of liquor traffic, disposition of tribal property and trust funds, and federal intervention in tribal activities through secretarial discretion, as well as Congress's action, and in the exercise of Indian sovereignty.[168]

As a result of the exercise of plenary power, a "trust" relationship has been imposed on Indian nations by the U.S. government which has resulted in genocidal and ecocidal policies of almost unimaginable proportions. Generations of Indian children have been forcibly removed from their families and imprisoned in "boarding schools" where they were stripped of their culture, traumatized, and often sexually abused.[169] In some periods the BIA Indian Health Services sterilized up to one-half of all Indian women of childbearing age, against their will and often without informing them.[170] The government has leased the most profitable land and mineral resources to white individuals and corporations at prices dramatically—sometimes 90%—below market value.[171] Corporations have been allowed to strip mine and produce radioactive waste, often leaving it

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B. NEWS & J. 92 (1991). In *Brendale*, the Court held that the Yakima Nation could not regulate a non-Indian owned parcel in an open section of their reservation, but could do so in a closed portion. 492 U.S. at 445. In *Employment Division*, the Court held that members of the Native American Church had no constitutionally protected right to use peyote in religious practices. *Employment Division*, 494 U.S. at 890. *See also* Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Nonmembers*, 109 YALE L.J. 1, 7 (1999) (noting that this exercise of "extraordinary authority in an area in which Congress has long operated with plenary power supports the disturbing conclusion that the Court has assumed a legislative function—that of implementing the ongoing colonial process").

167. Newton, *supra* note 10, at 285.

168. CLARK, *supra* note 79, at 109 (citations omitted). See also Newton, *supra* note 10, at 234, expanding on this list of powers and the cases supporting them. The plenary power doctrine has also been used to justify the requirement that Indian nations submit to state jurisdiction if they operate gaming operations. *See* Eric D. Jones, Note, *The Indian Gaming Regulatory Act: A Forum for Conflict Among the Plenary Power of Congress, Tribal Sovereignty, and the Eleventh Amendment*, 18 VT. L. REV. 127 (1993) (analyzing decisions under the Indian Gaming Regulatory Act, Pub. L. No. 100-497, 100 Stat. 2487 (1988) (codified at 25 U.S.C. §§ 2701-2721 and 18 U.S.C. §§ 1166-1168 (1998 & Supp. 1992)).

169. *See generally* DAVID WALLACE ADAMS, EDUCATION FOR EXTINCTION: AMERICAN INDIANS AND THE BOARDING SCHOOL EXPERIENCE, 1875-1928 (1995); David Wallace Adams, *From Bullets to Boarding Schools: The Educational Assault on the American Indian Identity*, *in* THE AMERICAN INDIAN EXPERIENCE, 1524 TO THE PRESENT: A PROFILE 218-39 (Philip Weeks ed., 1988); Raymond Cross, *American Indian Education: The Terror of History and the Nation's Debt to the Indian Peoples*, 21 U. ARK. LITTLE ROCK L. REV. 941 (1999); Jorge Noriega, *American Indian Education in the United States: Indoctrination for Subordination to Colonialism*, *in* THE STATE OF NATIVE AMERICA: GENOCIDE, COLONIZATION, AND RESISTANCE 371-402 (M. Annette Jaimes ed., 1992).

170. *See* WARD CHURCHILL, A LITTLE MATTER OF GENOCIDE: HOLOCAUST AND DENIAL IN THE AMERICAS, 1492 TO THE PRESENT 377 (1997).

171. *See, e.g.*, WARD CHURCHILL, *Genocide in Arizona: The "Navajo-Hopi Land Dispute" in Perspective*, *in* STRUGGLE FOR THE LAND: NATIVE NORTH AMERICAN RESISTANCE TO GENOCIDE, ECOCIDE AND COLONIZATION 177 (1999) (quoting estimates that the U.S. government was attempting to pay the Shoshone less than one penny of actual value for each acre taken in Newe Segobia).

in the immediate vicinity of Indian housing and schools.[172] The BIA has held revenues from leases, other governmental appropriations, and amounts due under treaties with no accountability, so that even today a suit is pending that charges the BIA with having "lost" billions of dollars of trust funds.[173] Thus, peoples who legally own significant land and resources constitute the poorest sector of American society and their communities suffer from the lowest life expectancies (in the 40s for both men and women on reservations), highest infant mortality rates, highest suicide rates, and highest rates of death from exposure, communicable diseases, and alcoholism in the United States.[174]

C. *External Colonies*

Today the United States holds about four million people in the "unincorporated territories" of Puerto Rico, the Northern Mariana Islands,[175] the "U.S." Virgin Islands, and "American" Samoa.[176] None is recognized as an independent country or a state of the union, and all are subject to the plenary power of the U.S. government. Residents of American Samoa are U.S. "nationals"; those of the other territories are "citizens," but without many of the rights of other U.S. citizens.[177] As recently as 1998 federal appellate courts relied on *Downes*

172. *See* WARD CHURCHILL, *Geographies of Sacrifice: The Radioactive Colonization of Native North America*, *in* CHURCHILL, *supra* note 171, at 239-91.

173. *See* Cobell v. Babbitt, 37 F. Supp. 2d 6 (D.D.C. 1999) (holding Secretaries of Interior and Treasury in contempt for failing to produce documents relating to an alleged $4 billion of missing trust funds), *aff'd sub nom.* Cobell v. Norton, 240 F.3d 1081 (D.C. Cir. 2001). The amount in question is unclear. The plaintiffs have alleged that $10 billion may have been mismanaged. *See* John Gibeaut, *Another Broken Trust: After the Government's Bungling of a Land Allotment Program for Hundreds of Thousands of Indians, All Eyes are Now on a Federal Judge Trying to Sort Out*, ABA J., Sept. 1999, at 40. *See generally* Billee Elliott McAuliffe, *Forcing Action: Seeking to "Clean Up" the Indian Trust Fund:* Cobell v. Babbit, 25 S. ILL. U. L.J. 647, 656 (2001) (discussing class action lawsuit for an accounting of the government's management of Indian assets).

174. *See* Rennard Strickland, *Buffalo Herd*, *in* TONTO'S REVENGE: REFLECTIONS ON AMERICAN INDIAN CULTURE AND POLICY 53 (1997).

175. On the history of the Mariana Islands, see Marie Rios-Martinez, *Congressional Colonialism in the Pacific: The Case of the Northern Mariana Islands and Its Covenant with the United States*, 3 SCHOLAR 41 (2000).

176. Christina Duffy Burnett & Burke Marshall, *Between the Foreign and the Domestic: The Doctrine of Territorial Incorporation, Invented and Reinvented*, *in* FOREIGN IN A DOMESTIC SENSE, *supra* note 97, at 1, 30 n.1 (citing GAO, REPORT TO THE CHAIRMAN, COMMITTEE ON RESOURCES, HOUSE OF REPRESENTATIVES, U.S. INSULAR AREAS: APPLICATION OF THE U.S. CONSTITUTION (1997)). *See generally* STANLEY K. LAUGHLIN, THE LAW OF UNITED STATES TERRITORIES AND AFFILIATED JURISDICTIONS (1995). This population figure does not include the more than two million Puerto Ricans who live on the mainland and are entitled to the full protection of U.S. citizenship. *See* Rivera Ramos, *supra* note 26, at 232.

177. BURNETT & MARSHALL, *supra* note 97, at 1-2. It should be noted that before Congress enacted the Jones Act, which conferred citizenship (but not representation in Congress) on Puerto Ricans in 1917, a statement by the Puerto Rican House of Delegates was read into the Congressional Record. It says, in part, "We firmly and loyally maintain our opposition to being declared, in defiance of our express wish or without our express consent, citizens of any country whatsoever other than our own beloved soil that God has given us as an inalienable gift and incoercible right." 51 CONG. REC. 6718-20 (1914), *quoted in* Arron Guevara, *Puerto Rico: Manifestations of Colonialism*, 26 REV. JUR. U.P.R. 275, 279 n.27 (1992). For a thorough analysis of Puerto Rican citizenship, see Ediberto Roman, *The*

v. Bidwell to deny U.S. citizenship to persons who were born in the Philippines between 1898 and 1946, while it was a U.S. territory.[178] According to the Court, during this period Filipinos were "wards" of the United States, "nationals" who owed allegiance to the United States but were not entitled to the full benefits of citizenship.[179] Because of the economic dependence, as well as the social ties, created by U.S. colonization, many Filipinos have tried to immigrate to the United States, but they are given no special consideration. As a result of this exercise of plenary power, Filipinos who now apply to immigrate as immediate family members of U.S. citizens or permanent residents have to wait longer than any people from any other country.[180]

The plenary power doctrine is also used to justify the political limbo in which Puerto Rico remains. In 1898 Puerto Ricans had their own parliament, full Spanish citizenship, and political representation in the Spanish parliament.[181] After more than a century of U.S. rule, they have no representation in Congress and only qualified U.S. citizenship. Chief Justice Fuller, dissenting in *Downes*, said the majority's position was that "if an organized and settled province of another sovereignty is acquired by the United States, Congress has the power to keep it, like a disembodied shade, in an intermediate state of ambiguous existence for an indefinite period."[182] This is exactly what has happened and Puerto Rico is still held in "an intermediate state of ambiguous existence" with no promise that Congress will ever allow it to determine its future.[183] Burnett and Marshall state,

> The unincorporated territories were denied even the promise of any final status, either within the constitutional framework or outside of it. They were subjected not only to an unequal condition but to absolute uncertainty concerning their ultimate status—uncertainty about who they were, where they belonged, and what their fu-

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Alien-Citizen Paradox and Other Consequences of U.S. Colonialism, 26 FLA. ST. U. L. REV. 1 (1998).

178. Valmonte v. INS, 136 F.3d 914, 918 (2d Cir. 1998), *cert. denied*, 525 U.S. 1024 (1998) (relying on the Insular Cases as "authoritative guidance on the territorial scope of the term 'the United States' in the Fourteenth Amendment"); *see also* Rabang v. INS, 35 F.3d 1449 (9th Cir. 1994).

179. Avelino J. Halagao, Jr., *Citizens Denied: A Critical Examination of the Rabang Decision Rejecting United States Citizenship Claims by Persons Born in the Philippines During the Territorial Period*, 5 ASIAN PAC. AM. L.J. 77, 77-78 (1998). For the statutory definition of "national," see 8 U.S.C. § 1101(a)(22) (1994).

180. According to the State Department, as of February 2002, the wait for Filipino spouses of permanent residents (and their unmarried children under twenty-one) was five years, nine months. For unmarried children over twenty-one, it was eight years, seven months. Ironically, it is harder for U.S. citizens to bring in children over twenty-one, the wait being about thirteen years; for siblings, it is over twenty-two years. U.S. Department of State, Bureau of Consular Affairs, Visa Bulletin, No. 41, Vol. VIII (2002), *available at* http://www.travel.state.gov/visa_bulletin.html.

