2002

The Plenary Power Doctrine: Subverting Human Rights in the Name of Sovereignty

Natsu Taylor Saito

Follow this and additional works at: https://scholarship.law.edu/lawreview

Recommended Citation
Available at: https://scholarship.law.edu/lawreview/vol51/iss4/4

This Article is brought to you for free and open access by CUA Law Scholarship Repository. It has been accepted for inclusion in Catholic University Law Review by an authorized editor of CUA Law Scholarship Repository. For more information, please contact edinger@law.edu.
THE PLENARY POWER DOCTRINE: SUBVERTING HUMAN RIGHTS IN THE NAME OF SOVEREIGNTY

Natsu Taylor Saito+

To deny any person their human rights is to challenge their very humanity.

Nelson Mandela

I. INTRODUCTION: INTERNATIONAL HUMAN RIGHTS AND STATE SOVEREIGNTY

Human rights law is a subset of the system of international law that evolved in Europe over the several centuries during which European states were consolidated and reached out to lay claim to the rest of the world. Because it is a system created by states, one of its bedrock principles is recognition of and respect for the sovereignty of states. Nonetheless, one of the fundamental tenets of human rights law, as it has developed since World War II, is that it limits state sovereignty. As all of the major world powers have acknowledged, universal principles of human rights must be accepted as binding on all states because domestic laws designed to protect the rights of “insiders” often fail to protect those

---

+ Professor of Law, Georgia State University College of Law. A version of this article was first presented at the Mid-Atlantic People of Color Conference at Georgetown University Law Center in January 2002. I am grateful to the organizers of that conference, to Michele Goodman for coordinating this symposium issue, to the editors of the Catholic University Law Review, and particularly to Ward Churchill.


2. See Father Robert Araujo, Sovereignty, Human Rights, and Self-Determination: The Meaning of International Law, 24 Fordham Int’l L.J. 1477, 1480-83, 1486-88 (2001) (arguing for recognition of the sovereignty of nations as well as states). Despite the common conflation of the terms, I distinguish states from nations. “Nation” as used herein 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.” Bernard Neitschmann, The Fourth World: Nations Versus States, in Reordering the World: Geopolitical Perspectives on the Twenty-First Century 226 (George J. Demko & William B. Wood eds., 1994). Neitschmann defines a state 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.
regarded as "others" within the state or within territories controlled by the state.  

Human rights law is thus intended to protect the fundamental rights of individuals against violations by the governments that rule them; to protect racial, ethnic, national, and religious minorities within states; and to ensure the rights of peoples to self-determination. The latter is particularly critical because of the colonial legacy of arbitrary imposition of state boundaries upon indigenous nations in almost every part of the world. Louis Henkin says:

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 United States was one of the earliest proponents of the basic principle that state sovereignty cannot override basic human rights or humanitarian law. Following World War II, the United States was the leading advocate among the Allied Powers of incorporating this principle into the London Charter, justifying the criminal trials held at Nuremberg and Tokyo on the grounds that German and Japanese leaders were personally responsible for violations of established international law even when their conduct was in compliance with, or mandated by, domestic law. The United States was also instrumental in ensuring that


7. See BRADLEY F. SMITH, THE ROAD TO NUREMBERG 4 (1981) ("After we allow for the spirit of the age as well as for the legal background, . . . the central fact is that the Nuremberg trial system was created almost exclusively in Washington by a group of
this approach was subsequently ratified by the United Nations as binding international law.\(^8\)

The United States is frequently criticized for its reluctance to ratify human rights agreements or to accept the jurisdiction of international decision-making bodies.\(^9\) However—with the exception of a few voices, such as that of Senator Jesse Helms—the U.S. government does not generally justify its actions with the argument that sovereignty permits the violation of basic human rights.\(^10\) Instead, it typically responds that it does not need to bind itself to international human rights instruments because the U.S. legal system provides not only full justice but *more* protection than international law.\(^11\)

The United States' failure to comply with the most fundamental tenets of international law with respect to many people and peoples under its jurisdiction is not merely a result of its failure to ratify human rights conventions or participate in international institutions. Even when the United States becomes a party to multilateral treaties or acknowledges relevant customary law, U.S. courts frequently refuse to enforce international law, particularly when it is violated by congressional or executive action. Instead of recognizing that domestic courts are the most important forum for the enforcement of international law\(^12\) or

---


taking seriously the Constitution's mandate that treaties are part of the supreme law of the land, these federal courts have created a vast array of judicial doctrines that render international law nearly meaningless within U.S. jurisprudence.

These self-imposed judicial limitations include the declaration of some treaties or treaty provisions as "non-self-executing" and the consequent refusal to enforce them in the absence of enabling legislation; the "last-in-time" rule under which later-enacted federal laws are enforced even if they put the United States squarely in violation of its treaty obligations; the "political question doctrine" under which certain issues are declared "non-justiciable" because they address subjects delegated to Congress or the Executive; the "act of state" doctrine under which courts refrain from judging the actions of other sovereigns, and the refusal to allow prosecution of actions against the U.S. government on grounds of sovereign immunity. The combined effect of these doctrines is that U.S. courts are not effective fora for the redress of violations of international

13. U.S. Const. art. VI, cl. 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.").

14. See Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829) (declaring that the treaty at issue was in the nature of a contract to perform a particular act and therefore required legislation to be enforceable in court). 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, 88-89 (1833) (finding the same treaty addressed in Foster to be self-executing after reconciling the Spanish and English versions). Sometimes, select provisions of treaties will be determined to be self-executing or non-self-executing. See Fujii v. Calif., 242 P.2d 617, 619-21, 628 (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).


18. See United States v. Clarke, 33 U.S. (8 Pet.) 436, 444 (1834) (first recognizing the sovereign immunity of the federal government); Koehler v. United States, 155 F.3d 262, 267 (5th Cir. 1998); Brown v. United States, 141 F.3d 800, 803 (8th Cir. 1998) (both cases holding that unless the federal government explicitly waives immunity from a particular kind of suit, courts lack subject matter jurisdiction).
law; thus, the United States violates a fundamental 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.”

There is, in addition, another extremely important judicially created rationale for the courts’ failure to enforce basic human rights, one that is almost always overlooked in assessments of U.S. compliance with international law. This is the doctrine that both Congress and the Executive have “plenary power” over large groups of people subject to U.S. law. “Plenary” means full or complete, and the doctrine as applied means that U.S. courts, rather than assessing governmental actions under the usual constitutional standards, defer to the “political” branches of government. The plenary power doctrine is explicitly justified as an exercise of sovereignty either because those against whom it is used are subjects of another sovereign or because the United States' national security or foreign policy objectives are at stake. Thus, the plenary power doctrine is essential to U.S. jurisprudence relating to American Indian nations, immigrants, and colonized territories such as Puerto

---


21. In her thorough analysis of the plenary power, Nell Jessup Newton explains that the term has been used to mean (1) “exclusive power,” (2) “power capable of preempting state law,” and (3) “unlimited power” and illustrates that the term has been used in each of these ways with respect to American 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 federal Indian law). See generally Stephen H. Legomsky, Immigration Law and the Principle of Plenary Congressional Power, 1984 SUP. CT. REV. 255, 255-86 (1984) (noting the Supreme Court’s deference to Congress in the admission and expulsion of immigrants through use of the plenary power doctrine); Hiroshi Motomura, Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation, 100 YALE L.J. 545, 550-60 (1990) (highlighting shifts in the application of the plenary power doctrine in immigration law cases).

22. See, e.g., infra notes 99-100, 132, 141-42, 172-76 and accompanying text.

23. I avoid the term “tribe” both because of its association with animal groupings and “primitive or nomadic peoples,” see, e.g., WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 2440 (1986), and because I believe it is used to obfuscate the fact that American Indian peoples comprise nations.
Rico and Guam.\textsuperscript{25} Plenary authority is also exercised over persons in the military and in prison.\textsuperscript{26}

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. For example, the plenary power doctrine is the legal rationale for allowing the federal government control over indigenous peoples through its exercise of "trust" authority, by which American Indian nations are robbed of their resources and rendered the poorest sector of the country;\textsuperscript{27} for detaining and arbitrarily deporting noncitizens, most recently thousands of young men of Middle Eastern origin not accused of any crime;\textsuperscript{28} for sanctioning the ongoing bombing of the island of Vieques; and for continuing to refuse to allow Puerto Ricans a binding vote on their relationship with the United States.\textsuperscript{29}

Nothing in the Constitution explicitly gives the federal government such power. Explanations and justifications of the exercise of plenary power are confused and sometimes contradictory, but they boil down to

\textsuperscript{24} To avoid using the term "aliens," I use "immigrants" in its general sense to mean non-U.S. citizens coming to or residing in the United States, not as it is used in immigration law to refer specifically to those noncitizens who have been granted lawful permanent resident status. See 8 U.S.C. § 1101(a)(15)(2000). Most of the immigration cases referencing the plenary power doctrine deal with the law governing admission and expulsion of noncitizens. See generally LEGOMSKY, supra note 21; MOTOMURA, supra note 21. While noncitizens are generally afforded constitutional protections in other respects, their exercise of these rights can be chilled by the threat of deportation. See generally David Cole, Damage Control? A Comment on Professor Neuman's Reading of Reno v. AADC (119 S.Ct. 936 (1999)), 14 GEO. IMMIG. L.J. 347 (2000).

\textsuperscript{25} 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 notes 262-64 and accompanying text. Hawai'i is also a directly colonized territory, but its forced incorporation into the United States has situated it somewhat differently with respect to the plenary power doctrine. See infra notes 146-48 and accompanying text.


\textsuperscript{27} See infra notes 221-24 and accompanying text.

\textsuperscript{28} See infra notes 300-20 and accompanying text.

\textsuperscript{29} See infra notes 256-65 and accompanying text.
the notion that it is an extraconstitutional power inherent in sovereignty, which the U.S. government acquired upon becoming a recognized state.\(^{30}\) 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 unrestrained in its dealings with outsiders or its control over its domestic population in the context of defending against outside threats.\(^{31}\) 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 is limited by the response of other sovereigns and, presumably, by the international law that governs relations between sovereigns. But, in fact, plenary power is used against those over whom the United States exercises essentially complete control, in situations in which the United States neither respects their sovereignty nor extends the usual protections of domestic or international law. The harsh consequences of the plenary power doctrine are generally ignored or dismissed as aberrations.\(^{32}\) Examination of the plenary power doctrine as a whole, however, reveals that it is not an exception to a general rule of conformity with human rights law but a systematic denial of both domestic and international protections to those who most need them. As noted above, the United States justifies its failure to incorporate international law more specifically by arguing that domestic law provides more protection of basic human rights.\(^{33}\) However, under the guise of the plenary power doctrine, the courts not only refuse to apply the basic protections "guaranteed" by the Constitution, but they also refuse to apply international law, leaving the basic rights of immigrants, American

\(^{30}\) See infra notes 99-100, 132, 141-42, 172-76 and accompanying text.

