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# 'A wolf in sheep's clothing': settler voting rights and the elimination of the Indigenous demos in US Pacific territories

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## ABSTRACT

Settler colonialism eliminates Indigenous sovereignty, enthrones itself, and thereby makes Indigenous land 'ours'. It may do this meta-politically, by absorbing 'them' into 'us'. This article explores three recent lawsuits brought by settlers against Indigenous demoi in US Pacific territories. I show that in each lawsuit, settlers brandished a novel 'tool of elimination': individual voting rights. I trace how settlers wielded this tool to deliver a 'one-two punch', first condemning as 'illiberal' restrictive voting laws flowing from Indigenous sovereignty and then championing race-neutral laws that would in effect enthrone settlers. I show that courts hearing these cases were faced with choosing the appropriate 'framing of justice' – with whether the relevant rights-bearer was the universal individual voter or the 'constitutionally prior' Indigenous demos. Finally, I show that, because the courts ultimately framed these disputes as individual-rights cases, settlers extended control of meta-politics on the US Pacific frontier.

## KEYWORDS

Settler colonialism; Indigenous sovereignty; voting; US Pacific territories; liberal theory; constitutional law

## 1. Introduction

Because there are many of us, says Jeremy Waldron, there is politics.<sup>1</sup> But who is 'us'? Are some instead 'them'? Can the former absorb the latter, and if so, how and when? It is because of questions like these that there is meta-politics, the focus of this paper. Meta-political questions may seem esoteric, but that is far from the case. They are elemental, generating the foundation stones upon which polities are built. Undergirding any self-governing community are subjective assertions about who 'we, the people' are and how and where 'we' should rule. If those meta-political foundations erode – or indeed, if they are strategically undermined – a polity may be brought to its knees.

That is one way to think about settler colonialism in the United States. Just four centuries ago, what is now the United States was home to an array of self-ruling Indigenous peoples who presided over territories and citizenries they considered their own. Then came the tide of Europeans, deposing Indigenes and enthroning themselves. Their tools were diverse – treaties, Bibles, boarding schools, Gatling guns. But their goal was simple: make 'theirs' ours.

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By 1890, this meta-political coup was largely complete. The Indian Wars were over, the frontier was closed, the West was won. Native Americans were wards of the United States, and Indian Country was a domestic rather than foreign jurisdiction.

Arguably, however, Manifest Destiny did not cease at the western ocean. That same decade, the United States acquired its first offshore territories in the Pacific. These too were Indigenous jurisdictions. Some of them, in some sense, remain that way. Hawaii was of course swallowed into the American body politic, but its Indigenous people, unlike mainland Native Americans, have an ambiguous constitutional status. Similarly, colonies like the Commonwealth of the Northern Mariana Islands (CNMI) and Guam are in meta-political limbo. They are not exactly ‘ours’, nor securely ‘theirs’. Insofar as native sovereignty in, and of, Hawaii, CNMI and Guam is disputed, these places may be seen as still-active fronts of US settler colonialism.

I suggest that key dynamics of modern settler colonialism may be revealed by examining settler/Indigenous clashes on these Pacific frontiers. I sort these dynamics into four strands.

First, I suggest that in the Pacific we can see settlers brandishing a new ‘tool of elimination’: individual voting rights, asserted in opposition to Indigenous anti-colonial efforts. Except in the work of scholars like Judy Rohrer,<sup>2</sup> this tool has received little attention. Second, building on her work, I suggest that settlers wielding this tool in effect deliver a ‘one-two punch’, condemning as ‘illiberal’ those voting laws flowing from Indigenous sovereignty and then swapping them with ostensibly race-neutral laws that serve to enthrone the settler demos. Third, building on Nancy Fraser’s<sup>3</sup> theory of ‘abnormal justice’, and on the ‘structure of democracy’ work of the likes of Samuel Issacharoff<sup>4</sup> and Richard Pildes,<sup>5</sup> I suggest that how these rights cases are resolved hinges on how they are framed – on whether courts see the appropriate subject of justice as the universal individual or the ‘constitutionally prior’ native demos. Finally, I contend that, where such disputes are framed as individual-rights cases, settlers may achieve control of frontier meta-politics. Having problematised the existence of a discrete ‘them’, they may dissolve Indigenous political selfhood into the broader American ‘we’. In this manner, settler rights, though asserted under the guise of liberalisation, may thwart Indigenous liberation.

This article seeks to examine these dynamics by analysing three recent lawsuits in the US Pacific. In all three, settlers charged that their rights were violated as a result of Indigenous assertions of self-determination. My argument proceeds in the following way. In Section 2 I lay out a theory of the meta-politics of settler colonialism. In Section 3 I examine the Hawaiian case *Rice v. Cayetano*, decided by the US Supreme Court in 2000. In Section 4 I study *Davis v. Commonwealth Election Commission*, involving CNMI, decided in 2016. In Section 5 I look at the 2017 case *Davis v. Guam*. In Section 6 I analyse and conclude.

