

2023

Imperialist Immigration Reform

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Recommended Citation

Cori Alonso-Yoder, *Imperialist Immigration Reform*, 91 Fordham L. Rev. 1623 ().

Available at: <https://ir.lawnet.fordham.edu/flr/vol91/iss5/2>

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IMPERIALIST IMMIGRATION REFORM

Cori Alonso-Yoder*

For decades, one of the most challenging domestic policy matters has been immigration reform. Dogged by controversial notions of what makes for a “desirable” immigrant and debates about enforcement and amnesty, elected officials have largely given up on achieving comprehensive, bipartisan immigration solutions. The lack of federal action has led to an outdated and impractical legal framework, with state and local lawmakers unable to step into the breach. Well over 100 years ago, the U.S. Supreme Court firmly stated that regulation of the U.S. immigration system is within the sole constitutional authority of the federal government.

Yet there is one place within the United States that has embraced an alternative. Though it has been under the control of the federal government for nearly eighty years, the Commonwealth of the Northern Mariana Islands (CNMI) remains exempt from federal immigration law. As a territory of the United States, the CNMI has controlled its own system of immigration with little federal interference. At the time of this writing, Congress has approved a transition period further delaying the application of federal immigration law in the CNMI until 2029. This extension was made possible through bipartisan legislation signed into law by President Donald J. Trump in 2018. Not only did President Trump sign legislation giving continued federal employment authorization to the CNMI’s otherwise undocumented workers, but, in 2019, President Trump also approved a bill to give permanent resident status to over 1,000 individuals facing deportation from the CNMI. Both actions fly in the face of President Trump’s domestic immigration policy.

This Essay argues that this imperialist immigration reform reveals as much about immigration policy in the CNMI as it does about what is not

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happening in the rest of the United States. Numerous scholars have pointed to the racist roots of U.S. immigration policy typified by the 1882 Chinese Exclusion Act. I suggest that the parallel system of immigration in the CNMI is the exception that proves the rule of racism in U.S. immigration law. The population of the CNMI is overwhelmingly Asian and Pacific Islander, with a white population making up less than 2 percent of the total. By looking at demographics, history, and constitutional law, including the law governing U.S. territories in the Insular Cases, I argue that the immigration policy of the CNMI demonstrates the federal government's alternative approach when protection of "white spaces" is taken out of the legislative equation.

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INTRODUCTION

Gi talo' halom tasi	In the middle of the ocean
Nai gaige tano'-hu.	Is where my land is
Ayu nai sempre hu	That is where I
Soda melago'-hu . . .	Will find what I'm searching for . . .
(Chamorro version)	(English version)

—National Anthem of the Commonwealth of
the Northern Mariana Islands¹

1. ARNOLD H. LEIBOWITZ, *DEFINING STATUS: A COMPREHENSIVE ANALYSIS OF UNITED STATES TERRITORIAL RELATIONS* 519 (1989).

On the second full day of his administration, President Donald J. Trump received a memorandum outlining several policy objectives in the realm of immigration law.² The memo urged the president to issue an executive order that would mandate the drafting of a report, “in consultation with the Secretary of State and the Governor of the Commonwealth of the Northern Mariana Islands, describing steps taken to combat the problem of ‘birth tourism,’ whereby individuals travel for the purpose of giving birth in the United States.”³ Although the president ultimately never issued the proposed executive order, this proposed policy highlights the obscure yet fascinating system of immigration and citizenship in the Commonwealth of the Northern Mariana Islands (CNMI). Congress has subjected the CNMI to its own form of immigration legislation and regulation, despite the CNMI’s status as a U.S. territory. It is a system that few Americans know exists and that surprisingly few legal scholars have explored. This is especially stunning considering that the Trump administration passed significant immigration reforms that apply to the CNMI only.⁴

In a 2019 opinion for the right-wing think tank Center for Immigration Studies,⁵ David North questioned why the Northern Mariana Islands Long-Term Legal Residents Relief Act⁶ got such little attention.⁷ Aside from the Center for Immigration Studies, the only reporting on this change in immigration law was done by news outlets in the CNMI.⁸ In that coverage, CNMI journalists underscored the need for federal cooperation from the executive and legislative branches to secure lawful status for residents of the

2. See Memorandum from Andrew Bremberg, Dir., Domestic Pol’y Council, to Donald J. Trump, President 4–5 (Jan. 23, 2017), https://www.soundimmigration.com/wp-content/uploads/2017/01/Protecting_Taxpayer_Resources_by_Ensuring_Our_Immigration_Laws_Promote_Accountability_and_Responsibility.0.pdf [<https://perma.cc/R8ED-S34P>].

3. *Id.* at 4.

4. See *infra* Part IV.D.

5. The Center for Immigration Studies has positioned itself as a mainstream think tank on immigration policy, but its racist and xenophobic origins are documented by the Anti-Defamation League. See CTR. ON EXTREMISM, MAINSTREAMING HATE: THE ANTI-IMMIGRANT MOVEMENT IN THE U.S. 18 (2018), <https://www.adl.org/sites/default/files/mainstreaming-hate-anti-immigrant-report-2018-v3.pdf> [<https://perma.cc/XKB4-QWMW>] (explaining that David North has spoken about immigration as the guest of a program whose host has expressed antisemitic views, such as Holocaust denial).

6. Pub. L. No. 116-24, 133 Stat. 977 (2019) (codified as amended in scattered sections of 48 U.S.C.).

7. David North, *U.S. Grants Legalization, with No Path to Citizenship, to Some Migrants*, CTR. FOR IMMIGR. STUD. (July 11, 2019), <https://cis.org/North/US-Grants-Legalization-No-Path-Citizenship-Some-Migrants> [<https://perma.cc/R5F2-USLF>].

8. See Jon Perez, *Kilili: Torres Should Use His Trump Connections*, SAIPAN TRIB. (Feb. 28, 2019), <https://www.saipantribune.com/index.php/kilili-torres-should-use-his-trump-connections/> [<https://perma.cc/8QGQ-M6J5>]; Jon Perez, *Two-Pronged Tactic on Labor Issues*, SAIPAN TRIB. (Mar. 7, 2019), <https://www.saipantribune.com/index.php/two-pronged-tactic-on-labor-issues/> [<https://perma.cc/98VL-MKAR>] [hereinafter Perez, *Two-Pronged Tactic on Labor Issues*]; Jon Perez, *HR 559 Goes to Trump*, SAIPAN TRIB. (June 24, 2019), <https://www.saipantribune.com/index.php/hr-559-goes-to-trump/> [<https://perma.cc/9WDR-H9FL>]; Jon Perez, *A Thousand New Residents*, SAIPAN TRIB. (June 27, 2019), <https://www.saipantribune.com/index.php/a-thousand-new-residents/> [<https://perma.cc/3EBZ-UWKR>].

commonwealth. One article quotes CNMI governor Ralph Deleon Guerrero Torres seeking congressional support and highlighting a challenge in lobbying for an immigration fix: “Only three people in the [congressional] committee have been in the CNMI”⁹

In this Essay, I explore the history of U.S. territorial expansion, lawmaking in the territories, and limitations on legal protections for noncitizens to provide context for understanding imperialist immigration reform in the CNMI. In Part I, I discuss the history of U.S. involvement in the Northern Mariana Islands and the creation of the political and legal foundations that would establish it as a territory of the United States. As part of the journey toward the CNMI’s association as a territory, the commonwealth secured an exemption for itself from key areas of federal law, including immigration. Part II explores the history of U.S. immigration law to demonstrate the stunning and anomalous nature of the CNMI’s immigration exemption. This history has often reflected efforts to legislate and litigate attitudes about racial difference. Part III weaves this history of racially motivated immigration law into a discussion of the constitutional law decisions governing the territories to highlight the similarities between the legal treatment of noncitizens and residents of the territories. Part IV applies this legal and historical context to explain the anomalous status of federal immigration law in the CNMI, including by invoking Professor John A. Powell’s theory of the law’s perpetuation and protection of spaces deemed “white.” I conclude that the U.S. government has constructed the CNMI as a “nonwhite” space, resulting in an alternative system of immigration law.