\(^{31}\) See infra notes 132, 141, 174-75 and accompanying text.

\(^{32}\) In attempting to justify the United States' 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). This characterization has generally been accepted. See, e.g., Francis Paul Prucha, American Indian Treaties: The History of a Political Anomaly 1-2 (1994). In his 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 21, 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.

\(^{33}\) See supra note 11.
Indians, residents of U.S. "territories," and other sectors of the American population essentially unprotected by anything except the goodwill of Congress. The jurisprudential rationale for the plenary power doctrine is the United States' sovereignty, and thus the United States has, in effect, returned to the premise it explicitly rejected at Nuremberg: the most fundamental human rights acknowledged in international law can be overridden by domestic law.

This article presents a brief overview of the application of the plenary power doctrine in U.S. jurisprudence and considers its implications for U.S. compliance with international law. Section II summarizes the cases of the late 19th and early 20th centuries that first articulated the plenary power doctrine with respect to American Indians, immigrants, and colonial subjects. Section III considers some of the ongoing violations of international law that result from the continued application of the plenary power doctrine in each of these areas. Section IV concludes that enforcement of international law, not simply extension of constitutional protections, is necessary to prevent or redress such violations.

II. ORIGINS OF THE PLENARY POWER DOCTRINE IN UNITED STATES JURISPRUDENCE

In a series of cases decided between 1886 and 1903, the United States Supreme Court first articulated a doctrine allowing the "political" branches of government plenary power over American Indian nations, immigrants, and external colonies such as Puerto Rico. While generally regarded as distinct fields of law, these cases form a consistent body of jurisprudence in which the Court defers to the political branches of government because the powers being exercised by Congress or the Executive are "inherent" in the sovereignty of the United States. What ties them together, of course, is not just this rationale but the fact that this sovereignty is being exercised over peoples who have been consistently identified as both social and political "outsiders" by virtue of citizenship, national origin, race, ethnicity, or some conflation of these

34. See infra notes 176-77 and accompanying text.
35. There are many excellent critiques of the plenary power doctrine in specific fields of U.S. law, but little in the way of overview. For a rare analysis comparing the use of the plenary power doctrine in the fields of immigration, Indian, and territorial law, see T. ALEXANDER ALENIKOFF, SEMBLANCES OF SOVEREIGNTY: THE CONSTITUTION, THE STATE, AND AMERICAN CITIZENSHIP (2002).
36. I have addressed some of these issues in Asserting Plenary Power Over the "Other": Indians, Immigrants, Colonial Subjects and Why U.S. Jurisprudence Needs to Incorporate International Law, 20 YALE L. & POL. REV. 427 (2002).
factors. Furthermore, the plenary power doctrine is applied in each of these areas of law to the same end: the rendering “legal” within domestic law of governmental action that is otherwise forbidden by the Constitution or by international law.

This Section presents a brief overview of the cases in which the plenary power doctrine originated, cases which are still consistently cited as precedent for the exercise of similar governmental powers against the same or similarly situated groups. First, however, it will consider the background against which these cases were decided—the long history of the United States’ exercise of plenary authority over another group of “outsiders”—persons of African descent.

Africans were subjected to the plenary authority of Europeans and their governments from their initial involuntary arrival in what was to become America in 1619.\(^{37}\) The law of slavery that evolved in America identified slaves as property, classified persons with any discernible African ancestry as “black,” presumed black persons to be slaves, and then used the power of the federal government to protect this “property” everywhere under its jurisdiction.\(^{38}\) The very existence of the Union depended upon provisions of the Constitution that ensured that the slave trade could not be banned before 1808,\(^ {39}\) that even jurisdictions where slavery was illegal would use their police powers to return fugitive slaves,\(^ {40}\) and that the militia would be available to suppress slave uprisings.\(^ {41}\) These provisions prompted William Lloyd Garrison to call the Constitution “a covenant with death” and “an agreement with hell.”\(^ {42}\)

In 1857, the Supreme Court articulated this plenary authority clearly in *Scott v. Sanford.*\(^ {43}\) Dred Scott sued his nominal owner in federal court arguing, among other things, that he should be adjudicated a free man because of the time he had spent in territory where slavery was forbidden.

---

37. See generally Lerone Bennett, Jr., Before the Mayflower: A History of Black America (1987). For background on pre-European contact by Africans, see Ivan Van Sertima, They Came Before Columbus (1976).
40. U.S. Const. art IV, § 2, cl. 3.
43. 60 U.S. (19 How.) 393 (1857).
by the Missouri Compromise. In an opinion written by Justice Taney, the Court held that the federal court had no diversity jurisdiction because Scott was not a citizen of Missouri. Taney went on to assert that black people were not citizens of the United States or of any particular state; they were not even “persons” under the law. He described all those of African descent 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.” Justice Taney concluded by declaring the Missouri Compromise unconstitutional. 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.

The legal framework that allowed for the exercise of such power changed dramatically with passage of the Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution and subsequent legal doctrines that perpetuated racial subordination within a framework of formal equality. The Thirteenth Amendment abolished legalized slavery except as punishment for those convicted of crimes. Subsequently, many southern legislatures responded by passing laws that criminalized a wide range of behavior, including idleness or vagrancy, and many emancipated but destitute African Americans found themselves convicts

44. Id. at 431.
45. Id. at 426-27.
47. Dred Scott, 60 U.S. at 407.
48. Id. at 431. He argued that Congress could not pass a law barring citizens from taking their property into U.S. territories. Id. at 452. It is noteworthy that this is what Justice Brown relied 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 177.
50. U.S. CONST. amend. XIII (ratified 1865).
51. U.S. CONST. amend. XIV (ratified 1868).
52. U.S. CONST. amend. XV (ratified 1870).
53. U.S. CONST. amend. XIII.
leased to their former “masters,” who now lacked even a financial motivation to keep them alive.54 The legal system was used to enforce the subordination of African Americans in so many ways that Justice Miller declared in the Slaughter-House Cases55 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.”56

The Fourteenth Amendment, responding directly to the Dred Scott decision, declared that all persons of African descent born in the United States were citizens of both the United States and the state in which they lived and required state governments to extend to them the equal protection of the law.57 Euroamerican law and policy makers—even most abolitionists—had not expected that persons of African descent would become full citizens, and they proceeded to reformulate legal strategies for ensuring the continued social, political, and economic subordination of African Americans.58 As a result, a two-track process evolved in which a formal commitment to 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 . . . .”59

The Fifteenth Amendment, forbidding states to interfere with the right to vote, was similarly undermined. In many disfranchisement cases, the Supreme Court refused to reach the merits; in others, it interpreted the amendment narrowly, upholding facially neutral legislation adopted for discriminatory purposes, extensive discretion for voter registrars, and

---

55. 83 U.S. (16 Wall.) 36 (1872).
56. Higginbotham, supra note 1, at 75.
57. U.S. Const. amend. XIV.
race-based interventions by private individuals.\textsuperscript{60} In one case, the Court "candidly conceded that even if southern disfranchisement devices were unconstitutional, [it] was powerless to provide adequate remedies."\textsuperscript{61}

As a result, by 1896 most of the gains African Americans had made during Reconstruction had been rolled back, and Jim Crow legislation was becoming commonplace.\textsuperscript{62} The same Supreme Court that articulated the plenary power doctrine in other contexts cemented this reversion in \textit{Plessy v. Ferguson}\textsuperscript{63} where Justice Brown opined that consigning Homer Plessy, admittedly "seven-eighths caucasian," to a "colored" railroad car was neither a "badge of servitude" violating the Thirteenth Amendment nor a violation of Fourteenth Amendment equal protection.\textsuperscript{64} \textit{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?"\textsuperscript{65} 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.\textsuperscript{66}

\textit{Plessy} opened the door to a rash of segregationist legislation that eventually extended "to every type of transportation, education, and amusement; to public housing, restaurants, hotels, libraries, public parks

\begin{itemize}
\item[61.] \textit{Id.} at 304; Giles v. Harris, 189 U.S. 475, 488 (1903); see also Charles A. Lofgren, \textit{The Plessy Case: A Legal Historical Interpretation} 203 (1987).
\item[63.] 163 U.S. 537 (1896).
\item[64.] \textit{Id.} at 542-43, 550-51.
\item[65.] McIntosh, \textit{supra} note 46, at 67.
\item[66.] \textit{Plessy}, 163 U.S. at 559; see Higginbotham, \textit{supra} note 1, at 116. In the same dissent, Harlan dismissed the Chinese entirely as an "unassimilable" race. See generally Gabriel J. Chin, \textit{The Plessy Myth: Justice Harlan and the Chinese Cases}, 82 \textit{Iowa L. Rev.} 151, 156 (1996) (putting the \textit{Plessy} dissent into the context of Justice Harlan's decisions in the Chinese exclusion and citizenship cases). According to Charles Lofgren, "[t]he 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, \textit{supra} note 61, at 201.
\end{itemize}
and recreational facilities, fraternal associations, marriage, employment, and public welfare institutions."\(^6\) In the words of Judge A. Leon Higginbotham:

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.\(^6\)

Thus, the real significance of Jim Crow laws, 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,\(^6\) lies not so much in their furtherance of segregation per se. Rather, their significance lies in their perpetuation of the plenary authority exercised over African Americans into an era of formal legal equality.\(^7\)

For African Americans, the sudden shift from legal non-personhood to full formal equality led to a long series of twists and turns that allowed for the perpetuation of white supremacy within a legal system purporting to extend full constitutional protection to all citizens of color. The plenary authority exercised over African Americans has been perpetuated in numerous ways\(^7\) but not through legal doctrine that

\(^6\) LOFGREN, supra note 61, at 202 (citing a 1950 study).

\(^6\) HIGGINBOTHAM, supra note 1, at 83.


\(^7\) Nearly thirty percent of African Americans have incomes below the official poverty line, with forty percent in actual poverty. See Clarence Lusane, Persisting Disparities: Globalization and the Economic Status of African Americans, 42 HOW. L.J. 431, 434-35 (1999). Median black household income is about two-thirds that of white households, and the disparity in wealth, rather than income, is even greater. Id. at 435.
explicitly declares African Americans to be outside the protection of the Constitution, as is the case for certain groups whom the Supreme Court has declared to be subject to the plenary power of the U.S. government.\textsuperscript{72}

The plenary power doctrine was first enunciated with respect to American Indian nations, immigrants, and the United States' "extraterritorial" colonies in a series of cases decided by the Supreme Court between 1886 and 1903, the same period in which it decided \textit{Plessy v. Ferguson}. By the late 1800s, the United States had consolidated control over the territory now identified as the forty-eight contiguous states. The Civil War had successfully prevented southern secession, and the sweeping social changes initiated during Reconstruction had been rolled back.\textsuperscript{73} With the Treaty of Guadalupe Hidalgo, the United States had annexed the northern half of Mexico in 1848.\textsuperscript{74} By 1869, the east and west coasts were connected by the transcontinental railroad; by 1877, 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.\textsuperscript{75} According to Howard Zinn, in the "year of the massacre at Wounded Knee, 1890, it was officially declared by the Bureau of the Census that the internal frontier was closed."\textsuperscript{76}

The powers of the state—legislative, executive, and judicial—then turned to two broad areas of concern. First, what was the place of those deemed "other" within American society, and how would they be kept in their place? Second, to what extent would the United States follow the path of European imperialism and continue to expand overseas? The Court addressed these issues in seminal decisions regarding American

\textsuperscript{72} However, in light of the dramatic disparities in incarceration rates, see \textit{supra} note 71, the government's exercise of plenary authority over prisoners may be the most effective way in which the plenary power doctrine is, in fact, extended to African Americans and other persons of color.

