William & Mary Bill of Rights Journal

Volume 27 | Issue 2 Article 6

A Reparative Justice Approach to Assessing Ancestral Classifications Aimed at Colonization's Harms

Susan K. Serrano

Repository Citation

Susan K. Serrano, *A Reparative Justice Approach to Assessing Ancestral Classifications Aimed at Colonization's Harms*, 27 Wm. & Mary Bill Rts. J. 501 (2018), https://scholarship.law.wm.edu/wmborj/vol27/iss2/6

Copyright c 2018 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.
https://scholarship.law.wm.edu/wmborj

A REPARATIVE JUSTICE APPROACH TO ASSESSING ANCESTRAL CLASSIFICATIONS AIMED AT COLONIZATION'S HARMS

Susan K. Serrano*

INTRODUCTION 501
I. *DAVIS V. GUAM* IN LEGAL-POLITICAL CONTEXT 506
A. The Dismantling of Justice 507
B. Rice v. Cayetano*: Ancestry as Proxy for Race* 510
C. Davis v. Guam*: Ancestry as Invidious Racial Purpose* 514
II. A REPARATIVE JUSTICE APPROACH TO REMEDYING THE HARMS OF COLONIZATION 518
A. Ancestry and Race as Key to Colonization 519
B. Reparative Justice Informed by Principles of Self-Determination 522
III. A REPARATIVE JUSTICE ANALYSIS OF *DAVIS V. GUAM* 527
CONCLUSION 536

INTRODUCTION

"Everybody should get to vote, no matter what color you are."[1] In 2018, this seductive phrase refers not to African American voting rights in the U.S. South, but to a white male's attempt to vote in a political-status plebiscite reserved for "native inhabitants of Guam."[2] Arnold Davis, a white U.S. citizen and Guam resident,[3] represented

---

* Associate Faculty Specialist; Associate Director, Ka Huli Ao Center for Excellence in Native Hawaiian Law; Associate Director of Legal Writing, William S. Richardson School of Law, University of Hawaiʻi at Mānoa. Many thanks to Eric Yamamoto, Dina Shek, and Avis Poai for their valuable suggestions. Thank you also to the editors of the *William & Mary Bill of Rights Journal* for their excellent editorial work.

[1] Jasmine Stole Weiss, *Judge to Decide on Plebiscite Challenge*, PAC. DAILY NEWS (Sept. 2, 2016), https://www.guampdn.com/videos/news/2016/09/01/89687134 [https://perma.cc/X95E-XFY4]. *See also* Jasmine Stole Weiss, *Guam Chief Judge Frances Tydingco-Gatewood to Decide on Plebiscite Case*, PAC. DAILY NEWS (Sept. 2, 2016, 12:46 AM), https://www.guampdn.com/story/news/2016/09/01/guam-chief-judge-frances-tydingco-gatewood-decide-plebiscite-case/89686794 [https://perma.cc/ZHD4-A9MN] [hereinafter Weiss, *Guam Chief Judge to Decide on Plebiscite Case*]; Jasmine Stole Weiss & Jerick Sablan, *Judge: Plebiscite Law Unconstitutional; AG May Appeal*, PAC. DAILY NEWS (Mar. 8, 2017), https://www.guampdn.com/story/news/2017/03/08/judge-arnold-davis-plebiscite-law-unconstitutional/98888880 [https://perma.cc/XP79-JC89].

[2] *Guam Inexplicably Delays Appeal*, CTR. INDIVIDUAL RTS. (Apr. 13, 2018), https://www.cir-usa.org/2018/04/guam-inexplicably-delays-appeal [https://perma.cc/FBG9-CHA8]. *See also* Weiss, *Guam Chief Judge to Decide on Plebiscite Case*, *supra* note 1.

[3] *Davis v. Guam*, CTR. INDIVIDUAL RTS. (Apr. 13, 2018), https://www.cir-usa.org/cases/davis-v-guam [https://perma.cc/CU5V-P8XZ] [hereinafter *Davis. v. Guam*, CTR. INDIVIDUAL RTS.].

by anti-affirmative action and conservative election attorneys,[4] sued the Territory of Guam for alleged violations of the Fourteenth and Fifteenth Amendments to the U.S. Constitution.[5] He contended that Guam's Decolonization Registry Law[6] unlawfully discriminated against him by prohibiting him from registering to participate in a future, largely symbolic, decolonization plebiscite.[7] The law allows eligible "native inhabitants"—those who became U.S. citizens pursuant to Guam's 1950 Organic Act and their descendants—to choose between independence, free association with the United States, or statehood,[8] as an expression of their long-awaited self-determination as an integral part of decolonization.[9]

Davis argued that Guam's "denial of [his] right to register and . . . vote constitute[d] racial discrimination that categorically violate[d] one of his most fundamental rights as a citizen of our democracy."[10] The conservative advocacy group representing Davis, the Center for Individual Rights, called the "native inhabitant"

---

[4] Davis's attorneys include the Center for Individual Rights (CIR) and J. Christian Adams. *Id.* CIR is a conservative non-profit law firm "dedicated to the defense of individual liberties against the increasingly aggressive and unchecked authority of federal and state governments." *Mission*, CTR. INDIVIDUAL RTS., https://www.cir-usa.org/mission [https://perma.cc/S95N-EGPG]. Among other things, it uses litigation, networking, and messaging strategies to challenge "affirmative action, civil rights, and racial equality." LEE COKORINOS, THE ASSAULT ON DIVERSITY: AN ORGANIZED CHALLENGE TO RACIAL AND GENDER JUSTICE 59–61 (2003). J. Christian Adams, President and General Counsel of the Public Interest Legal Foundation, is a conservative attorney and activist responsible for aggressive voter-purge lawsuits against several counties, and whose organization alleges that an "alien invasion" is committing rampant voter fraud. Pema Levy, *These Three Lawyers Are Quietly Purging Voter Rolls Across the Country*, MOTHER JONES (July 7, 2017, 6:00 AM), https://www.motherjones.com/politics/2017/07/these-three-lawyers-are-quietly-purging-voter-rolls-across-the-country [https://perma.cc/SZX7-XLAR] (outlining Adams's voter purge lawsuits targeting districts with histories of discrimination against people of color); Jane C. Timm, *Vote Fraud Crusader J. Christian Adams Sparks Outrage*, NBC NEWS (Aug. 27, 2017, 6:13 AM), https://www.nbcnews.com/politics/donald-trump/vote-fraud-crusader-j-christian-adams-sparks-outrage-n796026 [https://perma.cc/PMH5-4FZT] (describing the Public Interest Legal Foundation's controversial two-part "Alien Invasion" voter fraud reports).

[5] Memorandum in Support of Plaintiff's Motion for Summary Judgment at 1, Davis v. Guam, 2017 WL 930825 (D. Guam Mar. 8, 2017) (No. 11-00035) [hereinafter Pl.'s Mot. for Summ. J.].

[6] 3 GUAM CODE ANN. § 21000 (2000) *amended by* Guam Pub. L. 33-148 (2016).

[7] Defendants' Motion for Summary Judgment Pursuant to Fed. R. Civ. P. 56 at 1, Davis v. Guam, 2017 WL 930825 (D. Guam Mar. 8, 2017) (No. 11-00035) [hereinafter Defs.' Mot. for Summ. J.]. Guam's Commission on Decolonization is tasked with ascertaining native inhabitants' desired future political relationship with the United States. Davis v. Guam, 785 F.3d 1311, 1313 (9th Cir. 2015) (citing 1 GUAM CODE ANN. § 2105 (2000)).

[8] *Davis*, 785 F.3d at 1313 (citing 1 GUAM CODE ANN. § 2110 (2000)).

[9] 3 GUAM CODE ANN. § 21000 (seeking to further Congress's commitment to repair the harms of U.S. colonization by permitting "the native inhabitants of Guam . . . to exercise the inalienable right to self-determination").

[10] Pl.'s Mot. for Summ. J., *supra* note 5, at 2.

classification an "odious" tactic "of building a racial identity for a favored 'native' race in opposition to 'other' races."[11] Davis and his attorneys thus distorted the rhetoric of civil rights to erase the history and impacts of colonization in Guam for the benefit of white American Arnold Davis. In an opinion devoid of that historical context, the District Court of Guam held that Guam "used ancestry as a proxy for race" and unlawfully discriminated in violation of the Fourteenth and Fifteenth Amendments.[12] At the time of this writing, the case is on appeal to the United States Court of Appeals for the Ninth Circuit.[13]

The *Davis* case is not simply about a little-known non-binding plebiscite in a non-self-governing colony of the United States. It is yet another "reverse discrimination" lawsuit in the style of *Rice v. Cayetano*,[14] in which the U.S. Supreme Court ruled that a Native Hawaiian voting limitation was an unlawful proxy for race.[15] As in *Rice*, Davis and his supporters deployed a twisted civil-rights paradigm that ignores the history of colonization and discounts the difference between concepts of equality and Indigenous self-determination.[16] And like the Supreme Court's modern anti-affirmative action cases,[17] Davis and his attorneys treated all classifications as the same—whether they were designed to end an oppressive system or to perpetuate it.[18] The *Davis* case is thus part of a larger movement to dismantle civil and human rights for people of color and Indigenous people nationwide.[19]

The *Davis* case also illuminates the pressing need for an appropriate approach for reviewing ancestry-based classifications in this context. The Court's current approach treats non-tribal Native peoples' present-day efforts to restore self-determination not as "political" restorative measures but as simple racial preferences.[20] The

---

[11] *Davis v. Guam*, CTR. INDIVIDUAL RTS., *supra* note 3. *See also* Hans A. von Spakovsky, *Jim Crow Rears Its Ugly Head in Guam*, NAT'L REV. (Aug. 30, 2016, 8:00 AM), https://www.nationalreview.com/2016/08/guam-voting-registration-rights-native-inhabitants-racial-discrimination [https://perma.cc/Z572-AW6Y] (calling Guam's law a "modern, progressive 'identity politics' version of Jim Crow discrimination").

[12] Davis v. Guam, No. 11-00035, slip op. at *8, *14–15 (D. Guam Mar. 8, 2017).

[13] *See* Defendants' Notice of Appeal, Davis v. Guam, No. 11-00035 (9th Cir. Apr. 7, 2017).

[14] 528 U.S. 495 (2000).

[15] *Id.* at 514. *See also* Eric K. Yamamoto, *The Colonizer's Story: The Supreme Court Violates Native Hawaiian Sovereignty—Again*, COLORLINES (Aug. 20, 2000, 12:00 PM), http://www.colorlines.com/articles/colonizers-story-supreme-court-violates-native-hawaiian-sovereignty-again [https://perma.cc/FW6E-73GV] [hereinafter Yamamoto, *Colonizer's Story*].

[16] *See* Pl.'s Mot. for Summ. J., *supra* note 5, at 2.

[17] *See, e.g.*, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007); Grutter v. Bollinger, 539 U.S. 306 (2003); Gratz v. Bollinger, 539 U.S. 244 (2003); Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995); City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).

[18] *See infra* notes 106–10 and accompanying text.

[19] *See infra* notes 61–63 and accompanying text.

[20] *See, e.g.*, *Rice*, 528 U.S. at 516–17; *see also* Addie C. Rolnick, *The Promise of* Mancari*: Indian Political Rights as Racial Remedy*, 86 N.Y.U. L. REV. 958, 996–98 (2011) (contending

Court's framing fails to apprehend accurately both the way ancestry and race have been deployed to subjugate Native people, as well as the meanings of indigeneity and human rights for the Native communities involved.[21]

Consistent with the notion of "reparative justice,"[22] ancestry should not be treated as race, particularly in the context of remedies for the harms of U.S. colonization. The purpose of such remedial measures is not to target race itself, but rather the damage of colonization.[23] Justice Stevens recognized this idea in his *Rice* dissent: Hawai'i's Native Hawaiian voting limitation was not enacted "on account of race,"[24] but was based on the assumption that the law's beneficiaries "have a claim to compensation and self-determination that others do not."[25] This approach thus distinguishes between an ancestry-based classification that fosters a historically colonized group's self-determination and one that is designed to perpetuate historical racial oppression.

This restorative approach also acknowledges that the international human rights principle of self-determination, a central tenet of reparative justice, is key to colonized peoples' efforts worldwide to repair the damage of historical injustice.[26] Self-determination entails repairing the persisting harms suffered by those who have experienced systemic oppression according to their self-shaped notions of reparation.[27] This approach is also consistent with the Fifteenth Amendment and the jurisprudential underpinnings of existing case law.[28]

Some reparative-justice classifications do employ blood-quantum requirements or otherwise use language colloquially described as "race."[29] But those references

---

that the tension between "political" and "racial" jurisprudence was critical to the *Rice* Court's decision); Yamamoto, *Colonizer's Story*, *supra* note 15 (describing the *Rice* Court's transformation of a Native Hawaiian self-determination measure into a "reverse discrimination" civil-rights violation).

[21] *See* Rolnick, *supra* note 20, at 967–68.

[22] *See infra* notes 167–80 and accompanying text. This Article uses both "reparative" and "restorative" to mean repairing the persisting damage of a specific injustice according to the self-determined dictates or wishes of the communities involved.

[23] *See Rice*, 528 U.S. at 527–46 (Stevens, J., dissenting).

[24] *Id.* at 539 (quoting U.S. CONST. amend. XV, § 1).

[25] *Id.* at 545.

[26] *See* Eric K. Yamamoto, Miyoko Pettit & Sara Lee, *Unfinished Business: A Joint South Korea and United States Jeju 4.3 Tragedy Task Force to Further Implement Recommendations and Foster Comprehensive and Enduring Social Healing Through Justice*, 15 ASIAN-PAC. L. & POL'Y J. 1, 21 (2014).

[27] *See* Rebecca Tsosie, *Indigenous Peoples and the Ethics of Remediation: Redressing the Legacy of Radioactive Contamination for Native Peoples and Native Lands*, 13 SANTA CLARA J. INT'L L. 203, 245 (2015); Carlton Waterhouse, *The Good, the Bad, and the Ugly: Moral Agency and the Role of Victims in Reparations Programs*, 31 U. PA. J. INT'L L. 257, 267–68 (2009); Eric K. Yamamoto, Sandra Hye Yun Kim & Abigail M. Holden, *American Reparations Theory and Practice at the Crossroads*, 44 CAL. W. L. REV. 1, 16 (2007).

[28] *See* U.S. CONST. amend XV, § 1; *Rice*, 528 U.S. at 517, 540, 546 (Stevens, J., dissenting).