I. U.S. INVOLVEMENT WITH THE COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

The Commonwealth of the Northern Mariana Islands is located in the Philippine Sea, nearly 8,000 miles from Washington, D.C. Today, it is one of the five populated territories of the United States.¹⁰ The CNMI consists of fourteen islands, with Saipan serving as its most populated island and seat of government.¹¹ The people who are native to the CNMI are broadly categorized as Micronesian, with about one-fourth of the population belonging to the ethnic group of Chamorro, descendants of the original inhabitants of the islands.¹² The other largest ethnic groups are Filipino, with smaller representation of Chinese, Korean, and other Asian and Pacific Islander (including the Micronesian ethnic group, Carolinian).¹³ In 2017, the white population of the CNMI totaled only about 574 inhabitants—a mere

9. Perez, *Two-Pronged Tactic on Labor Issues*, *supra* note 8.

10. The others are American Samoa, Guam, Puerto Rico, and the U.S. Virgin Islands.

11. Sophie Foster & Dirk Anthony Ballendorf, *Northern Mariana Islands*, ENCYC. BRITANNICA, <https://www.britannica.com/place/Northern-Mariana-Islands> [https://perma.cc/LD75-ZDA2] (Feb. 17, 2023).

12. *Id.*

13. *Id.*

1.1 percent of the population.¹⁴ After generations of colonial rule by various occupying forces, the Northern Mariana Islands came under the political power of the United States. In 1898, the United States seized Guam, the southernmost island of the Marianas, from the control of the Spanish during the Spanish-American War.¹⁵ In 1947, following World War II, the Northern Mariana Islands and other islands that had been under the control of Japan entered into the U.S.-administered United Nations Trust Territory of the Pacific Islands.¹⁶

In subsequent years, the Northern Marianas chose to enter into a closer political union with the United States, while other islands maintained a relationship of free association with the country.¹⁷ In 1972, officials in the Northern Marianas engaged legal representation to navigate their status with the federal government and established the Marianas Political Status Commission.¹⁸ Following years of negotiations, officials of the Northern Marianas and the U.S. government signed the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America¹⁹ on February 15, 1975. The covenant was presented to the people of the Northern Marianas in a U.S.-monitored plebiscite.²⁰ Voters of the Northern Marianas approved the covenant by a landslide, with 78.8 percent voting in its favor.²¹ Based on this approval, President Gerald Ford sent a proposed joint resolution to Congress that was introduced and approved in both chambers.²² On February 24, 1976, President Ford signed House Joint Resolution 549²³ into law, officially recognizing the formation of the Commonwealth of the Northern Mariana Islands.²⁴

Under the covenant, the CNMI retained many forms of autonomy and self-government, including through mutual consent provisions that granted the CNMI the authority to prevent modification of certain provisions without its consent.²⁵ The covenant also allowed the CNMI to exercise its

14. *CNMI Labor Force Participation Survey 2017 Population Characteristics*, CNMI DEP'T OF COM., <https://ver1.cnmicommerce.com/lfp-population-characteristics-2017-by-ethnic-group/> [<https://perma.cc/S6VP-BTM8>] (last visited Mar. 6, 2023).

15. *Pacific Islanders: Territorial Status and Representation*, OFF. OF THE HISTORIAN, OFF. OF ART & ARCHIVES & OFF. OF THE CLERK, <https://history.house.gov/Exhibitions-and-Publications/APA/Historical-Essays/Growing-Diversity/Pacific-Islanders/> [<https://perma.cc/8LPG-8HAV>] (last visited Mar. 6, 2023).

16. THOMAS LUM, CONG. RSCH. SERV., R46573, *THE FREELY ASSOCIATED STATES AND ISSUES FOR CONGRESS 2* (2020). The other islands of the Trust Territory of the Pacific Islands included the Marshall Islands, Micronesia, and Palau. *Id.*

17. See R. SAM GARRETT, CONG. RSCH. SERV., IF11792, *STATEHOOD PROCESS AND POLITICAL STATUS OF U.S. TERRITORIES: BRIEF POLICY BACKGROUND 2* (2022).

18. See *Pacific Islanders: Territorial Status and Representation*, *supra* note 15.

19. Pub. L. No. 94-241, 90 Stat. 263 (1976) (codified at 48 U.S.C. § 1801 note).

20. *Id.*

21. *Id.*

22. *Pacific Islanders: Territorial Status and Representation*, *supra* note 15.

23. H.R.J. Res. 549, 94th Cong. (1976).

24. *Pacific Islanders: Territorial Status and Representation*, *supra* note 15.

25. See, e.g., *Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America* § 105, 90 Stat. at 264 (“In order to respect

prerogative on the incorporation of federal law into the commonwealth's, including to opt in or out of certain provisions of U.S. law.²⁶

Under the covenant, the CNMI maintained the authority to determine the application of citizenship status to inhabitants of the commonwealth, which could be modified only with its consent.²⁷ Article III of the covenant conferred U.S. citizenship on almost all of the CNMI's inhabitants and established birthright citizenship for future generations.²⁸ In addition, article V of the covenant set forth the applicability of U.S. law in the commonwealth.²⁹ Section 503 of article V provides that "[t]he following laws of the United States, presently inapplicable to the Trust Territory of the Pacific Islands, will not apply to the Northern Mariana Islands except in the manner and to the extent made applicable to them by the Congress by law"³⁰

Section 503(a) goes on to identify that, "except as otherwise provided in Section 506" of the covenant, the "immigration and naturalization laws of the United States" will be among the federal laws from which the CNMI is exempt.³¹ While broadly exempting the CNMI from federal immigration authority, the covenant provides in section 506 that certain provisions will apply in the CNMI: those associated with the conferral of citizenship or national status to children born abroad to U.S. citizens or nationals, as well as certain family-based immigration provisions.³² Section 503(c) also limited the applicability of the federal minimum wage provisions set forth in the Fair Labor Standards Act of 1938.³³

the right of self-government guaranteed by this Covenant the United States agrees to limit the exercise of that authority so that the fundamental provisions of this Covenant, namely Articles I, II and III and Sections 501 and 805, may be modified only with the consent of the Government of the United States and the Government of the Northern Mariana Islands.").

26. *See, e.g., id.* § 501, 90 Stat. at 267 (establishing the applicability of certain provisions of the U.S. Constitution within the CNMI and stating that other constitutional provisions "will be applicable within the Northern Mariana Islands only with the approval of the Government of the Northern Mariana Islands and of the Government of the United States").

27. *Id.* § 105, 90 Stat. at 264 (indicating that article III, entitled "Citizenship and Nationality," is one of the provisions of the covenant whose terms for modification are subject to the consent of the governments of the United States and Northern Mariana Islands).

28. *Id.* art. III, 90 Stat. at 265–66.

29. *Id.* art. V, 90 Stat. at 267–69.

30. *Id.* § 503, 90 Stat. at 268.