181. They had had this political representation for over thirty years. Trias Monge, *supra* note 102, at 6-7.

182. Downes v. Bidwell, 182 U.S. 244, 372 (1901).

183. In the referenda held on the status of Puerto Rico in 1952, 1967, and 1993, offering choices of statehood, independence, or commonwealth status, the latter has prevailed. Roman, *supra* note 177, at 39. However, because the referenda were non-binding, they have been boycotted by many who support Puerto Rican independence. In 1998 the referendum included a "none of the above" option which won an absolute majority of 50.3%. Trias Monge, *supra* note 102, at 18-19.

ture held.[184]

As recently as 1996, the House Committee on Resources noted that the "compact" currently governing U.S.-Puerto Rico relations does not meet the United Nations's standards for self-government, that Puerto Rico is still an unincorporated U.S. territory, and that Congress can unilaterally revoke local self-government and U.S. citizenship as long as it meets the "fundamental rights test" of the Insular cases.[185] Another consequence of this status is that the United States military occupies a significant proportion of Puerto Rico and continues, among other things, to engage in the very controversial bombing of Vieques Island.[186]

Economic exploitation is another on-going consequence of the exercise of plenary power over U.S. "territories." In 1941, John Gunther wrote of his visit to Puerto Rico:

> I saw rickety squatter houses perched in garbage-drenched mud . . . villages dirtier than any I ever saw in the most squalid parts of China . . . I saw, in short, misery, disease, squalor, filth. . . . It would be shocking enough in the remote uplands of Peru or the stinking valleys of the Ganges. But to see it on American territory, among people whom the United States has governed since 1898, in a region for which our federal responsibility has been complete for 43 years, is a paralyzing jolt . . . .[187]

Currently, more than 60 percent of Puerto Rican families live below the poverty level, slightly less than in 1940. The annual per capita income is one-third of that in the U.S., and welfare benefits are significantly lower than in the U.S., as illustrated by a 1999 supplemental income cap of $32 per month, compared with a mainland cap of $368 per month.[188]

Poverty has led to economic exploitation in U.S.-held territories. Unregulated by U.S. labor laws, corporations can manufacture goods in sweatshops and produce goods which can be imported with tariffs much lower than on "foreign" goods and still bear the "made in U.S.A." label.[189] Christina Duffy Burnett says,

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184. BURNETT & MARSHALL, *supra* note 97, at 12.

185. Trias Monge, *supra* note 102, at 16 (citing House Comm. on Resources, Report 104-713, part I, United States-Puerto Rico Political Status Act, to Accompany H.R. 3024, 104th Cong., 2d Sess. 14 (1996)). The locus of congressional authority on this question suggests that the government sees Puerto Rico as little more than another resource to be exploited.

186. *See* Raymond Hernandez, *A Tiny Island, But a Cause So Celebre: From New York to Hollywood—Vieques Has Issues for Everyone*, N.Y. TIMES, July 15, 2001.

187. John Gunther, *Inside Latin America* (1941), at 423 *quoted in* Cabranes, *supra* note 101, at 44-45; *see also* PEDRO A. CABAN, CONSTRUCTING A COLONIAL PEOPLE: PUERTO RICO AND THE UNITED STATES, 1898-1932, at 250-54 (1999).

188. Trias Monge, *supra* note 102, at 19.

189. *See* William Branigin, *Top Clothing Retailers Labeled Labor Abusers; Sweatshops Allegedly Run on U.S. Territory*, WASH. POST, Jan. 14, 1999, at A14. *See generally* Deborah J. Karet, *The Commonwealth of the Northern Mariana Islands: Is Litigation the Best Channel for Reforming the Garment Industry?*, 48 BUFF. L. REV. 1047 (2000).

> The people of the United States . . . continue to be complicitous in a vestigial colonialism. . . . The United States continues to exercise sovereignty over people (now its own citizens) denied equal membership in the Union; the colonial system that many warned would betray the nation's commitment to freedom and equality endures.[190]

IV. THE INADEQUACY OF INTRACONSTITUTIONAL SOLUTIONS

> "Mounting an attack on the plenary power doctrine may be the top legal priority for Indian tribes today. A victory over the doctrine may become the 'Brown v. Board of Education' of Indian rights." Elimination of the doctrine and a repudiation of the onerous aspects of *Lone Wolf* would establish the reality of the government-to-government relationship officially launched in the 1980s between the United States and tribes.[191]

This statement by Blue Clark conflates—unintentionally, I expect—the two directions in which the law could move upon rejection of the plenary power doctrine. The first is the direction of *Brown*,[192] a move to incorporate and assimilate those Others over whom plenary power is currently exercised into the mainstream of U.S. jurisprudence and to apply more fully the constitutional protections available to "insider" U.S. citizens. The second direction, making "government-to-government" relations a reality, is quite different. For that to happen—something *not* actually envisioned by U.S. Indian policy of the 1980s[193]—U.S. lawmakers would have to recognize and apply principles of international law. This section considers some of the shortcomings of the "intraconstitutional" or assimilationist[194] option.

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190. BURNETT & MARSHALL, *supra* note 97, at xiv. Estimates are that between one-third and one-half of all Puerto Rican women have been sterilized as a result of U.S. policies. *See* CHURCHILL, *supra* note 171, at 377.

191. CLARK, *supra* note 79, at 109-10 (citing George Grossman, *Indians and the Law*, *in* NEW DIRECTIONS IN AMERICAN INDIAN HISTORY 112 (Colin G. Calloway ed., 1988)).

192. Brown v. Bd. of Educ., 347 U.S. 483 (1954) (overturning implicitly *Plessy v. Ferguson* and holding that segregated public schools are inherently unequal).

193. *See* David Wilkins, *The Manipulation of Indigenous Status: The Federal Government as Shape-Shifter*, 12 STAN. L. & POL'Y REV. 223 (2001). *See generally* VINE DELORIA JR. & DAVID E. WILKINS, TRIBES, TREATIES, AND CONSTITUTIONAL TRIBULATIONS (1999); RECENT LEGAL ISSUES FOR AMERICAN INDIANS, 1968 TO THE PRESENT (John R. Wunder ed., 1996).

194. I use the term "assimilation" to refer both to the jurisprudential incorporation of these areas of law into the constitutional framework and to the broader social incorporation of those deemed Other into the American polity. In the latter context, George Martinez identifies three principle elements of assimilation: (1) abiding by dominant norms or a core culture, (2) rejecting race consciousness, and (3) repudiating the equal value of cultures. George A. Martinez, *Latinos, Assimilation and the Law: A Philosophical Perspective*, 20 CHICANO-LATINO L. REV. 1, 6 (1999).

While these requirements are placed on the Other, meeting them is necessary but not sufficient. Assimilation also requires a concomitant acceptance of the Other by the dominant society. This is illustrated by the language of the Chinese exclusion cases and the Japanese American internment cases, which both referenced the "refusal" of these groups to assimilate to a society which had persistently excluded them. *See, e.g.*, United States v. Korematsu, 323 U.S. 214, 237 n.4 (1944) (Murphy, J., dissenting); Chae Chan Ping, 130 U.S. 581, 606 (1888). For a more encompassing explanation of the "doctrines of assimilation" through which "non-European peoples [were] brought within the realm of international law," see Antony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nine-*

In a powerful critique of the plenary power doctrine in immigration law, Hiroshi Motomura argues that courts have used "phantom" constitutional norms in "subconstitutional," i.e., statutory and regulatory, decisions to gradually introduce constitutional constraints into immigration decisions which formally fall under the plenary power doctrine. Such cases illustrate, he says, that decisionmakers realize the inadequacy of the plenary power doctrine and are moving toward the full constitutionalization of immigration law.[195] While constitutionalization would lead to better results in many cases,[196] this solution raises two fundamental questions. First, is assimilation actually the best solution? And second, is the constitutional order actually capable of incorporating the Other within U.S. law? While the answers will be different in each field of law, there are common limitations to the intraconstitutional option that should be considered.

First, an intraconstitutional approach presumes away the rights of those who are subject to plenary authority to decide for themselves the nature of their affiliation with the United States, a right firmly rooted in international law. This is illustrated by the Supreme Court's recent decision in *Rice v. Cayetano*, where the Court used a race-based equal protection analysis to strike down a rule that only those of native Hawaiian descent were eligible to vote for the trustees of the Office of Hawaiian Affairs (thereby opening the vote to white settlers).[197] Chris Iijima notes that although the "colonization of native people is wrapped and justified in the rhetoric and the ideology of white supremacy,"[198] the Supreme Court's application of a standard equal protection analysis was inappropriate:

> The inquiry should not be whether Native Hawaiians constitute a "race" . . . [but] whether they have been specifically harmed as a people by the loss of their nationhood.
>
> It is not acceptable to confuse the remedy for loss of nationhood with the remedy for the denial of equal access to political, social, and economic power demanded by other subordinated groups within America. . . . [T]here can be no "cure" without proper diagnosis.[199]

Similarly, equal protection within the polity is not a remedy for the United States's disregard of American Indian sovereignty. Indian nations have consistently rejected the U.S. government's attempts to force them into the polity and

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teenth-Century International Law, 40 HARV. INT'L L.J. 1, 35-57 (1999).

195. *See* Motomura, *supra* note 10, at 549-50.

196. *See generally* Comment, *supra* note 160 (advocating the "constitutionalization" of federal Indian law).

197. Rice v. Cayetano, 528 U.S. 495 (2000) (rejecting the proposition, based on *Morton v. Mancari*, that this was a political rather than racial distinction). *See generally* Gavin Clarkson, *Recent Developments: Not Because They Are Brown, But Because of EA:* Rice v. Cayetano, 528 U.S. 495 (2000), 24 HARV. J.L. & PUB. POL'Y 921 (2001).

198. Iijima, *supra* note 99, at 120-21.

199. *Id.* at 123-24.

have fought instead for independence and the enforcement of treaties. Under international law, the United States's claims to incorporate Indian lands and peoples have no more legitimacy than Germany's claims to Luxembourg or the Netherlands in the early 1940s.[200] This debate is directly tied to the well-being of the people involved. The disastrous consequences of assimilationist policies can be seen throughout the history of colonial rule and in contemporary Indian communities, from the genocidal impact of European diseases and attempts to "Christianize" Indians, to the loss of land and community following the Allotment Act,[201] to the multi-generational trauma inflicted by boarding schools whose stated purpose was to "kill the Indian and save the man," to the urban resettlement programs of the 1950s and 1960s, which left large numbers of people homeless and unemployed.[202]

The devastation faced by indigenous communities is presumably a "worst case" scenario for assimilationist policies. However, it is commonly assumed that the problems of indigenous peoples, or those living in U.S. territories or subject to harsh immigration policies, are best solved by their full incorporation into the constitutional framework and, indeed, many are willing to give up claims to sovereignty or self-determination in exchange for equal protection.[203] The inadequacies of this option may be better assessed by considering what should be the "best case" scenario, the extension of full constitutional protection to African Americans.