[29] *See* Morton v. Mancari, 417 U.S. 535 (1974); Wabol v. Villacrusis, 958 F.2d 1450 (9th Cir. 1990).

do not transform a politically crafted remedial law aimed at rectifying the harms of colonization to an Indigenous people into an impermissible racial classification. As international scholar Albert Memmi aptly observed, the colonizer gains control over land and resources, and legitimates it, in part by disparaging Native peoples.[30] That vilification—characterizing the colonized as inferior and unworthy—takes many forms, including negative cultural imagery about the group and its ancestry.[31] The restorative-justice approach to remedying those material and cultural harms of colonization, therefore, must take into account that ancestry. And a law based on that deeply reparative-justice approach does not convert an ancestral classification into one that merely—without strong justification—aims to benefit one racial group over another.

In light of *Davis v. Guam* and other challenges to laws seeking to remedy harms of U.S. colonization,[32] the court's approach to analyzing ancestry-based classifications is crucial. The Ninth Circuit can adopt a narrow, formalist approach, and decide that ancestry is always a proxy for race (as the district court seemed to do).[33] Or, in its inquiry into the law's so-called "racial definition" and "racial purpose[,]"[34] the court can incorporate the context of colonization and its lasting damage to Native peoples to acknowledge that ancestry is key to repairing those harms.[35] This latter approach—consistent with reparative-justice principles and the purpose of the Fifteenth Amendment—properly recognizes that Guam's "native inhabitants" classification is

---

[30] *See* ALBERT MEMMI, RACISM 33–38 (Steve Martinot trans., Univ. Minn. Press 2000) (1982) [hereinafter MEMMI, RACISM].

[31] *See id.*; Susan K. Serrano, *Collective Memory and the Persistence of Injustice: From Hawai'i's Plantations to Congress—Puerto Ricans' Claims to Membership in the Polity*, 20 S. CAL. REV. L. & SOC. JUST. 353, 368–69 (2011) [hereinafter Serrano, *Collective Memory*].

[32] *See, e.g.*, Complaint at 2, United States v. Guam, No. 17-00113 (D. Guam) (filed Sept. 29, 2017) (challenging Guam's Chamorro Land Trust Act under the Federal Fair Housing Act for allegedly discriminating against non-Chamorros because the Trust provides special homelands leases and benefits to "native Chamorros").

[33] *See* Davis v. Guam, No. 11-00035, slip op. at *8 (D. Guam Mar. 8, 2017) (deciding that, because Guam's law treats Chamorros "as a 'distinct people[,]' . . . the Guam Legislature has used ancestry as a proxy for race").

[34] Rice v. Cayetano, 528 U.S. 495, 515 (2000); *Davis*, 2017 WL 930825, at *8.

[35] *See* Susan K. Serrano, Eric K. Yamamoto, Melody Kapilialoha MacKenzie & David M. Forman, *Restorative Justice for Hawai'i's First People: Selected Amicus Curiae Briefs in* Doe v. Kamehameha Schools, 14 ASIAN AM. L.J. 217–22 (2007) [hereinafter Serrano et al., *Restorative Justice for Hawai'i's First People*] (quoting Amicus Brief of the Japanese American Citizens League of Hawai'i–Honolulu Chapter et al. in Support of Defendants-Appellees' Petition for Rehearing En Banc, Doe v. Kamehameha Sch./Bernice Pauahi Bishop Estate, 470 F.3d 827 (9th Cir. 2006), *cert. denied*, 550 U.S. 931 (2007) [hereinafter JACL–Hawai'i Amicus Br.]); *Rice*, 528 U.S. at 545 (Stevens, J., dissenting); *see generally* S. James Anaya, *International Human Rights and Indigenous Peoples: The Move Toward the Multicultural State*, 21 ARIZ. J. INT'L & COMP. L. 13, 15 (2004) (examining the international human rights multicultural model in which "the terms of integration of indigenous people into the social and political orders of states must allow them to continue to live with their cultures intact").

not motivated by the exclusion of others on account of race, but seeks to remedy the ongoing harms of U.S. colonization, particularly for the targeted Indigenous group.

Part I situates *Davis* in the broader context of today's conservative dismantling of rights for people of color and Native peoples through the co-optation of the rhetoric of "equality." Relatedly, this Part briefly describes the evolution of the courts' "ancestry as proxy for race" inquiry that views race as devoid of social and political meaning, and that treats recognition of ancestry as immediately suspect.

Part II introduces a theoretical approach for assessing ancestral classifications grounded in reparative justice. This approach rests on two important theoretical foundations: Albert Memmi's groundbreaking theory of how race and ancestry are used to justify colonization or political aggression; and the concept of reparative justice, rooted in the international human rights principle of self-determination. Together, these theories point to a more appropriate method for assessing ancestry-based classifications in the context of remedies for the harms of U.S. colonization. This Part concludes that, in assessing a colonized group's attempts to restore a measure of self-governance through a political-status plebiscite, the court's inquiry into the law's so-called "racial definition" and "racial purpose" "must incorporate the context of colonization and its resulting 'devastation'" of that group.[36]

Part III analyzes the parties' arguments and the district court's decision in *Davis* in light of these theoretical insights, and concludes that the Decolonization Registry Law's use of ancestry is a legitimate restorative response to colonialism's devastation in Guam. This approach is not only significant for the *Davis* case, but has broader relevance for groups seeking both traditional and innovative remedies for the persisting harms of colonization within the territorial confines of the United States.

I. *DAVIS V. GUAM* IN LEGAL-POLITICAL CONTEXT

Against the backdrop of ongoing assaults on affirmative action and social programs,[37] Arnold Davis challenged Guam's "native inhabitants" classification as a "categorical" violation of his civil rights.[38] His attorney, the well-known conservative advocacy group, the Center for Individual Rights,[39] accused Guam of singling out

---

36 *See* JACL–Hawai'i Amicus Br., *supra* note 35, at 219.

37 *See, e.g.*, Patricia Hurtado, *Harvard Fights Broad Conservative Assault on Affirmative Action*, Financial Advisor Magazine (Oct. 15, 2018), https://www.fa-mag.com/news/harvard-fights-broad-conservative-assault-on-affirmative-action-41364.html [https://perma.cc/7QDB-N7F6].

38 Pl.'s Mot. for Summ. J., *supra* note 5, at 1–2.

39 Among other campaigns, the Center for Individual Rights has successfully sued to eliminate affirmative-action programs in Texas, California, and Michigan. *See* Gratz v. Bollinger, 539 U.S. 244 (2003); Hopwood v. Texas, 236 F.3d 256 (5th Cir. 2000); Coal. for Econ. Equity v. Wilson, 110 F.3d 1431 (9th Cir. Apr. 8, 1997), *amended by* 122 F.3d 692 (Aug. 21, 1997) *and amended by* 122 F.3d 718 (Aug. 26, 1997); *see also Civil Rights*, CTR. INDIVIDUAL RTS., https://www.cir-usa.org/case-types/civil-rights [https://perma.cc/ZPF2-MH2V] (describing the organization's victories in the above-mentioned cases).

a "favored 'native' race" for preferential treatment.[40] Davis and his attorneys thus twisted civil rights to discount the history and impacts of colonization in Guam.

But why attack a little-known non-binding plebiscite in a non-self-governing colony of the United States? To understand why, the *Davis* case must be viewed as part of the decades-long effort to dismantle civil rights in the federal courts and state legislatures, and through voter initiatives.[41]

A. The Dismantling of Justice

Over the past forty years, a divided U.S. Supreme Court, supported by conservative think tanks and advocacy groups, has dismantled hard-earned civil rights for African Americans and other racial groups. It has done so:

> [U]nder the Fourteenth and Fifteenth Amendments by banning claims of institutional discrimination, invalidating affirmative action programs, limiting federal court powers to monitor school desegregation, rejecting proof of racially discriminatory impact in death-penalty sentencing, countermanding state voter redistricting designed to ensure that votes of minorities count, [and] invalidating disability rights legislation.[42]

---

[40] *Davis v. Guam*, CTR. INDIVIDUAL RTS., *supra* note 3.

[41] *See* COKORINOS, *supra* note 4, at 18, 21 (describing right-wing attempts to dismantle programs, laws, and policies aimed at racial and gender equality).

[42] Eric Yamamoto, Susan K. Serrano, Minal Shah Fenton & James Gifford, *Dismantling Civil Rights: Multiracial Resistance and Reconstruction*, 31 CUMB. L. REV. 523, 529 (2001) [hereinafter Yamamoto et al., *Dismantling Civil Rights*]; Eric K. Yamamoto, Susan K. Serrano & Michelle Natividad Rodriguez, *American Racial Justice On Trial—Again: African American Reparations, Human Rights, and the War on Terror*, 101 MICH. L. REV. 1269, 1288 n.86 (2003). *See also* Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356 (2001) (holding that sovereign immunity insulated public university from liability under the Americans with Disabilities Act); Bush v. Vera, 517 U.S. 952 (1996) (striking down Texas legislative districts as invidiously racist); Shaw v. Hunt, 517 U.S. 899 (1996) (holding that only residents of an allegedly gerrymandered legislative district had standing to sue); Adarand Constructors, Inc. v. Pena, v. 515 U.S. 200 (1995) (holding that all explicit racial classifications, whether invidious or restorative, must be reviewed under strict scrutiny); Miller v. Johnson, 515 U.S. 900 (1995) (holding that a showing that race was a dominant and controlling rationale in legislative redistricting is sufficient to state an actionable claim for relief); Missouri v. Jenkins, 515 U.S. 70 (1995) (striking down features of district court's desegregation order as beyond the scope of the court's remedial authority); Shaw v. Reno, 509 U.S. 630 (1993) (holding actionable a claim of race-based legislative redistricting); City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (striking down city policy requiring city construction contractors to subcontract a set quota of business to minority-owned businesses); McKleskey v. Kemp, 481 U.S. 279 (1987) (holding that statistics indicating racially disparate application of the death penalty do not themselves establish a violation of the Equal Protection Clause); Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256 (1979) (holding state civil-service hiring preference for military veterans did not deprive women of equal protection under the law because the law established a neutral preference for veterans

The Court has further eroded civil rights by annulling an individual's right to enforce federal agency disparate-impact regulations under Title VI of the Civil Rights Act,[43] "striking down [a] state constitutional provision [,] that provides Native Hawaiian elections as a measure of self-determination,"[44] rejecting a school district's attempts to achieve racial diversity,[45] undermining disparate-impact cases on behalf of people of color under Title VII of the Civil Rights Act,[46] and nullifying a key provision of the Voting Rights Act.[47]

Underlying today's retreat from justice is the right's strategic emphasis on "color-blind" constitutionalism, where race-conscious remedies are now "reverse racism" and assaults on "individual liberty."[48] With unacknowledged irony, the U.S. Supreme Court has invoked the Fourteenth Amendment and the idea of "color-blindness" in favor of whites to overturn governmental efforts to remedy the effects of long-standing discrimination against non-whites. For example, in *Adarand Constructors, Inc. v. Pena*, a reverse-discrimination case brought by white contractors,[49] the Court held that all racial classifications—including affirmative-action programs designed to remedy past discrimination—are subject to strict scrutiny under the Equal Protection Clause, and are, therefore, presumptively invalid.[50]

Treating racial groups as "fungible" rather than deeply dependent on historical and present-day socioeconomic context,[51] the Supreme Court also has sharply limited

---

of either sex); Washington v. Davis, 426 U.S. 229, 242–44 (1976) (upholding legality of police-recruiting procedures that have racially disparate outcomes, and holding that a law is not unconstitutional solely because it has a racially disproportionate impact, regardless of whether it reflects a discriminatory purpose). The Court also narrowly redefined the reach of the Constitution's Commerce Clause to block a congressional act civilly advancing women's rights to be free from violence, United States v. Morrison, 529 U.S. 598 (2000), and invalidated key parts of age discrimination legislation, Kimel v. Florida Bd. of Regents, 528 U.S. 62 (2000).

[43] *See* Alexander v. Sandoval, 532 U.S. 275 (2001).

[44] Yamamoto et al., *Dismantling Civil Rights*, *supra* note 42, at 529–30.

[45] *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007).

[46] *See* Ricci v. DeStefano, 557 U.S. 557 (2009).

[47] *See* Shelby Cty., Ala. v. Holder, 570 U.S. 529 (2013).

[48] Yamamoto et al., *Dismantling Civil Rights*, *supra* note 42, at 545. *See also* Cheryl I. Harris & Kimberly West-Faulcon, *Reading* Ricci*: Whitening Discrimination, Racing Test Fairness*, 58 UCLA L. REV. 73, 82 (2010) (contending that the ideological and doctrinal re-orientation that has constrained antidiscrimination law is not premised on the notion that "people of all races are equally vulnerable to discrimination; rather, the underlying racial frame is that present-day discrimination is largely a problem confronting whites").

[49] 515 U.S. 200, 247 n.5 (1995) (Stevens, J., dissenting).

[50] *Id.* at 230 (1995) (citing City of Richmond v. J.A. Croson, 488 U.S. 469, 493–94 (1989)) (other citations omitted) ("[A]ny individual suffers an injury when he or she is disadvantaged by the government because of his or her race, whatever that race may be."). *See also* Cedric Merlin Powell, *Justice Thomas,* Brown*, and Post-Racial Determinism*, 53 WASHBURN L.J. 451, 453 (2014) ("[E]quality essentially means the right to bring a reverse discrimination suit premised on the 'injury' caused by any race-conscious remedy.").

[51] *See* MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES:

race-conscious educational programs.[52] In *Parents Involved in Community Schools v. Seattle School District*,[53] for example, Chief Justice John Roberts turned *Brown*'s anti-racism mandate on its head to discount any difference between a student-assignment plan that supported systemic racial subordination and one that endeavored to dismantle it.[54] A conservative advocacy group has now sued Harvard University and the University of North Carolina at Chapel Hill to halt their race-conscious admissions programs—this time using Asian American plaintiffs.[55] And the Trump Administration's Department of Justice has pledged to investigate and sue universities over "policies deemed to discriminate against white applicants."[56]

This formalistic color-blind approach disregards the historic purpose and original meaning and intent of civil-rights laws, which took express account of the social and political significance of race.[57] The Fourteenth and Fifteenth Amendments, at the heart

---

FROM THE 1960S TO THE 1990S (2d ed. 1994) (debunking the idea that race is based on fixed, biological characteristics, and describing the process of racialization, in which races are formed and reformed and imbued with social meaning); *see also* Neil Gotanda, *A Critique of "Our Constitution is Color-Blind*,*"* 44 STAN. L. REV. 1 (1991) (criticizing the Supreme Court's reliance on conceptions of race that ignore social context and historical experience).

[52] While affirmative-action programs in higher education generally persist, the Court has tightly circumscribed the instances in which a racial classification is "narrowly tailored." *See* Fisher v. Univ. of Texas at Austin, 570 U.S. 297 (2013) (upholding "diversity" as a compelling interest, but further limiting the "narrow tailoring" prong of strict-scrutiny review); Gratz v. Bollinger, 539 U.S. 244 (2003) (striking down the University of Michigan's undergraduate race-conscious admissions program because it was not sufficiently narrowly tailored); Grutter v. Bollinger, 539 U.S. 306, 342 (2003) (upholding Michigan Law School's race-conscious admissions program, but suggesting that "governmental use of race must have a logical end point").