\textsuperscript{73} \textit{See} \textit{Zinn}, \textit{supra} note 69, at 124-289.


The plenary power doctrine is a cornerstone of what is called federal Indian law. By 1871, when Congress officially suspended treaty making with American Indian nations, the United States had entered into approximately 800 treaties with Indian nations, 400 ratified and another 400 unratified. Initially, the U.S. government took the clear position that these were agreements with independent sovereigns. Indeed, in its early years, the United States was militarily weak and eager to be accepted as a legitimate state by European countries that did not look kindly upon colonies declaring their independence. As such, it wanted both the specific benefits embodied in the treaties with Indian nations and the recognition of legitimacy they implied. As Siegfried Weissner stated:

[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.

However, as its relative military power grew, the U.S. government more and more frequently imposed its will on the hundreds of indigenous nations it encountered, violating both its treaties and more generally applicable international law. The legal rationalization for such actions emerged from a trilogy of opinions authored by Chief Justice Marshall in the 1820s and 30s: *Johnson v. M’Intosh*, *Cherokee Nation v. Georgia*, and *Worcester v. Georgia*. Although these cases continue to be cited to support the complete subordination of Indian nations, Chief Justice Marshall’s assertions actually were much more limited.

87. 21 U.S. (8 Wheat.) 543 (1823).
89. 31 U.S. (6 Pet.) 515 (1832).
90. See Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381, 382, 406-18 (1993) (arguing that Chief Justice 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, 349-58 (1994) (analyzing the cases in the context of international law as articulated by early international law theorists Hugo Grotius and Emmerich de Vattel). In *Johnson*, Chief Justice 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 21, 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, 571 (1846) (claiming that the doctrine negated Indian ownership interests in their land and subjected them to U.S. political authority); see also Newton, *supra* note 21, at 209-11.

As Marshall said in *Johnson*, “[c]onquest 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. 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.” See *id*. 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. See *id.* at 588-89. Marshall clarified in *Worcester* that
In *Worcester*, Chief Justice Marshall repudiated Georgia’s claim of jurisdiction over Cherokee lands and acknowledged:

From 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 guaranteed by the United States.91

However, the previous year, he had asserted in *Cherokee Nation* that Indian nations were neither independent foreign countries nor states of the Union, unilaterally declaring them to be “domestic dependent nations” whose “relation to the United States resemble[d] that of a ward to his guardian.”92 This characterization, which had no basis in either international or domestic law, has been used to justify continued assertion of plenary power by Congress.93 According to Nell Newton:

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 extraconstitutional.94

In the mid-1800s, in clear violation of its treaty obligations, the U.S. government forcibly removed not only the Cherokee but virtually all

---

94. Newton, *supra* note 21, at 207 (footnotes omitted).
eastern Indian nations onto reservations west of the Mississippi River.\textsuperscript{95} By the 1880s, most indigenous resistance had been crushed, and the white settlers pressed for complete control over American Indian peoples as well as their land and resources. The Major Crimes Act of 1885 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.\textsuperscript{96} In \textit{United States v. Kagama}, the Supreme Court upheld the Act, holding that the United States could exercise criminal jurisdiction over Indians and that constitutionally such power rested with the federal, not state, government.\textsuperscript{97} The \textit{Kagama} Court began by declaring that Indian nations had not been truly sovereign since the \textit{Cherokee Cases} of the 1830s but were “semi-independent” with limited authority over their “internal and social relations.”\textsuperscript{98} The Court acknowledged that the Constitution did not explicitly delegate jurisdiction over Indian affairs to the federal government, and the Court fell back on the argument that such power must be inherent.\textsuperscript{99} It relied on cases that dealt with Congress’ power to regulate territories that had not yet become states and drew on Chief Justice Marshall’s earlier pronouncement that “[t]he right to govern may be the inevitable consequence of the right to acquire territory.”\textsuperscript{100}

Shortly after \textit{Kagama}, Congress passed the Allotment Act, which was designed to break up what remained of Indian land and political organization by “extinguishing Indian tribal lands, allotting the same in severalty among those entitled to receive them, and distributing Indian tribal funds.”\textsuperscript{101} The Act required any individual who accepted allotted land to accept U.S. citizenship, even though the Supreme Court had held the year before that Indians were not citizens by virtue of the Fourteenth Amendment.\textsuperscript{102} Despite tremendous Indian resistance, the federal

\begin{thebibliography}{100}
\bibitem{96} Major Crimes Act, ch. 341, § 9, 23 Stat. 362, 385 (1885).
\bibitem{97} 118 U.S. 375, 385 (1886).
\bibitem{98} \textit{Id.} at 381-82.
\bibitem{99} \textit{Id.} at 378.
\bibitem{100} \textit{Id.} at 380 (quoting Am. Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511, 542 (1828)).
\bibitem{101} Seminole Nation v. United States, 78 Ct. Cl. 455, 466 (1933).
\bibitem{102} \textit{Elk v. Wilkins}, 112 U.S. 94, 109 (1884).
\end{thebibliography}
government took collectively held lands, allotted the worst portions to individual Indians, and sold the “surplus” to white settlers.  

*Lone Wolf v. Hitchcock* was a suit brought by a Kiowa band chief who accepted an allotment under coercion and then tried to halt the assignment of allotments. Lone Wolf argued that the Allotment Act violated both 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 the due process clause of the Fifth Amendment. With respect to the due process claim, the Court asserted 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,” a position not supported by history or by Justice Marshall’s opinions. On the treaty claim, the Court relied on the “last-in-time” rule to hold that the Allotment Act overrode the treaty for purposes of judicial enforcement.

The practical effect of the invocation of the plenary power doctrine in *Lone Wolf* was that between 1887 and 1934, American Indian nations lost ninety million acres of reservation land, which constituted more than two-thirds of their holdings. Blue Clark stated:

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 sixty percent, establishing a pattern that persists down to the

103. *See Clark*, supra note 59, at 2 (“After removal from their homelands earlier in the century, allotment was the most traumatic federal policy affecting Indian people.”); *see also Wilkins*, supra note 21, at 65-117. 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,” due to the Indians’ “condition of dependency.” Cherokee Nation v. Hitchcock, 187 U.S. 294, 308 (1902); *see also Stephens v. Cherokee Nation*, 174 U.S. 445, 488 (1899).

104. 187 U.S. 553 (1903).


107. *See id.* at 565.

108. *See id.* at 568.

present. The Lone Wolf decision cast a whole people into an economic coma. All the Indians became a casualty.\footnote{110}

What is the source of this plenary power over Indian nations? Sometimes it is attributed to the "Indian Commerce Clause," the provision of the Constitution—the only one explicitly mentioning Indian affairs—that gives Congress the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."\footnote{111} This was the position asserted in 1989 by Justice Stevens in Cotton Petroleum Corp. v. New Mexico when he said that "the central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs."\footnote{112} However, the history of the clause clearly indicates that it was intended as an internal delegation of power to ensure that relations with Indian nations were handled by federal rather than state government.\footnote{113} In fact, it is a recognition that Indian nations are separate from the United States, and are therefore entities \textit{with} whom the United States can engage in commerce, rather than a delegation of power \textit{over} Indians.

A second source proffered for the plenary power doctrine is the federal government's control over "territories" that are not states. However, even if "[t]he right to govern may be the inevitable consequence of the right to acquire territory,"\footnote{114} what is the source of the right to acquire? Federal jurisdiction over territories purportedly comes from Article IV, Section 3, Clause 2 of the Constitution, which states 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."\footnote{115} However, 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 Chief Justice Marshall and other jurists of the day—by treaty or by conquest in

\footnotesize

\begin{itemize}
\item \footnote{110}{CLARK, \textit{supra} note 59, at 96. The government's attorney in \textit{Lone Wolf}, Willis Van Devanter, was subsequently appointed to the Supreme Court by President Taft in 1911. \textit{Id.} at 101. He was the author of \textit{United States v. Nice}, 241 U.S. 591, 601 (1916), which held that an enfranchised Indian could still be subject to the plenary power of Congress. \textit{WILKINS, \textit{supra} note 21, at 25} ("Nice served to seal the status of tribal Indians in perpetual legal and political limbo.").}
\item \footnote{111}{U.S. \textit{CONST.} art. I, § 8, cl. 3.}
\item \footnote{112}{490 U.S. 163, 192 (1989).}
\item \footnote{113}{See Robert N. Clinton, \textit{Redressing the Legacy of Conquest: A Vision Quest for a Decolonized Federal Indian Law}, 46 \textit{ARK. L. REV.} 77, 119-20, 119 n.139 (1993).}
\item \footnote{114}{Am. Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511, 542 (1828).}
\item \footnote{115}{U.S. \textit{CONST.} art. IV, § 3, cl. 2.}
\end{itemize}
a “just” war. 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. Thus, the United States could only acquire territory lawfully by treaty, and the acquisition only remains lawful if the United States complies with treaty terms.

Most assertions of plenary power over Indians depend upon an argument that it is based on powers “inherent in sovereignty.” However, the Constitution provides that only the President, with the concurrence of two-thirds of the Senate, can enter into treaties, and treaties are by definition agreements between sovereign entities. Therefore, recognition of U.S. sovereignty over lawfully acquired territory requires concomitant recognition of the sovereignty of the nations from which the territory was obtained. 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

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


118. See, e.g., *supra* notes 99-100 and infra note 213 and accompanying text.

119. *U.S. Const.* art. II, § 2, cl. 2 (giving the President the “Power, by and with the Advice and Consent of the Senate to make Treaties”).

120. A treaty is defined as any “international agreement concluded between States in written form and governed by international law.” *Vienna Convention on the Law of Treaties*, May 23, 1969, art. 2, § 1, 1155 U.N.T.S. 332, 333. In addition, the Constitution forbids states to enter into treaties. *U.S. Const.* art. I, § 10, cl. 1 (“No State shall enter into any Treaty, Alliance, or Confederation.”). Therefore, the federal government cannot enter into treaties with states or, presumably, any other of its own political subdivisions. See *id.*

121. However, the United States’ willingness to disregard international law was articulated clearly in *Cherokee Tobacco*, which upheld a congressional decision to pass an act in violation of a treaty “as if the treaty were not an element to be considered.” *Cherokee Tobacco*, 78 U.S. (11 Wall.) 616, 621 (1870); see also *Clark, supra* note 59, at 14.
denied, and because it alone can enforce its laws on all the tribes”\textsuperscript{122} – an argument remarkably close to “might makes right.”