While the plenary power doctrine as articulated in the 1890s was never formally applied to Africans in America, they were subject to the plenary authority of European individuals and their various governments beginning in 1619.[204] Without using the words "slave" or "slavery" the Constitution ensured that the slave trade could not be banned before 1808, that even jurisdictions that forbade slavery would use their police powers to return fugitive slaves, and

200. *See* ERNST FRAENKEL, THE DUAL STATE: A CONTRIBUTION TO THE THEORY OF DICTATORSHIP, at xiii (1941) (defining such conduct as characteristic of what he terms a "prerogative state").

201. *See supra* text accompanying notes 83-85, 151-55, 169-74.

202. *See* James A. Casey, *Sovereignty By Sufferance: The Illusion of Indian Tribal Sovereignty*, 79 CORNELL L. REV. 404, 412 (1994) ("[T]he assimilationist policies of the federal government were disastrous for Indian peoples."); Larry A. DiMatteo & Michael J. Meagher, *Broken Promises: The Failure of the 1920s Native American Irrigation and Assimilation Policies*, 19 U. HAW. L. REV. 1, 2-4 (1997).

203. *See, e.g.*, JUAN R. TORRUELLA, THE SUPREME COURT AND PUERTO RICO: THE DOCTRINE OF SEPARATE AND UNEQUAL (1985). Judge Torruella, the first Puerto Rican appointed to any federal court of appeals, sees Puerto Rico's current status as "separate and unequal" on "a par with Plessy v. Ferguson," and advocates elevation to full equality through statehood. *See also* Jose A. Cabranes, *Puerto Rico: Colonialism as Constitutional Doctrine*, 100 Harv. L. Rev. 450 (1986) (book review) (summarizing Torruella's arguments).

204. See generally LERONE BENNETT, JR., BEFORE THE MAYFLOWER: A HISTORY OF BLACK AMERICA (6th ed. 1987); and IVAN VAN SERTIMA, THEY CAME BEFORE COLUMBUS (1976), for background on pre-European contact by Africans.

that the militia would be available to suppress slave uprisings.[205] These provisions, without which the Union would not have been formed, prompted William Lloyd Garrison to call the Constitution "a covenant with death, and an agreement with hell."[206] The law of slavery that evolved in America treated slaves as property, classified persons with any discernible African ancestry as "black," presumed black persons to be slaves, and used the power of the federal government to protect this "property" everywhere under its jurisdiction.[207]

Justice Taney articulated this plenary authority most clearly in 1857 in *Dred Scott v. Sanford*.[208] Dred Scott sued his nominal owner in federal court arguing, among other things, that the time he had spent in territory where slavery was forbidden by the Missouri Compromise rendered him a free man. Taney held that the federal court had no diversity jurisdiction because Scott was not a citizen of Missouri, asserting that black people were not citizens of the United States or, therefore, of any particular state, nor even "persons" under the law.[209] He then described all those of African descent as "regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect."[210] Taney concluded by declaring the Missouri Compromise unconstitutional on the ground that Congress could not pass a law barring citizens from taking property into U.S. territories.[211] Thus, until the end of the Civil War, the legal system supported the exercise by white persons generally, and state governments particularly, of complete plenary authority over black people.[212]

The legal framework changed dramatically with enactment of the Thir-

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205. *See* U.S. CONST. art. II, § 8, cl. 15; *id.* § 9, cl. 1; *id.* art. IV, § 2, cl. 3; *see also* PAUL FINKELMAN, SLAVERY AND THE FOUNDERS: RACE AND LIBERTY IN THE AGE OF JEFFERSON 1-33 (1996); Staughton Lynd, *Slavery and the Founding Fathers*, *in* BLACK HISTORY: A REAPPRAISAL 115 (Melvin Drimmer ed., 1968).

206. Paul Finkelman, *A Covenant with Death: Slavery and the Constitution*, AMERICAN VISIONS, May-June 1986, at 21; *see also* HIGGINBOTHAM, *supra* note 1, at 73.

207. A. Leon Higginbotham, Jr. & Greer C. Bosworth, *"Rather Than the Free": Free Blacks in Colonial and Antebellum Virginia*, 26 HARV. C.R.-C.L. L. REV. 17 (1991).

208. 60 U.S. (19 How.) 393 (1856).

209. *Id.* at 407; *see* Simeon C.R. McIntosh, *Reading* Dred Scott, Plessy *and* Brown*: Toward a Constitutional Hermeneutics*, 38 HOW. L.J. 53, 65-67 (1994).

210. *Dred Scott*, 60 U.S. at 407. This is a crude version of the principle articulated in *Nishimura Ekiu* that an immigrant is due only such process as Congress says is due. *See supra* text accompanying notes 43-45.

211. *Dred Scott*, 60 U.S. at 452. Interestingly, this is what Justice Brown relies on in *Downes v. Bidwell* as an example of how the Courts will step in if Congress oversteps its bounds in exercising its plenary authority over territorial possessions. *See infra* note 114.

212. I use the terms "white" and "black" to refer not to "races," which I consider illegitimate social constructs, but to the classifications created by domestic law to promote and reinforce slavery and racial hierarchy in the United States. *See generally* IAN HANEY LOPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE (1996); MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990s (2d ed. 1994); Anthony Appiah, *The Uncompleted Argument: DuBois and the Illusion of Race*, *in* "RACE," WRITING AND DIFFERENCE 21 (Henry L. Gates ed., 1985).

teenth, Fourteenth, and Fifteenth Amendments. The Thirteenth Amendment abolished legalized slavery except as punishment for those convicted of crimes. Many southern legislatures responded by passing laws which criminalized idleness or vagrancy, and many emancipated, but destitute, African Americans found themselves convicts leased to their former "masters," doing the same work on the same land for no pay.[213] The legal system was used to enforce their subordination in numerous ways, leading Justice Miller to comment in the *Slaughter-House Cases* that the "black codes" passed by southern states after abolition "imposed upon the colored race onerous disabilities and burdens, and curtailed their rights in the pursuit of life, liberty, and property to such an extent that their freedom was of little value."[214]

These developments were paralleled in the history of the Fourteenth Amendment, which declared all persons of African descent born in the U.S. to be citizens of both the United States and the state in which they lived, and forbade state governments from discriminating against them. Euroamerican lawmakers and policymakers, even avid abolitionists, had not expected that persons of African descent would become full U.S. citizens,[215] and in response to the amendment they reformulated the legal apparatus in ways that resulted in the social, political, and economic subordination of African Americans.[216] This set the stage for a two-track process in which a stated commitment to formal legal equality ran parallel to legally-sanctioned, race-based subordination, beginning with a series of cases in which the Supreme Court refused to apply the Fourteenth Amendment or the Civil Rights Act of 1875 to non-governmental conduct and "left [the African American] segment of American society virtually unprotected against state actions."[217]

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213. *See generally* MATTHEW J. MANCINI, ONE DIES, GET ANOTHER: CONVICT LEASING IN THE AMERICAN SOUTH, 1866-1928 (1996); DAVID M. OSHINSKY, "WORSE THAN SLAVERY": PARCHMAN FARM AND THE ORDEAL OF JIM CROW JUSTICE (1996).

214. The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 70 (1873).

215. *See* Abraham Lincoln, Fourth Lincoln-Douglas Debate (1858), *reproduced in* DOCUMENTS OF AMERICAN PREJUDICE: AN ANTHOLOGY OF WRITINGS ON RACE FROM THOMAS JEFFERSON TO DAVID DUKE 286-90 (S.T. Joshi ed., 1999). *See generally* WINTHROP D. JORDAN, WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO, 1550-1812 (1968).

216. In *Elk v. Wilkins*, 112 U.S. 94, 99 (1898), Indians were not only Other by virtue of "race" but were non-citizens; however, the Allotment Act, 24 Stat. 388 (1887), passed just three years later, and the subsequent Indian Citizenship Act of 1924, 8 U.S.C. § 1401 (2001), unilaterally imposed citizenship on Indians. If the purpose of these laws, generally speaking, was to consolidate settler state control over those it wished to colonize internally, this could simply reflect a tactical shift from the politics of exclusion ("we don't owe you any protection because you belong to another sovereign") to those of inclusion ("we have declared you to be one of ours, so you are now bound by our laws"), a shift to an assimilationist model of subordination parallel to that reflected in the post-Reconstruction civil rights cases such as *Plessy v. Ferguson*, 163 U.S. 537 (1896). This seems to be something akin to what was happening when Congress granted a peculiarly limited kind of citizenship to Puerto Ricans. In all of these ways, the citizenship debate is inextricable from the issue of the assertion of plenary power.

217. CLARK, *supra* note 79, at 11; *see* The Civil Rights Cases, 109 U.S. 3 (1883); United States v. Cruikshank, 92 U.S. 542 (1875); United States v. Reese, 92 U.S. 214 (1875); The Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1872).

The Fifteenth Amendment, which forbade states from interfering with the right to vote, was similarly undermined. In many disfranchisement cases the Court refused to reach the merits; in others, the Court interpreted the Fifteenth Amendment narrowly, allowing facially neutral legislation adopted for a racially discriminatory purpose, extensive discretion for voter registrars, and race-based interventions by private individuals.[218] In one case, *Giles v. Harris*, the Court "candidly conceded that even if southern disfranchisement devices were unconstitutional, [it] was powerless to provide adequate remedies."[219]

By 1896 most of the gains African Americans had made during Reconstruction had been rolled back and Jim Crow legislation was becoming commonplace.[220] The Supreme Court cemented this reversion in *Plessy v. Ferguson*,[221] in an opinion written by Justice Brown, soon to be the author of *Downes v. Bidwell*.[222] Brown wrote that consigning Homer Plessy, admittedly "seven eighths Caucasian," to a "colored" railroad car was not a "badge of servitude" violating the Thirteenth Amendment, nor a violation of Fourteenth Amendment equal protection.[223] *Plessy* was not about the segregation of public accommodations so much as the "broader question of constitutive rhetoric and collective identity: who belongs to the American polity and on what conditions?"[224] Even Justice Harlan's dissent, well-known for its assertion that the Constitution is "color-blind," argued that compliance with the Constitution was the best way to maintain white supremacy:

> The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage and holds fast to the principles of constitutional liberty.[225]

Plessy spawned a rash of segregationist legislation which eventually extended "'to every type of transportation, education, and amusement; to public housing, restaurants, hotels, libraries, public parks and recreational facilities,

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218. Michael J. Klarman, *The Plessy Era*, 1998 SUP. CT. REV. 303.

219. 189 U.S. 475 (1903). KLARMAN, *supra* note 218, at 304. *See also*, LOFGREN, *supra* note 54, at 203.