## 2. Theory

### 2.1. Meta-politics and law

Democracy is ‘rule by the people’, but who are the people? This is the meta-political ‘boundary problem’ vexing to theorists of liberalism and democracy. Democracy provides no solution to the boundary problem; as Ivor Jennings observes, ‘The people cannot decide until someone decides who are the people’.<sup>6</sup> Liberalism is not much more helpful. Most

liberals support the right of peoples to collective self-determination, yet are troubled by how self-determination harms outsiders who want in and insiders who want out.

It is no wonder, then, that demos-bounding takes place external to normal politics. The line between the political ‘self’ and others typically emerges from deep history, or is dictated by brute *realpolitik*, or is crystallised in some hallowed ‘constitutional moment’. Issacharoff<sup>7</sup> describes bounding as ‘constitutionally prior’ to democracy; he thus calls it a ‘first order’ exercise. Ideally, boundaries are fixed before a government is up and running. In the classic American case, the federal demoi were identified, and their shares of power allotted, during the framing of the Constitution. The Great Compromise was exactly as it sounds – a meta-political bargain, hashed out between the big and small states, so everyone could get on with other business.

Other business like what? For one, formalising what could be called ‘second order’ political arrangements, dealing with how power is to be exercised once governance is underway. Second-order matters include rules and rights that fall under the so-called ‘law of democracy’<sup>8</sup> – the guidelines of the democratic process. These guidelines govern campaign funding, durational-residency requirements, electoral districting and so forth. Unlike first-order arrangements, which attach to demoi, second-order laws of democracy attach to individuals. Rather than enshrining collective self-determination, they protect liberal values such as difference-blindness and egalitarianism.

Yet meta-political choices complexly entwine with political ones, as is evident from the case of the aforementioned Great Compromise. Due to it, Wyoming, the state with the lowest population, and California, with the highest, enjoy equal representation in the US Senate. This first-order arrangement has staggering consequences ‘downstream’ for the second-order law of democracy. There, the federal voting power of individual Wyomingites dramatically exceeds that of Californians. Normally this would be unacceptable – an affront to ‘one person, one vote’. However, because the Great Compromise is constitutionally entrenched, the underrepresented citizens of California have no legal recourse. Any attempt to correct downstream malapportionment would wash upstream, impermissibly eroding the federal order.

Yet collective self-determination is not always entrenched at the time of state-making – or it does not always stay entrenched. When there develops a fervent demand to re-level the foundations of governance, first-order demotic battles may erupt into everyday politics.<sup>9</sup> Such constitutionally prior questions take diverse forms. What is to be done when a faction employs gerrymandering to achieve a stranglehold on power? How should power be divvied up among consociating polities? Should annexed peoples be merged into the broader state demos, or retain a measure of sovereignty? May sovereigntists break away?

As noted, democracy is incapable of answering such first-order dilemmas. Hence, courts are increasingly stepping in.<sup>10</sup> Ran Hirschl calls this the ‘judicialization of megapolitics’<sup>11</sup>; Pildes, the ‘constitutionalization of democratic politics’.<sup>12</sup> Fraser would situate it within the field of ‘abnormal justice’.<sup>13</sup> Familiar first-order cases include the European Court of Human Rights’ decisions on the legality of power sharing in Belgium<sup>14</sup> and Bosnia,<sup>15</sup> the German Federal Constitutional Court’s ruling on joining the Maastricht Treaty,<sup>16</sup> the Supreme Court of Canada’s *Quebec Secession Reference*,<sup>17</sup> and the US Supreme Court’s revolutionary redistricting decisions, such as *Reynolds v. Sims*.<sup>18</sup>

All demotic-bounding cases are thorny. They dredge up potentially fraught bargains that were hammered out, or awkward realities that were dodged, at the time of state-making. (Rhetorically, Stephen Tierney suggests, ‘why not let sleeping dogs lie rather than invite a confrontation over inclusion and exclusion’.<sup>19</sup>) Moreover, where first-order questions are emergent, they cannot be tackled in the vacuum of a ‘constitutional moment’. They must be grappled with on the fly, in the hurly-burly of everyday politics, with demoi who are already dug in, powers divvied up, and turf jealously guarded.<sup>20</sup>

Even more confoundingly, first-order cases can be hard to distinguish, or disentwine, from second-order cases. Individuals may contest ethnic discrimination that ensues from an upstream demotic compromise, as in the aforementioned Bosnian *Sejdić and Finci* case. Or, they may allege that their voting power has been watered down by a first-order power-sharing deal, as in the German Maastricht case. In such cases, courts may find themselves at sea. ‘Normal justice’, states Fraser, is about balancing the proverbial scale of justice until equilibrium is achieved. But in ‘abnormal’ conditions, where ‘constitutionally prior’ assumptions are in dispute, she suggests courts must begin with meta-questions. What is the correct scale to use? How should justice be framed?

Such questions are fundamental because in abnormal justice the frame may foreordain the result. The Supreme Court’s aforementioned *Reynolds* case makes this clear. In that case, an Alabama resident charged that malapportionment of the state senate diluted his voting power, violating the Constitution’s Equal Protection Clause. The state responded with the ‘federal analogy’: the US Senate is malapportioned, so why can’t Alabama’s senate be likewise? Chief Justice Warren deemed this analogy ‘inapposite’, writing, ‘Political subdivisions of states – counties, cities, or whatever – never were and never have been considered as sovereign entities’.<sup>21</sup> The court in effect ruled that Alabama’s political subdivisions lack first-order demotic rights. In *Reynolds*, the sole legitimate subject of justice was deemed to be the individual voter, owed ‘one person, one vote’. As history shows, this finding flooded upstream. The first-order ‘structure of democracy’ of almost every state legislature was quickly upended.