[53] 551 U.S. 701 (2007).

[54] *Id.* at 746–48 ("The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.").

[55] *See* Joan Biskupic, *Harvard Fight Could Redirect 40 Years of Affirmative Action*, CNN (Aug. 6, 2017, 3:34 AM), http://www.cnn.com/2017/08/05/politics/affirmative-action-harvard-justice-department/index.html [https://perma.cc/RP7D-UEBW]; Joseph P. Williams, *Sessions Says DOJ to Probe Harvard University on Affirmative Action*, U.S. NEWS (Oct. 6, 2017, 2:09 PM), https://www.usnews.com/news/politics/articles/2017-10-06/sessions-says-doj-to-probe-harvard-university-on-affirmative-action [https://perma.cc/FT7Q-CQTR] (noting that the same lawyer representing the anti-affirmative action plaintiffs against Harvard was the same attorney who represented Abigail Fisher against the University of Texas).

[56] Charlie Savage, *Justice Dept. to Take On Affirmative Action in College Admissions*, N.Y. TIMES (Aug. 1, 2017), https://nyti.ms/2hmhgRS (quoting an internal Department of Justice document that seeks attorneys to assist with "investigations and possible litigation related to intentional race-based discrimination in college and university admissions"). These distortions of civil rights reflect recent findings that a majority of whites believe that whites face discrimination, while a very small percentage say that they have actually experienced it. *See* Don Gonyea, *Majority of White Americans Say They Believe Whites Face Discrimination*, NPR (Oct. 24, 2017, 1:35 PM), http://www.npr.org/2017/10/24/559604836/majority-of-white-americans-think-theyre-discriminated-against [https://perma.cc/SRP7-JH8N].

[57] *See* H.R. Rep. No. 914, at 18 (1964), *reprinted in* 1964 U.S.C.C.A.N. 2393 (recognizing expressly that the "[m]ost glaring" discrimination against any minority group in America was

of the *Davis* case, were cornerstones of the Civil War Reconstruction that sought to rectify the immense burdens on African Americans who had just emerged from years of slavery and legalized oppression.[58] At one time used as key tools to eliminate state-sponsored systemic oppression against African Americans and other subordinated groups,[59] civil-rights laws now largely serve to safeguard the interests of whites.[60]

This co-optation of civil rights tightly constrains the rights of Indigenous peoples.[61] It does so in part by discounting the history of colonization—the confiscation of land, barring of language, suppression of identity, and loss of self-governance—and its harsh present-day consequences.[62] Once stripped of this historical and modern-day context, "programs to uplift indigenous people in their homeland [are] recast as simply wrong-headed 'racial preferences.'"[63] Politically, the success of these coordinated reverse-discrimination legal challenges, discussed below, threaten Indigenous efforts to restore a measure of self-determination and self-government.

B. Rice v. Cayetano*: Ancestry as Proxy for Race*

Davis's case is tightly tied to the conservative dismantling of the Native Hawaiian voting limitation in *Rice v. Cayetano*.[64] In *Rice*, a white American rancher, Harold Rice, appropriated the language of civil rights to challenge a requirement that individuals

---

against "Negroes[,]" who, "100 years after their formal emancipation," were "not accorded the rights, privileges, and opportunities which are considered to be, and must be, the birthright of all citizens").

[58] *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 247 (Stevens, J., dissenting).

[59] *See id.*

[60] *See* Yamamoto et al., *Dismantling Civil Rights, supra* note 42, at 545; Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1772 (1993).

[61] *See* Carole Goldberg, *American Indians and "Preferential" Treatment*, 49 UCLA L. REV. 943 (2002) (describing the ways in which non-Indians attack benefits for Native Americans using equal-rights rhetoric); *see also* Keith L. Camacho, *After 9/11: Militarized Borders and Social Movements in the Mariana Islands*, 64 AM. Q. 685, 700 (2012) (contending that the "major tenet of civil rights—that is, the equality of individuals within one nation—fails to consider concepts of sovereignty as they pertain to international law and to indigenous societies"); J. Kēhaulani Kauanui, *Colonialism in Equality: Hawaiian Sovereignty and the Question of U.S. Civil Rights*, 107 S. ATLANTIC Q. 635, 636 (2008) (arguing that the civil-rights paradigm is inadequate to address issues of sovereignty, nationhood, "nation-to-nation governance and land issues" for Native peoples). Rather than seeking equality under law or racial justice, Indigenous people seek a form of governmental sovereignty and to connect with their own knowledge systems, land, and life ways. *See* Yamamoto, *Colonizer's Story*, *supra* note 15.

[62] *See* Serrano et al., *Restorative Justice for Hawai'i's First People*, *supra* note 35, at 208–09.

[63] Eric K. Yamamoto & Catherine Corpus Betts, *Disfiguring Civil Rights to Deny Indigenous Hawaiian Self-Determination: The Story of* Rice v. Cayetano, *in* RACE LAW STORIES 566 (Rachel F. Moran & Devon Wayne Carbado eds., 2008).

[64] 528 U.S. 495 (2000).

be Native Hawaiian to vote for trustees to the Office of Hawaiian Affairs (OHA),[65] a semiautonomous organization created by the Hawai'i state constitution to manage certain funds and benefits for Native Hawaiians.[66] Rice argued that the voting structure unlawfully discriminated against non-Native Hawaiians in violation of the Fourteenth and Fifteenth Amendments to the U.S. Constitution.[67]

Proclaiming that "[a]ncestry can be a proxy for race[,]"[68] the U.S. Supreme Court held that the OHA voting structure violated the Fifteenth Amendment.[69] According to the Court, Hawai'i's law raised "grave concerns" because it "demean[ed] the dignity and worth of a person[,]" impermissibly "generat[ed] . . . prejudice and hostility[,]" and corrupted "the whole legal order democratic elections seek to preserve."[70] In striking down the voting limitation, the Court determined that, when considering the rights of Native Hawaiians, it must recount the immigration story of "many different races and cultures" to Hawai'i, and how those groups faced and overcame discrimination.[71] The Court implicitly assumed that Native Hawaiians are similarly situated to "Chinese, Portuguese, Japanese, and Filipinos[,]" who also had their "own history in Hawaii," their "own struggles with societal and official discrimination," their "own successes," and their "own role in creating the present society of the islands."[72] In listing Hawai'i's immigrants, the Court conspicuously omitted whites, as if European and American colonization never existed in Hawai'i.[73]

In similar fashion, the Court analogized Hawai'i's reparative law to a Jim Crow era "grandfather clause" that used ancestry to exclude African Americans from the vote.[74] In *Guinn v. U.S.*,[75] the Court in 1915 invalidated an Oklahoma law that imposed a literacy test as a voting qualification, but exempted individuals whose ancestors

---

[65] *See* Yamamoto & Betts, *supra* note 63, at 545, 549.

[66] *See id.* at 548. Among other things, OHA manages the income and proceeds from the "Kingdom lands" (commonly known as "ceded lands"), Native Hawaiian Government and Crown lands that were seized by the United States when it annexed Hawai'i. *See* NATIVE HAWAIIAN LAW: A TREATISE 79, 91 (Melody Kapilialoha MacKenzie et al. eds., 2015). When Hawai'i became a state, the United States transferred those lands to the State to be held in trust in part for the "betterment of the conditions of Native Hawaiians." *Id.* at 32–33. Thus, Hawai'i law furthered Native Hawaiian self-governance by limiting those eligible to serve as OHA trustees and to vote for OHA trustees to Hawaiians. *Id.* at 35. Hawaiians are defined as "any descendant of the aboriginal peoples inhabiting the Hawaiian Islands in 1778, and which peoples thereafter have continued to reside in Hawaii." HAW. REV. STAT. § 10-2 (2013).

[67] *See Rice*, 528 U.S. at 510.

[68] *Id.* at 514.

[69] *See id.* at 524.

[70] *Id.* at 517 (noting that such ancestral "tracing" "demeans the dignity and worth of a person[,]" and is inconsistent with "respect based on the unique personality each of us possesses").

[71] *Id.* at 506.

[72] *Id.*

[73] *See id.*

[74] *See id.* at 513–14 (citing Guinn v. United States, 238 U.S. 347 (1915)).

[75] 238 U.S. 347 (1915).

were entitled to vote prior to January 1, 1866—before the adoption of the Fifteenth Amendment.[76] In striking down the grandfather clause, the Court tried "in vain" to find any reason for the law other than the systematic exclusion of African Americans.[77] This, the *Rice* Court concluded, provided valuable guidance in assessing Hawaiʻi's Native Hawaiian voting limitation.[78]

By characterizing Native Hawaiians as simply another racial group, and equating Jim Crow racial exclusion to an effort to restore Native Hawaiian self-governance, the Court effectively erased the unique status of Native Hawaiians, the harms of U.S. colonization, and the present-day need to rectify those harms.[79] Moreover, because Native Hawaiians are not members of a federally recognized tribe,[80] and have no special relationship with the federal government,[81] laws singling them out are not legally permissible political classifications.[82] In this way, the Court "contract[ed] the legal definition of indigeneity . . . implying that the only other way indigenous status would carry legal significance under U.S. law would be as a racial designation."[83] Thus, for the Court, because the playing field was essentially leveled, the Native Hawaiian voting system was simply an illegal "racial preference[ ]" for Hawaiians and reverse racial discrimination against white American Freddy Rice.[84]

---

[76] *Guinn*, 238 U.S. at 364–65 ("But no person who was, on January 1st, 1866, or at any time prior thereto, entitled to vote under any form of government, or who at that time resided in some foreign nation, and no lineal descendant of such person, shall be denied the right to register and vote because of his inability to so read and write sections of such constitution.").

[77] *Rice*, 528 U.S. at 513 (citing *Guinn*, 238 U.S. at 364–65). The *Guinn* Court noted that the law does not expressly exclude any person because of race, but "inherently brings that result into existence since it is based purely upon a period of time before the enactment of the Fifteenth Amendment and makes that period the controlling and dominant test of the right of suffrage." 238 U.S. at 364–65. The Court concluded that it was "unable to discover how, unless the prohibitions of the Fifteenth Amendment were considered, the slightest reason was afforded for basing the classification upon a period of time prior to the Fifteenth Amendment." *Id.* at 365.

[78] *See Rice*, 528 U.S. at 513 (citing *Guinn*, 238 U.S. at 357).

[79] *See* Yamamoto & Betts, *supra* note 63, at 560–61, 566.

[80] *See* Rolnick, *supra* note 20, at 968 (citing *Rice*, 528 U.S. at 495).

[81] *See id.* at 997.

[82] *See Rice*, 528 U.S. at 518–20.

[83] Rolnick, *supra* note 20, at 1000. Legal scholar Addie Rolnick observed that *Rice* solidified the political classification doctrine's "oppositional framing," which treats Native American tribes "as political groups and 'Indian' as a political identity[,] . . . in opposition to racial groups and racial identities." *Id.* at 996. *Rice* therefore simultaneously discounted the role that race played in the colonization of tribal Indians and sharply limited the legal definition of "indigenous" to those who are members of federally recognized tribes. *See id.* at 996–97.

[84] Yamamoto & Betts, *supra* note 63, at 566–67; Susan K. Serrano & Breann Swann Nuʻuhiwa, *Federal Indian Law: Implicit Bias Against Native Peoples as Sovereigns*, *in* IMPLICIT RACIAL BIAS ACROSS THE LAW 217 (Justin D. Levinson & Robert J. Smith eds., 2012). The Court's analysis is rooted in the narrow biological definition of race. This limited view treats race as fixed, biologically determined and unconnected to culture, history, or social context. *See* Susan Kiyomi Serrano, Comment, *Rethinking Race for Strict Scrutiny Purposes:* Yniguez

Justice Stevens, in dissent, saw no similarity between voting systems "designed to exclude one racial class (at least) from voting" and "a system designed to empower politically the remaining members of a class of once sovereign, indigenous people."[85] The former, he contended, "recalls an age of abject discrimination against an insular minority in the old South[,]"[86] and the latter reflects a political "consensus determined to recognize the special claim to self-determination of the indigenous peoples of Hawaii."[87] Thus, for Justice Stevens, in light of Native Hawaiians' right to "compensation[,]" "self-determination[,]" and the "manifest purpose" of the Fifteenth Amendment, Hawai'i's reparative-justice voting scheme should be upheld.[88]

Rice opened the floodgates to other damaging lawsuits against Native Hawaiians and Pacific Islanders.[89] Using *Rice* as a starting point, non-Hawaiian plaintiffs successfully eliminated constitutional and statutory provisions requiring that Office of Hawaiian Affairs (OHA) trustees be Native Hawaiian,[90] challenged the allocation of benefits for Native Hawaiians by the OHA and the Hawaiian Homes Commission,[91] alleged that Native Hawaiians received "preferential treatment" under a variety of state programs,[92] challenged the real-property tax exemption granted to Native Hawaiian homestead leases,[93] and sued to dismantle the Kamehameha Schools' admissions policy favoring Native Hawaiian children.[94]

The *Rice* case's impact spread farther into the Pacific. In *Davis v. Commonwealth Election Commission*,[95] the Ninth Circuit Court of Appeals employed *Rice* to uphold the district court's decision to strike down a Commonwealth of the Northern Mariana Islands (CNMI) law restricting voting in certain elections to "persons of Northern

---

and the Racialization of English Only, 19 U. HAW. L. REV. 221, 234–35 (1997) [hereinafter Serrano, *Rethinking Race*]; *see also* Gotanda, *supra* note 51, at 4 (labeling this unconnected notion of race as "formal-race"). *But see* Gotanda, *supra* note 51, at 32 (arguing that linking racial categories to science erroneously suggests that race is a neutral, apolitical term, divorced from social content); Serrano, *Rethinking Race*, *supra*, at 236 (observing that "dominant paradigm of unalterable, biological race is inaccurate" because "it is based on false biological assumptions that have no scientific basis . . . [and] fail[s] to take into account the ways that race and racial categories are socially constructed").

85 *Rice*, 528 U.S. at 540 (Stevens, J., dissenting).

86 *Id.* at 546.

87 *Id.*

88 *Id.* at 528.

89 *See* Yamamoto & Betts, *supra* note 63, at 567–68.

90 *See* Arakaki v. Hawaii, 314 F.3d 1091 (9th Cir. 2002).

91 *See* Carroll v. Nakatani, 342 F.3d 934 (9th Cir. 2003).

92 Arakaki v. Lingle, 477 F.3d 1048, 1048 (9th Cir. 2007).

93 *See* Corboy v. Louie, 283 P.3d 695 (Haw. 2011).