220. On the gains, see W.E.B. DUBOIS, BLACK RECONSTRUCTION IN AMERICA 670-710 (1976); on the rollbacks, see DERRICK BELL, RACE, RACISM AND AMERICAN LAW 40-43 (3d ed. 1992). *See generally* LEON LITWACK, BEEN IN THE STORM SO LONG: THE AFTERMATH OF SLAVERY (1979).

221. *Plessy*, 163 U.S. 537 (1896).

222. 182 U.S. 244 (1901).

223. *Plessy*, 163 U.S. at 551-2.

224. McIntosh, *supra* note 209, at 67.

225. 163 U.S. at 559; *see also* HIGGINBOTHAM, *supra* note 1, at 116. In the same dissent, Harlan dismissed the Chinese entirely as an unassimilable race. 163 U.S. at 561. *See generally* Gabriel J. Chin, *The* Plessy *Myth: Justice Harlan and the Chinese Cases*, 82 IOWA L. REV. 151 (1996) (putting the *Plessy* dissent into the context of Justice Harlan's decisions in the Chinese exclusion and citizenship cases). Charles Lofgren says, "The justices had not gone so far as to hold explicitly that the Constitution recognized two categories of citizenship, one for whites and the other for non-whites, analogous to the stance it soon would take toward the inhabitants of the new territories acquired in the imperialist binge at the end of the decade." LOFGREN, *supra* note 54, at 201.

fraternal associations, marriage, employment, and public welfare institutions."[226] Judge Higginbotham wrote:

> In the post-Reconstruction era, legislatures and courts disingenuously affixed labels to their enactments and pronouncements that suggested compliance with the Fourteenth Amendment's requirements: labels such as "equal protection," "due process," and "privileges and immunities." Nevertheless, their conduct, rulings, and declarations were most often associated with black inferiority and powerlessness.[227]

This highlights the real significance of Jim Crow laws, which was not the furtherance of segregation per se but the perpetuation of white supremacy: Jim Crow was enacted in the midst of efforts to disenfranchise black voters and in an era when an average of two African Americans were "lynched by mobs—burned, hanged, mutilated" every week.[228]

Judge Higginbotham's "Ten Precepts of American Slavery Jurisprudence" begins with the precept "Inferiority: Presume, preserve, protect, and defend the ideal of the superiority of whites and the inferiority of blacks" and ends with "By Any Means Possible: Support all measures, including the use of violence, that maximize the profitability of slavery and that legitimize racism. Oppose, by the use of violence if necessary, all measures that advocate the abolition of slavery or the diminution of white supremacy."[229] As he said, "[i]t would be a mistake of the highest order to perceive these ten precepts as concepts that perished at the end of the Civil War or upon the passage of the Thirteenth, Fourteenth, and Fifteenth Amendments."[230] Similarly, these precepts did not perish when the Supreme Court overturned *Plessy* in *Brown v. Board of Education*[231] or when Congress passed the civil rights acts of the 1960s.[232]

Brown introduced an era of equal protection jurisprudence that recognized the inherently subordinating nature of legally segregated public accommodations and institutions, but it did little to address the social, economic, or political realities of a people who had been stripped of their national identities but still suffered from a form of internal colonialism.[233] Although it has been nearly fifty years since the *Brown* decision, for the most part public schools remain segregated.[234] Nearly thirty percent of African Americans have incomes below

226. *Id.* at 202 (quoting 1950 study).

227. HIGGINBOTHAM, *supra* note 1, at 83.

228. ZINN, *supra* note 28, at 308 (citing the average for 1899-1903). *See generally* LEON F. LITWACK, TROUBLE IN MIND: BLACK SOUTHERNERS IN THE AGE OF JIM CROW (1998).

229. HIGGINBOTHAM *supra* note 1, at 195-96.

230. *Id.* at 204.

231. 347 U.S. 483 (1954).

232. Civil Rights Act of 1964, 42 U.S.C. § 2000a (1994); Voting Rights Act of 1965, 42 U.S.C. § 1973bb (1994).

233. On the failures of equality jurisprudence, see Derrick Bell, *Racial Realism*, 24 CONN. L. REV. 363 (1992).

234. Lisa M. Fairfax, *The Silent Resurrection of* Plessy*: The Supreme Court's Acquiescence in the Resegregation of America's Schools*, 9 TEMP. POL. & CIV. RTS. L. REV. 1, 2 ("Despite the almost wholehearted public acceptance of *Brown* and the coinciding rejection of *Plessy*, the Burger and

the official poverty line, with forty percent in actual poverty. Median black household income is about two-thirds of that of white households and the disparity is much greater when wealth, rather than income, is compared.[235] Two-thirds of all "non-white" men are arrested and jailed before they turn thirty, and they are three-and-one-half times more likely than their white counterparts to be convicted of felonies.[236]

The *Brown* decision is often portrayed as diametrically opposed to *Plessy*, but they have both served the same end—incorporating persons of African descent into the American polity without fundamentally changing economic or political structures.[237] *Brown* eschewed separatism as inherently unequal. However, by emphasizing the need to assimilate black children into white society it reinforced a primary tenet of white supremacy: "white" is the norm to which others must assimilate and by which they will be measured. As Jerome Culp says, *Brown* assumed that "assimilation and cultural degradation were the only two courses available."[238] He summarizes the inadequacies of the equal protection framework:

> [*Brown*'s] failures stem from three common misconceptions . . . . The most important misconception was that if we changed the law of the land, "good" people would comply with it. However, preventing those "good" people from using ruses to achieve their cherished ends served by racial segregation has proven difficult . . . .
>
> The second misconception is that there is a race neutral policy that we can all

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Rehnquist Courts have acquiesced in the continuance of *Plessy*-like racially separate educational facilities by restricting the desegregation remedies available to lower courts and school boards . . . ." (footnote omitted)); *see also* Bradley W. Joondeph, *A Second Redemption?*, 51 WASH. & LEE L. REV. 169 (1999) (reviewing GARY ORFIELD & SUSAN E. EATON, DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF *BROWN V. BOARD OF EDUCATION* (1996)).

235. Clarence Lusane, *Persisting Disparities: Globalization and the Economic Status of African Americans*, 42 HOW. L.J. 431, 434-35 (1999).

236. JEROME G. MILLER, SEARCH AND DESTROY: AFRICAN AMERICAN MALES IN THE CRIMINAL JUSTICE SYSTEM 6 (1996); *see also* MARC MAUER, THE SENTENCING PROJECT, RACE TO INCARCERATE 118-41 (1999).

237. The connection is illustrated by Justice Harlan's famous "[o]ur Constitution is color-blind" dissent in *Plessy*, which has been used from *Brown* through the recent decisions of the Rehnquist Court. *See* Richmond v. Croson, 488 U.S. 469, 521 (1989) (Scalia, J., concurring) ("At least where state or local action is at issue, only a social emergency rising to the level of imminent danger to life and limb . . . can justify an exception to the principle . . . that "[o]ur Constitution is color-blind."); Fullilove v. Klutznick, 448 U.S. 448, 522-23 (1980) (Stewart, J. and Rehnquist, C.J., dissenting from holding that minority contractor set-aside was constitutionally permissible). (The majority's position was receded from in *Adarand v. Pena*, 515 U.S. 200 (1995), and considered overruled in *Doe v. Univ. of Ill.*, 138 F.3d 653 (7th Cir. 1998).) *See* Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 STAN. L. REV. 1, 3 (1991) (listing cases referencing this assertion).

For Justice Harlan, there was no discontinuity between that assertion, his affirmation of the dominance of the white race, and his critique of the statute at issue on the grounds that it allowed "a Chinaman," someone of "a race so different from our own that we do not permit those belonging to it to become citizens of the United States," to "ride in the same passenger coach with white citizens . . . while citizens of the black race" could not. *Plessy*, 163 U.S. at 561, *see* Chin, *supra* note 225, at 156.

238. Jerome M. Culp, Jr., *Black People in White Face: Assimilation, Culture, and the* Brown *Case*, 36 WM. & MARY L. REV. 665, 678 (1995). For an extensive critique of attempts to use the law to assimilate Latinos, see Martinez, *supra* note 194 (comparing the dominant society's demands for assimilation to those of the "resistance-is-futile" Borg species on *Star Trek*).

> agree on that will achieve racial justice . . . .
>
> The final misconception at the heart of the *Brown* decision is that a single standard of assimilation can be articulated for American society, and that black people will be willing to adhere to that standard. This requirement of black assimilation is akin to a requirement that black people put on white face and is ultimately unacceptable as a goal for a decolonized African American community.[239]

The experience of African Americans illustrates that equal protection under law is necessary for the protection of human rights, but is not sufficient. The limits to an intraconstitutional solution to problems created by the U.S. government's exercise of plenary power are summarized by the statements of two great African American leaders, quoted by Judge Higginbotham in *Shades of Freedom*. In 1852 Frederick Douglass said,

> This Fourth of July is yours, not mine. You may rejoice I must mourn . . . . The blessings in which you, this day, rejoice, are not enjoyed in common. The rich inheritance of justice, liberty, prosperity and independence, bequeathed by your fathers, is shared by you, not by me. The sunlight that brought light and healing to you, has brought stripes and death to me.[240]

And 140 years later, on July 4, 1992, Justice Thurgood Marshall said,

> I wish I could say that racism and prejudice were only distant memories . . . and that liberty and equality were just around the bend . . . . But as I look around, I see not a nation of unity but of division—Afro and white, indigenous and immigrant, rich and poor, educated and illiterate . . . . [T]here is a price to be paid for division and isolation.[241]

The African American experience, paralleled in many respects by other "minorities" in the United States, and the terrible price paid by indigenous peoples for attempts to assimilate them[242] illustrate the limitations of an intraconstitutional solution to problems caused by the government's exercise of plenary power.[243] The following section considers a "metaconstitutional" option which

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239. Culp, *supra* note 238, at 669-70; *see also* Spencer A. Overton, *The Threat Diversity Poses to African Americans: A Black Nationalist Critique of Outsider Ideology*, 37 HOW. L.J. 465 (1994) (concluding that diversity could promote majoritarian control).

240. HIGGINBOTHAM, *supra* note 1, illus. following 128.

241. *Id.*, illus. preceeding 129.

242. These problems are also reflected in other settler societies. *See generally* ANDREW ARMITAGE, COMPARING THE POLICY OF ABORIGINAL ASSIMILATION: AUSTRALIA, CANADA, AND NEW ZEALAND (1995); GEOFFREY YORK, THE DISPOSSESSED: LIFE AND DEATH IN NATIVE CANADA (1990).