It can be seen, then, that what is ‘constitutionally prior’ complexly entwines with what is ‘constitutionally post’ – that the ‘structure of democracy’ and the ‘law of democracy’ are interlinked in an upstream/downstream dynamic. Hence, scholars have urged courts to wade into this thicket with caution.<sup>22</sup> Issacharoff warns of the danger of overlooking first-order implications: ‘[C]ourts should be wary of following their impulses to treat such ... conflicts about the structure of political systems as familiar claims of individual rights’.<sup>23</sup> Fraser fears the opposite, that the foundational integrity of the state will overshadow second-order pleas for justice. But her solution is the same: judges must be cognisant of how justice is framed. To do this, they must adjudicate ‘reflexively’, grappling first with what scale of justice to use before trying to level the balance.<sup>24</sup>

I suggest there is even greater cause for judicial caution. First-order cases may be tactically disguised as second-order cases. Despite claims to the contrary, plaintiffs’ objective may not be to liberalise the law but, quite conversely, to undermine the foundations of governance so their own group rises to the top. This might occur where remedying second-order injustices would have an upstream effect, eroding pre-political first-order arrangements, much as occurred in *Reynolds*. As I will show next, such caution is especially warranted in cases of settler colonialism.

## 2.2. *Settler colonialism and meta-politics*

Colonialism, as conventionally understood, occurs where developed-world powers exert economic, political and cultural control over exogenous subaltern territories, exploiting the inhabitants' labour, in combination with the land and resources, for the benefit of the metropole. Typifying this dynamic was Europe's centuries-long dominion over the Global South. Since the Second World War, colonialism of this sort has retreated, with more than 80 former colonies, encompassing 750 million residents, declaring independence.

As Patrick Wolfe<sup>25</sup> famously observed, a colonial variant called settler colonialism has proved far more resilient. The United States is an archetypal settler colony; others include Canada, Australia and New Zealand. Settler colonies may have begun conventionally, as imperial possessions yoked for profit.<sup>26</sup> But distinctively, they were at some point flooded with metropolitan and other developed-world settlers. Motivated by what Wolfe calls a 'logic of elimination', these settlers strived to assimilate, confine, expel or kill the Indigenous, take their homelands, and establish 'a new colonial society on the expropriated land base'.<sup>27</sup> He states that settlers employ a sort of one-two punch. 'Settler colonialism destroys to replace',<sup>28</sup> with native sovereignty first dissolved and then settlers installed. In this manner, Wolfe says, settler colonialism supplants Indigenous jurisdictions with new versions of the settler motherland.

Over the past several decades, inspired by the retreat of colonialism overseas, and empowered by domestic and international 'rights revolutions',<sup>29</sup> Indigenous peoples have mobilised against settler colonialism.<sup>30</sup> By harnessing law and politics they now resist demotic assimilation, pressing for acknowledgment as constitutionally discrete polities and asserting the right to enjoy group-differentiated treatment and to exercise self-determination and autonomy.<sup>31</sup>

Yet, given the nature of settler colonialism, assertions of Indigenous political rights encounter a distinctive challenge. Where in conventional decolonisation the colonist 'goes home', under all but the most radical conceptions of settler decolonisation, settlers remain. In the United States, settlers continue to numerically dominate, retaining substantial interests concerning mobility, land, voting and so forth. What is more, settler colonialism too has joined the rights revolution, brandishing individual liberal rights in opposition to decolonisation.

Much has been written about how Western individual rights, though ostensibly neutral, may further the subjection of subalterns. Marx, of course, felt exalting liberty promoted selfishness and distance, protecting the bourgeoisie.<sup>32</sup> Communitarians like Michael Sandel and Charles Taylor see rights as atomistic, dissolving the bonds of community that cradle the less well off.<sup>33</sup> Feminists such as Carol Gilligan suggest 'rights-talk' centres the 'masculine voice' and foregrounds male campaigns for 'justice' over female 'ethics of care'.<sup>34</sup> Students of Indigenous law, such as Val Napoleon, argue liberal constitutionalism is hostile to legal pluralism, crowding out Native legal orders.<sup>35</sup>

As well, much has been written about how, even *within* the logic of Western liberalism, rights have been employed to Indigenous disadvantage.<sup>36</sup> Will Kymlicka observes that when states engage in 'demographic engineering', moving settlers into restive subaltern regions, they may condemn as illiberal those arrangements that guard subaltern autonomy. He thus concludes, 'where ethnocultural justice is absent, the rhetoric and practice

of human rights may actually worsen the situation'.<sup>37</sup> Similarly, Avigail Eisenberg notes that the expansion of settler-state constitutionalism into minority jurisdictions may be passed off as liberalisation when in fact it is the opposite – a tool 'aimed at advancing the collective cultural dominance of the majority'.<sup>38</sup>