31. *Id.* § 503(a), 90 Stat. at 268.

32. *See id.* § 506(a), 90 Stat. at 269 ("Notwithstanding the provisions of Subsection 503(a) . . . the [Immigration and Nationality] Act [(INA)] . . . will apply to the Northern Mariana Islands to the extent indicated in each of the following Subsections of this Section."); *id.* § 506(b), 90 Stat. at 269 (discussing the applicability of the INA to "children born abroad to United States citizen or non-citizen national parents permanently residing in the Northern Mariana Islands"); *id.* § 506(c), 90 Stat. at 269 (discussing the applicability of the INA to "aliens who are 'immediate relatives' . . . of United States citizens who are permanently residing in the Northern Mariana Islands").

33. Ch. 676, 52 Stat. 1060 (codified as amended in scattered sections of 29 U.S.C.); *see id.* § 6, 52 Stat. at 1062 (codified as amended at 29 U.S.C. § 206); Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America § 503(c), 90 Stat. at 268.

In order to justify these federal law exemptions, some have pointed to the need for the territories to exercise authority to protect their culture and way of life.³⁴ Although concerns for cultural preservation may have motivated many of the provisions in the covenant, there are reasons to doubt that patrimonial interests alone motivated officials in the CNMI. Lawyers for the CNMI explained how exemption from the federal minimum wage and immigration laws were beneficial to the interests of the islands because “economic growth depended heavily on the use of alien laborers” and “application of the federal minimum wage would cause serious dislocation in the local economy”³⁵ As predicted, the provisions exempting the CNMI from minimum wage and immigration laws combined to create a major influx of foreign immigration to the CNMI. In the 1980s and 1990s, the CNMI’s garment industry experienced huge growth fueled mostly by immigrant labor.³⁶ In 1983, following Congress’s failure to act on the immigration authority delegated to it in section 503 of the covenant, the CNMI passed its own immigration law called the Nonresident Workers Act.³⁷ The act permitted employers to recruit immigrant workers, primarily for positions in the garment and tourist industries.³⁸ It created a guest worker status for the new arrivals and a method of entry into the CNMI that was far less onerous than its closest analogue in federal immigration law, the H-2 visa.³⁹

As a result of the CNMI’s Nonresident Workers Act, the population ballooned from less than 10,000 inhabitants around the time of the signing of the covenant⁴⁰ to over 40,000 in 1990, more than half of whom were guest workers.⁴¹ By the 1990s, reports of labor exploitation in the CNMI’s garment industry began to garner federal congressional attention.⁴² In 2007, congressional hearings on “labor, immigration, law enforcement and

34. See Ross Dardani, *Citizenship in Empire: The Legal History of U.S. Citizenship in American Samoa, 1899–1960*, 60 AM. J. LEGAL HIST. 311, 312 (2020) (explaining how Congress understood the conferring of U.S. citizenship to be undesired by the residents of American Samoa as a loss of their cultural heritage).

35. Farrah-Marisa Chua Short, *An Experiment in Protecting Workers’ Rights: The Garment Industry of the U.S. Commonwealth of the Northern Mariana Islands*, 7 U. PA. J. LAB. & EMP. L. 971, 973 (2005) (alteration in original) (quoting HOWARD P. WILLENS, AN HONORABLE ACCORD: THE COVENANT BETWEEN THE NORTHERN MARIANA ISLANDS AND THE UNITED STATES 179–80 (2002)).

36. See Rose Cuison Villazor, *Citizenship for the Guest Workers of the Commonwealth of the Northern Mariana Islands*, 90 CHI.-KENT L. REV. 525, 535 (2015).

37. 1982 N. Mar. I. Pub. L. No. 3-66 (repealed 2007); see Villazor, *supra* note 36, at 535.

38. Villazor, *supra* note 36, at 535.

39. Compare Nonresident Workers Act § 4 (authorizing the employment of nonresident workers “as necessary to supplement the available labor force”), with Immigration Act of 1990, Pub. L. No. 101-649, sec. 205(a), § 214(g), 104 Stat. 4978, 5019 (codified as amended at 8 U.S.C. § 1184(g)) (establishing a numerical cap on the number of immigrants who may be admitted as temporary workers under H-2 visas each fiscal year).

40. See *Pacific Islanders: Territorial Status and Representation*, *supra* note 15 (noting that the 1970 census calculated the population of the Northern Marianas to be at 9,640).

41. See Villazor, *supra* note 36, at 535.

42. See Robert J. Misulich, *A Lesser-Known Immigration Crisis*, 20 PAC. RIM L. & POL’Y J. 211, 217 (2011).

economic conditions in the Commonwealth of the Northern Mariana Islands” highlighted accounts of labor exploitation made possible in part by the CNMI’s lax immigration and minimum wage laws.⁴³ After many failed attempts, Congress finally succeeded in passing legislation to bring CNMI’s immigration laws in line with federal law through the Consolidated Natural Resources Act of 2008⁴⁴ (CNRA).⁴⁵ Signed into law by President George W. Bush, the 2008 law provided for the application of federal immigration law to the CNMI during a target transition period set to conclude by December 31, 2014.⁴⁶ As noted by Professor Rose Cuison Villazor, the parties agreed during the negotiation of the covenant that “it would be in the best interests of the CNMI for it to have the authority to regulate their own immigration laws.”⁴⁷ This arrangement of self-governance on immigration law also existed for American Samoa, making this kind of autonomy a unique carve-out for these two territories.⁴⁸ These exceptions were notable in part because, a century earlier, the U.S. government had asserted its own plenary power in the regulation of immigration law.⁴⁹

II. IMMIGRATION LAW FOUNDATIONS

The CNMI’s prerogatives in immigration policy are not unique in U.S. history. In the early history of the United States, immigration—when regulated at all—was managed by state and local officials.⁵⁰ But those practices were eventually challenged in a series of late nineteenth-century Supreme Court cases known as *The Passenger Cases*⁵¹ and *The Head Money Cases*.⁵² The Chinese Exclusion Act⁵³ and the Immigration Act of 1882⁵⁴

43. See *Conditions in the Commonwealth of the Northern Mariana Islands: Hearing Before the S. Comm. on Energy & Nat. Res.*, 110th Cong. 6–7 (2007) (statement of David B. Cohen, Deputy Assistant Secretary for Insular Affairs, Department of the Interior).

44. Pub. L. No. 110-229, 122 Stat. 754 (codified as amended in scattered sections of the U.S.C.).

45. See Misulich, *supra* note 42, at 220; Consolidated Natural Resources Act of 2008 §§ 701–705, 122 Stat. at 853–67 (codified as amended in scattered sections of 8 and 48 U.S.C.).

46. See Misulich, *supra* note 42, at 220–21; Consolidated Natural Resources Act of 2008 § 702, 122 Stat. at 854 (codified as amended in scattered sections of 8 and 48 U.S.C.).

47. Villazor, *supra* note 36, at 532.

48. *Id.* at 528.

49. See *Chae Chan Ping v. United States*, 130 U.S. 581, 609 (1889) (stating that “[t]he power of exclusion of foreigners” belongs “to the political department of our government, which is alone competent to act upon the subject”).

50. See HIDEAKA HIROTA, *EXPPELLING THE POOR: ATLANTIC SEABOARD STATES AND THE NINETEENTH CENTURY ORIGINS OF AMERICAN IMMIGRATION POLICY* 42 (2017) (discussing the history of state control of immigration based on expelling or preventing the entry of immigrants based on indigence).