243. This thesis is supported by Jack Chin's exposition of the notion that even had the Supreme Court been making its immigration decisions within a constitutional framework, it would have reached essentially the same results that it did using the plenary power doctrine. *See* Gabriel J. Chin, *Is There a Plenary Power Doctrine? A Tentative Apology and Prediction for Our Strange But Unexceptional Constitutional Immigration Law*, 14 GEO. IMMIGR. L.J. 257 (2000); *see also* Kevin R. Johnson, *Race and Immigration Law and Enforcement: A Response to Is There a Plenary Power Doctrine?*, 14 GEO. IMMIGR. L.J. 289 (2000) (generally agreeing with Chin's thesis, but arguing that immigration law is particularly vulnerable to improper racial bias); Stephen H. Legomsky, *Immigration Exceptionalism: Commentary on Is There a Plenary Power Doctrine?*, 14 GEO. IMMIGR. L.J. 307 (2000) (proposing some qualifications, but generally agreeing with Chin's thesis).

As long as U.S. policy is driven by colonial imperatives to acquire more land, labor, or resources, assimilation cannot be considered a viable option. Such imperatives will cease to exist only through the

incorporates international law, an alternative that has much to offer people of African descent in the U.S. as well as those formally subjected to the plenary power doctrine.

V. INCORPORATING INTERNATIONAL LAW INTO A "METACONSTITUTIONAL" JURISPRUDENCE

> Human rights is the idea of our time. It asserts that every human being, in every society, is entitled to have basic autonomy and freedoms respected and basic needs satisfied .... The society has corresponding duties to give effect to these rights through domestic laws and institutions.
>
> Today the human rights idea is universal, accepted by virtually all states and societies regardless of historical, cultural, ideological, economic, or other differences. It is international, the subject of international diplomacy, law, and institutions ....
>
> The universalization of human rights is a political fact.[244]

Judge Higginbotham said, that "more than a century ago, Justice Holmes suggested that the law was a seamless web"[245] to explain the interrelatedness of his precepts of slavery jurisprudence and, in a broader sense, to argue that American law cannot be understood without studying the law of slavery and racial subordination. Similarly, the plenary power doctrine is not peripheral to the law, but is the cornerstone of American jurisprudence concerning those deemed Other in a more complex way than "race" alone. As such, it, too, must be seen as an integral part of this seamless web.[246] American law is generally defined by the parameters of the Constitution, making the exercise of plenary power as discussed in this Article aberrational with respect to "real," i.e., intraconstitutional, law.[247] However, American jurisprudence comprises both intraconstitutional law and the extraconstitutional exercise of jurisdiction under the plenary power doctrine, for American law accompanies U.S. jurisdiction—the

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recognition of real self-determination for all peoples, at which point the issue will be framed as voluntary co-operative relationships between peoples, not the assimilation of one group into another. *See generally* WARD CHURCHILL, *I Am Indigenist: Notes on the Ideology of the Fourth World*, *in* FROM A NATIVE SON: SELECTED ESSAYS ON INDIGENISM, 1985-1995, at 509-46 (1996).

244. HIGGINBOTHAM, *supra* note 1, at 205 (quoting Louis Henkin).

245. *Id.* at 172.

246. Felix Cohen said, "Like the miner's canary, the Indian marks the shift from fresh air to poison gas in our political atmosphere; and our treatment of Indians, even more than our treatment of other minorities, reflects the rise and fall in our democratic faith." FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW V (Rennard Strickland et al., eds., 1982). The truth of this observation again becomes apparent as plenary power, with its accompanying disregard for basic human rights, is extended to a shifting configuration of Others. Thus, in immigration law, legal principles designed to exclude the Chinese are used against Europeans accused of being "communists" and Muslims presumed to be "terrorists," and what was conceived on the basis of race can be applied on the basis of national origin, religion, culture, political belief, or any other signifier of outsider status. *See supra* notes 123-133, 143-48.

247. While one could see the exercise of the plenary power as "intraconstitutional" because it has been deemed consistent with the Constitution, the point is to incorporate law that provides protections not afforded within this constitutional framework.

law has followed the flag, even if the Constitution has not. Since the Constitution was not designed to and does not, in fact, protect all persons within the jurisdiction of U.S. courts,[248] we must acknowledge that the United States has obligations to those persons under international law and envision a "metaconstitutional" American jurisprudence that incorporates international law.[249]

The Other against whom plenary power is exercised often consists of people identified as non-white. However, its primary function is not promotion of racial hierarchy per se; however, the maintenance of colonial structures and relationships, which provide access to land, labor and natural resources.[250] Within this sphere of plenary power, constitutional rights are not being protected, nor is the global rule of law adhered to, despite the Constitution's specific directive that treaties are part of the supreme law of the land.[251] In fact, it appears that the plenary power doctrine is invoked precisely to avoid otherwise applicable law, domestic and international.[252]

The United States has either refused to ratify core human rights treaties or done so subject to significant reservations.[253] Those who turn to the courts for relief under the treaties that do bind the United States have been confronted with judicially-created doctrines that the courts invoke to disregard treaty obligations—not only the plenary power doctrine but also the "last-in-time" rule under which the courts enforce later-enacted federal statutes even if they result in treaty violations[254]; the courts' refusal to enforce those treaties or treaty provisions deemed "non-self-executing"[255]; and courts' deference to Congress and

248. *See infra* text accompanying notes 40-49, 74-84, 111-117.

249. In advocating the incorporation of international law, I do so with the recognition that it is limited because all of its foundational principles are rooted in the European legal tradition, and it focuses almost exclusively on the relations between sovereign "states" to the exclusion of the indigenous nations upon whose land and people those states are built. For an excellent exposition of the centrality of the colonial confrontation to contemporary international law, see Antony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law*, 40 HARV. INT'L L.J. 1 (1999). *See also* Makau Mutua, *Savages, Victims, and Saviors: The Metaphor of Human Rights*, 42 HARV. INT'L L.J. 201 (2001) (exposing the rhetoric underlying the human rights movement). On the relationship between nations and states, see *supra* note 5.

250. The integral relationship Antony Anghie has articulated between colonialism and the development of international law, *see* Anghie, *supra* note 194, finds parallel in the relationship between colonialism and the plenary power doctrine in U.S. law.

251. U.S. CONST. art. VI, cl. 2. *See also* The Paquete Habana, 175 U.S. 677 (1900).

252. This pattern is clearly seen in the United States's recent attempts to rationalize its treatment of Afghans and others allegedly affiliated with al Qaeda being held without charge in open air cages on the U.S. naval base at Guantanamo, Cuba by asserting that neither constitutional protections nor the laws of war apply. *See* Carol Rosenberg, *In Limbo: Detainees Await the Next Step*, MIAMI HERALD, Jan. 17, 2002, at 20A ("[The al Qaeda and Taliban captives] are men without countries from a war that has never been declared. They are prisoners defined as detainees, caged up by the U.S. military on a slice of territory that is technically not American soil.").

253. *See infra* notes 270-277, 287-290, 292-295, 301-305.

254. *See* Whitney v. Robertson, 124 U.S. 190 (1888) (enforcing a later-enacted law exempting Hawaiian sugar from duty despite its conflict with an earlier treaty with the Dominican Republic); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 115 (1987).

255. *See, e.g.*, Foster & Elam v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829) (declaring that treaties in the nature of a contract to perform a particular act require legislation before the courts will enforce

the executive on "political questions."[256]

The combined result of such doctrines is that those injured by violations of international law are thus left in the position described so eloquently by Justice Jackson, dissenting in *Mezei*: they are free to leave Ellis Island "in any direction except west; that might mean freedom, if only [they were] amphibian[s]."[257] Even Justices White and Brown, writing for the majority in *Downes*, stated that everyone has some fundamental or "natural" rights, but the Supreme Court has never identified the law that protects such rights. International law provides just such protections and its enforcement would prevent many of the injustices currently suffered by immigrants, Indians, and those in external colonies under the plenary power doctrine, and would dramatically improve the situation of African Americans and other minority groups in the U.S., as illustrated by the examples that follow.

Current interpretation and enforcement of U.S. immigration law violates international law in numerous ways, as the Tenth Circuit Court of Appeals pointed out in *Rodriguez-Fernandez*.[258] The Universal Declaration of Human Rights proclaims a right to freedom of movement, with specific protections for persons seeking asylum from persecution.[259] The rights of asylum seekers are spelled out in the Convention Relating to the Status of Refugees and its Protocol, to which the U.S. is a party.[260] International norms are also violated by the U.S.'s arbitrary and indefinite detention of persons, including juveniles, and by current immigration restrictions relating to HIV/AIDS.[261] These problems are compounded by provisions of the 1996 Illegal Immigration Reform and Immigrant Responsibility Act,[262] which Jaya Ramji calls a "fearsome example of

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them). It is difficult to tell which treaties will be declared non-self-executing. *See, e.g.*, United States v. Percheman, 32 U.S. (7 Pet.) 51, 89 (1833) (finding the same treaty addressed in *Foster & Elam* to be self-executing; both opinions were authored by Justice Marshall). Sometimes select provisions of treaties will be determined to be self-executing or non-self-executing. *See* Sei Fujii v. State, 38 Cal. 2d 718, 242 P.2d 617 (1952) (refusing to find the non-discrimination provisions of the U.N. Charter self-executing, but invalidating California's alien land laws on the basis of Fourteenth Amendment Equal Protection).

256. *See, e.g.*, Baker v. Carr, 369 U.S. 186, 211-13 (1962) (stating that judicial deference to the "political branches" of government is appropriate with respect to certain matters of foreign policy).

257. Shaughnessy v. United States, 345 U.S. 206, 220.

258. Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382, 1388-90; *see supra* notes 127-129; *see also* Robert J. Williams, Sale v. Haitian Centers Council *and Its Aftermath: A Problematic Gap in International Immigration Law*, 9 TEMP. INT'L & COMP. L.J. 55 (1995) (analyzing the *Sale* decision, which refused to give extraterritorial jurisdiction to the Refugee Convention).

259. *Universal Declaration of Human Rights*, art. 13, para 2, art. 14, para 1, G.A. Res. 217(AIII), U.N. GAOR, 3d Sess., pt. 1, at 71, U.N. Doc. A/810 (1948).

260. Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150. The U.S. has neither signed nor ratified this treaty, but it is binding by virtue of the U.S. ratification of the Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267 (136 States parties; U.S. ratified with two reservations).

261. Joan Fitzpatrick & William McKay Bennett, *A Lion in the Path? The Influence of International Law on the Immigration Policy of the United States*, 70 WASH. L. REV. 589, 608-18 (1995).