This tool has been employed recurrently in settler states. In the United States, policies such as reserve-land allotment,<sup>39</sup> tribal termination,<sup>40</sup> and the imposition of American citizenship<sup>41</sup> were in part rationalised as providing Native Americans with equal rights. One of the most notorious such policies, the *Dawes Act*, was in its time hailed as the 'Indians' Magna Carta'.<sup>42</sup> In Canada, the declared aim of the 1969 White Paper proposing elimination of Indigenous status was to let Indians 'be free – free to develop Indian cultures in an environment of legal, social and economic equality with other Canadians'.<sup>43</sup> In New Zealand, champions of the Treaty of Waitangi Deletion Bill vowed to spare Maori from a 'destructive path of separate development' akin to apartheid.<sup>44</sup>

Once Native sovereignty is eliminated, Indigenous collectives are left with two unhappy options. The first is absorption into the settler body politic. The second is staying different – no longer as a political order, but as a distinct racial group. Many scholars have observed how Indigenous group-difference, once racialised, is often condemned as discriminatory. Some scholars have even noted how, for Indigenous groups, racialisation may be *self-destructive*. Robert Porter argues that in the United States, political *Ongwehoweh* misperceive themselves as ethnic 'Native Americans', impairing tribal vitality.<sup>45</sup> Kirsty Gover shows that rules policing tribal citizenship in Canada,<sup>46</sup> and disregard for Indigenous sovereignty in Australia,<sup>47</sup> compel Indigenous peoples to bound their own demoi in a manner that leaves them vulnerable to racial-discrimination claims.

Yet little research has considered how settlers, pursuing a 'logic of elimination', have in recent decades weaponised liberalism, moving it from the realm of rhetoric into the arena of the courts – and how, in doing so, settlers assert rights in a manner that undermines the foundations of Indigenous governance, altering the answer to 'who are the people?' Where Indigenous peoples assert sovereignty, settlers may strive to eradicate that sovereignty, delegitimising the pre-colonial 'them' and replacing it with 'us'.

As Wolfe might predict, settlers weaponise voting rights through a two-phase approach. Rohrer discerns this approach when she observes that in *Rice v. Cayetano* settlers sought first to 'problematize collective native identity' and then 'naturalize white settler subjectivity via a color-blind ideology'.<sup>48</sup> Specifically, settlers first charged that existing laws of democracy – laws that were the epiphenomenal, downstream effect of first-order Indigenous sovereignty – violated second-order individual rights. By framing Indigenous peoples as seeking to illiberally subject fellow citizens to racial discrimination, rather than as a pre-political sovereign exercising self-determination, Indigenous polities were attacked at their demotic foundations. The second settler move was to appeal for the law to be reformed to treat individuals equally. Such liberalisation, of course, had transformative upstream impacts, opening Indigenous jurisdictions to domination by the greater settler demos.

Hence I suggest that, per the aforementioned warnings, courts should be cautious about (mis)framing settler-constitutional challenges as second-order appeals to liberal fairness. Rather, such challenges may sometimes be more coherently understood as camouflaged attacks on Indigenous structures of governance, with settlers deploying rights in a manner that serves less to liberalise than to dominate – to 'colonise the demos'.

In the following three sections I show how this dynamic played out in a trio of recent settler-voting-rights cases in the US Pacific.

### 3. The Hawaiian case, *Rice v. Cayetano* (2000)

Hawaii, the largest island group in Polynesia, occupies just over 4,000 square miles of land in the central Pacific Ocean. Its population is 1.4 million, of which Native Hawaiians and other Pacific Islanders comprise 10%, Asian-Americans 37%, whites 27%, and mixed-race people and 'others' 26%.<sup>49</sup>

Native Hawaiians have inhabited Hawaii for well over a millennium. The first outsider, Captain James Cook, arrived in 1778. Yet for more than a century thereafter, Hawaii remained sovereign, governed by Native Hawaiian monarchs and eventually boasting a constitution, foreign consulates and formal recognition by the United States and European powers. In 1893, American settlers, backed by US troops, overthrew Queen Lili'uokalani. US annexation followed. Native Hawaiians, unlike mainland Native Americans, were not granted federal recognition as a 'semi-sovereign tribal entity'.<sup>50</sup> Still, Congress at times acted as their guardian, including by reserving 200,000 acres for Native homesteading. In 1959 the residents of Hawaii, most of whom by then were settlers,<sup>51</sup> voted for statehood. The United States thus successfully petitioned the United Nations to removed Hawaii from its list of colonised territories.<sup>52</sup> The Native homesteading lands were entrusted to the state 'for the betterment of the conditions of native Hawaiians'.

In the 1960s, Native Hawaiians mobilised for self-determination, with some calling for federal tribal status like Native Americans and others demanding reestablishment of Hawaiian sovereignty. They enjoyed a number of qualified successes. In 1978, the state of Hawaii amended its constitution to create the Office of Hawaiian Affairs (OHA), a semi-autonomous agency that would be the principal administrator of programmes targeting Native Hawaiians and would manage their entrusted lands. The OHA was to be governed by a board of trustees elected exclusively by 'Hawaiians', defined as descendants of persons inhabiting Hawaii when Europeans arrived in 1778. In 1993, the centennial of Lili'uokalani's overthrow, Congress apologised for this injustice and conceded that Native Hawaiians had not legally relinquished sovereignty. The US departments of Interior and Justice issued a report calling for government-to-government relations with Native Hawaiians in the same manner as with mainland tribes. At the time, the most logical Native Hawaiian governing body was felt to be the OHA.<sup>53</sup>

But, observes J. Kēhaulani Kauanui, these Native Hawaiian victories prompted a settler backlash: 'a series of lawsuits by white Americans ... attempting to eradicate Hawaiian-specific institutions in the name of civil rights'.<sup>54</sup> The most prominent was *Rice v. Cayetano*.