The plenary power doctrine is also integral to U.S. immigration law. As a sparsely populated and fairly weak settler state, for nearly a century the United States encouraged immigration from northern and western Europe.\textsuperscript{123} However, after it succeeded in occupying what became the “lower 48” 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.\textsuperscript{124} In 1868, the United States and China entered into the Burlingame Treaty, an agreement that, among other things, guaranteed unfettered migration and invoked the “inherent and inalienable right of man to change his home and allegiance, and . . . the mutual advantage of . . . free migration.”\textsuperscript{125} The following year, however, the transcontinental railroad was completed, and shortly thereafter the country found itself in an economic depression. With rising unemployment among both Chinese and American workers, Congress was pressured to restrict immigration.\textsuperscript{126} In 1882, Congress suspended the immigration of new Chinese workers for ten years and, in 1884, enacted a law that required Chinese residents leaving the United States to obtain certificates of re-entry.\textsuperscript{127}

Chae Chan Ping, who had lived in the United States for twelve years, obtained such a certificate and left the country.\textsuperscript{128} In 1888, just before his return, Congress enacted legislation precluding the entry of all Chinese

\begin{itemize}
\item[122.] United States v. Kagama, 118 U.S. 375, 384-85 (1886).
\item[123.] There was no federal regulation of immigration until 1875, but there were attempts by individual states to restrict immigration. See generally Gerald L. Neuman, The Lost Century of Immigration Law (1776-1875), 93 Colum. L. Rev. 1833 (1993).
\item[127.] In 1880, the United States had convinced China to amend the Burlingame Treaty by allowing the United States to “regulate, limit or suspend” the immigration of additional Chinese laborers while promising that those who were already in the U.S. could “go and come of their own free will.” Motomura, supra note 21, at 550.
\item[128.] Chinese Exclusion Case, 130 U.S. 581, 582 (1889).
\end{itemize}
laborers, regardless of whether they held re-entry certificates. Chae Chan Ping challenged the 1888 law as a violation of the Burlingame Treaty and Fifth Amendment due process. 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. Addressing the constitutional question, the Court held 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.

In 1892, Congress extended the ban on the immigration of Chinese laborers and provided that a worker already in the U.S. could stay only if he obtained a certificate of residency. The certificate had to be based on the testimony of a credible white witness. In Fong Yue Ting v. United States, the Supreme Court rejected the claims of three Chinese workers who were acknowledged to be long-term residents but had no white witnesses to testify on their behalf. Justice Gray extended Congress’ plenary power from the exclusion of those first arriving to the deportation of permanent residents, and he refused to characterize deportation as punishment that would trigger heightened constitutional scrutiny. Three dissenters argued that some constitutional protections should apply, but no one questioned Congress’ right to exclude on the basis of race or nationality.

In the meantime, in Nishimura Ekiu v. United States, the Court upheld an immigration officer’s determination to exclude a Japanese woman without a hearing because she was likely to become a “public

129. Id.
130. See id. at 589-90.
131. 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 enforce that which is most recent. See supra note 15.
132. Chinese Exclusion Case, 130 U.S. at 606. According to Justice Field, 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 . . . [Congress’] determination is conclusive upon the judiciary.” Id.
133. Fong Yue Ting v. United States, 149 U.S. 698, 699 n.1 (1893).
134. Id. at 700 n.1.
135. Id. at 732.
136. Id. at 713-14, 723-24.
137. See id. at 733-34 (Brewer, J., dissenting).
138. See id. at 732-34 (Brewer, J., dissenting).
139. 142 U.S. 651 (1892).
charge.” 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 self-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.” 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. Thus, in immigration law, the plenary power doctrine is explicitly grounded in the notion that the United States’ existence as a sovereign state gives it the power and the right to exclude noncitizens on any ground and in any manner it chooses and that the courts will not interfere to impose any constitutional limitations on the exercise of that power.

Shortly after it established the plenary power doctrine with respect to American Indian nations and immigrants, the Supreme Court extended application of the doctrine to the United States’ acquisition of external possessions. As soon as the “interior frontier” was declared closed in 1890, politicians began to debate whether the United States should continue to expand by acquiring external territories; in other words, they debated whether the United States should become an explicitly imperialist power. In 1893, using strategies much like those used to acquire Texas, American businessmen, backed by the United States Marines, overthrew the Hawaiian monarchy and installed a republican government, which the United States quickly recognized. After a half-

140. Id. at 661.
141. Id. at 659.
142. See id. at 660 (“As to [foreigners], the decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law.”).
144. See supra note 76.
146. See Acuña, supra note 74, at 9-12, 25-53 (describing the “invasion” and “colonization of Texas”).
147. When the United States did not immediately annex Hawai’i, Roosevelt called it “a crime against white civilization.” Zinn, supra note 69, at 293. Hawai’i was annexed in
Subverting Human Rights in the Name of Sovereignty

In the 19th century, Hawai‘i was incorporated into the United States. As a result, Native Hawaiians are subjected to many of the violations of international law faced by residents of the unincorporated territories, but their position within the domestic legal structure is somewhat different. The government does not claim to be exercising plenary power over them; rather, it leaves them with only the remedies available under the Constitution, thus giving them no legal forum in which to pursue their right to self-determination.\footnote{148}

The territories occupied by the United States that have not been incorporated have been subjected to the plenary power doctrine. During the late 1800s, the peoples of Cuba, Puerto Rico, and the Philippines each struggled to gain their independence from Spanish colonialism.\footnote{149} They had almost succeeded in 1898 when the United States stepped in, declared war on Spain, and claimed the Spanish territories.\footnote{150} As a result, rather than gaining their independence, Cuba, Puerto Rico, Guam, and the Philippines were “ceded” by Spain to the United States under a treaty that provided that “[t]he civil rights and political status of the native inhabitants . . . shall be determined by the [United States]


\footnote{150}{150. José A. Cabranes, Some Common Ground, in Foreign in a Domestic Sense: Puerto Rico, American Expansion, and the Constitution 39 (Christina Duffy Burnett & Burke Marshall eds., 2001); Zinn, supra note 69, at 302.}
Because Congress had just passed a resolution declaring that Cuba would not be annexed, the United States did not invade Cuba, controlling it instead through political, military, and economic means. The United States did, however, take direct possession of Puerto Rico, Guam, and the Philippines.

There was strong indigenous resistance to American occupation of the Philippines. In what was frequently described as an “Indian war,” American troops had 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 in the name of the “pacification” and the “benevolent assimilation” of a people officially “believed to be incapable of any considerable degree of civilization or advancement.”

As U.S. lawmakers turned their attention to the legal status of these “territories,” they looked to their colonial experience with Indians for legal as well as military precedent. 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


153. See Lazos Vargas, supra note 149.

154. See THE PHILIPPINES READER: A HISTORY OF COLONIALISM, NEOCOLONIALISM, DICTATORSHIP, AND RESISTANCE 5-33 (Daniel B. Schirmer & Stephen Rosskamm Shalon eds., 1987) (estimating that a million Filipinos were killed and hundreds of villages burned to the ground). See generally MILLER, supra note 145.

155. See MILLER, supra note 145, at 196-218.

156. See THE PHILIPPINES READER, supra note 154, at 17.

157. See ZINN, supra note 69, at 306-11; MILLER, supra note 145, at 196-218. The purported justification for such atrocities, as with the atrocities committed against American Indians, was that these were not “civilized peoples,” and therefore, the rules of civilized warfare did not apply; however, “[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 152, at 74.

158. Weiner, supra note 152, at 67.

159. See MILLER, supra note 145, at 219 (noting that General Smith, who gave orders to “kill and burn, kill and burn” and ordered the massacre of civilians over age ten, was a veteran of the 1890 Wounded Knee massacre).
to Justice Marshall’s decisions justifying federal Indian policy in the *Cherokee* cases. In Clark’s words, Lodge “summarized imperialists’ views when he stated that national Supreme Court decisions declared that ‘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.’”

A similar policy was followed in Puerto Rico, which the United States occupied without significant military resistance. In 1901, the Supreme Court directly confronted the meaning of its territorial status in *Downes v. Bidwell*. This was the first of the *Insular Cases* decided between 1901 and 1922 and involved a challenge to U.S. duties levied on Puerto Rican goods at a percentage of the rate levied on similar “foreign” goods. According to the plaintiffs, if Puerto Rico was not a foreign country, it must have been part of the United States, and thus the Commerce Clause precluded any duties at all.

*Downes* “caused more turmoil on the Supreme Court than any case since *Dred Scott*** and generated five separate opinions. The debate is sometimes characterized as a debate over whether the Constitution “follows the flag,” that is, whether constitutional protections are co-extensive with U.S. jurisdiction. Justice Brown, who had authored the majority opinion in *Plessy v. Ferguson* just five years earlier, wrote “for

---

160. See supra notes 87-94 and accompanying text.

161. CLARK, supra note 59, at 102. 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.


163. 182 U.S. 244 (1901).

164. While there is some dispute over which cases constitute the “Insular Cases,” there is general agreement that they start with *Downes* and continue through *Balzac v. People of Porto Rico*, 258 U.S. 298, 305, 313-14 (1922), which held that the Jones Act, 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 in-depth analysis of these cases, see Efrén Rivera Ramos, *The Legal Construction of American Colonialism: The Insular Cases (1901-1922)*, 65 REV. JUR. U. P.R. 225 (1996); see also EFRÉN RIVERA RAMOS, *THE LEGAL CONSTRUCTION OF IDENTITY: THE JUDICIAL AND SOCIAL LEGACY OF AMERICAN COLONIALISM IN PUERTO RICO* 71-142 (2001).


166. Id. at 248-49.


168. See generally *Downes*, 182 U.S. at 244.

169. For critiques of this phrasing, see Cabranes, supra note 150, at 32 n.44.
the Court” even though no other justice joined his opinion. According to Justice Brown, 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.

“The power to acquire territory by treaty,” he stated, “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.”

The legal theory that ultimately had the most influence was that of Justice White, who said in his concurrence that the applicability of the Constitution rested on whether a particular territory had been “incorporated” into the United States. If it were “unincorporated,” according to White, the inhabitants possessed only certain “fundamental” rights. He thus created a “twilight zone” status comparable to that of Marshall’s “domestic dependent nation”:

[Whilst in an international sense Porto Rico [sic] was not a foreign country, since it was subject to the sovereignty of and

171. Id. at 279.
172. Id.
173. U.S. CONST. art. IV, § 3, cl. 2.
176. Downes, 182 U.S. at 278-79.
177. Rivera Ramos, Colonialism, supra note 164, at 246-47 (citing Downes, 182 U.S. at 280). Justice Brown went on to reassure the people that the fact that the Court had only once overturned congressional action in the territories was evidence that Congress could be trusted 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. See Downes, 182 U.S. at 280; see also supra notes 43-48 and accompanying text.