262. IIRIRA, Pub. L. No. 104-208, division C, 110 Stat. 3009-546 (codified in various sections of 8 and 18 U.S.C.).

how individual rights can be abridged in a country that fails to take its international human rights obligations seriously."[263]

The IIRIRA abrogates U.S. obligations under various treaties, including those contained in the 1967 Protocol Relating to the Status of Refugees,[264] the 1985 Convention Against Torture,[265] and the International Covenant on Civil and Political Rights.[266] Ramji states:

> The IIRIRA breaches numerous individual rights and duties of states that arise from these treaties, including the right to be free from arbitrary detention, the right to due process of law, the duty of non-refoulement, the duty not to punish asylum seekers who enter illegally, and the duty of good faith interpretation of treaties.[267]

Ramji concludes, "Under current doctrine, there is no domestic remedy for victims of the United States' derogations from international standards."[268]

The harshest consequences of U.S. immigration law and policy have thus far been deemed constitutionally acceptable by the Supreme Court. They would be eliminated, however, if the United States courts would enforce the treaties identified above, as well as the Vienna Conventions on Diplomatic and Consular Relations,[269] the Convention on the Rights of the Child,[270] and various applicable treaties of friendship and commerce or extradition.[271] In the wake of

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263. Jaya Ramji, *Legislating Away International Law: The Refugee Provisions of the Illegal Immigration Reform and Immigrant Responsibility Act*, 37 STAN. J. INT'L L. 117, 160 (2001).

264. Protocol Relating to the Status of Refugees, *supra* note 260, *incorporating* the Convention Relating to the Status of Refugees, *supra* note 260.

265. Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment, G.A. Res. 46, U.N. GAOR, 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/39/46 (1984). The U.S. ratified with three reservations, one understanding, and one declaration, all of which qualify its commitments.

266. International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171. The U.S. ratified with five reservations, five understandings, four declarations, and one proviso. The U.S. is not a party to the Optional Protocol to the ICCPR, G.A. Res. 2200A(XXI), U.N. GAOR, 21st Sess. Supp. No. 16, at 59, U.N. Doc. A/6316 (1966), nor to the Second Optional Protocol to the ICCPR, Aiming at the Abolition of the Death Penalty, G.A. Res. 44/128, U.N. GAOR, 44th Sess., Annex Supp. No. 49, at 207, U.N. Doc. A/44/49 (1989).

267. Ramji, *supra* note 263, at 118. The United States is a party to each of these conventions.

268. *Id. See generally* Meredith K. Olafson, *The Concept of Limited Sovereignty and the Immigration Law Plenary Power Doctrine*, 13 GEO. IMMIGR. L.J. 433 (1999) (arguing that the plenary power doctrine does not comport with contemporary public international law).

269. Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 500 U.N.T.S. 95; Vienna Convention on Consular Relations, Apr. 24, 1963, 596 U.N.T.S. 261. These have particular significance in the human rights arena because they require particular protections for non-citizens which are frequently ignored by the United States. *See* Shana F. Marbury, Breard v. Greene*: International Human Rights and the Vienna Convention on Consular Relations*, 7 TUL. J. INT'L & COMP. L. 505 (1999) (discussing the U.S. execution of a Paraguayan national in spite of a request for a stay from the International Court of Justice).

270. Convention on the Rights of the Child, G.A. Res. 44/25, U.N. GAOR, 44th Sess., Annex, Supp. No. 49, at 167, U.N. Doc. A/44/49 (1989). The United States and Somalia, which has not had a functioning government, are the only countries which are not parties to this treaty.

271. The problem is illustrated by *United States* v. *Alvarez-Machain*, 504 U.S. 655 (1992) (holding that the abduction of a Mexican citizen by U.S. agents did not violate U.S.-Mexico Extradition Treaty of May 4, 1978 [1979], because the treaty, while providing avenues for extradition, did not explicitly forbid abduction). *See generally* Royal J. Stark, *The* Ker-Frisbie-Alvarez *Doctrine: International Law, Due Process, and United States Sponsored Kidnapping of Foreign Nationals Abroad*, 9

the indefinite and unexplained detention of unidentified persons since September 11, 2001, the Inter-American Convention on the Forced Disappearance of Persons[272] should be added to the list as well.

The harms that result from the assertion that Puerto Rico and other "unincorporated territories" are not colonies but "freely associated" with the United States are best remedied through international law as well. The right of nations to "self-determination" is one the United States has advocated since World War I.[273] It is a foundational principle of the Charter of the United Nations,[274] featured prominently in the International Covenant on Civil and Political Rights (ICCPR)[275] and the International Covenant on Economic, Social and Cultural Rights (ICESCR),[276] and recognized as a customary norm of international law, perhaps even a *jus cogens* norm.[277]

In defining "self-determination," James Anaya references "a universe of human rights precepts concerned broadly with peoples, including indigenous peoples, and grounded in the idea that all are equally entitled to control their own destinies. Self-determination gives rise to remedies that tear at the legacies of empire, discrimination, suppression of democratic participation, and cultural suffocation."[278] According to Efren Rivera Ramos:

> The conceptual scheme of the Insular Cases is entirely incompatible with any notion of self-determination . . . [which] at a minimum . . . implies the right . . . of a people . . . to determine its own status and associations with other peoples or groups

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CONN. J. INT'L L. 113 (1993).

272. Inter-American Convention on Forced Disappearance of Persons, June 9, 1994, 33 I.L.M. 1529 (*entered into force* Mar. 28, 1996). The United States is not a party to this treaty, nor to the American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123 (*entered into force* July 18, 1978); the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights, Nov. 17, 1988, O.A.S. Treaty Series No. 69 (*entered into force* Nov. 16, 1999); the Inter-American Convention to Prevent and Punish Torture, O.A.S. Treaty Series No. 67 (*entered into force* Feb. 28, 1987); or the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, 33 I.L.M. 1534 (*entered into force* Mar. 5, 1995).

273. *See* Woodrow Wilson, "The Fourteen Points Address" Address to a joint session of Congress (1918), *reprinted in* THE HUMAN RIGHTS READER: MAJOR POLITICAL ESSAYS, SPEECHES, AND DOCUMENTS FROM THE BIBLE TO THE PRESENT 299-304 (Micheline R. Ishay ed., 1997).

274. U.N. CHARTER art. 1, para. 2.

275. ICCPR, *supra* note 266, art. 1 ("All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their ecoomic, social and cultural development.").

276. International Covenant on Economic, Social and Cultural Rights, art. 1, Dec. 16, 1966, 993 U.N.T.S. 3 (*entered into force* Jan. 3, 1976) (providing the same rights as under article 1 of the ICCPR). The United States, though instrumental in drafting both of these conventions, did not ratify the ICCPR until 1992 and has signed but not ratified the ICESCR.

277. S. JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW 75 (1996); *see* Araujo, *supra* note 5; Richard Falk, *The Rights of Peoples (In Particular Indigenous Peoples), in* THE RIGHTS OF PEOPLES 17-37 (James Crawford ed., 1988); Ruth E. Gordon, *Some Legal Problems with Trusteeship*, 28 CORNELL INT'L L.J. 301 (1995); Ediberto Roman, *Empire Forgotten: The United States's Colonization of Puerto Rico*, 42 VILL. L. REV. 1119, 1127-33 (1997) (explaining the principle of self-determination).

278. Anaya, *supra* note 277, at 75.

> and to fashion for itself the organizing principles of its social existence. The logic of the Court's discourse, however, presupposes the plenary power of the metropolitan state to determine the political condition and the civil and political rights of the people of the acquired territory.[279]

He adds that it "is not anachronistic to level this critique against the Court's political rationale," for even by the late 1800s and early 1900s, the notion of collective and, specifically, national self-determination was widely accepted.[280]

In 1960, U.N. General Assembly Resolution 1514, the Declaration on the Granting of Independence to Colonial Countries and Peoples, noted that "all peoples have an inalienable right to complete freedom, the exercise of their sovereignty and the integrity of their national territory" and proclaimed the "necessity of bringing to a speedy and unconditional end colonialism in all its forms and manifestations."[281] Among other things, the General Assembly declared that "[i]mmediate steps shall be taken, in Trust and Non-Self-Governing Territories or all other territories which have not yet attained independence, to transfer all powers to the peoples of those territories, without any conditions or reservations."[282]

Since 1972, the U.N. Decolonization Committee and other international organizations have called for the decolonization of Puerto Rico, as have other international organizations.[283] The United States maintains that Puerto Rico is not a colony but a commonwealth, based on Public Law 600.[284] Enacted by Congress in 1950, it declared a "compact" of free association between Puerto Rico and the United States and gave Puerto Rico additional but limited powers of self-government.[285] However, the compact was unilaterally imposed upon Puerto Rico and, as Aaron Guevara notes, the following are clear indicators of Puerto Rico's colonial status: (1) lack of equality under the law; (2) inability to vote in national elections; (3) lack of representation in Congress; (4) application of the laws passed by Congress; (5) lack of ability to decide its future status; and (6) economic dependence.[286] At a minimum, self-determination for Puerto Rico and each of the other "unincorporated" U.S. territories will require

279. Rivera Ramos, *supra* note 26, at 298.

280. *Id.* at 299.

281. G.A. Res. 1514, 15 U.N. GAOR, 15th Sess., Supp. No. 16, at 66, U.N. Doc. A/4684 (1961).

282. *Id.*

283. Aaron Guevara, *Puerto Rico: Manifestations of Colonialism*, 26 REV. JUR. U.P.R. 275, 303-04 (1992).

284. Act of July 3, 1950, Pub. L. No. 600, 64 Stat. 319.

285. Roman, *supra* note 277, at 1151-61. In 1953, after Puerto Rico became a "commonwealth" and elected a local government, the U.S. convinced the United Nations to take Puerto Rico off its list of non-self-governing territories. G.A. Res. 748, U.N. GAOR, 8th Sess., at 25, U.N. Doc A/PV.459 A/RES/758(vii) (1953). *See* Guevara, *supra* note 283, at 283-90.

286. *Id.* at 275 n.4. The relationship between the U.S. and Puerto Rico is defined in the Federal Relations Act, 48 U.S.C. §§ 731-916 (1994). With respect to other U.S. territories, see generally Jon M. Van Dyke, *The Evolving Legal Relationships Between the Untied States and Its Affiliated U.S.-Flag Islands*, 14 U. HAW. L. REV. 445 (1992).

real, not simply formal, recognition of the law that has emerged from the United Nations since 1948 regarding the independence of colonies and "trust territories."

Bringing "federal Indian law" into compliance with international law would first require enforcing the treaties that exist between the United States and Indian nations and interpreting them in accordance with customary international law and the principles articulated in the Vienna Convention on the Law of Treaties.[287] Siegfried Wiessner says,

> The fact that treaties with Indian nations can be abrogated under *Lone Wolf* does not stand in the way of their characterization as obligations under international law .... Traditional international law scholarship, applied in intellectual honesty, would have a hard time denying commitments arising from U.S.-Indian treaties the effect of international legal obligations.[288]

He concludes that these treaties are still enforceable under international law, particularly in light of the 1975 advisory opinion of the International Court of Justice on the status of the Western Sahara, which confirmed the international legal effect of agreements between indigenous peoples and clearly recognized sovereign states.[289] Weissner also notes that the treaties must be interpreted in accordance with the provisions of the Vienna Convention, which differs significantly from U.S. domestic law interpreting treaties with Indian nations, and means that judicially-created doctrines cannot be invoked to avoid their enforcement.[290]

Indian nations are best described as internal colonies, for they meet all of the international criteria for "non-self-governing territories" except the condition that such territories must be separated from the colonizing power by at least 30 miles of open sea.[291] This requirement, strongly supported by the U.S.,

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287. Vienna Convention on the Law of Treaties, *supra* note 93. Although the United States is not a party to the treaty, it recognizes the treaty as codifying the customary law of agreements between states which is binding on the U.S. *See* Steven C. Nelson, *Contemporary Practice of the United States Relating to International Law*, 65 AM. J. INT'L L. 599, 605 (1971).