51. 48 U.S. 283 (1849) (holding that New York and Massachusetts laws taxing passengers arriving in the United States from abroad were unconstitutional).

52. 112 U.S. 580 (1884) (holding that the Immigration Act of 1882’s provision for an importation tax on arriving immigrants was a permissible exercise of the federal power to regulate immigration).

53. Act of May 6, 1882, ch. 126, 22 Stat. 58 (repealed 1943).

54. Act of Aug. 3, 1882, ch. 376, 22 Stat. 214 (no longer in force).

both established, for the first time, a set of criteria for lawful entry into the United States under federal law. In the case of the Chinese Exclusion Act, the Supreme Court affirmed the right of the federal government to control immigration law, finding that Congress had plenary power to legislate in that area.

In *Chae Chan Ping v. United States*⁵⁵ (also known as the *Chinese Exclusion Case*), the Supreme Court affirmed the validity of the exclusion laws, explaining that Congress's authority to legislate in this area derived from the U.S. Constitution—"[i]f [the federal government] could not exclude aliens, it would be to that extent subject to the control of another power."⁵⁶ Although subsequent acts of Congress undid Chinese exclusion, the rationale of the court remains good law and stands for many principles in immigration law today. Most relevant for understanding immigration law in the CNMI, *Chae Chan Ping* affirms that the federal government is endowed with the exclusive authority to regulate immigration.

The Chinese Exclusion Act reveals another aspect relevant to understanding U.S. immigration law and policy in the CNMI. U.S. immigration law is, and always has been, fraught with racist attitudes. The Chinese Exclusion Act was made possible by a deep, racist xenophobia toward Chinese immigrants.⁵⁷ Not only did the act prevent the additional immigration of Chinese nationals, it also prevented those already in the United States from becoming U.S. citizens.⁵⁸ Dean Kevin R. Johnson explains how the Chinese Exclusion Act and *Chae Chan Ping* laid the groundwork for subsequent immigration laws discriminating against racial minorities, leading to "a national origins quotas system that favored the immigration of whites from Northern Europe while discriminating against southern and eastern Europeans, who were believed at the time to constitute inferior races of people."⁵⁹ These overtly race-based laws remained in place until the struggles of the civil rights movement for Black Americans brought greater awareness to legal discrimination, particularly at the federal level. In 1965, on the heels of the federal civil and voting rights acts, Congress passed immigration legislation to formally remove the quota system.⁶⁰

Although efforts to enact federal legislation addressing anti-Black discrimination were aided in the courts by decisions like *Brown v. Board of Education*,⁶¹ the Supreme Court never repudiated the racist rationale of early immigration policies. In 1954, *Brown* rejected the racist "separate but equal"

55. 130 U.S. 581 (1889).

56. *Id.* at 603–04.

57. See HIROSHI MOTOMURA, *AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES* 16–17 (2006) (describing the history of anti-Chinese sentiment leading up the passage of the Chinese Exclusion Act).

58. Act of May 6, 1882, ch. 126, §§ 1, 14, 22 Stat. 58, 58–59, 61 (repealed 1943).

59. Kevin R. Johnson, *Systemic Racism in U.S. Immigration Laws*, 97 *IND. L.J.* 1455, 1471 (2022).

60. *Id.*; see also Act of Oct. 3, 1965, Pub. L. No. 89-236, 79 Stat. 911 (codified as amended in scattered sections of 5 and 8 U.S.C.).

61. 347 U.S. 483 (1954).

doctrine established in the 1896 case of *Plessy v. Ferguson*.⁶² Like *Chae Chan Ping* and *Fong Yue Ting v. United States*,⁶³ *Plessy* was decided by the court led by Chief Justice Melville Fuller. Like those two earlier cases, *Plessy* also integrated assumptions about white supremacy into its analysis. In his dissent, Justice John Marshall Harlan explained: “The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth, and in power.”⁶⁴ Despite this, Justice Harlan went on to conclude: “But in view of the constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our constitution is color-blind, and neither knows nor tolerates classes among citizens.”⁶⁵

III. CONSTITUTIONAL LAW FOUNDATIONS: THE TERRITORIAL CLAUSE AND THE *INSULAR CASES*

Justice Harlan’s notion of a color-blind constitution is complicated by another series of cases contemporaneous with *Plessy* and *Chae Chan Ping*. Also decided by the Fuller Court, the *Insular Cases*⁶⁶ arose following the Spanish-American War.⁶⁷ Those cases sought to reconcile the legal status of the inhabitants of new U.S. territories, ceded to the United States by Spain upon its defeat. According to the Treaty of Paris of 1898,⁶⁸ which ended the war, “the civil rights and political status of the native inhabitants of the territories . . . ceded to the United States shall be determined by the Congress.”⁶⁹

62. 163 U.S. 537 (1896), *overruled by* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); *see Brown*, 347 U.S. at 493–95 (holding that racially segregated educational facilities inherently deprived Black children of the right to equal educational opportunities, and rejecting “[a]ny language in *Plessy v. Ferguson* contrary to this finding”); *see also Plessy*, 163 U.S. at 551–52 (establishing the doctrine that legislation mandating racially segregated but ostensibly “equal” facilities for Black and white people was constitutionally permissible).

63. 149 U.S. 698, 707 (1893) (“The right of a nation to expel or deport foreigners, who have not been naturalized or taken any steps towards becoming citizens of the country . . . is as absolute and unqualified as the right to prohibit and prevent their entrance into the country.”).

64. *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting).

65. *Id.*

66. Although some scholars include decisions regarding the territories made well into the late twentieth century as part of the *Insular Cases*, the series of cases decided immediately following the conclusion of the Spanish-American War are most widely regarded as making up the *Insular Cases*. According to Judge Juan R. Torruella, they include *De Lima v. Bidwell*, 182 U.S. 1 (1901), *Goetze v. United States*, 182 U.S. 221 (1901), *Dooley v. United States*, 182 U.S. 222 (1901), *Armstrong v. United States*, 182 U.S. 243 (1901), *Downes v. Bidwell*, 182 U.S. 244 (1901), and *Huus v. New York & Porto Rico Steamship Co.*, 182 U.S. 392 (1901). Juan R. Torruella, *The Insular Cases: The Establishment of a Regime of Political Apartheid*, 29 U. PA. J. INT’L L. 283, 284 n.4 (2007).

67. *See* Kristina M. Campbell, *Citizenship, Race, and Statehood*, 74 RUTGERS U. L. REV. 583, 589 (2022).

68. Treaty of Peace Between the United States of America and the Kingdom of Spain, Spain-U.S., Dec. 10, 1898, 30 Stat. 1754.

69. Campbell, *supra* note 67, at 589 (quoting Treaty of Peace Between the United States of America and the Kingdom of Spain, Spain-U.S., art. IX, Dec. 10, 1898, 30 Stat. 1754).

This statement seems to be a straightforward application of the Constitution's Territorial Clause that empowers Congress "to make all needful Rules and Regulations" regarding the territories.⁷⁰ But in practice, the treatment of the new territories differed from the U.S. government's prior approach to territorial acquisitions. The American victory over the Spanish brought territories including Guam, the Philippines, and Puerto Rico under U.S. control. As opposed to the prior process for U.S. territorial expansion, these territories were annexed by U.S. military intervention, rather than as a result of government policies promoting subjugation and annihilation of native people in favor of settlement by white colonists.⁷¹ This earlier policy also followed the Constitution's procedure for empowering Congress to work with state legislatures to incorporate new states into the union.⁷² But when it came to the territories ceded from the Spanish, new questions of distance, race, and language shifted the formerly well-worn path to statehood. Judge Juan R. Torruella observes that the new lands "were not, in contrast to the American West, large areas of mostly uninhabited land masses, but were instead populated by established communities whose inhabitants differed from the dominant stateside societal structure with respect to their race, language, customs, cultures, religions, and even legal systems."⁷³ These differences contributed to opposition to the admission of the new territories as states in the growing union.⁷⁴ Instead of positioning them for statehood, Congress would keep the new territories under its plenary control.