94 *See* Doe v. Kamehameha Sch./Bishop Estate, 470 F.3d 827 (9th Cir. 2006), *cert. dismissed*, 550 U.S. 931 (2007). For a description of *Rice* and the cases that followed, see NATIVE HAWAIIAN LAW: A TREATISE, *supra* note 66, at 284–303.

95 844 F.3d 1087 (9th Cir. 2016) (holding that the voting limitation is race-based and violates the Fifteenth Amendment to the U.S. Constitution).

Marianas descent."[96] The law specified that only those of Northern Marianas descent could vote on proposed constitutional amendments that govern restrictions on the ownership of land, which is limited to Indigenous Chamorros and Carolinians.[97] Such voting limitations were put in place to protect CNMI's ancestry-based land-alienation provisions, which many fear are also at risk.[98]

By equating Indigenous reparative measures with invidious racial discrimination, these challenges discount the history of colonization and its lasting consequences. Along with *Rice*, these challenges form the backdrop for *Davis v. Guam*.

C. Davis v. Guam*: Ancestry as Invidious Racial Purpose*

In 2011, Arnold Davis, a white U.S. citizen and Guam resident, sued the Territory of Guam in federal district court, alleging that the territory unlawfully discriminated against him by prohibiting him from registering to vote in a political status plebiscite reserved for "native inhabitant[s] of Guam."[99] Guam law directs Guam's Commission on Decolonization to "ascertain the intent of the Native Inhabitants of Guam as to their future political relationship with the United States."[100] It also provides for a future plebiscite in which "Native Inhabitants of Guam" would choose between independence, free association with the United States, or statehood.[101]

The law defines native inhabitants as "those persons who became U.S. Citizens by virtue of the authority and enactment of the 1950 Guam Organic Act and descendants of those persons."[102] The "native inhabitants" classification includes mostly

---

[96] *Id.* at 1089–90. *See also* N. MAR. I. CONST. art. XII, § 4 (defining persons of Northern Marianas descent as having at least some degree of "Northern Marianas Chamorro or Northern Marianas Carolinian blood or a combination thereof" and deeming full-blooded those who were "born or domiciled in the Northern Mariana Islands by 1950"). The Northern Marianas Islands Constitution was amended in September 2013 to remove a provision requiring "at least one-quarter Northern Marianas Chamorro or Northern Marianas Carolinian blood." *See* 2013 N. Mar. I. H.L.I. 18-1.

[97] *See Davis*, 844 F.3d at 1090.

[98] *See* Brief for Intervenors or, in the Alternative, *Amici Curiae* the American Samoa Government and Congressman Eni F.H. Faleomavaega at 27–28, Tuaua v. United States, 788 F.3d 300 (D.C. Cir. 2015) (No. 13-5272). Importantly, the Covenant between the United States and the CNMI restricts the acquisition of land to those of Northern Marianas descent in order to preserve the people's culture and traditions, and to promote their economic advancement and self-sufficiency. *See* Wabol v. Villacrusis, 958 F.2d 1450, 1452 (9th Cir. 1990) (describing the land alienation provision of the Covenant).

[99] Defs.' Mot. for Summ. J., *supra* note 7, at 1.

[100] Davis v. Guam, 785 F.3d 1311, 1313 (9th Cir. 2015) (citing 1 GUAM CODE ANN. § 2105 (2000)).

[101] *Id.* (citing 1 GUAM CODE ANN. § 2110 (2000)).

[102] 3 GUAM CODE ANN. § 21001(e) (2000), *amended by* Guam Pub. L. No. 33-148 (2016). A descendant is "a person who has proceeded by birth, such as a child or grandchild, to the remotest degree, from any '*Native Inhabitant of Guam*,' . . . and who is considered placed

Indigenous Chamorros, but also includes multiracial and multi-ethnic populations who were present in Guam in 1950.[103] Guam is directed to conduct the plebiscite "if and when 70 percent of all eligible Native Inhabitants register."[104] It would then transmit the results of the plebiscite to the U.S. President, Congress, and the United Nations.[105]

Davis alleged that the law racially discriminated against him in violation of the Fourteenth and Fifteenth Amendments, the Voting Rights Act, and the Organic Act of Guam,[106] because it "exclude[d] those without the preferred ancestors or racial bloodline and bestow[ed] the right to vote effectively only on a favored race."[107] For Davis, any reference to ancestry automatically implicated race and thereby violated the Fifteenth Amendment; even if the classification "were not intended to, and did not have the effect of, favoring a particular race," it would violate the Fifteenth Amendment, "because it uses ancestry or bloodlines."[108] He additionally argued that native inhabitants were not a "political group" because "political groups are not defined by blood relationships."[109] Perhaps more importantly, Davis framed the case to appeal more broadly to anti-affirmative action advocates by equating the "native inhabitants" classification to the pernicious "one drop" rules of the post-Reconstruction U.S. South[110]:

> [Guam] intended to create a set of voters deemed eligible to vote by blood relations in the same way that other states decades ago used blood relations to unconstitutionally *deny* the right to vote. In those states, one drop of the wrong blood could disqualify a citizen from voting; on Guam, one drop of the preferred blood vests the right to vote. Both schemes are abhorrent to the Fifteenth Amendment.[111]

in a line of succession from such ancestor where such succession is by virtue of blood relations." 3 GUAM CODE ANN. § 21001(c) (2000).

[103] *See* Opposition to Plaintiff's Motion for Summary Judgment at 14, 21, Davis v. Guam, 2017 WL 930825 (D. Guam Mar. 8, 2017) (No. 11-00035) [hereinafter Opp. to Pl.'s Mot. for Summ. J.].

[104] *Davis*, 785 F.3d at 1313 (citing 1 GUAM CODE ANN. § 2110 (2000)).

[105] 1 GUAM CODE ANN. § 2105 (repealed/re-enacted by Pub. L. No. 25-106:10 (Mar. 24, 2000)).

[106] Davis v. Guam, No. 11-00035, 2017 WL 930825, at *1–2 (D. Guam Mar. 8, 2017).

[107] Pl.'s Mot. for Summ. J., *supra* note 5, at 7, 11 (contending that Guam's reference to descent violates the Fifteenth Amendment because it clearly "distinguish[es] among citizens based on race").

[108] Response in Opposition to Defendants' Motion for Summary Judgment at 4, Davis v. Guam, 2017 WL 930825 (D. Guam Mar. 8, 2017) (No. 11-00035).

[109] *Id.* at 5. *But see* Rolnick, *supra* note 20, at 967–68 (contending that Native groups are simultaneously racialized and have a special political relationship with the United States government).

[110] Reply in Support of Plaintiff's Motion for Summary Judgment at 4, Davis v. Guam, 2017 WL 930825 (D. Guam Mar. 8, 2017) (No. 11-00035).

[111] *Id.*

Guam framed the case as one rooted in broader conceptions of justice that embrace Guam's history and present-day colonization, the legitimacy of international law, and the United States' obligation to rectify past wrongs.[112] Guam argued that, although the case is "styled as a reverse discrimination case, this lawsuit has nothing to do with preventing race discrimination or safeguarding civil rights."[113] Instead, Guam contended, "[t]his case seeks to deny a multi-racial, multi-ethnic group of people, namely, the pre-1950 residents of Guam and their descendants, from effectively exercising their right to express by plebiscite their desires regarding their future political relationship with the United States of America."[114] For Guam, "[a]ttempting to disguise such an injustice beneath the cloak of civil rights is as shameful as it is transparent."[115]

Guam argued that the plebiscite law was instead a "temporal" classification that depended only on whether a person received U.S. citizenship by way of Guam's 1950 Organic Act.[116] Rather than racial exclusion, the law's purpose was to "implement the process of decolonization taken up in the first instance by Congress in Guam's Organic Act."[117] According to the Guam Legislature, the law's intent was to "permit the native inhabitants of Guam, as defined by the U.S. Congress' 1950 Organic Act of Guam to exercise the inalienable right to self-determination of their political relationship with the United States of America."[118]

The district court initially framed the case as one involving "the topic of self-determination of the political status of the island[,]" but noticeably omitted any analysis of Guam's self-determination, colonial history, or modern-day attempts to decolonize.[119] Devoid of that larger context, the court held that "native inhabitants" was a race-based classification[120] and, therefore, Guam's voting limitation violated the Fourteenth and Fifteenth Amendments.[121] Citing heavily to *Rice*, Judge Frances M. Tydingco-Gatewood proclaimed that Guam's voting qualification was "a proxy for race because it exclude[d] nearly all persons whose ancestors are not of a particular race."[122] While neutral on its face, Guam's classification had a clear "racial purpose": it "treated the Chamorro people as 'a distinct people.'"[123]

---

[112] *See* Defs.' Mot. for Summ. J., *supra* note 7, at 7–8.
[113] *Id.* at 1.
[114] *Id.*
[115] *Id.*
[116] *Id.* at 8.
[117] *Id.* at 11.
[118] *Id.* (quoting 3 GUAM CODE ANN. § 21000 (2000)).
[119] Davis v. Guam, No. 11-00035, 2017 WL 930825, at *1, *14 (D. Guam Mar. 8, 2017) (acknowledging "the long history of colonization of this island and its people, and the desire of those colonized to have their right to self-determination").
[120] *Id.* at *5.
[121] *See id.* at *11, *14.
[122] *Id.* at *6.
[123] *Id.* at *8. For a more in-depth critique of the district court's opinion, see *infra* Part III.

On appeal to the Ninth Circuit, Guam warned of the district court's "dangerous over-reading of *Rice*."[124] For Guam, *Rice* did not "invalidate[ ] a purely symbolic expression of self-determination, by a federally created class of people, in an unincorporated territory, which, by definition, is 'not destined for statehood,' and not bound in permanent union with the United States."[125] Moreover, Guam did not use ancestry as a "cover" or a "pretext" for racial discrimination, but sought to further the United States' commitment to Guam's decolonization.[126] The plebiscite "classified people according to whether they or their ancestors were present on Guam on the date the island was colonized by the United States . . . [and] in furtherance of Congress's self-proclaimed obligation under international law to facilitate the self-determination rights of a colonized people."[127]

Davis contended that Guam "engaged in definitional games" and used "ancestral tracing" as a substitute for race to "enforce a race-based voting restriction against citizens of the United States."[128] According to Davis, the classification is both facially race-based and infected with discriminatory intent: "The entire tenor of the debate" surrounding the plebiscite law, alongside legislative discussions of related "Chamorro-only" laws, "confirms that the plebiscite law was widely understood to have been enacted with the purpose of limiting the vote to Chamorro people."[129] With that framing, Davis depicted Guam's contemporary history as one in which "preferred" Chamorros routinely attempted to create race-based privileges exclusively for themselves.[130] As in *Rice*, by portraying Chamorros as simply another racial group, and by discounting the history of U.S. imperialism and militarization in the region,[131] Chamorros became "preferred" and "favored," rather than an Indigenous group with a unique need to rectify the damage of years of colonization.

The Ninth Circuit will soon decide whether Guam's Decolonization Registry Law unlawfully discriminates against white American Arnold Davis in violation of the Fifteenth Amendment.[132] If the court employs a formalist, ahistorical lens, and

---

[124] Opening Brief of Defendants-Appellants at 17, Davis v. Guam (No. 17-15719) (Aug. 31, 2017) [hereinafter Opening Br. of Defs.-Appellants].

[125] *Id.* at 1 (citation omitted).

[126] *Id.* at 11.

[127] *Id.* at 1.

[128] Response Brief for Appellee at 1, Davis v. Guam, No. 17-15719 (9th Cir. Nov. 21, 2017) [hereinafter Resp. Br. for Appellee].

[129] *Id.* at 36–37. *See also* Brief for the United States as *Amicus Curiae* Supporting Plaintiff-Appellee and Urging Affirmance at 10–16, Davis v. Guam, No. 17-15719 (9th Cir. Nov. 28, 2017) (arguing, among other things, that Guam's decolonization law uses ancestry as a proxy for race, and thereby intentionally discriminates based on race in violation of the Fifteenth Amendment).

[130] *See* Resp. Br. for Appellee, *supra* note 128, at 8.

[131] *Id.* at 1; *see also id.* at 33.

[132] The Ninth Circuit's oral argument was held on October 10, 2018. While both Fourteenth and Fifteenth Amendment claims are on appeal, this Article addresses primarily the Fifteenth Amendment claim.

determines that ancestry is always a proxy for race, then Guam's Decolonization Registry Law and many other remedial statutes meant to remedy the harms of U.S. colonization will be struck down. But *Rice* did not hold that ancestry is *always* a proxy for race. For this reason, it is crucial to explore the appropriate approach for determining whether, and under what circumstances, an *ancestral* classification would become a *racial* one. As explained below, the court should embrace a more contextual approach, consistent with the relevant case law, that recognizes that reference to ancestry or descent does not convert a classification into a race-based one, particularly when the initiative aims to remedy the harms of U.S. colonization.

II. A REPARATIVE JUSTICE APPROACH TO REMEDYING THE HARMS OF COLONIZATION

In its modern interpretation of Reconstruction-era civil-rights laws, the U.S. Supreme Court has defined "racial discrimination" as "that which singles out 'identifiable classes of persons . . . solely because of their ancestry or ethnic characteristics.'"[133] From this view, race refers only to ancestry or skin color, and has no political or social meaning;[134] mere recognition of descent is instantly suspect.[135] But as critical sociologists Michael Omi and Howard Winant recognize, race—based in part on ancestry—is continually created, shaped, and transformed by social and political forces, "thereby imparting [positive or negative] racial meaning to groups, social practices and events."[136] This racialization process is key to colonization's function.[137] Scholars worldwide recognize that colonizing forces exert control over land and resources, and legitimate that power, in part by disparaging Native peoples.[138] That vilification—characterizing colonized peoples as inferior and unworthy—takes many forms, including negative cultural imagery about the group and its ancestry.[139]

---

[133] Rice v. Cayetano, 528 U.S. 495, 515 (2000) (quoting Saint Francis Coll. v. Al-Khazraji, 481 U.S. 604, 613 (1987)). *See also id.* at 517 ("Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." (quoting Hirabayashi v. United States, 320 U.S. 81, 100 (1943))).

[134] *See id.* at 515.

[135] *See* Rolnick, *supra* note 20, at 1001–02.

[136] Serrano, *Collective Memory*, *supra* note 31, at 365–66 (quoting OMI & WINANT, RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990S 55–56 (2d ed. 1994)). From this view, race is socially constructed, value-laden, and changeable, and racial categories carry social and political significance and serve to legitimize the unequal allocation of resources. *See* OMI & WINANT, *supra*, at 55 (defining race as an "unstable and 'decentered' complex of social meanings constantly being transformed by political struggle"); Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 11 (1994) (describing race as socially fabricated by humans rather than created by natural differentiation).

[137] Serrano, *Collective Memory*, *supra* note 31, at 368.

[138] *See* MEMMI, RACISM, *supra* note 30, at 170–77.