288. Wiessner, *supra* note 65, at 584, 591.

289. *Id.* at 592; *see* Western Sahara, 1975 I.C.J. 4 (Oct. 16, 1975).

290. Wiessner, *supra* note 65 at 593-97; *see also infra* text accompanying notes 254-256. "In addition, the international law character of these treaties would make their provisions potentially invocable before international bodies." *Id.* at 598.

291. The U.N. Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514, U.N. GAOR, 15th Sess., at 66, U.N. Doc. A/RES/1514(XV) (1960), declares, "The subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights. . . ." While this would appear to apply directly to Indian nations, the United Nations, being a body composed only of *states*, followed up with Resolution 1541 (XV) which constrained its application to people separated from colonizing powers by at least thirty miles of open ocean. The lack of intervening "blue water," however, does not change realities of the relationship. *See* Roxanne Dunbar Ortiz, *Protection of American Indian Territories in the United States: Applicability of International Law*, *in* IRREDEEMABLE AMERICA: THE INDIANS' ESTATE AND LAND CLAIMS 247, 259-60 (Imre Sutton ed., 1985). *See generally* WARD CHURCHILL, *The Indigenous Peoples of North America: A Struggle Against Internal Colonialism*, *in* STRUGGLE FOR THE LAND: NATIVE NORTH AMERICAN RESISTANCE TO GENOCIDE, ECOCIDE AND COLONIZATION 15 (1999); WARD CHURCHILL, *A Breach of Trust: The Radioactive Colonization of Native North America*, *in* PERVERSIONS OF JUSTICE:

adds nothing substantive to the definition of a colonized people. It simply insulates settler states which occupy the lands of peoples they have colonized. Thus, indigenous peoples in the United States should be protected by all of the provisions for self-determination described above, as well as the Genocide Convention[292] and the norms articulated with respect to indigenous and colonized peoples in the U.N. Declaration on the Granting of Independence to Colonial Territories and Peoples,[293] the International Labour Organization (ILO)'s Convention on Indigenous Populations,[294] and the Draft Declaration on the Rights of Indigenous Peoples[295] developed by the Working Group on Indigenous Populations which was organized under the auspices of the U.N. Human Rights Committee as a result of the efforts of the indigenous International Indian Treaty Council in the late 1970s and early 1980s.[296]

Application of this body of international law would mean that Congress could not simply pass something entitled the "Indian Self-Determination Act"[297] providing for increased access to federal programs while maintaining its plenary power prerogatives, and wash its hands of the matter.[298] "Self-determination" by its very nature, cannot be imposed upon a people but must be defined by them. James Anaya says:

> In pressing their demands internationally, indigenous peoples have pointedly undermined the premise of the state as the highest and most liberating form of human association . . . . The model that is emerging . . . sees indigenous peoples as simultaneously distinct from yet part of the states within which they live, as well as part of other units of social and political interaction that might include indigenous federations or transnational associations. Within this model, self-determination is achieved . . . by the consensual development of context-specific arrangements that

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INDIGENOUS PEOPLES AND ANGLOAMERICAN LAW (forthcoming 2002).

292. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 (*entered into force* Jan. 12, 1951). Forty years after the convention was drafted, the U.S. ratified with two reservations, five understandings, and one declaration, including a reservation against jurisdiction by the International Court of Justice.

293. *See supra* notes 281-282.

294. Convention Concerning Populations and Tribal Peoples in Independent Countries, June 27, 1989, *reprinted* at 28 I.L.M. 1382 (1989).

295. Draft Declaration on the Rights of Indigenous Peoples, Revised Working Paper Submitted by the Chairperson/Rapporteur, Mrs. Erica-Irene Daes, U.N.Doc. E/CN.4/Sub.2/1993/26 (1993), *available at* http://www.usask.ca/nativelaw/ddir.html. For a history and compilation of related documents, see SHARON HELEN VENNE, OUR ELDERS UNDERSTAND OUR RIGHTS: EVOLVING INTERNATIONAL LAW REGARDING INDIGENOUS RIGHTS (1998).

296. *See* S. JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW 151-79 (1996); ROXANNE DUNBAR ORTIZ, INDIANS OF THE AMERICAS: HUMAN RIGHTS AND SELF-DETERMINATION 29-72 (1986); JIMMIE DURHAM, A CERTAIN LACK OF COHERENCE: WRITINGS ON ART AND CULTURAL POLITICS 38-56 (1993); VENNE, *supra* note 275, at 107-63. *See generally* Russel Lawrence Barsh, *Indigenous Peoples in the 1990s: From Object to Subject of International Law?*, 7 HARV. HUM RTS. J. 33 (1994).

297. Indian Self-Determination Act, Pub. L. No. 93-638, 88 Stat. 2203 (1975) (codified at 25 U.S.C. § 450 (2000)).

298. *See generally* Markus B. Heyder, *The International Law Commission's Draft Articles on State Responsibility: Draft Article 19 and Native American Self-Determination*, 32 COL. J. TRANSNAT'L L. 155 (1994).

> uphold for indigenous peoples both spheres of autonomy commensurate with relevant cultural patterns and rights of participation in the political processes of the states in which they live.[299]

If the United States complied with international law, it would both allow for real self-determination, and would provide all peoples within its jurisdiction protections similar to, but more extensive than those provided by the Constitution. These are embodied in the general provisions for human rights included in the U.N. Charter[300] and the Universal Declaration of Human Rights,[301] the Convention on the Prevention and Punishment of the Crime of Genocide,[302] the International Covenant on Civil and Political Rights[303] and the International Covenant on Economic, Social and Cultural Rights,[304] and the Convention on the Rights of the Child,[305] among other instruments. Put most succinctly, the incorporation of international law into U.S. jurisprudence is the most promising way to ensure the end of genocidal and ecocidal policies and practices, the adherence to existing treaties, the return of unceded land, and the implementation of political self-determination.[306]

The integration of international law into U.S. jurisprudence would also dramatically improve the legal posture of African Americans and other "minorities" who have been treated as Other, but are not officially subject to the plenary power doctrine, as has been recognized by advocates of racial justice from Frederick Douglass and W.E.B. DuBois to Martin Luther King, Jr. and Malcolm X.[307] In 1947, the National Association for the Advancement of Colored People (NAACP) denounced U.S. racial discrimination in a petition to the United Nations and in 1951, the Civil Rights Congress filed another petition entitled "We Charge Genocide." The potential impact of international human

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299. S. James Anaya, *Indigenous Peoples and International Law Issues*, 92 AM. SOC'Y INT'L L. PROC. 96, 98 (1998).

300. U.N. Charter, *supra* note 274.

301. Universal Declaration of Human Rights, *supra* note 259.

302. Convention on the Prevention and Punishment of the Crime of Genocide, *supra* note 292.

303. International Covenant on Civil and Political Rights, *supra* note 266.

304. International Covenant on Economic, Social, and Cultural Rights, *supra* note 276.

305. Convention of the Rights of the Child, *supra* note 270.

306. Curtis G. Berkey, *International Law and Domestic Courts: Enhancing Self-Determination for Indigenous Peoples*, 5 HARV. HUM. RTS. J. 65, 65 (1992) (noting that because Congress and U.S. courts have failed to provide legal protection, Indian nations should "turn to international human rights law for help in securing the right of self-government against federal abrogation"). *See generally* Steven Paul McSloy, *Back to the Future: Native American Sovereignty in the 21st Century*, 20 N.Y.U. REV. L. & SOC. CHANGE 217 (1993); Robert A. Williams, Jr., *Encounters on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous Peoples' Survival in the World*, 1990 DUKE L.J. 660.

307. *See* Theodore M. Shaw, *The Race Convention and Civil Rights in the United States*, 3 N.Y. CITY L. REV. 19 (1998) (discussing the benefits international law could provide to the struggle for civil rights in the U.S.). *See generally* Ruth Gordon, *Critical Race Theory and International Law: Convergence and Divergence*, 45 VILL. L. REV. 827 (2000); Sharon K. Hom & Eric K. Yamamoto, *Collective Memory, History, and Social Justice*, 47 UCLA L. REV. 1747 (2000); Hope Lewis, *Reflections on "Blackcrit Theory": Human Rights*, 45 VILL. L. REV. 1075 (2000).

rights law on racial justice in the United States can be seen by considering one of many possible examples, the United States' systematic use of "law enforcement" to crush political dissent.

In 1975, a lengthy investigation by the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities (the "Church Committee") revealed that since the mid-1950s federal intelligence and law enforcement agencies had engaged in concerted efforts "to disrupt, . . . discredit, or otherwise neutralize" organizations which challenged the social, political or racial hierarchy.[308] The groups targeted included all of the civil rights organizations, from King's Southern Christian Leadership Conference to the Black Panther Party, the American Indian Movement, the Puerto Rican Young Lords and others who advocated Puerto Rican independence, and the Chicano Brown Berets.[309] The emergence of leadership of color was perceived as a threat to the government, and multiracial coalitions were particularly targeted.[310] Government tactics included intentional dissemination of misleading information about the groups and their leaders, repeated arrests of activists on false charges, wrongful convictions and imprisonment, use of infiltrators and agents provocateur to disrupt organizations, orchestration of military and police actions to erode community support, physical assaults, and outright assassinations.[311]

The Church Committee hearings were suspended in 1975, just before testimony was to be heard about attacks on American Indian and Latino organizations, and they have never been resumed.[312] Despite the Committee's harsh condemnation of the agencies' practices as constituting a "record of abuse,"[313] many similar programs continue to be implemented today.[314] Some who were wrongfully incarcerated as a result of these programs have been released but others remain in prison, and no acknowledgment of or redress for these actions has been extended to the victims or their families.[315] Intraconstitutional re-

308. *See* FBI memorandum of August 25, 1967 initiating the "Black liberation movement" COINTELPRO, *reproduced in* WARD CHURCHILL & JIM VANDER WALL, THE COINTELPRO PAPERS: DOCUMENTS FROM THE FBI'S SECRET WAR AGAINST DISSENT IN THE UNITED STATES 92-93 (1990) [hereinafter COINTELPRO PAPERS]; *see also* WARD CHURCHILL, *"To Disrupt, Discredit and Destroy": The FBI's Secret War against the Black Panther Party, in* LIBERATION, IMAGINATION, AND THE BLACK PANTHER PARTY 78-117 (Kathleen Cleaver & George Katsiaficas eds., 2001); WARD CHURCHILL AND JIM VANDER WALL, AGENTS OF REPRESSION: THE FBI'S SECRET WARS AGAINST THE BLACK PANTHER PARTY AND THE AMERICAN INDIAN MOVEMENT (1988) [hereinafter AGENTS]; ROBERT JUSTIN GOLDSTEIN, POLITICAL REPRESSION IN MODERN AMERICA FROM 1870 TO 1976 (2001).