Professor Natsu Taylor Saito observes:

American Indians, residents of external colonies, and immigrants . . . are predominantly people of color, historically excluded from citizenship as well as from popular notions of who is an 'American.' They are included within the border in the sense that the United States asserts power over them, but excluded from the protections which provide the underlying rationale for having and enforcing borders.⁷⁵

This treatment, Saito explains, is typified by the title of a book published soon after the conclusion of the Spanish-American War: the official U.S.

70. U.S. CONST. art. IV, § 3, cl. 2.

71. See Campbell, *supra* note 67, at 589–90 (discussing the cession of Puerto Rico to the United States at the conclusion of the Spanish-American War in 1898).

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

73. Juan R. Torruella, *Ruling America's Colonies: The Insular Cases*, 32 YALE L. & POL'Y REV. 57, 62–63 (2013).

74. *Id.* at 63–64 (explaining that the 1900 U.S. presidential election was viewed in part as a referendum on the status of the new territories that was decided with the reelection of President William McKinley and his imperialist vice president, Theodore Roosevelt).

75. Natsu Taylor Saito, *Border Constructions: Immigration Enforcement and Territorial Presumptions*, 10 J. GENDER RACE & JUST. 193, 237 (2007).

policy of engagement with these groups was one of “our islands and their people.”⁷⁶

In the 1901 decision *Downes v. Bidwell*,⁷⁷ the Court looked at the question of whether constitutional protections applied in the territories. The issue in the case was whether Congress’s delimitations of the application of U.S. law in Puerto Rico under the Foraker Act⁷⁸ violated Article I, Section 8 of the Constitution requiring that “all Duties, Imposts and Excises shall be uniform throughout the United States.”⁷⁹ Justice Henry Billings Brown, the author of the majority opinion in *Plessy* five years earlier, delivered the opinion of the Court. In concluding that the Foraker Act was constitutional, Justice Brown reasoned that the territories were “inhabited by alien races, differing from us in religion, customs, laws, methods of taxation and modes of thought,” such that “the administration of government and justice according to Anglo-Saxon principles may for a time be impossible.”⁸⁰ Commentators have criticized the decision in *Downes* and the series of cases that share its rationale as being inconsistent with constitutional law and overtly racist.

Judge Juan R. Torruella compares the damage done to minority groups in these cases to the havoc wrought by the now repudiated decision in *Plessy*, explaining that “[t]he ‘redeeming’ difference is that *Plessy* is no longer the law of the land,” while the *Insular Cases*’ “regime of de facto political apartheid . . . continues in full vigor.”⁸¹ The *Insular Cases* continue a line of reasoning from *Chae Chan Ping* to *Plessy*, in which majoritarian dominance of geographical spaces premised on white superiority creates a political asymmetry. The government is permitted by law to regulate racial minorities, but not to extend full legal protections to these same groups. The result is a legal status that Saito calls “our islands and their people.”⁸²

IV. THE CNMI AND IMPERIALIST IMMIGRATION REFORM

A. *Protection of White Spaces and the Lessons of the CNMI’s Immigration Policy*

Chae Chan Ping, *Plessy*, and the *Insular Cases* were contemporaries, decided under the tenure of the same chief justice. The cases affirmed the federal government’s right to regulate different groups of racial minorities while protecting racialized spaces and geographies. *Plessy*, the only of these

76. *Id.* at 237–38 (quoting OUR ISLANDS AND THEIR PEOPLE AS SEEN WITH CAMERA AND PENCIL (William Smith Bryan ed., 1899)).

77. 182 U.S. 244 (1901).

78. Ch. 191, 31 Stat. 77 (1900) (codified as amended in scattered sections of 11 and 48 U.S.C.).

79. U.S. CONST. art. I, § 8, cl. 1; *Downes*, 182 U.S. at 299 (White, J., concurring) (“The sole and only issue . . . is whether the particular tax in question was levied in such form as to cause it to be repugnant to the Constitution. This is to be resolved by answering the inquiry, had Porto Rico, at the time of the passage of the act in question, been incorporated into and become an integral part of the United States?”).

80. *Downes*, 182 U.S. at 287.

81. Torruella, *supra* note 66, at 286.

82. Saito, *supra* note 75, at 237–38.

decisions to be overruled at the time of this writing, dealt directly with the question of segregating spaces according to racial demarcations. *Chae Chan Ping* and the *Insular Cases* addressed the regulation of people and spaces in a subtler way. In *Chae Chan Ping*, the Court confirmed the right of the federal government to regulate Chinese nationals and exclude them from the country. Likening the decision of Congress to exclude the Chinese to a decision to protect the nation from foreign hostilities, the Court in *Chae Chan Ping* reasoned that if Congress “considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security . . . its determination is conclusive upon the judiciary.”⁸³

Professor John A. Powell explains how this regulation and restriction of immigrants into the nation is a function of constructing the nation: “Our everyday discourse is replete with the idea of a national identity and by extension, national boundaries. Part of this discourse is also about the invasion of the alien other.”⁸⁴ As nations are created, “[w]hat is being sorted in the making of a nation-state is not just the question of who is in a physical space, but who is in the psychic space, in the imagined community of that space.”⁸⁵ When Justice Stephen J. Field in *Chae Chan Ping* speaks of “us,” he is invoking the imagined national community. As Powell goes on to explain, “[i]t is not enough to be in the physical space to be part of the imagined community; one also has to be able to assert that one is part of the ‘racial state of being’ to claim legitimacy for membership in white space.”⁸⁶ When it came to Chinese nationals, this perceived inability to “assimilate” or join the imagined community justified disparate treatment.

Likewise, in the *Insular Cases*, the residents of the newly appended territories met the “inclusion in the physical space” test but failed to fall within the “imagined community.” In explaining the validity of the U.S. claim to control the physical space of the territories, Justice Edward D. White in *Downes* concluded that a “state may acquire property or domain in various ways” including “by conquest, confirmed by treaty or tacit consent.”⁸⁷ While affirming the inclusion of the territories into the sovereign control and possession of the United States, Justice White doubted that the people could be similarly subsumed into the national identity, concluding that, “if the conquered are a fierce, savage, and restless people, [the conqueror] may . . . govern them with a tighter rein, so as to curb their ‘impetuosity and to keep them under subjection.’”⁸⁸

83. *Chae Chan Ping v. United States*, 130 U.S. 581, 606 (1889) (emphasis added).

84. John A. Powell, *Dreaming of a Self Beyond Whiteness and Isolation*, 18 WASH. U. J.L. & POL’Y 13, 17 (2005).

85. *Id.*

86. *Id.*

87. *Downes v. Bidwell*, 182 U.S. 244, 300–01 (1901) (White, J., concurring) (quoting H.W. HALLECK, INTERNATIONAL LAW; OR RULES REGULATING THE INTERCOURSE OF STATES IN PEACE AND WAR 126 (1st ed. 1861)).