179. Id. at 291 (White, J., concurring).
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.\textsuperscript{180}

Justice White's distinction between incorporation and possession allowed the Court to rationalize the possession of external territory and the concomitant control of its peoples without constitutional restrictions on the treatment of those people or the disposition of their territory. As Judge Cabranes stated, "[i]t is fair to say that it was devised in order to make colonialism possible."\textsuperscript{181} The dissenters characterized both Justice White and Justice Brown's positions as theories of extraconstitutional governmental power.\textsuperscript{182} 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.\textsuperscript{183}

Nonetheless, the plenary power doctrine, which had already been used to violate the principles of the Constitution in immigration and Indian law, was now firmly ensconced in "territorial law" as well.\textsuperscript{184} As Blue Clark noted:

\textit{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

\begin{flushright}
\textsuperscript{180} \emph{Id.} at 341-42.
\textsuperscript{181} Cabranes, \textit{supra} note 150, at 43.
\textsuperscript{182} \textit{Downes,} 182 U.S. at 374-75 (Fuller, C.J., dissenting).
\textsuperscript{183} \emph{Id.} at 382.
\textsuperscript{184} Reflecting the consensus among the Justices that Puerto Ricans were distinctly "other," Jose Trias Monge says that the plenary power doctrine articulated in \textit{Downes} "flowed from the holding in \textit{Plessy v. Ferguson}.” Monge, \textit{supra} note 151, 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.” \textit{Downes,} 182 U.S. at 384 (Harlan, J., dissenting). Blue Clark notes:

In 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.
\end{flushright}

\textit{CLARK, supra} note 59, at 104 (citing \textsc{Robert B. Highsaw, Edward Douglas White: Defender of the Conservative Faith} (1981)).
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.¹⁸⁵

The following Section traces these original plenary power cases into contemporary U.S. jurisprudence and considers some of the resulting violations of human rights that are allowed to go unredressed by U.S. courts.

III. CONTEMPORARY VIOLATIONS OF HUMAN RIGHTS IN THE EXERCISE OF PLENARY POWER

The cases establishing the plenary power doctrine, from the Chinese Exclusion Cases to Kagama and Lone Wolf to the Insular Cases, would be historical anomalies except that they continue to provide the legal basis for the continued subordination of immigrants, American Indians, and residents of "unincorporated" territories controlled by the United States. As U.S. jurisprudence struggles to balance its image of itself as a nation of laws¹⁸⁶ with its desire to maintain structures of colonization, the legal justifications enunciated a century ago for the exercise of extraconstitutional and apparently unlimited power over these peoples continue to be the basis for judicial deference to governmental policies that violate their basic human rights.¹⁸⁷ Justice Harlan, dissenting in Hawaii v. Mankichi, warned that application of the plenary power

[w]ould 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

¹⁸⁵. CLARK, supra note 59, at 101-02.
¹⁸⁶. See Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803) ("The government of the United States has emphatically been termed a government of laws, not of men.").
¹⁸⁷. See Frickey, supra note 90, 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.") (footnote omitted).
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.\footnote{188}

This is, in fact, what has happened. This Section considers some of the contemporary results of the dual system of government foreseen by Justice Harlan and briefly summarizes some of the violations of international human rights law that result from these policies.

Under the rubric of exercising its “plenary power” over American Indian nations, a power said to derive from its existence as a sovereign nation, the United States has denied to the Indians within its borders their right to self-determination as acknowledged by international law; to basic human rights guaranteed all persons under international law; and to protections mandated by the Constitution. First, it must be noted that the United States has violated the terms of every one of the approximately eight hundred treaties, ratified and unratified, that it imposed upon Indian nations; yet, it continues to use those treaties to justify its occupation of Indian lands.\footnote{189} 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.\footnote{190} As Siegfried Wiessner stated:

\begin{quote}
The fact that treaties with Indian nations can be abrogated under \textit{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.\footnote{191}
\end{quote}

Weissner concluded 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


191. Weissner, \textit{supra} note 85, at 584, 591.}
confirmed the "international legal effect of agreements between indigenous [peoples] . . . and clearly recognized sovereign states." Weissner also noted 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.

Instead of interpreting treaties in accordance with the provisions of the Vienna Convention, courts continue to invoke the plenary power doctrine as justification for ongoing violations of those treaties and for treatment that violates customary international law as well as numerous human rights treaties to which the United States is a party. American Indians within the United States today are subject to all of the laws governing U.S. citizens and to several thousand additional statutes. This system of federal law imposes a "quasi-sovereign" status on Indian nations and subjects them to the "trusteeship" of the U.S. government. As Robert Clinton states, "[v]estiges of the law's historic colonial role in legitimating conquest and expropriation remain imbedded in the doctrines employed today allegedly to protect Indian interests."

The plenary power doctrine enunciated in *Lone Wolf* and *Kagama* is alive and well in federal jurisprudence. In 1955, the Supreme Court held in *Tee-Hit-Ton Indians v. United States* that indigenous land is not protected by the takings clause of the Fifth Amendment or its requirement of just compensation. Turning the applicable law on its head, the Court held that aboriginal title would not be recognized unless 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. As a result, the Tlingit and other native peoples, who had neither been conquered in battle nor required to cede their land by
treaty, lost their claim to most of what is now Alaska. Justice Reed's opinion misconstrued the Cherokee Cases to say that they permitted the arbitrary confiscation of indigenous lands without compensation, based on the U.S. conquest of all Indian nations. According to Nell Newton, "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." As a result, billions of dollars in oil revenue have gone to the state of Alaska and to oil companies, while the Tlingit remain among the poorest people under U.S. jurisdiction.

In the 1970s, it appeared that the Supreme Court might curtail application of the plenary power doctrine to Indians, but this did not happen. 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." Nonetheless, just five years later, he justified the unilateral imposition of much of the Bill of Rights on American Indian nations in Santa Clara Pueblo v. Martinez by saying, "Congress has plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess."

In 1974, in Morton v. Mancari, the Supreme Court engaged in an equal protection analysis of a Bureau of Indian Affairs (BIA) policy


201. See Tee-Hit-Ton Indians, 348 U.S. at 278-79; see also Newton, supra note 21, at 248.

202. Id. at 248 n.299. In Tee-Hit-Ton, 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. Tee-Hit-Ton, 348 U.S. at 283 n.17. See generally Wilkins, supra note 21, at 168-85.

203. Clinton, supra note 95, at 114 (citing McLanahan v. State Tax Comm'n, 411 U.S. 164, 172 n.7 (1973)).

204. 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. See id. at 7; see also Clinton, supra note 95, at 115; Newton, supra note 21, at 265.

giving preferential treatment to Indian employment. This could have been interpreted as an imposition of constitutional constraints on the government's exercise of plenary power. 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 and in United States v. Antelope to uphold 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. According to Newton, "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."

In Oliphant v. Suquamish Indian Tribe, Justice Rehnquist converted pre-existing Indian sovereignty to "delegated sovereignty" (delegated by the U.S. government, of course) 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. In 1990, the Court extended Oliphant in Duro v. Reina, holding that Indian criminal jurisdiction is limited to "tribal members" and not "non-member Indians" despite historical evidence that Indian courts had exercised jurisdiction over non-member Indians since their establishment. To quote Nell Newton: "Whatever Congress wants,

207. The policy was allowed as primarily "political rather than racial in nature." Id. at 553 n.24.
210. Id. at 646.
211. Newton, supra note 21, at 280. This analysis was extended from individuals to Indian nations in Washington v. Yakima Indian Nation, 439 U.S. 463 (1979).
213. Id. at 208.
215. Id. at 688.
216. Robert N. Clinton, Peyote and Judicial Political Activism: Neo-Colonialism and the Supreme Court's New Indian Law Agenda, 38 FED. B. NEWS & J. 92 (1991). Clinton argues that Duro v. Reina, 495 U.S. 676 (1990), Brendale v. Yakima Indian Nation, 492 U.S. 408 (1989) (holding 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), and
Congress gets, and *Mancari* and its progeny are now increasingly impressed to serve that end.\(^{217}\) Blue Clark summarized:

> 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.\(^{218}\)

The concrete consequences of the exercise of this plenary power is a “trust” relationship imposed on Indian nations by the U.S. government that has resulted in genocidal and ecocidal policies of almost unimaginable proportions. Generations of Indian children were forcibly removed from their families and imprisoned in “boarding schools” where they were stripped of their culture, traumatized, and often sexually abused.\(^{219}\) During some periods, the BIA Indian Health Services sterilized up to one-half of all Indian women of childbearing age, without...
their consent and often without their knowledge. The government has leased the most profitable land and mineral resources to white individuals and corporations at prices dramatically—sometimes ninety percent—below market value. Corporations have been allowed to strip mine and produce radioactive waste, often leaving it in the immediate vicinity of Indian housing and schools. A suit is currently pending that charges the BIA with having “lost” billions of dollars worth of trust fund assets generated from leases, other governmental appropriations, and amounts due under treaties. Thus, because of federal government actions, peoples who legally own significant land and resources constitute the poorest sector of American society, and their communities suffer from the lowest life expectancies, the highest infant mortality rates, the highest suicide rates, and the highest rates of death from exposure, communicable diseases, and alcoholism in the United States.

The United States prides itself on being a nation of laws, and one of the law’s fundamental purposes is to provide remedies for wrongs. As the plenary power cases so clearly establish, constitutional remedies for the wrongs perpetrated against American Indian peoples simply do not exist. We turn, therefore, to the only other applicable source of law—international law. Adherence to international law would mean recognition of the right to self-determination, which James Anaya describes as 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-


221. See, e.g., Ward Churchill, *Genocide in Arizona: The Navajo-Hopi Land Dispute in Perspective*, in WARD CHURCHILL, 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).


determination gives rise to remedies that tear at the legacies of empire, discrimination, suppression of democratic participation, and cultural suffocation.\footnote{226}

The right of nations to “self-determination” has been publically advocated by the United States since World War I.\footnote{227} It is a foundational principle of the Charter of the United Nations,\footnote{228} featured prominently in the International Covenant on Civil and Political Rights (ICCPR)\footnote{229} and the International Covenant on Economic, Social and Cultural Rights (ICESCR),\footnote{230} and recognized as a customary norm of international law, perhaps even a \textit{jus cogens}, or peremptory, norm.\footnote{231}

In token deference to this body of international law, in 1975 Congress passed the Indian Self-Determination Act.\footnote{232} However, rather than acknowledging the real meaning of self-determination, the Act simply provides for increased access to federal programs while maintaining all of Congress’ prerogatives under the plenary power doctrine.\footnote{233} According to James Anaya, “self-determination” by its very nature, cannot be imposed upon a people but must be defined by them:

In pressing their demands internationally, indigenous peoples have pointedly undermined the premise of the state as the

\footnote{227} See Woodrow Wilson, \textit{The Fourteen Points Address, in The Human Rights Reader: Major Political Essays, Speeches, and Documents From the Bible to the Present} 299-304 (Micheline R. Ishay ed., 1997).
\footnote{228} U.N. \textit{Charter}, art. 1, para. 2.
\footnote{229} \textit{International Covenant on Civil and Political Rights}, Dec. 19, 1966, art. I, § 1, 999 U.N.T.S. 171, 173 [hereinafter ICCPR] (“All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”).
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 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.