[139] *See id.* at 190; Serrano, *Collective Memory*, *supra* note 31, at 368–69.

The restorative justice approach to remedying those material and cultural harms of colonization, therefore, must take into account that ancestry.

A. Ancestry and Race as Key to Colonization

International scholar Albert Memmi, "a Tunisian Jew and resister of French colonialism,"[140] incisively describes how race and ancestry are deployed to justify colonization or political "aggression."[141] Because the colonizer portrays itself as "civilized and law-abiding,"[142] it needs a mechanism for justifying to its people and the world its bald political takeover of another country and its people.[143] That mechanism is racism.[144] Memmi defines racism as "the generalized and final assigning of values to real or imaginary differences, to the accuser's benefit and at his victim's expense, in order to justify the former's own privileges or aggression."[145] "For Memmi, [then,] 'racism' . . . is not simple ignorance or skin color prejudice. Rather, [it involves the process of] characterizing people as 'different,' less-worthy, or less-human 'others' (threatening, uncivilized, inferior)"—often rooted in that groups' ancestry—"to make political 'aggression' [against the entire group] for economic or military reasons appear necessary."[146]

---

[140] Serrano, *Collective Memory*, *supra* note 31, at 368.

[141] *See* ALBERT MEMMI, DOMINATED MAN 186–95 (1968) [hereinafter MEMMI, DOMINATED MAN].

[142] JACL–Hawai'i Amicus Br., *supra* note 35, at 13.

[143] MEMMI, DOMINATED MAN, *supra* note 141, at 186; ALBERT MEMMI, THE COLONIZER AND THE COLONIZED 69–76 (Howard Greenfield trans., Orion Press 1965) (1957) [hereinafter MEMMI, COLONIZER]. *See also* Robert A. Williams, Jr., *Documents of Barbarism*: *The Contemporary Legacy of European Racism and Colonialism in the Narrative Traditions of Federal Indian Law*, 31 ARIZ. L. REV. 237, 261–77 (1989) (describing Memmi's framework in the context of the colonization of Native Americans).

[144] *See* MEMMI, RACISM, *supra* note 30, at 179.

[145] *Id.* at 169.

[146] Serrano et al., *Restorative Justice for Hawai'i's First People*, *supra* note 35, at 217 (citing amicus brief employing Memmi's framework). *See also* Juan F. Perea, *Fulfilling Manifest Destiny: Conquest, Race, and the* Insular Cases, *in* FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION, AND THE CONSTITUTION 140 (Christina Duffy Burnett & Burke Marshall eds., 2001) (applying Memmi's insights to the U.S. conquest of Puerto Rico); Richard Delgado & Jean Stefancic, *Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills?*, 77 CORNELL L. REV. 1258, 1259–60 (1992) (describing negative historical depictions of the major groups of color in the United States); Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1370 (1988) (contending that "the subordination of Blacks was rationalized by a series of stereotypes and beliefs that made their conditions appear logical and natural"); Williams, *supra* note 143, at 261–78 (employing Memmi's framework to analyze white society's aggression against Indian tribes).

Memmi describes four steps, or discursive strategies, used by European-derived cultures to justify the colonization of non-white races:

> (1) [s]tressing the real or imaginary differences between the racist and his victim[;] (2) [a]ssigning values to those differences, to the advantage of the racist and the detriment of his victim[;] (3) [t]rying to make them absolutes by generalizing from them and claiming that they are final[;] [and] (4) [j]ustifying any present or possible aggression or privilege.[147]

In other words, the colonizer underscores the real or imaginary biological or cultural differences between the accuser and victim "to intensify or cause . . . exclusion," and to place the victim outside of the polity, "or even outside humanity."[148] For example, "for Whites, the color and physical characteristics of Black people, which are made to signify a biological inferiority, constitute the very authorization to preside over them."[149]

As Memmi recognizes, biological differences, for the colonizer, are points of departure.[150] The colonizer places a value on those differences that automatically proves the inferiority of non-white peoples, and the concomitant superiority of whites.[151] Thus, the colonizer "ascribes to [its] victim a series of surprising traits, calling him incomprehensible, impenetrable, mysterious, strange, [and] disturbing."[152]

The colonizer totalizes those differences "until all of the victim's personality is characterized by the difference, and all of the members of [its] social group are targets for the accusation."[153] It then makes those differences absolute through time: no change is possible because the inferior races have always been and will always be this way.[154]

---

[147] MEMMI, DOMINATED MAN, *supra* note 141, at 186 (emphasis removed). *See also* MEMMI, COLONIZER, *supra* note 143, at 69–76 (describing the colonizer's use of racism); Williams, *supra* note 143, at 265 ("[T]he strategic use of difference to intensify the separation of peoples of color unites the colonizing discourses deployed by Europeans in all the lands they have invaded and conquered."); EDWARD W. SAID, CULTURE AND IMPERIALISM 9 (1994) ("[Colonialism and imperialism] are supported and perhaps even impelled by impressive ideological formations that include notions that certain territories and people *require* and beseech domination, as well as forms of knowledge affiliated with domination.").

[148] MEMMI, RACISM, *supra* note 30, at 171 (noting that "[t]he colonizer discriminates to demonstrate the impossibility of including the colonized in the community: because he would be too biologically or culturally different, technically or politically inept, etc.").

[149] *Id.* at 190.

[150] *Id.*

[151] *See id.* at 173.

[152] *Id.* at 176.

[153] *Id.* at 174.

[154] *See id.* at 176. *See also* Johnson v. M'Intosh, 21 U.S. 543 (1823) (Marshall, C.J.) (denying Native American claims to first-in-time title to land on racial grounds); ROBERT A. WILLIAMS, JR., LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE

Finally, using these negative characterizations, the colonizer justifies permanent aggression and colonial exploitation: the colonized deserves what he receives;[155] at the same time, the colonizer is relieved of responsibility.[156] In sum, "[u]nderneath its masks, racism is the racist's way of giving himself absolution."[157]

Thus, racism—based on cultural representations in part tied to ancestry—appears "not as an incidental detail, but as a consubstantial part of colonialism. It is the highest expression of the colonial system and one of the most significant features of the colonialist."[158] And this significant feature persists over time; "[n]ot only does [racism] establish a fundamental discrimination between colonizer and colonized, a *sine qua non* of colonial life, but it also lays the foundation for the immutability of this life."[159]

As described below, at the turn of the twentieth century, U.S. leaders described Chamorros as ignorant, childlike, easily controlled, immature, simple, and primitive.[160] These negative racialized characterizations served to justify U.S. colonial rule,[161] the confiscation of land,[162] de jure segregation,[163] and the outlawing of Chamorro cultural practices,[164] causing long-lasting negative impacts on Chamorros. As a result, in the 1950 Organic Act of Guam, Congress acknowledged its international obligations to restore to Guam's native inhabitants a measure of self-determination, while acknowledging that "the ultimate expression of self-determination had yet to occur."[165] Recognizing this congressional commitment, Guam's decolonization law seeks to facilitate the exercise of native inhabitants' "inalienable right to self-determination."[166]

LEGAL HISTORY OF RACISM IN AMERICA 47 (2005) (describing the Founding Fathers' view of Indian tribes as uncivilized and savage, as part of "a long established language of racism in America"); Rolnick, *supra* note 20, at 992 (asserting that the United States' relationship with Indian tribes "was shaped by a racialized assumption of Indian savagery").

[155] *See* MEMMI, RACISM, *supra* note 30, at 178–79.

[156] *See id.* at 179.

[157] *Id.* at 180. *See also* FRANTZ FANON, BLACK SKIN, WHITE MASKS 69 (Charles Lam Markmann trans., Pluto Books 1967) (1952) ("The feeling of inferiority of the colonized is the correlative to the European's feeling of superiority. Let us have the courage to say it outright: *It is the racist who creates his inferior*."); Jean-Paul Sartre, *Introduction*, *in* MEMMI, COLONIZER, *supra* note 143, at xxvi (explaining that the colonizer dehumanizes the colonized to exalt or exonerate himself).

[158] MEMMI, COLONIZER *supra* note 143, at 74.

[159] *Id.*

[160] *See infra* notes 219–30 and accompanying text.

[161] *See infra* notes 219–30 and accompanying text.

[162] *See infra* notes 219–30 and accompanying text.

[163] *See infra* notes 219–30 and accompanying text.

[164] *See infra* notes 231–55 and accompanying text; *accord* Rolnick, *supra* note 20, at 967 (observing that, similarly, "Indian racialization has drawn on ideas about culture, religion, savagery, skin color, and ancestry to justify an unequal distribution of power, land, and rights").

[165] Opp. to Pl.'s Mot. for Summ. J., *supra* note 103, at 17.

[166] 3 GUAM CODE ANN. § 21000 (2000), *amended by* Guam Pub. L. No. 33-148 (2016).

B. Reparative Justice Informed by Principles of Self-Determination

Meaningful decolonization thus "entails repairing the harms suffered by those who have experienced systemic oppression according to their self-shaped notions of reparation."[167] This type of repair, or "reparative justice," focuses on mending breaches in the polity by healing the persisting wounds of communities harmed.[168] Its goal is to ascertain and respond to groups' self-determined ideas of injury and remedy in order to build new relationships "as focal points for fostering an interest-convergence among the victims of injustice . . . and society itself."[169] As legal scholar Eric Yamamoto asserts, "[b]ecause the wounds are the material and psychological harms of injustice, the prescriptions for healing those wounds must be informed by justice[,]" shaped by both those harmed and the larger society.[170] Similarly, legal scholar Martha Minow contends that reparative justice for victims of mass violence should embody the notion of restorative justice "to repair the harms and to institute future changes to correct the injustice."[171] For Indigenous legal scholar Rebecca Tsosie, "self-determination provides the baseline requirement for an effective theory of reparative justice."[172]

Reparative justice, informed by principles of self-determination, thus requires us to pay close attention to the proactive-justice claims of those harmed by the injustice. Legal scholar Carleton Waterhouse maintains that effective reparative-justice efforts should focus on victims' material needs and well-being,[173] and offer those victims a central role in the design and implementation of schemes to repair harms to their political autonomy.[174] This kind of "[d]eference to victims respects their rights to personhood and self-determination."[175] In the context of U.S. colonization,

---

[167] Susan K. Serrano, *Elevating the Perspectives of U.S. Territorial Peoples: Why the* Insular Cases *Should Be Taught in Law School*, 21 J. GENDER, RACE & JUST. 11 (forthcoming 2018) [hereinafter Serrano, *Elevating the Perspectives*]. *See also* Tsosie, *supra* note 27, at 245.

[168] *See* Yamamoto et al., *supra* note 27, at 16.

[169] *Id.* at 4.

[170] *Id.* at 39. *See also* Eric K. Yamamoto, Miyoko Pettit-Toledo & Sarah Sheffield, *Bridging the Chasm: Reconciliation's Needed Implementation Fourth Step*, 15 SEATTLE J. SOC. JUST. 109, 145 n.159 (2016) (noting that "[r]eparative justice is deeply rooted in international human rights norms that not only seek to prevent gross violations but also to repair the damage already inflicted").

[171] Tsosie, *supra* note 27, at 249 (citing MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE 91–117 (1998)).

[172] *Id.* at 253. *See also* D. Kapua'ala Sproat, *Wai Through Kānāwai: Water for Hawai'i's Streams and Justice for Hawaiian Communities*, 95 MARQ. L. REV. 127, 172 (2011) (noting that "a restorative justice approach informed by principles of self-determination" is "particularly apt in light of the ravages of colonization").

[173] *See* Waterhouse, *supra* note 27, at 268.

[174] *See id.* at 267–70.

[175] Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22

the damage to a people's self-determination should similarly be repaired according to the colonized peoples' sense of what is needed.

Thus, reparative justice for U.S. territorial peoples may entail repairing long-standing imbalances of power and agency, and redressing multiple political, economic, cultural, and social harms.[176] For Indigenous inhabitants of the territories, in particular, the preservation of their deep connections to land (and where applicable, the return of land), the reclaiming of knowledge systems, language, and life ways, and the regeneration of self-government, are also central to their self-determination.[177] As Tsosie notes, reparative justice for Indigenous peoples "ought to engage Native normative frameworks of justice because, for Native peoples, reparative justice is a process that is simultaneously emotional and spiritual, political and social."[178] As she observes, however, no single theory of reparative justice "can fit all cultures, all nations, and all peoples."[179] Instead, "the theory will differ depending on the particular historical context and cultural framework that applies."[180]

Given this reality, and because ancestry was integral to U.S. colonialism,[181] Chamorro "political efforts to rectify the devastation of [that] colonization must address . . . ancestry as part of the restoration process."[182] Justice Stevens expressly acknowledged the import of this analysis in assessing Native Hawaiian programs: principles of self-determination and "compensat[ion] for past wrongs" require considering Indigenous ancestry.[183] Employing such an inquiry ensures an appropriate

---

HARV. C.R.-C.L. L. REV. 323, 387, 397 (1987) (contending that redress should always look "to victims for guidance").

[176] *See, e.g.*, Pedro A. Malavet, *Reparations Theory and Postcolonial Puerto Rico: Some Preliminary Thoughts*, 13 BERKELEY LA RAZA L.J. 387, 391 (2002) (employing a "repair" paradigm to envision ways to construct "local political power for Puerto Ricans, and to create a viable Puerto Rican economy that supports real equal opportunity . . . thus repairing the legacy of political, economic, and psychological colonization by the United States"); Ediberto Roman, *Reparations and the Colonial Dilemma: The Insurmountable Hurdles and Yet Transformative Benefits*, 13 BERKELEY LA RAZA L.J. 369, 384 (2002) (suggesting that a transformative reparations effort for the people of the U.S. territories should first focus on exposure and acknowledgment of the wrongs committed, and should "use the commonalities of wrongs to coalesce and form formidable political efforts" in a continuing effort to support territorial peoples' human rights).

[177] *See* Camacho, *supra* note 61, at 700 ("Construed as cultural, economic, or spiritual connections to land, Chamorro proponents of indigenous rights discourses have long contested [American multiculturalism] in favor of Chamorro-centered modes of identity, nationhood, and politics."); Tsosie, *supra* note 27, at 236 (noting that the "[r]epatriation of land is central to Indigenous self-determination, and is fundamentally linked to the political and cultural sovereignty of Indigenous peoples").

[178] Tsosie, *supra* note 27, at 253 (interior quotes omitted).

[179] *Id.*

[180] *Id.* at 253–54.

[181] *See* Serrano et al., *Restorative Justice for Hawai'i's First People*, *supra* note 35, at 221.

[182] JACL–Hawai`i Amicus Br., *supra* note 35, at 13.