88. *Id.* at 302 (quoting H.W. HALLECK, INTERNATIONAL LAW; OR RULES REGULATING THE INTERCOURSE OF STATES IN PEACE AND WAR 814 (1st ed. 1861)).

Though today's territories comprise somewhat different geographies than those originally considered in the *Insular Cases*, their collective disparate legal treatment persists more than a century on. Lack of inclusion in the imagined community is one of the primary indicators of the territories' ongoing unequal legal status. Two of the most intractable issues have been the citizenship status and political representation of those residing in the territories. All five of the U.S. territories have limited political representation at the federal level,⁸⁹ and one, American Samoa, does not extend U.S. citizenship to those born in the territory.⁹⁰ In the words of Powell, "[o]ne is likely to think of a nation-state as a bounded territory that must be policed, but there is also always the issue of people who are already in the bounded territory who are not considered part of the nation-state."⁹¹

1. The Relevance of History to the CNMI

As explained in Part I, the Northern Mariana Islands were not yet part of the U.S. territories at the time of the *Insular Cases*. But the impact of those cases continues to reverberate in the legal treatment of the CNMI today. As with all of the territories except Puerto Rico, the CNMI's federal policy is coordinated by the U.S. Department of the Interior's Office of Insular Affairs.⁹² As with the other territories, the CNMI also has limited congressional representation that was not secured until the Consolidated Natural Resources Act provided for a nonvoting delegate to the commonwealth in 2008.⁹³

Despite these similarities, the history of the relationship between the CNMI and the United States differs from other territories in large part due to the commonwealth's negotiation of a bilateral agreement in the lead-up to its formation. With the covenant, the CNMI was able to assert its prerogative across a variety of strategic interests. Among those priorities was the ability to opt in and out of certain provisions of federal law, including regulating its own system of immigration for decades.

At the same time, the history of U.S. relations with the Marianas is not without conquest and violence. The islands initially came under U.S. influence within the context of war and U.S. military strategy. During World War II, the United States captured two of the major islands in the Marianas, Saipan and Tinian, from Japanese control.⁹⁴ The fact that the Marianas offered a position of strategic military importance that continues today⁹⁵

89. See GARRETT, *supra* note 17.

90. See *Fitisemanu v. United States*, 1 F.4th 862, 865 (10th Cir. 2021); *Tuaua v. United States*, 788 F.3d 300, 306–07 (D.C. Cir. 2015).

91. Powell, *supra* note 84, at 17.

92. GARRETT, *supra* note 17.

93. See *id.*; Consolidated Natural Resources Act of 2008, Pub. L. No. 110-229, § 711, 122 Stat. 754, 868 (codified at 48 U.S.C. § 1751).

94. *Pacific Islanders: Territorial Status and Representation*, *supra* note 15.

95. See *About, CNMI JOINT MILITARY TRAINING EIS/OEIS*, <https://www.cnmijointmilitarytrainingeis.com/about.html> [https://perma.cc/VSP8-9X6C] (last visited Mar. 6, 2023).

offers one rationale for the United States's political ties to the islands. In the negotiations leading up to the signing of the covenant establishing the CNMI, the United States negotiated to retain the right to control defense and foreign affairs for the CNMI.⁹⁶

Both of these U.S. interests make Congress's decision to leave the administration of immigration to the commonwealth particularly perplexing. Among the Supreme Court's reasons for recognizing Congress's superior interest in regulating immigration at the federal level, defense and foreign affairs rank high. Justice Field, writing for the Court in *Chae Chan Ping*, explained that federal power, including in national security and foreign relations, "can be invoked for the maintenance of [the country's] absolute independence and security *throughout its entire territory*."⁹⁷ In the Court's view, these powers were central to the federal government's plenary power to displace state regulations and exercise exclusive control over immigration.⁹⁸

2. The CNMI Immigration Carve-Out

Given this historical context, it is particularly anomalous that Congress would permit the CNMI to regulate its own system of immigration. The interests of the CNMI, including maintenance of its own sovereignty as well as economic considerations, have been more thoroughly explored in scholarship.⁹⁹ But what were the interests of the federal government in ceding this immigration authority to the CNMI? During World War II, the CNMI offered a militarily strategic location, perhaps most infamously as the launch site of the atomic bomb attacks on Hiroshima and Nagasaki.¹⁰⁰ Later, the islands represented a perceived geopolitical advantage during the Cold War, including in the context of a failed attempt by the Central Intelligence Agency to prevent the spread of communism in mainland China.¹⁰¹ These imperialistic interests also formed part of the underlying motivation for the United States's interest in negotiating the covenant in the 1970s. During the negotiations leading up to covenant, the Carter administration touted the Northern Mariana Islands's strategic proximity to crude oil shipping lanes between the Middle East and Japan.¹⁰² These interests were especially significant in the context of the domestic energy crisis brought about by foreign oil embargoes of the time.¹⁰³

96. See *Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America*, Pub. L. No. 94-241, 90 Stat. 263 (1976) (codified at 48 U.S.C. § 1801 note); see also *Pacific Islanders: Territorial Status and Representation*, *supra* note 15.

97. *Chae Chan Ping v. United States*, 130 U.S. 581, 604 (1889) (emphasis added).

98. See *id.*

99. See, e.g., Villazor, *supra* note 36, at 531–40; Misulich, *supra* note 42, at 213–19.

100. LEIBOWITZ, *supra* note 1, at 526.

101. *Id.*

102. *Id.* at 533.

103. See *The Oil Shocks of the 1970s*, YALE UNIV., <https://energyhistory.yale.edu/units/oil-shocks-1970s> [<https://perma.cc/D57T-L2YB>] (last visited Mar. 6, 2023).

In addition to the U.S. interests specific to cementing a relationship with the Northern Mariana Islands, historical context relating to domestic immigration trends are also significant for understanding Congress's acquiescence to the immigration carve-out. Throughout U.S. history, attitudes toward immigration have tended to fluctuate in reaction to migration flows. At the time of the negotiation of the CNMI covenant in the 1970s, immigration was on the upswing, due in large part to the 1965 Immigration and Nationality Act's¹⁰⁴ efforts to redress racially discriminatory quotas.¹⁰⁵ But this increase was relatively gradual.¹⁰⁶ In addition, the 1970s was a time during which two major trends in immigration were still in development.

First, the demographic shift in nonwhite immigration to the United States had yet to occur. Although the 1965 Immigration and Nationality Act created opportunities for more immigrants from around the world to settle in the United States, the demographic data of the time reveal that those deeper changes in the racial makeup of arriving immigrants were yet to come. In 1970, European immigration still accounted for nearly 60 percent of new arrivals.¹⁰⁷ As a result, some of the racial anxiety that has more recently characterized national policy did not exist at the same level. Second, the phenomenon of unauthorized immigration was only beginning to be understood in the 1970s. By capping immigration to the United States from the western hemisphere, the 1965 Immigration and Nationality Act had for the first time placed numerical restrictions on immigrants who had not been previously subject to those limitations.¹⁰⁸ As a consequence, unauthorized immigration, primarily from Mexico, would start to build, reaching massive levels in the 1980s¹⁰⁹ and continuing into the early 2000s.¹¹⁰

104. Act of Oct. 3, 1965, Pub. L. No. 89-236, 79 Stat. 911 (codified as amended in scattered sections of 5 and 8 U.S.C.).

105. See Muzaffar Chishti, Faye Hipsman & Isabel Ball, *Fifty Years On, the 1965 Immigration and Nationality Act Continues to Reshape the United States*, MIGRATION POL'Y INST. (Oct. 15, 2015), <https://www.migrationpolicy.org/article/fifty-years-1965-immigration-and-nationality-act-continues-reshape-united-states> [<https://perma.cc/K9JR-BSRX>].