#### 3.1. The case

*Rice v. Cayetano* was filed by Harold 'Freddy' Rice, a non-Native Hawaiian who had applied to participate in an election for OHA trustees. His application was rejected because, though he was a fifth-generation state resident, he lacked Hawaiian ancestry dating from 1778. Rice sued, alleging violation of his Fourteenth Amendment right to equal protection of the laws and his Fifteenth Amendment right to vote regardless of



race.<sup>55</sup> The District Court of the State of Hawaii ruled against Rice, as did the Ninth Circuit Court of Appeals. Rice appealed again, to the US Supreme Court. Supporting *amici curiae* were filed by conservative attorneys, including former Supreme Court nominee Robert Bork and now-Justice Brett Kavanaugh. In 2000 the Supreme Court took up his case.

The State of Hawaii, in its statement to the high court, maintained that its impugned voter-classification scheme hinged on lineage, not race. It argued that, with the requisite in-state roots, a person who by blood was almost fully white could vote in the OHA election; without those roots, a full-blood Polynesian could not. The state further argued that, even if the court found the voting scheme to be race-based, it was nonetheless constitutionally defensible, on three grounds.

First, the state noted that in *Morton v. Mancari* the Supreme Court had upheld certain federal preferences for Native Americans. This is because tribes retain ‘quasi-sovereign authority’, respect for which requires group-differentiated treatment of tribal members. Second, the state argued that OHA elections were ‘special purpose elections’ not unlike that which the Supreme Court, in *Salyer v. Tulare*, had exempted from ‘one-person, one vote’. (*Salyer* involved a regional water-use board created to manage irrigation; the court had decided that voting for board members could be weighted in favour of larger landowners). Third, the state argued that its voting scheme was necessary to ensure proper alignment between the fiduciaries of the OHA trust and the beneficiaries, Native Hawaiians.

### 3.2. The ruling

In a 7–2 decision, the Supreme Court disagreed. Justice Anthony Kennedy, writing for the majority, ruled that the state had abridged the Fifteenth Amendment. That amendment, Kennedy stated, affirms ‘the equality of the races at the most basic level of the democratic process, the exercise of the voting franchise’.<sup>56</sup>

Dismissing the state’s argument that its OHA-election qualifications hinge not on race but lineage, Kennedy declared, ‘Ancestry can be a proxy for race. It is that proxy here’.<sup>57</sup> He found that both the purpose and effect of limiting voting to ‘Hawaiians’ was to treat them as a race. He noted that the court, in numerous Jim Crow-era rulings, had expressly forbidden voting restrictions that, while race-neutral on their face, were racial in intent and outcome. Kennedy characterised such restrictions as demeaning to ‘the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities’, and ‘corruptive of the whole legal order democratic elections seek to preserve’.<sup>58</sup>

Kennedy went on to attack the state’s argument that, even if its voting scheme was found to be race-based, it should be upheld regardless. He questioned whether *Mancari* applies to Hawaii, noting that Congress had neither clearly assigned quasi-sovereign status to Native Hawaiians nor clearly authorised the state to treat them as such. Even if it had, he stated, Congress may not empower a state to conduct race-based public elections. ‘If a non-Indian lacks a right to vote in tribal elections, it is for the reason that such elections are the internal affair of a quasi-sovereign’, he wrote. ‘The OHA elections, by contrast, are the affair of the State of Hawaii’.<sup>59</sup>

Kennedy then challenged the state’s other arguments, in effect maintaining that racial classifications could not be excused by the narrowly tailored nature of ‘special purpose elections’, nor by the goal of aligning the interests of ‘the fiduciaries and the beneficiaries

of a trust'. Finally, while acknowledging Native Hawaiians' ambitions for decolonisation, Kennedy insisted the Constitution prevails:

When the culture and way of life of a people are all but engulfed by a history beyond their control, their sense of loss may extend down through generations; and their dismay may be shared by many members of the larger community. As the State of Hawaii attempts to address these realities, it must, as always, seek the political consensus that begins with a sense of shared purpose. One of the necessary beginning points is this principle: The Constitution of the United States, too, has become the heritage of all the citizens of Hawaii.<sup>60</sup>

Writing for the minority, Justice John Paul Stevens disagreed. He maintained that even if Congress never formally recognised Native Hawaiians as a tribe, it had long treated them as such, most notably when it issued the 1993 apology. Stevens wrote, 'there is simply no invidious discrimination present in this effort to see that indigenous peoples are compensated for past wrongs'.<sup>61</sup> To find otherwise, he argued, placed them in a perverse bind. 'It is a painful irony indeed to conclude that native Hawaiians are not entitled to special benefits designed to restore a measure of native self-governance because they currently lack any vestigial native government – a possibility of which history and the actions of this Nation have deprived them'.<sup>62</sup>