[183] Rice v. Cayetano, 528 U.S. 495, 528, 533–35 (2000) (Stevens, J., dissenting).

nexus between the historical harm and the present-day remedy. To do otherwise would foreclose modern-day recognition of that group's historically rooted self-determination rights.[184]

In the context of repair for harms of colonization, courts should therefore conduct a "context-specific inquiry"[185] to determine whether the ancestral classification serves to remedy the damage of colonization.[186] As Justice Stevens recognized, the U.S. Supreme Court has historically viewed voting laws designed to exclude a racial group "through a specialized lens—a lens honed in specific detail to reveal the realities of time, place, and history behind the voting restrictions being tested."[187] Implicit in Justice Stevens's statement is that all ancestral classifications must also be viewed through a specialized—or contextual—lens. Thus, in assessing a colonized group's attempts to restore a measure of self-governance through a political status plebiscite, a court's inquiry into the program's so-called "racial definition" and "racial purpose" "must incorporate the context of colonization and its resulting devastation of the Native people."[188] In other words, in examining Guam's attempts to facilitate Congress's self-proclaimed international law obligation to advance native inhabitants' self-determination, the Ninth Circuit should not tightly limit its inquiry, as the district court did, to "whether a challenged program effectively excludes other groups."[189] Instead, the court must ask if the plebiscite's use of ancestry is crafted as a restorative response to colonialism's devastation.[190]

That very inquiry is the jurisprudential foundation of *Morton v. Mancari*,[191] in which the U.S. Supreme Court found a preference for Native American ancestry in Bureau of Indian Affairs employment decisions to be a "political" restorative measure and therefore legitimate, even though race was involved.[192] The fact that the Indigenous

---

[184] Opening Br. of Defs.-Appellants, *supra* note 124, at 2.

[185] *Id.* at 17.

[186] *See id.*

[187] *Rice*, 528 U.S. at 540 (Stevens, J., dissenting). *See also* Guinn v. United States, 238 U.S. 347, 355 (1915) (expressly considering the history of discrimination against African Americans in Oklahoma in its decision to strike down Oklahoma's racially exclusionary grandfather clause).

[188] JACL–Hawai'i Amicus Br., *supra* note 35, at 219. *See also Rice*, 528 U.S. at 545 (Stevens, J., dissenting); Anaya, *supra* note 35, at 15.

[189] JACL–Hawai'i Amicus Br., *supra* note 35, at 220.

[190] This approach is equally apt for analyzing Davis's Equal Protection claim. For the same reasons, when assessing a colonized group's attempts to restore a measure of self-governance, the court should ask if the law's use of race or ancestry is compelling in that it does not vilify other racial groups (treating them as racially inferior or uncivilized) and, most importantly, is crafted as a restorative response to colonialism's devastation.

[191] 417 U.S. 535 (1974).

[192] *See id.* at 553 n.24; *see also* Carole Goldberg, *What's Race Got to Do With It?: The Story of* Morton v. Mancari, *in* RACE LAW STORIES 237, 241 (Rachel F. Moran & Devon Wayne Carbado eds., 2008) (observing that the Indian Reorganization Act expressly included blood quantum requirements).

hiring practice excluded other racial groups was not determinative.[193] Indeed, ancestry had to be an integral factor in the political restoration process because ancestry "had been key originally in the United States's justification for the confiscation of land,"[194] "the creation of guardian-ward reservations,"[195] and the destruction of culture and self-governance (the savage and uncivilized Natives had to be conquered and then watched over).[196]

That analysis also found support in the jurisprudential underpinnings of *Wabol v. Villacrusis*.[197] There, the Ninth Circuit held that ancestry-based restrictions on certain acquisitions of land in the Commonwealth of the Northern Mariana Islands were "race-based" but were nevertheless lawful restorative measures to promote the economic advancement and self-sufficiency of formerly colonized peoples.[198] For the court, interposing the Equal Protection Clause in that context would be impractical and anomalous because it would lead to "the loss of [Native] land, [and the Native People's] cultural and social identity," and "force the United States to break its pledge to preserve and protect NMI culture and property."[199]

---

193 *See Mancari*, 417 U.S. at 544 n.17, 545, 553–54 (acknowledging that the Indian "preference" would disadvantage non-Indian applicants).

194 JACL–Hawai'i Amicus Br., *supra* note 35, at 220–21.

195 *Id.*

196 *See* Johnson v. M'Intosh, 21 U.S. 543, 573 (1823) (justifying the confiscation of Native American land because "the character and religion of its inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendency"); DAVID H. GETCHES ET AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW 103 (5th ed. 2005) (asserting that race was the justification by which American Indians were deemed "incapable of . . . assimilation" and a "challenge to white [civilized] society"); Bethany R. Berger, *Red: Racism and the American Indian*, 56 UCLA L. REV. 591, 598 (2009) (tracing the use of racism to shape U.S. Indian policy and concluding that throughout the various eras, "tribes [were] reinscribed as inferior, limited, and defined by their race to justify limiting tribal independence and controlling Indian people"); Rolnick, *supra* note 20, at 1026 (contending that "[e]very aspect of the Indian political relationship has been shaped by a racialized definition of Indians, from the trust relationship to the recognition of separate jurisdiction to the question of which groups qualify as Indian tribes"); Williams, *supra* note 143, at 262, 277 (describing the United States' use of racism to justify domination of Indians); *see also* Harris, *supra* note 60, at 1715 (describing how race was used to justify U.S. conquest of Indians and slavery of African Americans).

197 958 F.2d 1450 (9th Cir. 1990).

198 *See id.* at 1451–52 (explaining that the purpose of section 805 of the Covenant to Establish a Commonwealth in Political Union with the United States of America was "'to protect [the people] against exploitation and to promote their economic advancement and self-sufficiency' and to preserve the islanders' culture and traditions, which are uniquely tied to the land") (alteration in original).

199 *Id.* at 1462 (determining that equal access to race-based land ownership was not a fundamental right in CNMI). The court declared that "[t]he Bill of Rights was not intended to interfere with the performance of our international obligations. Nor was it intended to operate as a genocide pact for diverse native cultures." *Id. See also* Craddick v. Territorial Registrar

Importantly, a law based on this deeply reparative justice approach does not seek to vilify, stereotype, or exclude based on race.[200] It is not a pretext or "cover" for invidious racial discrimination.[201] Unlike the white-imposed ancestry-based voting law in *Guinn v. U.S.*, which served only to exclude African Americans,[202] a law that has at its core the restoration of self-determination for a colonized people is not converted into one that merely aims to benefit one racial group over another.[203] Instead, such a reparative law is based on the notion that ancestry served to justify the colonial exploitation and differential treatment of Native peoples.[204] A Native group's use of ancestry—as part of a restorative response to colonialism's devastation—therefore appropriately connects that harm and the needed remedy.

---

of Am. Sam., 1 A.S.R.2d 10, 14 (Am. Sam. App. Div. 1980), *available at* http://www.asbar.org/index.php?option=com_content&view=article&id=641:1asr2d10&catid=50&Itemid=254 [https://perma.cc/PG8L-G2XC] (holding that the preservation of American Samoan culture constituted a compelling interest to uphold ancestry-based land alienation, and noting that the U.S. government has consistently acknowledged the importance of such restrictions); Rose Cuison Villazor, *Blood Quantum Land Laws and the Race Versus Political Identity Dilemma*, 96 CAL. L. REV. 801, 806 (2008) (analyzing *Wabol* and *Craddick* to articulate a "retheorization of equal protection law that would make it more accommodating of measures designed to facilitate the self-determination rights of all indigenous peoples in the United States" by "expanding the law's interpretation of the meaning of political indigeneity"). Villazor recommends a closer analysis of U.S. territorial blood quantum land laws, "considering in particular their colonial origins and how the property laws promote the indigenous peoples' right of self-determination." *Id.* at 824. In light of past and present colonialism in the territories, "these land laws facilitate a measure of political control over the indigenous peoples' social, economic and cultural developments" and therefore should "be held to promote a political and not racial purpose." *Id.* My approach shares some aspects of Villazor's "political indigeneity" framework, particularly her emphasis on the history of colonization and Indigenous self-determination; but rather than seeking to expand the meaning of "political," I explore a reparative approach that takes account of ancestry.

[200] *See* Opening Br. of Defs.-Appellants, *supra* note 124, at 11.

[201] *Id.*

[202] *See* Guinn v. United States, 238 U.S. 347, 364–65 (1915).

[203] *See* Opening Br. of Defs.-Appellants, *supra* note 124, at 16–17, 22.

[204] *See* MEMMI, RACISM, *supra* note 30, at 190–91. Rolnick articulates a theoretical framework that acknowledges that "Indianness" is both racial and political: Indians belong to a group that has been racialized and that has a political and historical relationship with the United States. Rolnick, *supra* note 20, at 967, 1026. Her framework embraces *Mancari*'s "political classification" principle, but advances a conceptual reframing of both racial Indianness (as more than simple skin color or ancestry) and political Indianness (as more than simply a matter of civil participation). *See id.* at 967, 1028. Her approach uncovers the "cyclical relationship between Indian racialization and Indian political status[,]" and "facilitates consideration of how tribal political rights counteract anti-Indian racism." *Id.* at 967–68. My framework shares some aspects of Rolnick's approach, particularly her examination of the deep connections between race and indigeneity, but instead of inquiring into the political-classification doctrine, I examine a reparative approach—in the context of non-tribal Native peoples—to remedying the harms of colonization by taking account of ancestry.

III. A REPARATIVE JUSTICE ANALYSIS OF *DAVIS V. GUAM*

This "specialized" analysis is starkly missing, however, from the district court's constricted "ancestry as proxy for race" approach in *Davis*.[205] To uncover Guam's so-called "invidious discriminatory purpose," the district court employed a narrow "historical background" inquiry that focused tightly on the events leading up to the law's passage,[206] but ignored the historical injuries the law sought to remedy.[207] In the absence of that historical context, the court simply combed the committee reports of related laws and bills for any mention of ancestry as an indicator of invidiousness.[208] In a bill about voter registration and educational campaign programs, for example, the Guam Legislature referred to "'Chamorro' self-determination."[209] In a round table meeting regarding another bill that did not become law, a legislator expressed her desire that the plebiscite vote be limited to Chamorros as a measure of their self-determination.[210] The court also noted that the "Native Inhabitants" definition was "nearly identical" to the "Native Chamorro" definition in the Chamorro Land Trust Act.[211] Thus, according to the court, because Guam "used ancestry as a racial definition and for a racial purpose[,]"[212] Guam's voting restriction violated Davis's Fifteenth Amendment rights.[213]

Both Davis and the district court ignored the "historical background" of the law itself; that it was enacted as a restorative response to U.S. colonization.[214] That colonization was carried out using race and ancestry to destabilize and dehumanize the Chamorro people as a means of control.[215] Indeed, the United States deployed all four

---

205 Davis v. Guam, No. 11-00035, 2017 WL 930825, at *4 (D. Guam Mar. 8, 2017).

206 *Id.* at *4, *7–8. *See also* Arlington Heights v. Metro. Housing Dev. Corp., 429 U.S. 252, 266–67 (1977) (noting that, in determining whether "invidious discriminatory purpose was a motivating factor" in a governmental decision, the court may consider "[t]he historical background of the decision . . . particularly if it reveals a series of official actions taken for invidious purposes[,]" and "[t]he specific sequence of events leading up to the challenged decision[,]" among other things).

207 *See* Reply Brief of Defendants-Appellants at 11–13, Davis v. Guam No. 17-15719 (Dec. 21, 2017) [hereinafter Reply Br. of Defs.-Appellants].

208 *See Davis*, 2017 WL 930825, at 7–11.

209 *Id.* at 1. According to that bill, "the registration method and educational campaign programs for the Plebiscite were to be developed in consultation with the 'Commission on Decolonization for the Implementation and Exercise of *Chamorro* Self Determination.'" *Id.* (quoting Guam Pub. L. No. 31-92 (May 20, 2011)).

210 *See id.* at 9 (referring to Defendants' argument which utilized then-Senator Tina Mura Banes's statements to support their claim that the plain meaning of a statute wins over statements of "individual lawmakers").

211 *Id.* at 10. *See* 21 GUAM CODE ANN. §§ 75101–75117 (2000).

212 *Davis*, 2017 WL 930825 at 8.

213 The court also held that the plebiscite law violated Davis's Fourteenth Amendment rights. *See id.* at 14.

214 *See* Reply Br. of Defs.-Appellants, *supra* note 207, at 11–13.

215 *See* Julian Go, *"Racism" and Colonialism: Meanings of Difference and Ruling Practices in America's Pacific Empire*, 27 QUAL. SOC. 35, 41–44 (2004).

of Memmi's discursive strategies to justify the colonization of the Chamorro people.[216] After the United States acquired Guam by Spanish cession in 1898 following the Spanish-American War,[217] the U.S. Navy took total control over the island and governed it for fifty years.[218] To the newly established U.S. government in Guam, the Chamorro people were "poor, ignorant, very dirty in their habits, but gentle and very religious . . . . They [were] like children, easily controlled and readily influenced by example, good and bad . . . ."[219] U.S. naval officials viewed them as "lazy,"[220] "immature,"[221] and "'incapable' of governing themselves."[222] At the same time, they were "a happy, careless people,"[223] who possessed no "ambition or the desire for change or progress."[224] A naval governor of Guam similarly called them

---

[216] About 4,000 years ago, the ancestors of the Chamorro people arrived in the Marianas Islands. *See* Tiana R. Na'puti & Michael Lujan Bevacqua, *Militarization and Resistance from Guåhan: Protecting and Defending Pågat*, 67 AM. Q. 837, 842 (2015). A matriarchal society, the Chamorro people are deeply connected to their ancestors, "for they believe their spirits, *I taotaomo'na*, are omnipresent in the air, land, ocean and all dimensions of life." LisaLinda Natividad & Victoria-Lola Leon Guerrero, *The Explosive Growth of U.S. Military Power on Guam Confronts People Power: Experience of an Island People under Spanish, Japanese and American Colonial Rule*, 8 ASIA-PAC. J. 1, 3 (2010). Colonization and dispossession for over 400 years under Spain, Japan, and the United States hastened the near-demise of Chamorros, resulting in the loss of cultural practices, traditions, and language, and the manifestation of unresolved trauma. *See* Julian Aguon, Comment, *Other Arms: The Power of a Dual Rights Legal Strategy for the Chamoru People of Guam Using the Declaration on the Rights of Indigenous Peoples in U.S. Courts*, 31 U. HAW. L. REV. 113, 126–27 (2008) [hereinafter Aguon, *Other Arms*]; Natividad & Guerrero, *supra*, at 3; Jon M. Van Dyke et al., *Self-Determination for Nonself-Governing Peoples and for Indigenous Peoples: The Cases of Guam and Hawai'i*, 18 U. HAW. L. REV. 623, 625 (1996).

[217] *See* Treaty of Paris, U.S.-Spain, art. I–III, Dec. 10, 1898, 30 Stat. 1754, 1755–56 (concluding the Spanish-American War and ceding Puerto Rico, Cuba, Guam, and the Philippines to the United States).