106. See *Legal Immigration to the United States, 1820–Present*, MIGRATION POL'Y INST., <https://www.migrationpolicy.org/programs/data-hub/charts/Annual-Number-of-US-Legal-Permanent-Residents> [<https://perma.cc/8JDK-SRKA>] (last visited Mar. 6, 2023) (showing a relatively stable growth in the 1970s compared to immigration spikes in other decades).

107. *Regions of Birth for Immigrants in the United States, 1960–Present*, MIGRATION POL'Y INST., <https://www.migrationpolicy.org/programs/data-hub/charts/regions-immigrant-birth-1960-present> [<https://perma.cc/6ZRJ-NKB6>] (last visited Mar. 6, 2023) (noting that in 1970, European immigrants made up 59.7 percent of new arrivals to the United States).

108. See Chishti et al., *supra* note 105.

109. See Jeffrey S. Passel, *Estimating the Number of Undocumented Aliens*, MONTHLY LAB. REV., Sept. 1986, at 33 (estimating that approximately two million undocumented immigrants were counted in the 1980 census, of whom 1.1 million were Mexican nationals).

110. See Mark Hugo Lopez, Jeffrey S. Passel & D'Vera Cohn, *Key Facts About the Changing U.S. Unauthorized Immigrant Population*, PEW RSCH. CTR. (Apr. 13, 2021), <https://www.pewresearch.org/fact-tank/2021/04/13/key-facts-about-the-changing-u-s-unauthorized-immigrant-population/> [<https://perma.cc/3F74-YPF8>] (estimating that 12.2 million people were living in the United States as undocumented immigrants in 2007, of whom 6.9 million were Mexican nationals).

But at the time of the effective date of the political association between the United States and CNMI, concerns about unauthorized immigration and immigration enforcement (especially as it would develop post-9/11) did not yet exist on today's scale.

3. The Consolidated Natural Resources Act of 2008

As explored in Part I, concerns about labor exploitation in the CNMI served as the catalyst for Congress to pass the CNRA in 2008. As part of the legislation, Congress made certain provisions of U.S. immigration law applicable in the commonwealth on the effective date of the act but created a transition period through December 31, 2014¹¹¹ to allow the CNMI to address its most challenging issue—what to do with the thousands of foreign guest workers¹¹² who would not qualify for immigration status under federal law.¹¹³ Section 702 of the act also included a provision that would allow for five-year extensions of the transition period if “necessary to ensure an adequate number of workers will be available for legitimate businesses in the Commonwealth.”¹¹⁴ In response to the legislation, the U.S. Department of Homeland Security (DHS) promulgated regulations to implement the transitional worker classification created by the CNRA.¹¹⁵ The CNMI then sued seeking to enjoin implementation of the CNRA's immigration provisions. In companion cases filed with the U.S. District Court for the District of Columbia, the CNMI challenged not only Congress's authority to pass the CNRA,¹¹⁶ but also DHS's implementing regulations.¹¹⁷

In decisions issued on the same day, the court agreed with the CNMI that DHS had erred in failing to provide a notice-and-comment period and temporarily halted the regulations but found in favor of the U.S. government's authority to enact the CNRA. In the CNRA litigation, the U.S. government asserted that its interests in enacting the CNRA were “to ensure (1) ‘that effective border control procedures are implemented and observed’ in the CNMI; and (2) ‘that national security and homeland security issues are properly addressed’ in the CNMI.”¹¹⁸ In the case challenging Congress's authority to implement immigration law, the CNMI argued that the covenant

111. Consolidated Natural Resources Act of 2008, Pub. L. No. 110-229, sec. 702(a), § 6(a)(2), 122 Stat. 754, 855 (codified at 48 U.S.C. § 1806(a)).

112. The litigation initiated by the CNMI following the passage of the CNRA estimated that the number of foreign workers and their family members totaled “roughly 24,000” of the approximately 60,000 inhabitants of the commonwealth. *Northern Mariana Islands v. United States*, 670 F. Supp. 2d 65, 71 (D.D.C. 2009).

113. Consolidated Natural Resources Act of 2008 sec. 702(a), § 6(d)(2), 122 Stat. at 857 (codified at 48 U.S.C. § 1806(d)(2)).

114. *Id.* sec. 702(a), § 6(d)(5)(A), 122 Stat. at 857–58 (stricken in 2014).

115. Commonwealth of the Northern Mariana Islands Transitional Worker Classification, 74 Fed. Reg. 55094 (Oct. 27, 2009) (to be codified at 8 C.F.R. pts. 103, 214, 274a, 299).

116. *See Northern Mariana Islands*, 670 F. Supp. 2d at 69.

117. *See Northern Mariana Islands v. United States*, 686 F. Supp. 2d 7, 11 (D.D.C. 2009).

118. *Northern Mariana Islands*, 670 F. Supp. 2d at 87 (quoting Consolidated Natural Resources Act of 2008, § 701(a)(1)–(2), 122 Stat. 754, 853–54 (codified at 48 U.S.C. § 1806 note)).

required the CNMI's consent to enact the changes.¹¹⁹ The court disagreed and determined that the covenant not only provided for Congress to enact immigration law for the commonwealth¹²⁰ but also held "that a sovereign's interests in foreign affairs and security" justified Congress's action.¹²¹

B. *The CNMI's Absence of White Space*

The rationales of national security and foreign affairs referenced in the CNRA litigation have existed since early immigration regulation in the United States. Yet despite the court's reasoning in those cases, the United States continues to treat the CNMI differently when it comes to immigration. A fact from the CNMI's litigation against the United States may explain why. In those cases, CNMI officials "concluded that various factors would make it difficult to attract workers and investors from the United States," and thus opted to "attract large numbers of foreign workers."¹²² In the CNMI, the majority of the population identifies as Asian American and Pacific Islander (AAPI). The number of U.S. citizens of any non-AAPI ethnicity is extremely limited, with the white ethnic group comprising a mere 1.1 percent of the total population and all other non-AAPI ethnicities comprising only 6.2 percent of the total population.¹²³ These demographics are likely due in part to land alienation laws that restrict land ownership in the CNMI to the indigenous people of the islands and their descendants.¹²⁴ Yet these land restrictions have done little to deter migration of nonwhite ethnicities to the CNMI. Nonwhite, nonindigenous residents make up the majority of the CNMI's population.¹²⁵ To the extent that our laws and policies have made U.S. citizenship coextensive with white ethnicity, the relative absence of white spaces in the CNMI is a salient and, I argue, operative motivation for the federal government's attitudes toward immigration in the commonwealth. With white interests underrepresented in the CNMI, under Powell's theoretic framework, the CNMI both fails to present a "white space" worthy of governmental enforcement and a population whose people fall outside of Powell's conception of the "imagined community."¹²⁶

119. *See id.* at 77.

120. *See id.* at 87 (citing Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, Pub. L. No. 94-241, § 104, 90 Stat. 263, 264 (1976) (codified at 48 U.S.C. § 1801 note) (providing that the United States has "complete responsibility for and authority with respect to matters relating to foreign affairs and defense")).

121. *Id.* at 88 (first citing *Landon v. Plasencia*, 459 U.S. 21, 34 (1982); and then citing *Kleindienst v. Mandel*, 408 U.S. 753, 765 (1972)).

122. *Id.* at 72.