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. American Indian nations, like the “unincorporated” territories controlled by the United States, meet all of the substantive international criteria for “non-self-governing territories.” Thus, indigenous peoples in the United

States and residents of external colonies should be protected by all of the provisions for self-determination described above, as well as the Genocide Convention and the norms articulated with respect to indigenous and colonized peoples in the United Nations Declaration on the Granting of Independence to Colonial Territories and Peoples, the International Labour Organization (ILO) Convention on Indigenous Populations, and the Draft Declaration on the Rights of Indigenous Peoples. This draft declaration was developed by the Working Group on Indigenous Populations, which was organized under the auspices of the United Nations Human Rights Committee as a result of the efforts of the indigenous International Indian Treaty Council in the late 1970s and early 1980s.

Compliance with international law would not only allow for real self-determination but would also ensure all peoples within U.S. jurisdiction protections similar to, but more extensive than, those provided by the Constitution. These protections, embodied in the many human rights instruments developed by international organizations over the past half-century, are articulated in the United Nations Charter, the Universal Declaration of Human Rights, the Convention on the Prevention and Punishment of the Crime of Genocide, and the International Covenant on Civil and Political Rights, all of which have been ratified by and are
therefore binding on the United States. Other instruments of protection, such as the International Covenant on Economic, Social and Cultural Rights,\(^\text{246}\) and the Convention on the Rights of the Child,\(^\text{247}\) have been signed but not ratified by the United States.

Adherence to these international human rights instruments would also remedy the wrongs perpetrated against the residents of “unincorporated territories” controlled by the United States. The United States currently exercises jurisdiction over approximately four million people in Puerto Rico, the Northern Mariana Islands,\(^\text{248}\) the “U.S.” Virgin Islands, and “American” Samoa.\(^\text{249}\) None is recognized as an independent country or a state of the union, but all are subject to the plenary power of the U.S. government. Although one of the basic tenets of international law is that no person shall be rendered stateless, the residents of these territories have been placed in a curious state of limbo with respect to citizenship. As recently as 1998, a federal appellate court relied on Downes v. Bidwell to deny U.S. citizenship to a person who was born in the Philippines between 1898 and 1946, while it was a U.S. territory.\(^\text{250}\) According to the court, during this period Filipinos were “wards” of the United States; they were “nationals” who owed allegiance to the United States but were not entitled to the full benefits of citizenship.\(^\text{251}\) Because of the economic dependence and social ties created by U.S. colonization, many Filipinos have tried to move to the United States, but they are given no special consideration.\(^\text{252}\) Instead, because of the backlog,

\(^{246}\) See supra note 230.


\(^{248}\) On the history of the Mariana Islands, see Marie Rios-Martinez, Comment, Congressional Colonialism in the Pacific: The Case of the Northern Mariana Islands and Its Covenant with the United States, 3 SCHOLAR 41 (2000).

\(^{249}\) Burnett & Marshall, supra note 145, 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, Colonialism, supra note 164, at 232.

\(^{250}\) Valmonte v. INS, 136 F.3d 914, 918 (2d Cir. 1998) (relying on the Insular Cases as “authoritative guidance on the territorial scope of the term ‘in the United States’ in the Fourteenth Amendment”). See also Rabang v. INS, 35 F.3d 1449 (9th Cir. 1994).


\(^{252}\) The Tydings-McDuffie Act of 1934, Act of March 24, 1934, Ch. 84, 48 Stat. 456, promised eventual independence to the Philippines and limited Filipino immigration to
Filipinos who apply to immigrate as immediate family members of U.S. citizens or permanent residents have to wait longer than people from any other country. Residents of American Samoa are U.S. "nationals"; those who live in the other territories are called "citizens" but do not have many of the rights of other U.S. citizens.

The plenary power doctrine is also used to justify the state of 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. After more than a century of U.S. rule, they have no representation in Congress and only qualified citizenship.

According to Burnett and Marshall:

[T]he 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 also to absolute uncertainty concerning their fifty people per year. Despite their historic ties to the United States, Filipinos are now subject to the same immigrant quotas as persons of all other nationalities. See §§ 203(a)-(b) of the Immigration and Nationality Act.

253. 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. U.S. Department of State, Bureau of Consular Affairs, Visa Bulletin, No. 44, Vol. VIII (May 2002), available at http://travel.state.gov/visa_bulletin.html. For unmarried children over twenty-one, it was eight years, seven months. Id. Ironically, it is harder for U.S. citizens to bring in Filipino children over twenty-one, the wait being about thirteen years; for siblings, it is over twenty-two years. Id.

254. 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 states, in part: "[W]e 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." MEMORIAL OF THE HOUSE OF DELEGATES OF PUERTO RICO TO THE PRESIDENT AND THE CONGRESS OF THE UNITED STATES CONCERNING CITIZENSHIP, 51 CONG. REC. 6718-20 (1914) (statement of José De Diego, Speaker of the House of Delegates of Puerto Rico). For a thorough analysis of Puerto Rican citizenship, see Ediberto Román, The Alien-Citizen Paradox and Other Consequences of U.S. Colonialism, 26 FLA. ST. U. L. REV. 1 (1998).

255. See Monge, supra note 151, at 6-7. They had had this political representation for over thirty years. See id.

256. Puerto Ricans living in Puerto Rico cannot vote for president or vice president, and they have reduced governmental benefits. Because their citizenship was conferred by statute, some believe it can also be revoked by Congress. See Lazos Vargas, supra note 149, at 934-36; see also Igartua de la Rosa v. United States, 32 F.3d 8 (1st Cir. 1994) (explaining that a Puerto Rican registered to vote in a state can vote for president by absentee ballot if she moves to a foreign country, but not if she returns to Puerto Rico); Atty. Gen. of Guam v. United States, 738 F.2d 1017 (9th Cir. 1984) (explaining that American citizens living in Guam cannot vote for president).
ultimate status—uncertainty about who they were, where they belonged, and what their future held.257

Chief Justice Fuller, dissenting in Downes, characterized the majority’s position to be 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.”258 This is exactly what has happened. In the referenda held on the status of Puerto Rico in 1952, 1967, and 1993, which offered choices of statehood, independence, or commonwealth status, the latter prevailed.259 However, because the referenda were non-binding, they have been boycotted by many Puerto Ricans, especially those who support independence.260 A 1998 referendum included a “none of the above” option that won an absolute majority of 50.3 percent.261 In 1996, a study by the U.S. House Committee on Resources concluded that the “compact” currently governing U.S.-Puerto Rico relations does not meet the United Nations’ 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.262

The United States’ exercise of plenary power over its external territories results in a variety of harms. According to Aaron Guevara, the following indicators are determinative 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.263 Moreover,

258. 182 U.S. 244, 372 (1901) (Fuller, C.J., dissenting).
259. See Román, supra note 254, at 39.
261. Monge, supra note 151, at 18-19.
262. See id. at 16 (citing HOUSE COMM. ON RESOURCES, REPORT 104-713, Part I, U.S.-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.
[t]he people of the United States . . . continue to be complicitous in a vestigial colonialism. The “anti-imperialists” of the turn of the century, after all, warned of consequences we live with today: 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 commitments to freedom and equality endures.264

A consequence of Puerto Rico’s colonial status is that the U.S. military occupies a significant portion of the main island and continues, among other things, to engage in the very controversial bombing of Vieques Island.265 Estimates are that, as a result of U.S. policies, between one-third and one-half of all Puerto Rican women have been sterilized.266 Currently, “more than 60 percent of Puerto Rican families live under the poverty level, just slightly less than in 1940.”267 The annual per capita income in Puerto Rico is one third of that in the United States, and welfare benefits are significantly lower than in the United States.268 This discrepancy is illustrated by a 1999 supplemental income cap of $32 per month, compared with a mainland cap of $368 per month.269 Poverty has exacerbated economic exploitation, especially where corporations can manufacture goods in sweatshops, unregulated by U.S. labor laws, and produce goods that can be imported with significantly lower tariffs and still bear the “Made in the U.S.A.” label.270

Clearly, appeals for constitutional protection have proven futile and, as with the internally colonized American Indian nations, the residents of

264. Burnett, Preface to FOREIGN IN A DOMESTIC SENSE, supra note 145, at xiv.

265. See Raymond Hernandez, A Tiny Island, but a Cause So Célebre: From New York to Hollywood -- Vieques Has Issues for Everyone, N.Y. TIMES, July 15, 2001, at A25; ALFREDO LOPEZ, DOÑA LICHÁ’S ISLAND: MODERN COLONIALISM IN PUERTO RICO 64 (1987) (“Today in Puerto Rico and Vieques . . . there are over twenty active military installations; they literally form a string around the entire island and cover about 75 percent of Vieques’ land.”).


267. Monge, supra note 151, at 19.

268. See id.

269. See id. at 20; see also LOPEZ, supra note 265, at 67-91.

these external colonies would be best served by the enforcement of existing norms of international law. Efren Rivera Ramos noted:

The conceptual scheme of the Insular Cases is entirely incompatible with any notion of self-determination. . . . [self-determination,] at a minimum[,] . . . implies the right . . . of a people or group . . . to determine its own status and associations with other peoples or groups 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. 271

Again, the only legal remedies appear to be international. Enforcing international law in this context would mean complying with all of the basic instruments designed to ensure the civil, political, economic, social, and cultural rights of all persons. 272 These are the protections the United States claims are adequately guaranteed by the U.S. Constitution. However, such domestic law remedies, thanks to the plenary power doctrine, are unenforceable in U.S. courts.

Compliance with international law mandates the recognition of such civilian political rights as well as U.S. recognition of the sovereignty of these territories. In 1960, a United Nations General Assembly Resolution entitled 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." 273 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." 274

Since 1972, the United Nations Decolonization Committee and other international organizations have called for the decolonization of Puerto Rico. 275 The United States' response is that Puerto Rico is not a colony

274. Id.
but a commonwealth. This is true, it asserts, because in 1950, Congress declared a “compact” of free association between Puerto Rico and the United States and gave Puerto Rico additional — but limited — powers of self-government.\textsuperscript{276} The terms of the compact, however, were decided upon by the United States and apparently can be changed unilaterally by Congress. At a minimum, self-determination for Puerto Rico and each of the other “unincorporated” U.S. territories will require 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.”