Following the decision, settlers launched further lawsuits attacking state and federal programmes containing provisions relating to Native Hawaiian education, health and housing. According to Linda Zhang, the 'threat to the very existence of these programs led to a frantic rush to attain federal recognition for Native Hawaiians'.<sup>63</sup> In 2000, US Senator Daniel Akaka, a Democrat from Hawaii, proposed the 'Akaka Bill', to establish a Native Hawaiian governing body and acknowledge Native Hawaiians' right to self-determination. Republicans condemned the bill as a 'plan for a race-based government'.<sup>64</sup> Conversely, some Native Hawaiians argued that the bill did not go far enough in righting past wrongs and securing self-determination.<sup>65</sup> Akaka's proposal has since been repeatedly amended, including to preclude Hawaiian secession. Still, Congress has so far rejected it.

#### 4. The CNMI case, *Davis v. Commonwealth Election Commission* (2016)

CNMI consists of 14 islands, comprising 184 square miles of land, in the Marianas chain of Micronesia. Its population is approximately 54,000, of which 24% are Indigenous Chamorro, 11% other Pacific islanders, 50% of Asian origin, and 15% mixed-race people and 'others'.<sup>66</sup>

Chamorros occupied the Northern Marianas for at least four millennia before coming under Spanish dominion in the sixteenth century. After the Spanish-American War, Spain sold the islands to Germany, which lost them to Japan in the First World War. Following Japan's defeat in the Second World War, the United Nations included the Northern Marianas in a trust territory administered by the United States. The trusteeship agreement required that the United States promote territorial self-government and protect inhabitants 'against loss of their lands'.<sup>67</sup> Though the trust's other jurisdictions (the Federated States of Micronesia, the Marshall Islands and Palau) eventually gained independence, the Northern Marianas opted to become a US commonwealth.

This status was sealed by a 1976 covenant between the Northern Marianas and the United States as two sovereigns. The covenant established CNMI self-government by a

popularly elected governor and legislature. As well, despite the Supreme Court's *Insular Cases* doctrine, which limits application of the Constitution in unincorporated territories to those rights deemed 'fundamental', and blocks application in circumstances that would be 'impractical and anomalous',<sup>68</sup> the covenant explicitly applied the Fourteenth and Fifteenth Amendments to CNMI.

Yet the commonwealth covenant further required that CNMI draft a territorial constitution in which certain distinctive provisions would be enshrined.<sup>69</sup> Among these was Article XII, prohibiting acquisition of land by persons not 'of Northern Marianas descent'. This ban on alienation of Indigenous land mirrored US policy under trusteeship. It also paralleled guarantees in federal Indian Law relating to mainland Native Americans.<sup>70</sup> Per the covenant, Article XII is necessary 'in view of the importance of the ownership of land for the culture and traditions of the people of the Northern Mariana Islands, and in order to protect them against exploitation and to promote their economic advancement and self-sufficiency'. The covenant forbids the US government from unilaterally altering the land-alienation prohibition, and explicitly exempts it from the US Constitution.

The 1990 federal appeals court ruling *Waboll v. Villacrusis* substantiated this exemption. When a plaintiff charged that Article XII violates the Fourteenth Amendment, the court found otherwise. It held that the right of outsiders to buy land is not 'fundamental', and thus, per the *Insular Cases*, not constitutionally protected in CNMI. Further, the court declared that the United States ought not be forced to break the terms it agreed to in the covenant.<sup>71</sup> Wrote the court, 'The 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. ... Its bold purpose was to protect minority rights, not to enforce homogeneity'.<sup>72</sup>

In the same year, the United Nations removed the Northern Marianas from its list of colonised territories. However, land-alienation efforts continued. Article XII had been written to be potentially time-limited. Unless renewed by a referendum, it would expire twenty-five years after the dissolution of US trusteeship. Trusteeship officially ended in 1986. In 1999, the CNMI legislature amended the territorial constitution so only electors of 'Northern Marianas descent', defined as those with roots in CNMI dating back to 1950, could vote in referenda concerning amending Article XII. In 2011, for the purposes of such a referendum, the legislature established an official registry of voters of Northern Marianas descent. In 2012, the case *Davis v. Commonwealth Election Commission* was filed, challenging the exclusion of non-Marianas descendants from Article XII referenda.

#### 4.1. The case

*Davis* was filed in the federal district court of CNMI by John Davis Jr, a non-Chamorro CNMI resident excluded from the official registry of voters of Northern Marianas descent. He charged that this contravened his voting rights under the Fourteenth and Fifteenth Amendments. The district court agreed, citing *Rice v. Cayetano*. The commonwealth government then appealed that ruling to the US Court of Appeals for the Ninth Circuit.

In its statement to the appeals court, the commonwealth maintained that its voting scheme differed in at least two significant ways from the Hawaiian scheme invalidated by *Rice*. First, it argued that 'Northern Marianas descendants' was not a race-based classification. Where Hawaii sought to enfranchise only voters with roots pre-dating European

contact, CNMI's scheme encompassed a multi-ethnic political community 'who rebuilt the Northern Mariana Islands after the devastation of the Second World War' and 'the descendants of those individuals that remained in the Northern Mariana Islands and improved the work of their forebears'.<sup>73</sup> The commonwealth showed that not just Chamorros but various races inhabited CNMI in 1950; hence, referendum voters would not be mono-ethnic.