123. *CNMI Labor Force Participation Survey 2017 Population Characteristics*, *supra* note 14.

124. *See* Rose Cuison Villazor, *Blood Quantum Land Laws and the Race Versus Political Identity Dilemma*, 96 CALIF. L. REV. 801, 806 n.24 (2008) (discussing sections 1 and 4 of article XII of the Northern Mariana Islands Commonwealth Constitution, which limit land ownership to persons of Northern Marianas descent).

125. *See CNMI Labor Force Participation Survey 2017 Population Characteristics*, *supra* note 14.

126. *See* Powell, *supra* note 84, at 17.

C. *Bipartisan Extension of the CNMI Transition Period*

It is easy to write off the initial failure of the federal government to enact and enforce immigration law as an oversight or necessary compromise to secure political union with the Northern Mariana Islands. A concern for local autonomy may have also initially guided the U.S. government's approach to immigration in the commonwealth. But the CNRA effectively negated that purported commitment by overriding the will of the CNMI's local officials. Today, federal immigration law has supplanted the commonwealth's immigration system. It has done so not by incorporating the immigration system used in the rest of the nation, but instead by creating an alternate system of immigration regulation. After the CNMI prevailed in its efforts to enjoin the implementing regulations of the CNRA from taking effect, the DHS opened a new notice-and-comment period with a final rule for CNRA implementation that went into effect in 2011.¹²⁷ In this rule, DHS explained that it could not "adopt the suggestion to extend the transition period [for CNMI workers] beyond 2014," despite comments requesting this approach.¹²⁸ Yet the temporary transition period has been extended a number of times with a current termination date of December 31, 2029.¹²⁹ What has been remarkable about the federal government's extension of the transition period is its bipartisanship.¹³⁰ That this would remain true even under the divisive Trump administration is particularly astounding.

D. *The Trump Administration and the Northern Mariana Islands Long-Term Legal Residents Relief Act*

President Trump signed legislation that extended the transition period to the end of 2029 when he endorsed the Northern Mariana Islands U.S. Workforce Act of 2018.¹³¹ This legislative accomplishment received little attention outside of the CNMI.¹³² The Trump administration's general hostility to immigration policies that did anything but restrict migration is stunning when you consider his endorsement of immigration reform in the CNMI. Not only did he approve the extension of the transition period for incorporating federal immigration law, but he also signed the Northern

127. See Commonwealth of the Northern Mariana Islands Transitional Worker Classification, 76 Fed. Reg. 55502 (Sept. 7, 2011) (to be codified at 8 C.F.R. pts. 103, 214, 274a, 299).

128. *Id.* at 55524.

129. See *U.S. Immigration Law in the Commonwealth of the Northern Mariana Islands (CNMI)*, U.S. CITIZENSHIP & IMMIGR. SERVS. (June 18, 2020), <https://www.uscis.gov/laws-and-policy/other-resources/us-immigration-law-in-the-commonwealth-of-the-northern-mariana-islands-cnmi> [<https://perma.cc/3VG7-SLZA>].

130. See Secretary of Labor Extends the Transition Period of the Commonwealth of the Northern Mariana Islands—Only Transitional Worker Program, 79 Fed. Reg. 31988, 31989 (June 3, 2014) (extending the period during the Obama administration).

131. Pub. L. No. 115-218, 132 Stat. 1547 (codified as amended in scattered sections of 48 U.S.C.).

132. See *Breaking News: NMI US Workforce Act of 2018 Now Law*, SAIPAN TRIB. (July 25, 2018), <https://www.saipantribune.com/index.php/breaking-news-nmi-us-workforce-act-of-2018-now-law/> [<https://perma.cc/CGD3-CWBG>].

Mariana Islands Long-Term Legal Residents Relief Act. That legislation set CNMI workers on a pathway to permanent resident status in the CNMI.¹³³

Despite Congress's declaration in the CNRA that the federal government intends to bring the CNMI into harmony with federal immigration law,¹³⁴ the creation of the CNMI-only resident status¹³⁵ endorsed by President Trump in 2019 suggests otherwise. It creates a new immigration status unique to the CNMI that has no analogue in federal law. Although this legislation may appear inconsistent with President Trump's domestic policy platform, deeper inquiry suggests that his support of the bill can be understood within the context of imperialist immigration reform. Some of the main beneficiaries of the law are foreign labor-dependent companies who donated to President Trump's lavish inaugural gala.¹³⁶ In the lead-up to the law's passage, a Trump campaign aide who had assisted in organizing the gala became a registered lobbyist.¹³⁷ His client was a Saipan-based casino that is dependent on foreign guest workers.¹³⁸

CONCLUSION

U.S. immigration policy has been one of the central and most divisive national policy debates, but the federal government's attitude toward the CNMI has been wholly inconsistent with that larger debate. Despite claimed interests in a uniform system of immigration, Democrats and Republicans have ensured that immigration in the CNMI remains exempt from federal law. As a result, beneficiaries of the 2019 long-term resident legislation enjoy protection in the CNMI but shed that protection upon travel to other parts of the United States. They exist in a legal liminal space that keeps them confined to an island chain far from the lands and peoples that the federal government has determined enjoy different rights. Indeed, those who have arguably benefitted most from the legislation are the U.S. companies that retain a permanently disenfranchised workforce. Over a hundred years later, Chief Justice Fuller's dissent in *Downes* speaks presciently to the CNMI's imperialist immigration reform: "Congress has the power to keep it, like a

133. Northern Mariana Islands Long-Term Legal Residents Relief Act, Pub. L. No. 116-24, sec. 2, § 6(e)(6), 133 Stat. 977, 977 (2019) (codified as amended at 48 U.S.C. § 1806).

134. See Consolidated Natural Resources Act of 2008, Pub. L. No. 110-229, § 701(a), 122 Stat. 853, 853 (codified at 48 U.S.C. § 1806 note) (explaining in the act's statement of congressional intent that the provisions relating to immigration in the CNMI were enacted "in recognition of the need to ensure uniform adherence to long-standing fundamental immigration policies of the United States").

135. Northern Mariana Islands Long-Term Legal Residents Relief Act sec. 2, § 6(e)(6)(A)(iv)(IV), 133 Stat. at 978 (codified as amended at 48 U.S.C. § 1806(e)(6)(A)(iv)(IV)) (providing that an alien granted status under the act "automatically shall lose such status if the alien travels from the Commonwealth to any other place in the United States").

136. Lulu Ramadan, *Hidden Cash Flowed at Trump Asian Inaugural Ball*, PALM BEACH POST, <https://www.palmbeachpost.com/story/news/politics/government/2019/04/12/undisclosed-cash-flowed-at-trump-inaugural-ball-with-ties-to-china-embattled-saipan-casino/5445458007/> [<https://perma.cc/E9D2-H7WL>] (Apr. 13, 2019, 4:28 PM).

137. *Id.*

138. *Id.*

disembodied shade, in an intermediate state of ambiguous existence for an indefinite period.”¹³⁹

Ya un dia bai hu hanao
Bai hu fatto ha' ta' lo.
Ti sina hao hu
Dingu o tano'-hu.
(Chamorro version)

And one day I shall leave
But I shall return.
For I cannot depart from you,
These Mariana Islands.
(English version)

—National Anthem of the Commonwealth of
the Northern Mariana Islands¹⁴⁰

139. *Downes v. Bidwell*, 182 U.S. 244, 372 (1901) (Fuller, C.J., dissenting).

140. LEIBOWITZ, *supra* note 1, at 519.