Finally, current application of the plenary power doctrine in immigration law illustrates that in this area, we need to look to the protections afforded under international law. Although it is generally presumed that courts would no longer legally sanction the kind of blatant racism that fueled the Chinese exclusion acts, the plenary power doctrine that grew out of those cases is alive and well in immigration law. No intervening legal decisions have prohibited immigration laws which discriminate on the basis of race, ethnicity, national origin, or religion, and consequently the doctrine continues to be invoked to exclude those perceived as “other.”\textsuperscript{277} The due process rights of noncitizens who have not been officially admitted to the United States are still limited by the position the Court announced in 1950 in \textit{United States ex rel. Knauff v. Shaughnessy}:\textsuperscript{278} “Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.”\textsuperscript{279}

In \textit{Knauff}, a slim majority of the Court, citing \textit{Nishimura Ekiu}\textsuperscript{280} and \textit{Fong Yue Ting},\textsuperscript{281} held that the German wife of a U.S. citizen 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.\textsuperscript{282} This was true despite the fact that she had performed

277. Currently, this is often on the basis of perceived political beliefs or associations. See generally Philip Monrad, Comment, \textit{Ideological Exclusion, Plenary Power and the PLO}, 77 CAL. L. REV. 831 (1989); see also infra notes 311-20 and accompanying text.
278. 338 U.S. 537 (1950)
279. \textit{Id.} at 544.
281. \textit{Fong Yue Ting} v. United States, 149 U.S. 698, 713-14 (1893).
“excellent” work as a civilian employee of the U.S. War Department.\textsuperscript{283} Furthermore, the Court concluded in Shaughnessy \textit{v. United States ex rel. Mezei}\textsuperscript{284} that a permanent resident, returning from a trip to Europe to visit his dying mother, could be held indefinitely on Ellis Island without a hearing because the Attorney General had decided on the basis of confidential information that his entry would be “prejudicial to the public interest.”\textsuperscript{285} It was irrelevant to the Court that Mezei had lived, in Justice Jackson’s words, “a life of unrelieved insignificance” for twenty-five years in Buffalo, New York and had nowhere else to go.\textsuperscript{286}

More recently, federal courts have used \textit{Knauff} and \textit{Mezei} 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 \textit{Rodriguez-Fernandez v. Wilkinson}, \textsuperscript{287} the first significant ruling of this series, the Tenth Circuit Court of Appeals ordered the release of a Mariel Cuban who was excludable under U.S. law but had no other country to go to.\textsuperscript{288} The court first identified the problem:

\begin{quote}
[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.

In 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.\textsuperscript{289}
\end{quote}

The court ordered Rodriguez-Fernandez released under the immigration statute, noting that if the statute were construed differently,

\begin{enumerate}
\item 283. \textit{id.} at 539.
\item 284. 345 U.S. 206 (1953).
\item 285. \textit{id.} at 208-09, 216. After the United States took such a position, Mezei could find no other country to accept him. \textit{id.} at 209.
\item 286. \textit{id.} at 219 (Jackson, J., dissenting). To quote Justice Jackson’s scathing dissent: “Government 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!” \textit{id.} at 220 (Jackson, J., dissenting).
\item 287. 654 F.2d 1382 (10th Cir. 1981).
\item 288. \textit{id.} at 1390.
\item 289. \textit{id.} at 1385.
\end{enumerate}
it would violate both the Constitution and international law. The court said that indefinite detention was punishment subject to constitutional constraints: “Surely congress 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.” 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.”

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. In 1984, the Eleventh Circuit held in *Jean v. Nelson* that noncitizens 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.” The following year the Supreme Court refused to grant certiorari in *Garcia-Mir v. Meese*, which had followed *Jean*, noting specifically that claims under international human rights law were inapplicable. As the Eleventh Circuit said in *Garcia-Mir*, “[t]hese legal realities may be harsh, but they are that way by design.”

---

290. See id. at 1390.
291. Id. at 1387.
292. *Fong Yue Ting* v. United States, 149 U.S. 698 (1893).
294. Id. at 1388 (citing the Universal Declaration of Human Rights and the American Convention on Human Rights).
295. The Fourth Circuit upheld the indefinite detention of “excludable aliens.” See *Palma v. Verdeyen*, 676 F.2d. 100, 104-05 (4th Cir. 1982). The Second Circuit reversed a district court decision ordering the release of detained Haitians. See *Bertrand v. Sava*, 684 F.2d 204, 219 (2d Cir. 1982). Similarly, a district court decision 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*, 734 F.2d 576, 584 (11th Cir. 1984).
297. Id. at 968. 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 (1985).
299. See id. at 1484. Thus, for example, even though Cuban prisoners were held in maximum security federal penitentiaries, subjected to strip searches and beatings, and moved arbitrarily from facility to facility, they apparently have no Eighth Amendment rights because INS detention is civil, not criminal, per *Fong Yue Ting* and its progeny. See Richard A. Boswell, *Throwing Away the Key: Limits on the Plenary Power?*, 18 Mich. J.
The consequences grew harsher in the 1990s. In 1993, in *Reno v. Flores*, the Supreme Court upheld an Immigration and Naturalization Service (INS) policy of imprisoning about one thousand unaccompanied children per year, often in adult facilities, rather than releasing them to non-custodial family members or guardians. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) and the Anti-Terrorism and Effective Death Penalty Act dramatically reduced due process rights and judicial review of immigration decisions and retroactively rendered permanent residents deportable based on prior criminal convictions.

In 2001, the Supreme Court held in *Zadvydas v. Davis* that congressional plenary power “is subject to important constitutional limitations,” which qualify the government’s ability to detain indefinitely permanent residents who are to be deported but do not have countries willing to accept them. While this decision has allowed lower courts some discretion to ameliorate the harshest consequences of the 1996 acts, it does not signal a fundamental change in the plenary power

---


306. See id. at 695 (citing INS v. Chadha, 462 U.S. 919, 941-42 (1983)).

307. See, e.g., Patel v. Zemski, 275 F.3d 299, 309, 310 (3d Cir. 2001) (citing *Zadvydas* and applying heightened due process scrutiny to pre-removal-order detention of a long-term permanent resident); Kim v. Ziglar, 276 F.3d 523, 529-31 (9th Cir. 2002) (relying on *Zadvydas* to find pre-removal mandatory detention unconstitutional as applied to petitioner).
doctrine because the Zadvydas opinion cites Mezei\(^{308}\) and The Chinese Exclusion Case\(^{309}\) with approval and relies more on ambiguity in the statute than on the Constitution to support its conclusion.\(^{310}\)

Recent cases have merged exclusion based on race or national origin with exclusion based on political belief or association, allowing the INS to use secret evidence to detain and deport a number of Muslims and persons of Arab or Middle Eastern descent.\(^{311}\) Georgetown law professor David Cole, who has represented thirteen individuals in such deportation cases, testified before a subcommittee of the House Judiciary Committee:

> At 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, activity.\(^{312}\)

The INS sought to preempt constitutional challenges to its use of secret evidence by invoking Congress’ plenary power, using The Chinese Exclusion Case,\(^{313}\) as well as Knauff\(^{314}\) and Mezei,\(^{315}\) as authority.\(^{316}\) Some federal courts forced the INS to reveal its evidence and, seeing how flimsy it was, ordered the detainees released.\(^{317}\) However, the Supreme

---

\(^{308}\) 345 U.S. 537 (1953).

\(^{309}\) 130 U.S. 581 (1889).

\(^{310}\) “Despite this constitutional problem, if ‘Congress has made its intent’ in the statute ‘clear, we must give effect to that intent.’” Zadvydas, 533 U.S. at 696 (citations omitted).


\(^{313}\) 130 U.S. 581 (1889).

\(^{314}\) 338 U.S. 537 (1950).

\(^{315}\) 345 U.S. 206 (1953).


Court effectively undermined this trend by holding in *Reno v. American-Arab Anti-Discrimination Committee*\(^{318}\) that after the passage of IIRIRA federal courts have dramatically limited jurisdiction to review deportation decisions at all.\(^{319}\) This case 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.\(^{320}\)

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. This is presumed to be acceptable because "aliens," as they are designated in immigration law, have their own sovereigns to protect them. However, this is problematic for several reasons. First, the individuals involved are often long-term permanent residents of the United States with substantial ties to this country, including jobs, homes, and spouses or children who are U.S. citizens. It clearly violates international law for the U.S. government to disavow responsibility for the protection of their basic rights. Second, reliance on the intervention of another government is a blunt and ineffective remedy for individual violations of human rights, one which happens only occasionally in particularly egregious or highly publicized cases. Finally, the theory that another sovereign is responsible for protecting the noncitizens' rights

permanent resident, as he returned from Syria where he had attended a conference affiliated with the Popular Front for the Liberation of Palestine. *Id.* at 509. The INS had 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." *Id.* at 508. As the D.C. Circuit said, "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." *Id.* at 516; see also JAMES X. DEMPESEY & DAVID COLE, TERRORISM AND THE CONSTITUTION: SACRIFICING CIVIL LIBERTIES IN THE NAME OF NATIONAL SECURITY 128-137 (1999) (summarizing secret evidence cases); Susan M. Akram, Scheherezade Meets Kafka: Two Dozen Sordid Tales of Ideological Exclusion, 14 GEO. IMMIGR. L.J. 51, 73-81 (1999) (summarizing secret evidence cases).


only works if the United States complies with international law governing sovereign-to-sovereign relations.\textsuperscript{321}

As the Tenth Circuit Court of Appeals pointed out in\textit{Rodriguez-Fernandez}, current interpretation and enforcement of U.S. immigration law violates international law in numerous ways.\textsuperscript{322} The Universal Declaration of Human Rights proclaims a right to freedom of movement, with specific protections for persons seeking asylum from persecution.\textsuperscript{323} The rights of asylum seekers are spelled out in the Convention Relating to the Status of Refugees and its Protocol, to which the United States is a party.\textsuperscript{324} International norms are also violated by the United States' arbitrary and indefinite detention of persons, including juveniles, and by the current immigration restrictions relating to HIV/AIDS.\textsuperscript{325} These problems are compounded by provisions of the 1996 Illegal Immigration Reform and Immigrant Responsibility Act,\textsuperscript{326} which has been called a "fearsome example of how individual rights can be abridged in a country that fails to take its international human rights obligations seriously."\textsuperscript{327}

The IIRIRA abrogates U.S. obligations under various treaties, including those contained in the 1967 Protocol Relating to the Status of

\textsuperscript{321} This includes respecting the Vienna Conventions on Diplomatic and Consular Relations, see infra note 333, as well as various treaties of friendship and extradition agreements, see infra note 335 and accompanying text.

\textsuperscript{322} 654 F.2d 1382 (1981); see supra notes 287-94. 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 application to the Refugee Convention).


Refugees, the 1985 Convention Against Torture, and the International Covenant on Civil and Political Rights. "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.