Second, the commonwealth maintained that the Fourteenth and Fifteenth Amendments are not germane. That is because CNMI, unlike Hawaii, is an unincorporated territory where, per the US Supreme Court's *Insular Cases*, the Constitution does not fully apply. Though the 1976 covenant imported those amendments to the islands, it simultaneously exempted land-alienation restrictions from Constitutional scrutiny. The commonwealth argued that, as controlling land alienation is intimately related to controlling who can vote on land alienation, the impugned voting qualifications should likewise be constitutionally exempt.

Finally, the commonwealth maintained that even if the court deemed 'Northern Marianas descendants' to be a racial group, and even if the Fourteenth and Fifteenth Amendments were found to apply in this case, the restrictions should nonetheless stand. This is because they were narrowly tailored to fulfil a compelling state interest – namely, to insure that the group whose lands were protected in the covenant will control any changes to that protection.

#### 4.2. The ruling

In December 2016, in a unanimous decision, the appeals court found in favour of Davis. Chief Judge Sidney Thomas penned the terse decision, condemning CNMI's voting scheme as both race-based and offensive to the Fifteenth Amendment.

Thomas declared the court's findings to be controlled by *Rice*. He ruled that, similarly to *Rice*, the category 'Northern Marianas descendants' functions as a proxy for race. As well, he found that analogies to American Indian tribes are, in the Marianas as in Hawaii, inapplicable. CNMI's Indigenous people were never congressionally recognised as a 'quasi-sovereign'; thus they do not enjoy constitutionally distinct political status. As well, Thomas scoffed at the notion that Northern Marianas descendants' exclusive participation in the proposed land-alienation referendum is justified by their supposedly greater stake in the outcome. All CNMI residents, he declared, will be affected by the referendum, and thus deserve to vote.

Thomas additionally maintained that, unlike the prohibition on land-alienation at issue in *Wablol*, the present infringement is not shielded by the commonwealth covenant. 'Limits on who may own land are quite different – conceptually, politically, and legally – than limits on who may vote in elections to amend a constitution'.<sup>74</sup> As well, Thomas argued that the *Insular Cases* do not apply. Per the covenant, he found the Fifteenth Amendment is fully applicable in CNMI and thus 'fundamental'.

Following Thomas' ruling, the commonwealth government petitioned the US Supreme Court for reconsideration. In October 2017 the high court denied that petition.

#### 5. The Guam case, *Davis v. Guam* (2017)

At 212 square miles, Guam is the largest island of Micronesia and the southern-most island in the Marianas chain. Its population is approximately 167,000, of which

Indigenous Chamorros comprise 37%, other Pacific Islanders 12%, people of Asian origin 34%, whites 7%, and mixed-race people and ‘others’ 10%.<sup>75</sup>

As with neighbouring CNMI, Guam has for millennia been a Chamorro homeland. Chamorros began experiencing ‘cultural genocide’ after Spaniards arrived in the sixteenth century.<sup>76</sup> Between 1668 and 1740 the Chamorro population dropped from approximately 80,000 to 5,000.<sup>77</sup> The United States assumed control of Guam following the 1898 Spanish-American War. In 1950, Guamanians – of whom at the time almost 99% were Chamorros<sup>78</sup> – were made US citizens under the *Organic Act*. At the same time there was ‘an express acknowledgment by Congress, in the relevant congressional reports surrounding the enactment of Guam’s Organic Act, of its “international obligations” to usher the territory toward a fuller measure of self-government’.<sup>79</sup> In 1968 an amendment to the *Organic Act* extended various sections of the US Constitution to Guam, including the Fourteenth Amendment’s Equal Protection Clause and the Fifteenth Amendment.

Guam, unlike CNMI, has not officially exercised self-determination. It thus remains on the United Nations’ list of colonised territories. Its relationship with the United States has been neither voted upon by Guamanians nor enshrined in a covenant. This is not for want of trying. In a 1982 plebiscite open to all registered voters, Guamanians supported commonwealth status. Guam’s legislature thus submitted a draft commonwealth act to Congress. The draft included a requirement that final ratification of commonwealth status be limited to Chamorros. Congress opposed this limitation and negotiations broke down. Guam has resubmitted the draft act in every subsequent Congressional session, to no avail.<sup>80</sup>

Guam’s legislature thus began the decolonisation process on its own, mandating that there be held ‘a political status plebiscite to conform to the international obligations of the United States in administering Guam as a non-self-governing territory’.<sup>81</sup> As laid out in United Nations General Assembly Resolution 1541, which concerns compliance with the principles of self-determination, the plebiscite would offer three choices: independence, ‘free association’ with the United States, or statehood.

To this end, Guam’s legislature established a Commission on Decolonization and set up the Guam Decolonization Registry, enrolling voters who would be permitted to participate in a non-binding plebiscite. Enrolment was initially limited to ‘Chamorro people of Guam’. Immediately after the *Rice* ruling, that wording was changed to ‘native inhabitants of Guam’, defined as those Guamanians who became US citizens under the 1950 Organic Act and their descendants. By law, the plebiscite must be conducted when 70% of ‘native inhabitants of Guam’ join the registry. So far that threshold has not been reached.