309. *See* AGENTS, *supra* note 308, at 32-62.

310. *Id.* at 37-62.

311. *Id.*

312. *See* PETER MATTHIESSEN, IN THE SPIRIT OF CRAZY HORSE 125-26 (1991); COINTELPRO PAPERS, *supra* note 308, at 397 n.147.

313. U.S. Senate, Final Report, Select Committee to Study Governmental Operations with Respect to Intelligence Activities, Bk. II, at 20 (1975).

314. *See* AGENTS, *supra* note 308, at 353-81; COINTELPRO PAPERS, *supra* note 308, at xiv-xv, GOLDSTEIN, *supra* note 308, at xiii.

315. *See* Human Rights in the U.S.: The Unfinished Story of Political Prisoners/Victims of COINTELPRO (2001) (from transcript of forum held for the Congressional Black Caucus, Sept. 14,

sponses to these violations of both the Constitution and international law have proven ineffective, in large measure because these programs were carried out by the very agencies charged with upholding the law and the Constitution, with the specific intent of preventing the expression of political dissent or the implementation of meaningful social change.[316]

International law, particularly as articulated in the Covenant on Civil and Political Rights and the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD),[317] specifically prohibits such conduct by a government towards its citizens. If American courts would enforce these treaties, both of which have been ratified by the United States, the abuses documented by the Church Committee and others could be fully investigated, legislation implemented to prevent such practices, and victims identified and compensated to the extent possible. This, in turn, would make the constitutional guarantees that are supposed to protect those who work for racial and economic justice actually effective.[318]

Generally, compliance with international law would require adherence to international standards of civil and political rights, thus opening up the polity to the possibility of structural change. It would also mean abolishing the de facto existence of separate systems of law for different groups,[319] and complying with the provisions of the Racial Discrimination Convention, as well as other international law concerning the treatment of ethnic, racial, religious, and linguistic minorities. It would require something the United States has fought since the formation of the United Nations[320]—acknowledging that U.S. domestic policies with respect to race are not consistent with international norms and genuinely participating in international fora such as the 2001 U.N. Conference on Racism in Durban, South Africa rather than walking out of them, literally or figuratively.[321]

2000) (on file with author).

316. *See* AGENTS, *supra* note 308. On-going problems of this nature were presented to the ICERD Committee in 2001. *See* HUMAN RIGHTS RESEARCH FUND, REPORT TO THE UNITED NATIONS COMMITTEE FOR THE ELIMINATION OF RACIAL DISCRIMINATION, CONCERNING THE INITIAL REPORT FROM THE UNITED STATES UNDER THE INTERNATIONAL CONVENTION FOR THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION (2001) (on file with author).

317. INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION, 600 U.N.T.S. 195, 5 I.L.M. 352 (1966) (*entered into force* Jan. 4, 1969).

318. For a parallel analysis, see Martin A. Geer, *Human Rights and Wrongs in Our Own Backyard: Incorporating International Human Rights Protections Under Domestic Civil Rights Law—A Case Study of Women in United States Prisons*, 13 HARV. HUM. RTS. J. 71 (2000).

319. Among other things it would mean eliminating the "intent" requirement for discrimination, *compare* ICERD art. 2.1(c) (focusing on effect), *with* Washington v. Davis, 426 U.S. 229 (1976) (requiring discriminatory intent), and getting to the root of racial disparities in criminal law enforcement. *See generally* JEROME G. MILLER, SEARCH AND DESTROY: AFRICAN AMERICAN MALES IN THE CRIMINAL JUSTICE SYSTEM (1996).

320. *See* Henkin, *supra* note 8.

321. On the U.S. walkout from the Durban conference, see Rachel L. Swarns, *Rancor and Powell's Absence Cloud Racism Parley*, N.Y. TIMES, Aug. 31, 2001, at A3.

VI. CONCLUSION

A metaconstitutional jurisprudence such as I am proposing would acknowledge that American law encompasses both (1) the large body of statutes, common law, and judicial decisions which fall within the parameters of the Constitution, and (2) the law that is created and enforced by the U.S. government but has been declared by the Supreme Court to be essentially unconstrained by the Constitution. If the latter is actually law and not simply the exercise of raw power, and yet does not incorporate constitutional protections, it seems logical to recognize it as an area governed by international law. This would preserve the United States as a "nation of laws"; to do otherwise is to elevate "might makes right" to the status of judicial doctrine.

As briefly sketched above, this is not simply a matter of logic. Individuals, communities, and nations have been and continue to be damaged and destroyed by the government's exercise of plenary power. The United States government often treats Others in a manner that violates international law. Applying an intraconstitutional analysis, the courts have sometimes proscribed such actions, either by recognizing the Constitution's directive that international law is part of the supreme law of the land, or by extending constitutional protections to the Others involved. More often, however, they have developed judicial doctrines that allow such actions despite their conflict with international law, or have declared the action acceptable because those affected are not protected by the Constitution. A metaconstitutional jurisprudence would recognize that this is only part of the legal analysis; even if such actions are deemed "constitutional" they must also comport with international law. It would develop a comprehensive picture of American law, both intra- and extraconstitutional, and would recognize the responsibility of the judiciary to ensure that whenever the U.S. government asserts American jurisdiction, it is *lawful*—not simply allowed by the Constitution, but lawful.

Advocating the incorporation of international law into U.S. jurisprudence is not to suggest that those currently subject to the plenary power doctrine should not benefit from equal protection under the Constitution. It is, instead, an argument that expanding intraconstitutional protection is insufficient. For the reasons discussed in Part IV, it may be structurally infeasible to fully constitutionalize governmental action with respect to immigrants, Indian nations, and external U.S. colonies. Just as the law of slavery was integral to the Union and to the Constitution, the existence of a realm in which the government exercises plenary power may be integral to U.S. law as a whole. If the purpose of the domestic legal system is to ensure full civil and political rights to those "inside" the polity while simultaneously maintaining the structures of colonial domination that ensure the state's control over the land, labor, and resources it desires, it would be futile to expect that law to protect those it was designed to exclude.

Even where constitutional protection is or could be made available, it will

not suffice to protect the rights of those currently subject to the exercise of plenary power. Limiting those subject to U.S. jurisdiction to intraconstitutional remedies violates international law, both because of the domestic doctrines that "override" international law and because the solution presumes that the United States has legitimate jurisdiction over these peoples. Further assimilation of those regarded as Other into the U.S. polity may not be their choice, as illustrated by Puerto Rican opposition to statehood and the long history of Indian resistance to incorporation into the American polity. As Judge Cabranes says: "Powerlessness is what colonialism is all about. And decolonization in all its varieties—whether it is national independence, autonomy or free association, or political integration into the metropolitan state on the basis of equality—is everywhere supposed to be the antidote to this historical political impotence."[322] Most importantly, the way in which decolonization occurs must be freely chosen by the colonized; it is not a choice for the colonizing power to make.

In arguing for a jurisprudence that incorporates international law, this article leaves two large subject areas virtually untouched. First, I have referred to law that would prohibit the injustices currently allowed by invocation of the plenary power doctrine but have not focused on redress or reparation for the damage already caused. As Karen Parker and Jennifer Chew state: "The right to redress an international wrong is recognized by scholars as a fundamental principle of customary law. Recognition of this right clearly pre-dates World War II, and it has been incorporated into both treaties and international legal opinions."[323] Particularly in light of the redress programs that have been instituted following the horrors of World War II, a considerable body of international law is evolving in this field and it too would have to be taken seriously, if international law were incorporated into U.S. jurisprudence.[324]

Second, I have not addressed the use of international fora for the enforcement of international law. The United States's advocacy of the "global rule of law" has been discredited by its refusal to submit to the jurisdiction of the International Court of Justice,[325] the International Criminal Court,[326] the Inter-

322. Cabranes, *supra* note 101, at 40.

323. Karen Parker & Jennifer F. Chew, *Compensation for Japan's World War II War Rape Victims*, 17 HASTINGS INT'L & COMP. L. REV. 497, 524 (1994); *see also* Jiménez de Aréchaga, *International Law in the Past Third of a Century*, 159 Rec. des Cours 285-87 (1978), *reprinted in* HENKIN ET AL., INTERNATIONAL LAW CASES AND MATERIALS 583 (3d ed. 1993) ("[A] State discharges the responsibility incumbent upon it for breach of an international obligation by making reparation for the injury caused."). This principle was recognized by the district court in *Rodriguez-Fernandez v. Wilkinson*, 505. F. Supp. 787, 798 (D. Kan. 1980), *aff'd* 654 F.2d 1382 (10th Cir. 1981).

324. *See generally* STEVEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY (1997); DINAH SHELTON, REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW (1999).

325. *See generally* Paul W. Kahn, *From Nuremberg to the Hague: The United States Position in* Nicaragua v. United States *and the Development of International Law*, 12 YALE J. INT'L L. 1 (1987).

326. *See* Lynn Sellers Bickley, *U.S. Resistance to the International Criminal Court: Is the Sword Mightier Than the Law?*, 14 EMORY INT'L L. REV. 213 (2000).

American Court of Human Rights,[327] and other international institutions. To the extent the United States acknowledges international law, it will have to take these institutions seriously and participate in their development. In the meantime, it seems that the best way to enhance the support they receive from the U.S. government is to get the law they enforce taken seriously in U.S. courts.

Legal changes alone will not solve all of the problems referenced in this article. As Rivera Ramos emphasizes, the Supreme Court's plenary power decisions "are not the ultimate determinants of the reproduction of the colonial condition. The reproduction of the relationship of subordination that colonialism entails is the resultant of diverse factors that have served to reinforce each other in a multidimensional process."[328] Nonetheless, restructuring the legal paradigm within which the United States operates would go a long way toward reversing this process of reinforcement, for real de-colonization and protection of fundamental human rights requires a jurisprudence that explicitly incorporates international law.

327. Because the United States is not a party to the Inter-American Convention on Human Rights, Nov. 22, 1969, O.A.S. Treaty Series No. 36, at 1, OEA/ser. L./V/11, 23 doc. Rev.2, it is not subject to the jurisdiction of this Court. The Inter-American Commission, however, can investigate allegations that the United States is violating its obligations under the Charter of the Organization of American States or the American Declaration on the Rights and Duties of Man. *See generally* THOMAS BUERGENTHAL & DINAH SHELTON, PROTECTING HUMAN RIGHTS IN THE AMERICAS: CASES AND MATERIALS (4th ed. 1995).

328. Rivera Ramos, *supra* note 26, at 311.