[218] *See* ROBERT F. ROGERS, DESTINY'S LANDFALL: A HISTORY OF GUAM 224 (1995); Anthony (T.J.) F. Quan, *"Respeta I Taotao Tano": The Recognition and Establishment of the Self-Determination and Sovereign Rights of the Indigenous Chamorros of Guam Under International, Federal, and Local Law*, 3 ASIAN-PAC. L. & POL'Y J. 3, 70 (2002).

[219] Laurel Anne Monnig, "Proving Chamorro": Indigenous Narratives of Race, Identity, and Decolonization on Guam 83 (2007) (unpublished Ph.D. dissertation, University of Illinois at Urbana–Champaign) (on file with author) (quoting the 1904 comments of U.S. Commander and Naval Governor G.L. Dyer). *See also* Go, *supra* note 215, at 43 (describing Governor Dyer in 1904 as stating that Chamorro people "lead lives of Arcadian simplicity and freedom from ambition or desire for change or progress").

[220] Go, *supra* note 215, at 41 (describing the second governor of Guam Seaton Schroeder's proclamation that "the Chamorros showed certain 'vices' such as 'laziness,' but he stressed that this was due to the remote and isolated context in which the Chamorros lived").

[221] Monnig, *supra* note 219, at 92.

[222] *Id.*

[223] Go, *supra* note 215, at 42.

[224] ARNOLD H. LEIBOWITZ, DEFINING STATUS: A COMPREHENSIVE ANALYSIS OF UNITED STATES TERRITORIAL RELATIONS 319 (1989).

"ideally simple and childlike"[225] and "happy and contented"[226] because of their remoteness from "time [and] modernity."[227] President McKinley commanded that the U.S. Navy's "mission, with respect to the Chamorro, [be] one of 'benevolent assimilation.'"[228] This approach treated Chamorros as "diseased . . . primitive, . . . illiterate, . . . amoral,"[229] and "sick . . . condition[s] that required modern, Western intervention to survive."[230]

Based on these value-laden and racialized representations, the United States easily controlled the population for its own economic, political, and military advantage.[231] The United States confiscated Chamorro homelands,[232] converted Guam into a strategic military outpost,[233] and destabilized Chamorro culture and language in an effort to "civiliz[e]" and "Americaniz[e]" Chamorros for U.S. military gain.[234] Indeed, according to a naval governor of Guam, "colonial governance should attend to the

---

225 Go, *supra* note 215, at 46 (describing Governor Schroder's characterization of the Chamorros). *See also id.* at 54 (quoting the Governor of Guam in 1905 as declaring, "[t]his is purely an agricultural community. It would be of doubtful advantage to attempt to educate them in subjects likely to induce feelings of restlessness and dissatisfaction with their simple lives").

226 *Id.* at 51.

227 *Id.* ("Isolated from time, modernity, and corrupt foreign influences, the Chamorros and Samoans were already happy and contented . . . ."). In this way, Chamorros were often romanticized by U.S. decision-makers. *See id.* at 42 (reporting that Guam's Naval governor in 1904 "asserted that while the Chamorros were sometimes lazy, they were at the same time a 'peaceful, good-natured, law-abiding people, industrious in their own way'").

228 Jonathan Fanning, "We Flow Like Water": Contemporary Livelihoods and the Partitioning of the Self Among the Chamorro of Guam 16 (Spring 2015) (unpublished M.A. thesis, Colorado State University) (on file with author), *available at* https://mountainscholar.org/bitstream/handle/10217/167041/Fanning_colostate_0053N_13009.pdf?sequence=1&isAllowed=y. *See also* Anne Perez Hattori, Colonial Dis-Ease: U.S. Navy Health Policies and the Chamorros of Guam, 1898–1941 159 (Dec. 2004) (unpublished Ph.D. dissertation, University of Hawai'i) (observing that a key part of the United States' colonial mission was the "rehabilitation of the Chamorro race" to serve the interests of the Naval government).

229 *See* Hattori, *supra* note 228, at 72 (explaining that naval policies viewed American personnel on Guam as the binary opposite: healthy, modern, literate, and moral).

230 Fanning, *supra* note 228, at 16.

231 *See* Go, *supra* note 215, at 52 (quoting the Governor of Guam in 1904 as declaring that the political system in Guam was "appropriate and practical, 'thanks to the docile temperament of a gentle people, their respect for law and order and their confidence in the integrity of the officers . . . appointed to care for them and their welfare'").

232 *See* Michael P. Perez, *Pacific Identities Beyond US Racial Formations: The Case of Chamorro Ambivalence and Flux*, 8 SOC. IDENTITIES 457, 459 (2002) [hereinafter Perez, *Pacific Identities*] (discussing the U.S. acquisition of Chomorro ancestral land during and after World War II).

233 *See* Na'puti & Bevacqua, *supra* note 216, at 843.

234 *See* Hattori, *supra* note 228, at 78–81 (maintaining that Americanization programs on Guam "ultimately served the interests of the military" by protecting the health of the personnel and validating their colonial presence while positioning them as the rescuers of an underprivileged race).

'welfare' of the Chamorros, but only because the natives' welfare in turn secured the welfare of the navy base."[235] Thus, the United States simultaneously sought to "civilize" Chamorros, but denied them U.S. citizenship,[236] civil rights and liberties,[237] and the ability to participate in the government that controlled them.[238]

More broadly, the United States used race and ancestry to justify its conquest and subordination of territorial peoples throughout its newly expanded empire.[239] The U.S. government viewed territorial peoples as "alien,"[240] "ignorant,"[241] and "semi-civilized."[242] The territories were viewed as "far off, not contiguous to the continent, densely populated, unamenable to colonization by settlement on the part of Anglo-Americans, and, above all, inhabited by alien peoples untrained in the arts of representative government."[243] Decision-makers proclaimed "the United States [should not] 'incorporate the alien races, [or the] civilized, semi-civilized, barbarous, and savage peoples of [the] islands into [the U.S.] body politic.'"[244] A report by the Committee on the Pacific Islands and Puerto Rico warned against the inclusion of "people of wholly different character . . . and incapable of exercising the rights and privileges guaranteed by the Constitution."[245] If a territory is inhabited by such people, it argued, Congress should "withhold from [them] the operation of the Constitution and the laws of the United States, and . . . hold the territory as a mere possession."[246] The *Insular Cases*, a series of cases decided from 1901 to 1922,[247] employed these negative cultural representations of territorial peoples as "savages" and warned of serious consequences if such people became U.S. citizens "entitled to all the rights,

---

[235] Go, *supra* note 215, at 54 (quoting the Governor of Guam in 1904 as stating that "[t]he interests of the Naval Station and natives are intimately interwoven. The one, as an organization, cannot escape, or live far apart, from the other, and the efficiency of the first depends entirely on the welfare of the second").

[236] *See* Quan, *supra* note 218, at 66.

[237] *Id.* at 66–67.

[238] *See id.* at 66; Na'puti & Bevacqua, *supra* note 216, at 842–43.

[239] *See* Ediberto Román & Theron Simmons, *Membership Denied: Subordination and Subjugation Under United States Expansionism*, 39 SAN DIEGO L. REV. 437, 452–55 (2002) (discussing the United States' use of race to justify the unequal treatment of native inhabitants of newly acquired territories).

[240] José A. Cabranes, *Citizenship and the American Empire: Notes on the Legislative History of the United States Citizenship of Puerto Ricans*, 127 U. PA. L. REV. 391, 432 (1978).

[241] Juan Torruella, *The Insular Cases: The Establishment of a Regime of Political Apartheid*, 77 REVISTA JURÍDICA U.P.R. 1, 10 (2008).

[242] Cabranes, *supra* note 240, at 432. *See* Efrén Rivera Ramos, *The Legal Construction of American Colonialism: The Insular Cases (1901–1922)*, 65 REVISTA JURÍDICA U.P.R. 225, 238–39 n.35 (1996); Román & Simmons, *supra* note 239, at 458; Torruella, *supra* note 241, at 10.

[243] Ramos, *supra* note 242, at 237–38.

[244] Cabranes, *supra* note 240, at 432 (citing 33 CONG. REC. 3622 (1900)).

[245] Román & Simmons, *supra* note 239, at 455 (quoting S. Rep. No. 56-249, at 8–9 (1900)).

[246] *Id.*

[247] *See* Ramos, *supra* note 242, at 228.

privileges and immunities of citizens."[248] In doing so, the cases tightly circumscribed territorial peoples' rights in far-reaching ways—from the political to the economic, and the social to the cultural.[249]

In Guam, in particular, the United States used alleged Chamorro racial inferiority to justify de jure "segregation in schools and public spaces,"[250] naval regulations that outlawed marriage to Chamorros,[251] and "post-WWII alienation of one-third of Chamorro land on Guam to the military and government."[252] U.S. regulations in effect barred many Chamorro cultural practices to "re-pattern and reconfigure Chamorro practices into an 'American' form of existence."[253] After Guam suffered wartime atrocities under Japanese rule from 1941 through 1944, the "United States completely destroyed the island with bombs in retaking it in 1944, leaving many [Chamorros] without their homes or land to return to."[254] After the war, the United States seized valuable tracts of Chamorro homelands as part of its ever-increasing strategic military presence on the island.[255]

Not only did the district court in *Davis* omit these racialized historical injuries,[256] but its "racial purpose" analysis also conspicuously omitted the foundation for Guam's reparative-justice commitment to decolonization and remedy.[257] In 1946, Guam was added to the United Nations's list of non-self-governing territories that have yet to

---

[248] Downes v. Bidwell, 182 U.S. 244, 279 (1901) (holding that the imposition of duties on goods shipped between Puerto Rico and the continental United States did not violate the Uniformity Clause, and introducing the concept of the unincorporated territory, in which territories belong to the United States but are not incorporated into it). *See also* Serrano, *Elevating the Perspectives*, *supra* note 167, at 13–27 (describing the racialized underpinnings of the *Insular Cases*).

[249] Serrano, *Elevating the Perspectives*, *supra* note 167, at 6.

[250] Monnig, *supra* note 219, at 23. *See also* RONALD STADE, PACIFIC PASSAGES: WORLD CULTURE AND LOCAL POLITICS IN GUAM 105 (1998) (explaining that in the early twentieth century, the Navy outlawed the use of the Chamorro language in schools and on school grounds); ROGERS, *supra* note 218, at 147 (reporting that in 1922, naval authorities collected and burned Chamorro-English dictionaries).

[251] *See* ROGERS, *supra* note 218, at 130 (noting that "Naval Station Order 47 in 1907 decreed that the Navy Department 'opposed [*sic*] marriages between Marines and natives except in specially meritorious cases which must be referred to the [navy] Secretary'"); Monnig, *supra* note 219, at 87 (explaining that in 1907 and 1919, the naval governors temporarily banned interracial marriage).

[252] Monnig, *supra* note 219, at 23. *See also* Perez, *Pacific Identities*, *supra* note 232, at 459 (reporting that the United States confiscated large parts of land both before and after World War II).

[253] Monnig, *supra* note 219, at 85.

[254] Natividad & Guerrero, *supra* note 216, at 3.

[255] ROGERS, *supra* note 218, at 214–17.

[256] *See generally* Davis v. Guam, No. 11-00035, 2017 WL 930825, at *14 (D. Guam Mar. 8, 2017) (recognizing Guam's "long history of colonization . . . and the desire of those colonized to have their right to self-determination," but omitting any analysis of that history or the self-determination right).

[257] *See id.* at *8.

achieve full self-government, and it remains on the list today.[258] The United States, as the administering power, is required to submit periodic reports to the UN Secretary-General regarding the steps it has taken to move Guam toward self-government.[259] Guam's Organic Act, adopted by Congress in 1950, designed a civilian government for the island and gave residents—its native inhabitants—statutory U.S. citizenship.[260] Through the Organic Act, Congress sought to further "the obligation assumed by the United States under article 73 of the United Nations Charter to promote the political, economic, social, and educational advancement of the inhabitants of the non-self-governing Territories under United States administration."[261] Congress expressly acknowledged these international obligations in the Organic Act's legislative history:

> In addition to its obligation under the Treaty of Paris, the United States has additional treaty obligations with respect to Guam as a non-self-governing Territory. Under Chapter XI of the Charter of the United Nations, . . . we undertook, with respect to the people of such Territories, to insure political advancement, to develop self-government, and taking 'due account of the political aspirations of the peoples; . . . to assist them in the progressive development of their free political institutions . . . .'[262]

Congress thus sought to uphold the United States' international commitment to remedy the "democratic deficits" at the core of the Guam-U.S. political relationship.[263]

But this right to self-determination was never realized.[264] Despite the replacement of a military government with a civilian one, the people's multiple attempts to alter Guam's political status vis-à-vis the United States,[265] and the struggle of Chamorros to

---

[258] *See* Aguon, *Other Arms*, *supra* note 216, at 139–40.

[259] *See* Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514 (XV), U.N. Doc. A/4684 (Dec. 14, 1960).

[260] Organic Act of Guam, Pub. L. 81-630, 64 Stat. 384 (1950), codified at 48 U.S.C. §§ 1421–28e (2012).

[261] Defs.' Mot. for Summ. J., *supra* note 7, at 17. *See also* U.N. Charter art. 73; Julian Aguon, *On Loving the Maps Our Hands Cannot Hold: Self-Determination of Colonized and Indigenous Peoples in International Law*, 16 UCLA ASIAN PAC. AM. L.J. 47, 68 (2010) [hereinafter Aguon, *On Loving the Maps*] (noting that in the Organic Act of Guam, Congress reserved the authority to annul laws passed by the Territory).

[262] 3 GUAM CODE ANN. § 21000 (2000).

[263] *See* Defs.' Mot. for Summ. J., *supra* note 7, at 7.

[264] *See id.*

[265] *See* Van Dyke et al., *supra* note 216, at 626–28 (describing self-determination movements in Guam, including the 1980 creation of the Commission on Self-Determination to explore political status options, the repeated introduction of the Guam Commonwealth Act to the U.S. Congress, and Chamorro efforts to petition the United Nations to advocate for their right to self-determination); *see also* Michael P. Perez, *Colonialism, Americanization, and Indigenous Identity: A Research Note on Chamorro Identity in Guam*, 25 SOCIOLOGICAL SPECTRUM 571,

attain the right of self-determination as Indigenous peoples,[266] immense power remained in U.S. government hands.[267] Guam does not have its own constitution,[268] and it is managed by the U.S. Department of the Interior.[269] Because of this enduring colonial status, the United States continues to reap the benefits of its strategic military presence on Guam—including using the island for massive weapons storage[270] and desecrating the environment and sacred spaces[271]—without the consent of its native inhabitants.[272]

Guam's challenged decolonization law thus aimed to further Congress's limited self-government commitment to those singled out for self-determination in Guam's Organic Act—Guam's native inhabitants.[273] According to Guam's Legislature, the right to self-determination "has never been afforded the native inhabitants of Guam, its native inhabitants and land having themselves been overtaken by Spain, and then ceded by Spain to the United States of America during a time of war, without any consultation with the native inhabitants of Guam."[274] Expressly acknowledging Congress's responsibility to repair historical harms, the Guam Legislature sought "to permit the native inhabitants of Guam . . . to exercise the inalienable right to self-determination of their political relationship with the United States of America."[275]

Therefore, Guam contends that "those people made U.S. citizens by the Guam Organic Act have never enjoyed equal U.S. citizenship rights[,]" and have never realized their right to self-determination.[276] "[T]his inequality explains, at least in

---

573 (2005) (describing the people's belief that a Commonwealth political status would "increase the level of self-government while maintaining U.S. sovereignty and citizenship").