The harshest consequences of U.S. immigration law and policy have thus far been deemed constitutionally acceptable by the Supreme Court. In fact, "[u]nder current doctrine, there is no domestic remedy for victims of the United States' derogations from international standards." These violations could be prevented, however, if the United States courts would enforce the treaties identified above, as well as the Vienna Conventions on Diplomatic and Consular Relations, the Convention

---

331. Ramji, supra note 327, at 117-18. The United States is a party to each of these conventions. See supra notes 245, 324, 329.
on the Rights of the Child, and various applicable treaties of friendship and commerce or extradition. In the wake of the indefinite and unexplained detention of unidentified persons since September 11, 2001, the Inter-American Convention on the Forced Disappearance of Persons should be added to the list as well.

Compliance with international law would, in addition, require that federal courts acknowledge claims for redress for past violations of fundamental human rights. As Karen Parker and Jennifer Chew stated, "[t]he 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." In light of redress programs that have been instituted following the horrors of World War II, a considerable body of international law is evolving in this field. These laws would have to be taken seriously if international law were


incorporated into U.S. jurisprudence. Thus far, the United States has a poor record of complying with international law when other sovereigns have stepped forward to protect the rights of their citizens. If the United States wants to claim a prerogative based on its own sovereignty, it can do so only to the extent that it complies with international law, and it cannot do so by relying on the plenary power doctrine.

Despite Chief Justice Marshall's disclaimer that "the relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist no where else," the law described in this Section is not simply an aberration within U.S. jurisprudence. When the areas of immigration law, "federal Indian law," and the law governing external territories are considered together, they encompass a significant sector of the people subject to U.S. jurisdiction. Further, the plenary power doctrine is not aberrational because it encompasses powers that can, and have been, extended to almost any sector of the population by virtue of the United States' assertion that it is in its sovereign interest to do so.

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.

The plenary power doctrine extends to military law and has effectively been applied to persons in prison or otherwise in the custody of the criminal justice system. It has most often been exercised over people identified as outsiders on the basis of race, ethnicity, or national origin, but has also been extended to people on the basis of religion and political or ideological association. As long as a "national security" rationale

339. See infra notes 333, 335 and accompanying text.
341. Frickey, supra note 90, at 383.
342. See supra note 26.
can be invoked, the plenary power doctrine can be extended to any group over whom the U.S. government has, or takes, jurisdiction.344

IV. CONCLUSION: PLENARY POWER AND THE SUBVERSION OF HUMAN RIGHTS LAW

American jurisprudence is generally thought to encompass the body of domestic law founded on the Constitution. It provides for checks and balances among the branches of government and protects the fundamental human rights embodied in the Bill of Rights and the Reconstruction era amendments. The extent to which the United States fails to comply with international law, particularly human rights and humanitarian law, is frequently measured in terms of the “gap” between the mandates of the Constitution and those of international law. However, as the previous Sections have illustrated, there is a large and very significant sector of American jurisprudence—the application of U.S. law to those under U.S. jurisdiction—encompassed by the plenary power doctrine, under which the courts refuse to apply either the protections of the Constitution or international law and justify this refusal on the basis of U.S. sovereignty.

The harsh consequences of the plenary power doctrine have been frequently criticized. The solution most frequently advanced, however, is not the application of international law, but the extension of constitutional protections to those subject to the government’s plenary power.345 This Section concludes by arguing that an “intraconstitutional” solution is inadequate and that international human rights law must be

---

344. Felix Cohen asserted, “Like the miner’s canary, the Indian marks the shifts 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.” COHEN, supra note 117, at v. The truth of this observation is again 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 277-320 and accompanying text.

345. 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 that formally fall under the plenary power doctrine. See Motomura, supra note 21, at 560-600. Such cases, he says, illustrate that decisionmakers realize the inadequacy of the plenary power doctrine and are moving toward the full constitutionalization of immigration law. See id. at 600-13. For an argument advocating the “constitutionalization” of federal Indian law, see Federal Plenary Power in Indian Affairs after Weeks and Sioux Nation, supra note 208.
incorporated into U.S. jurisprudence and applied by U.S. courts. To do otherwise is to allow the United States to assert, in direct contravention of the principles it urged upon the world at Nuremberg, that state sovereignty can shield a government from complying with its international treaty obligations and acknowledged norms of customary international law.

While the extension of constitutional protections would in many cases lead to more humane results, this solution is inadequate for several reasons. First, an intraconstitutional approach denies the rights of colonized peoples subject to plenary authority to decide for themselves the nature of their affiliation with the United States. 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. Chris Iijima, noting that the "colonization of native people is wrapped and justified in the rhetoric and the ideology of white supremacy," explained why the Supreme Court's application of a standard equal protection analysis was inappropriate:

The inquiry should not be whether Native Hawaiians constitute a "race"... Instead, the question should be 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.

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

347. Id. at 512, 520, 522 (rejecting the proposition, based on Mancari, that this was a political rather than racial distinction). See generally Gavin Clarkson, Not Because They Are Brown, But Because of Ea: Rice v. Cayetano, 528 U.S. 495 (2000), 24 HARV. J. L. & PUB. POL. 921 (2001).
348. Iijima, supra note 147, at 120-21.
349. Id. at 123-24 (citations omitted).
American Indian lands and peoples have no more legitimacy under international law than did Germany's claims to Luxembourg or the Netherlands in the early 1940s. The disastrous consequences of assimilationist policies can be seen throughout the history of colonial rule and in contemporary American Indian communities. The tragic story weaves through the genocidal impact of European diseases and attempts to "Christianize" Indians, the loss of land and community following the Allotment Act, 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.

The devastation wrought upon indigenous communities is presumably a "worst case" scenario for assimilation into the polity. However, because many people currently subject to the plenary power doctrine are willing to give up their claims to sovereignty or self-determination in exchange for equal protection, the option should be considered in light of what is presumably the "best case" scenario—the extension of full constitutional protection to African Americans. It should be the "best case" because the full range of domestic legal protections has, in theory, been extended to African Americans—full and unconditional citizenship, constitutionally mandated equal protection under the law, and a wide range of protective and remedial legislation. Nonetheless, courts have


351. See Ernst Fraenkel, The Dual State: A Contribution to the Theory of Dictatorship xiii (1941) (defining such conduct as characteristic of what he terms a "prerogative state").

352. See supra notes 101-10 and accompanying text.


consistently interpreted these constitutional and legislative protections in ways that minimize their impact rather than ensure their enforcement.  

While an assessment of the African-American legal experience is beyond the scope of this article, the ongoing injustices that have not been remedied by intraconstitutional solutions are well-known and well documented. They are, however, summarized in the oft-quoted statements of two great African-American leaders. In 1852, Frederick Douglass, while fighting to abolish slavery, 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.

One hundred and forty years later, on July 4, 1992, Supreme Court Justice Thurgood Marshall stated:

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.

The African-American experience, paralleled in many respects by the experience of other “minorities” in the United States, and the terrible price paid by indigenous peoples for U.S. attempts to assimilate them illustrate the limitations of a domestic legal solution to problems caused by the government’s exercise of plenary power.


358. HIGGINBOTHAM, supra note 1, at 128 (illustration).

359. Id.

360. 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).

361. 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
Advocating the incorporation of international law into U.S. jurisprudence does not 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. Not only have intraconstitutional remedies proven themselves to be inadequate, but limiting those subject to U.S. jurisdiction to such remedies in and of itself violates international law. This is due to 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 asserted, "[p]owerlessness 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." Most importantly, the way in which decolonization occurs should be a choice for the colonized, not the colonizers, to make.

The best solution to the many violations of international law occasioned by the U.S. government’s invocation of plenary power remains the actual incorporation of international law into U.S. jurisprudence. This is not to imply that legal changes alone will solve these problems. Instead, 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." Nonetheless,


362. Cabranes, supra note 150, at 40.
363. Rivera Ramos, Colonialism, supra note 164, at 311.
restructuring the legal paradigm within which the United States operates would go a long way toward reversing this process of reinforcement because real decolonization and protection of fundamental human rights requires a jurisprudence that explicitly incorporates international law.

A first step would be to recognize that American jurisprudence comprises both intraconstitutional law and the extraconstitutional exercise of jurisdiction under the plenary power doctrine because American law accompanies U.S. jurisdiction.\footnote{64} The law has followed the flag, even if the Constitution has not. Where the courts have invoked the plenary power doctrine, constitutional rights have not been protected, nor has the global rule of law been adhered to, despite the Constitution’s specific directive that the law of nations is part of the supreme law of the land.\footnote{65} In fact, it appears that the plenary power doctrine is invoked precisely to avoid otherwise applicable domestic and international law.\footnote{366} Even Justices White and Brown, writing for the majority in \textit{Downes}, acknowledged that all persons have some fundamental or “natural” rights,\footnote{67} yet the Supreme Court has never identified the law that protects such rights. Individuals, communities, and nations have been and continue to be damaged and destroyed by the government’s exercise of plenary power.

Because the Constitution was not designed and does not, in fact, protect all persons within the jurisdiction of U.S. courts, we must acknowledge both that the plenary power doctrine is a significant part of American jurisprudence and that the United States has obligations under

\begin{flushleft}
\textsuperscript{364} 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.

\textsuperscript{365} U.S. CONST. art. VI, cl. 2; see also \textit{The Paquete Habana}, 175 U.S. 677, 700 (1900) (noting that international law is part of United States law and must be “administered by the courts of justice of appropriate jurisdiction”).

\textsuperscript{366} This pattern is clearly seen in the United States’ recent attempts to rationalize its treatment of Afghans and others allegedly affiliated with al Qaeda who are being held without charge in open air cages on the U.S. naval base at Guantanamo, Cuba. The United States asserts that neither constitutional protections nor the laws of war apply. \textit{See} Carol Rosenberg, \textit{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.”); \textit{see also} Cole, \textit{supra} note 320, at 953-54; Human Rights Watch, \textit{U.S.: Growing Problem of Guantanamo Detainees}, May 30, 2002, available at http://www.hrw.org.

\textsuperscript{367} \textit{See supra} note 179 and accompanying text.

\textsuperscript{368} \textit{See supra} notes 39-42 and accompanying text.
\end{flushleft}
international law to all persons under its jurisdiction.\textsuperscript{369} A first step is recognizing that American law encompasses not only a large body of statutes, common law, and judicial decisions, which fall within the parameters of the Constitution, but also the law that is created and enforced by the U.S. government and has been declared by the Supreme Court to be essentially unconstrained by the Constitution. To the extent the latter is actually law and not simply the exercise of raw power, we must insist that it be effectively constrained by the enforcement of international law in U.S. courts. This would preserve the United States’ claim to be a “nation of laws;” to do otherwise makes us all “complicitous in a vestigial colonialism”\textsuperscript{370} which elevates “might makes right” to the status of judicial doctrine.

\textsuperscript{369} In other contexts, I have referred to this as a “metaconstitutional” jurisprudence. See Asserting Plenary Power Over the “Other,” supra note 36. 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). On the relationship between nations and states, see supra note 2.

\textsuperscript{370} See Burnett, supra note 264, at xiv.