[266] *See* Van Dyke et al., *supra* note 216, at 626–28.

[267] *See* Perez, *Pacific Identities*, *supra* note 232, at 460 (noting also that the U.S. President retained the authority to claim portions of Guam's land for military reasons); *see also* Van Dyke et al., *supra* note 216, at 626 (observing that after seventy years of military control and U.S. president–appointed governors, Congress finally permitted Guam's people to elect their first full-term governor in 1968).

[268] *Guam*, CIA WORLD FACTBOOK (2017), https://www.cia.gov/library/publications/the-world-factbook/geos/gq.html [https://perma.cc/6BAW-TRJJ] (noting that the "Guam Act of 1950 serves as a constitution").

[269] *See* Aguon, *Other Arms*, *supra* note 216, at 138.

[270] *See generally* Natividad & Guerrero, *supra* note 216; *see also infra* note 295 and accompanying text.

[271] *See, e.g.*, Natividad & Guerrero, *supra* note 216, at 10 (describing backlash over U.S. military "desecration" of 2,200 acres of the Pågat region of Guam).

[272] *See* Perez, *Pacific Identities*, *supra* note 232, at 461; Aguon, *Other Arms*, *supra* note 216, at 137–38; Van Dyke et al., *supra* note 216, at 629 (noting that the United States continues to benefit militarily in Guam but has left unresolved the self-determination of its people).

[273] *See* Opening Br. of Defs.-Appellants, *supra* note 124, at 78.

[274] 3 GUAM CODE ANN. § 21000 (2000). *See also* Defs.' Mot. for Summ. J., *supra* note 7, at 11–12 (contending that Guam's Legislature acknowledges that the "'native inhabitants' remain due their right of self-determination by operation of the Organic Act, the U.N. Charter, and other treaties of the United States").

[275] 3 GUAM CODE ANN. § 21000.

[276] Reply Br. of Defs.-Appellants at 7, Davis v. Guam (No. 17-15719) (Dec. 21, 2017).

part, why the same people have the right of self-determination and can express their views regarding decolonization."[277] And the law's reference to ancestry serves to identify the group of people entitled to that decolonization: native inhabitants experienced U.S. colonization's harms, and, as a result, their U.S. citizenship and unfulfilled right to self-determination are tied to the political status of Guam.[278] Thus, for Guam, extending *Rice* to foreclose any consideration of ancestry "would prevent any present-day recognition of self-determination rights of colonized peoples because those necessarily depend in part (but not entirely) on the question of whether one's ancestors experienced colonization."[279]

While Guam's decolonization law refers to "blood relations"[280] or ancestry, and related laws single out Chamorros,[281] those references do not convert a politically crafted remedial law aimed at rectifying the harms of colonization to an Indigenous people into an unlawful racial classification.[282] The United States gained control over Guam's land and resources, and legitimated that colonization, in part by characterizing the Chamorro people as inferior and unworthy, through negative cultural imagery about the group and its ancestry.[283] The restorative-justice approach to remedying those material and cultural harms of colonization, therefore, must take into account that ancestry. Viewed through this specialized lens, Guam's plebiscite law was crafted as a restorative response to colonialism's devastation: it was based on the assumption that the law's beneficiaries have a claim to reparation and self-determination that others do not.[284]

This reparative-justice approach to Guam's decolonization law is also consistent with the Fifteenth Amendment's mandate, which prohibits the denial or abridgment of the right to vote "on account of race."[285] Unlike in the Jim Crow context, Guam's law was not motivated by "prejudice and hostility"[286] and, as such, did not seek to benefit one group while vilifying another.[287] Justice Stevens's observation in *Rice* is particularly

---

[277] *Id.*

[278] *See* Opp. to Pl.'s Mot. for Summ. J., *supra* note 103, at 14 (arguing that the plebiscite law "simply carves out a class of colonized people").

[279] Opening Br. of Defs.-Appellants, *supra* note 124, at 2. *See also* Opp. to Pl.'s Mot. for Summ. J., *supra* note 103, at 14 ("If the Court were to accept Plaintiff's invitation to broaden *Rice* so significantly, it would be impossible for a colonized people to exercise any measure of self-determination because the mere act of designating who constitutes the colonized people would collapse into an act of racial categorization.").

[280] 3 GUAM CODE ANN. § 21001(c) (2000) ("'Descendant' shall mean a person who has proceeded by birth, such as a child or grandchild, to the remotest degree, *from any 'Native Inhabitant of Guam*,' as defined in Subsection (e), and who is considered placed in a line of succession from such ancestor where such succession is by virtue of blood relations.").

[281] *See* Davis v. Guam, No. 11-00035, 2017 WL 930825, at *11 (D. Guam Mar. 8, 2017).

[282] *See* Opening Br. of Defs.-Appellants, *supra* note 124, at 5–6.

[283] *See supra* notes 231–55 and accompanying text.

[284] *See* Rice v. Cayetano, 528 U.S. 495, 545 (2000) (Stevens, J., dissenting).

[285] U.S. CONST. amend. XV, § 1.

[286] *Rice*, 528 U.S. at 517.

[287] *See id.*

apt here: no similarity exists between a voting system devised to exclude a racial group from voting and one that is "designed to empower politically the remaining members" of a people with a "special claim to self-determination."[288] The purpose of the decolonization law is not to target race itself, but rather the damage of colonization.

Instead of engaging with this deep historical context, the district court's historical omissions and formalistic analysis told a simple story of reverse discrimination against white American Arnold Davis.[289] From this perspective, the "native inhabitants" of Guam suffered no harsh impacts of U.S. colonization. Instead, they are just another racial group, or, worse, a "favored" racial group attempting to wrest away benefits from others.[290] By ignoring the "roots and consequences of colonialism,"[291] as well as the United States' commitment to repair the resulting damage, the decolonization law's attempt to afford native inhabitants a limited right to self-determination was simply recast as promoting an illegal racial purpose.[292]

The court's decontextualized approach, bolstered by the decades-long ideological attack on civil and human rights for people of color and Indigenous peoples, masks the ongoing consequences of U.S. colonialism in Guam.[293] Today, those consequences include a U.S. military buildup slated for 2022[294] that some fear will trigger a "demographic change in the makeup of the island that even the U.S. military admits will result in the political dispossession of the [Chamorro] people."[295] Because the native inhabitants did not consent to the seizure of their homelands to house and test weapons of war, many consider the ever-growing military presence in Guam "an intrusive force that runs roughshod over political sovereignty and cultural identity."[296]

---

[288] *Id.* at 540, 546 (Stevens, J., dissenting).

[289] *See* Davis. v. Guam, No. 11-00035, 2017 WL 930829, at *14 (D. Guam Mar. 8, 2017).

[290] *See Davis. v. Guam,* CTR. INDIVIDUAL RTS., *supra* note 3.

[291] Yamamoto & Betts, *supra* note 63, at 566.

[292] *See supra* notes 259–63 and accompanying text.

[293] *See* Perez, *Pacific Identities*, *supra* note 232, at 460.

[294] *See* Aguon, *On Loving the Maps*, *supra* note 261, at 67.

[295] *Id.* The buildup proposes doubling the size of the current U.S. military presence from 6,000 to 11,000, plus 1,300 dependents; the acquisition of land; and the construction of training facilities—to add to the twenty-eight percent of the island already occupied by the U.S. military. *See* Na'puti & Bevacqua, *supra* note 216, at 845; Jon Letman, *Proposed US Military Buildup on Guam Angers Locals Who Liken It to Colonization*, GUARDIAN (Aug. 1, 2016, 2:43 PM), https://www.theguardian.com/us-news/2016/aug/01/guam-us-military-marines-deployment [https://perma.cc/ENC3-6XQ9] (reporting that Guam houses a drove of bombers, fast-attack nuclear submarines, supersonic aircraft, an expeditionary helicopter squadron, a Naval Ordnance Annex and a terminal high-altitude area defense (THAAD) missile battery, and headquarters the Joint Region Marianas, which oversees Andersen Air Force Base, Naval Base Guam, and "a 984,000-square-mile testing and live-fire training area").

[296] Letman, *supra* note 295 (noting that residents fear that doubling the military presence will overwhelm Guam's infrastructure). *See also supra* note 295 and accompanying text.

CONCLUSION

In *Davis v. Guam*, Davis and his attorneys distorted the language of civil rights to erase the history and effects of colonization on the native inhabitants of Guam. Davis's supporters called Guam's decolonization law a "modern . . . version of Jim Crow discrimination,"[297] and Guam's efforts to remedy past harms "racial separatism."[298] But for others in Guam, the case signifies the need for "concrete, albeit sometimes symbolic, steps . . . in the name of restorative justice."[299] This type of repair requires "a genuine act of decolonization [which] involve[s] the decision of those who were colonized, not those who have come to the island because of its colonization."[300] From this view, Guam's law plays a key part in repairing the long-standing damage of U.S. colonization by offering a measure of self-determination to Guam's native inhabitants—even if based on ancestry. Because ancestry was integral to Guam's colonization,[301] the appropriate restorative remedy must take account of that ancestry.

In reviewing *Davis*, the Ninth Circuit will therefore have two framing choices. It could treat Guam's present-day effort to restore native inhabitants' self-determination

---

[297] von Spakovsky, *supra* note 11. *See also* Keli'i Akina, *How Guam May Impact Hawaii: Race-Based Voting Deja Vu*, GRASSROOT INST. OF HAWAII (Sept. 10, 2016), http://www.grassrootinstitute.org/2016/09/how-guam-may-impact-hawaii-race-based-voting-deja-vu [https://perma.cc/6FC3-MSSV] (contending that Guam's race-based voting scheme will rightfully hinder Native Hawaiians' nation-building efforts); Roger Clegg, *Letter to the Editor, Dave Davis' Right to Vote*, GUAM DAILY POST (Sept. 1, 2016), https://www.post guam.com/forum/letter_to_the_editor/dave-davis-right-to-vote/article_16a4b528-6f15-11e6-b246-f73ae52c0423.html [https://perma.cc/S5C2-LSY2] (comparing Guam's law to "the Jim Crow South or apartheid South Africa").

[298] Michael Barone, *Race-Based Voting Overturned in Guam—After Six Years*, WASH. EXAM. (Mar. 13, 2017, 10:01 AM), https://www.washingtonexaminer.com/race-based-voting-overturned-in-guam-after-six-years [https://perma.cc/H2LE-W3GM] (arguing that activists in Guam and Hawai'i, "supported by appeasement-minded politicians . . . seem to be bent on racial separatism"). *See also* Hans A. von Spakovsky, *Guam Has a Racist Voting Law. The Justice Department Is Finally Helping to Fight It*, NAT'L REV. (Nov. 30, 2017, 3:41 PM), https://www.nationalreview.com/2017/11/guams-racist-voting-law-doj-fights [https://perma.cc/H2LE-W3GM] (celebrating Attorney General Jeff Sessions's amicus curiae brief in support of Davis); Hans A. von Spakovsky, *Guam's Racially Segregated Voting Scheme Is Struck Down*, HERITAGE FOUND. (Mar. 10, 2017), https://www.heritage.org/civil-rights/commentary/guams-racially-segregated-voting-scheme-struck-down [https://perma.cc/ZG2N-QKVM] (criticizing the Obama Administration and Guam officials for their failure to side with Davis).

[299] Michael Lujan Bevacqua, *Decolonization Case Arguments Prophetic*, PAC. DAILY NEWS (Dec. 22, 2016, 11:25 PM), http://www.guampdn.com/story/opinion/columnists/2016/12/08/decolonization-case-arguments-prophetic/95130880 [https://perma.cc/7NLC-3AJQ]. *See also* Weiss & Sablan, *supra* note 1.

[300] Weiss & Sablan, *supra* note 1 (quoting Victoria Leon Guerrero, co-chair of the Commission Decolonization's Independence for Guam Task Force).

[301] *See id.* (quoting Victoria Leon Guerrero as stating that "Guam's colonization and continued colonization [were] based on race from the beginning").

not as a restorative measure but as a simple racial preference.[302] It could do so by discounting Guam's history of colonization and by treating any mention of ancestry as a proxy for race. Or, consistent with the notion of reparative justice, the court could acknowledge that ancestry should not be treated as race, particularly in the context of remedies for the harms of U.S. colonization. In doing so, the court could—and should—incorporate the context of colonization, and its lasting damage to the Chamorro people, to acknowledge that ancestry is key to repairing those harms.[303]

This latter approach recognizes Albert Memmi's apt description of how race and ancestry are deployed to justify colonization or political aggression.[304] The colonizer, who portrays itself as civilized and law-abiding, uses negative cultural imagery as a mechanism for justifying its political takeover of another country and the resulting oppression of its people.[305] This approach is also consistent with the international human rights principle of self-determination, a principal tenet of reparative justice, which is integral to colonized peoples' efforts worldwide to repair the damage of historical injustice.[306]

In *Davis*, as in many other controversies rooted in U.S. colonialism,[307] the court must ask if the law's use of ancestry is crafted as a restorative response to colonialism's devastation. This is the jurisprudential foundation of *Mancari*: the purpose of such remedial measures is not to target race itself, but rather the damage of colonization.[308] Therefore, a law based on this profoundly reparative-justice approach does not convert an ancestral classification into one that merely aims to benefit one racial group over another. Instead, it creates the appropriate nexus between the long-standing material harms of colonization and a meaningful present-day remedy.

---

302 *See* Yamamoto, *Colonizer's Story*, *supra* note 15.

303 *See* JACL–Hawai'i Amicus Br., *supra* note 35, at 13.

304 *See* MEMMI, DOMINATED MAN, *supra* note 141, at 186–95.

305 *See id.* at 186.

306 *See* Yamamoto et al., *supra* note 27, at 21.

307 *See, e.g.*, Complaint, United States v. Guam, No. 17-0113 (D. Guam) (filed Sept. 29, 2017) (challenging Guam's Chamorro Land Trust Act under the Federal Fair Housing Act).

308 *See* Rice v. Cayetano, 528 U.S. 495, 517 (2000).