### 5.1. The case

*Davis v. Guam* was filed in 2011 by Arnold Davis (no relation to John Davis Jr), a non-Chamorro Guamanian blocked from the Guam Decolonization Registry. He was represented by the Centre for Individual Rights, a Washington, DC-based conservative non-profit known for its anti-affirmative action work. Citing *Rice*, Davis charged the government of Guam with ‘audacious racial discrimination’<sup>82</sup> contravening the Fourteenth and Fifteenth Amendments. The district court of Guam initially found his claim ‘unripe’ and lacking legal standing. The Ninth Circuit Court of Appeals reversed, prompting the district court to revisit the case.

In its statement to the district court, the government of Guam argued that the Decolonization Registry is not race-based. The registry's intent, the government argued, is to enfranchise a federally created political class: Guamanians, and descendants thereof, who became citizens under the *Organic Act* and to whom obligations are still owed under international law. This, the government insisted, made *Davis v. Guam* different from both *Rice* and the CNMI case, *Davis v. Commonwealth Election Commission*. Moreover, the registry's effect would be non-racial. Not just Chamorros but various ethnicities inhabited Guam in 1950; hence, enrollees would be multi-ethnic.

Further, the government of Guam maintained that in this case, unlike *Rice*, the Fourteenth and Fifteenth Amendments are not applicable. Guam is an unincorporated territory, where, per the *Insular Cases*, the Constitution does not apply in full force. Hence, voting in the decolonisation plebiscite is not a 'fundamental right'. Moreover, the government argued, applying the Constitution to Guam in a manner that blocks inhabitants from exercising their acknowledged right to self-determination would be 'impractical and anomalous' and 'an outcome proscribed in the *Insular Cases*'.<sup>83</sup>

## 5.2. The ruling

In March 2017, the court issued its ruling, finding in favour of *Davis*. Judge Frances Tydingco-Gatewood penned the decision. She ruled that the Fourteenth and Fifteenth Amendments are fundamental in Guam. Despite Guam's unincorporated status, she noted, Congress explicitly extended both amendments to the territory under the *Organic Act*.

Citing *Rice*, she stated that the Fifteenth Amendment forbids ancestry-based voter qualifications that act as a proxy for race. Likewise, it bars qualifications that, though on their face racially neutral, are race-based in intent and effect. The classification 'native inhabitant of Guam', she stated, fails on both counts. Per an analysis of the registry's legislative history, she ruled that legislators clearly intended to preference Chamorros. Further, given that almost 99% of the people made citizens under the 1950 Organic Act were Chamorro, the registry would have precisely that effect.

Tydingco-Gatewood noted that, under the Equal Protection Clause, racial distinctions are permissible only when narrowly tailored so as not to exclude substantially affected parties. Yet, she found, 'ascertaining the future political relationship of Guam to the United States is a public issue that affects not just the Native Inhabitants of Guam but rather the entire people of Guam. Every Guam resident otherwise qualified to vote can claim a profound interest in the outcome of the Plebiscite'.<sup>84</sup>

Finally, the judge addressed the territory's arguments that the impugned voting limitations are necessary for self-determination. As to international obligations, she stated, 'Defendants ... failed to provide this court with any legal authority – whether it be international law or a binding international treaty – that allows for this court to disregard or circumvent the U.S. Constitution'.<sup>85</sup> And even if such international obligations were proven, she suggested it would nonetheless be unconstitutional for the Guamanian government – instead of, for example, a non-profit corporation – to conduct a race-based plebiscite.

Tydingco-Gatewood concluded, 'The court recognizes the long history of colonization of this island and its people, and the desire of those colonized to have their right to self-

determination. However, the court must also recognize the right of others who have made Guam their home'.<sup>86</sup>

In August 2017, Guam appealed the decision to the Ninth Circuit Court. It opened its appeal with a dramatic statement: 'This case is a wolf in sheep's clothing. Although styled as a reverse discrimination case ... [t]his case seeks to deny the "native inhabitants of Guam" ... from effectively exercising their right to express by plebiscite their desires regarding their future political relationship with the United States of America'.<sup>87</sup> Taking an opposite stand was the US Department of Justice, which filed an *amicus* brief supporting Davis. As of September 2018 the appeals court had not ruled.

## 6. Analysis and conclusion

I contend that these three legal battles in the US Pacific – *Rice v. Cayetano*, *Davis v. Commonwealth Election Commission*, and *Davis v. Guam* – showcase how settler-colonial assertions of rights may in effect colonise Indigenous demoi. From this web, at least four distinct strands may be teased out.

First, *Rice*, *Davis* and *Davis* all highlight the use of a rather novel and understudied settler 'strategy of elimination': the assertion of individual voting rights in a manner that undermines Indigenous sovereigns and replaces them with universal, settler-dominated demoi. This strategy might indeed be seen as 'a wolf in sheep's clothing'. In *Rice*, the settler plaintiff, Freddy Rice, charged that Hawaii's voting scheme, instituted to empower Native Hawaiians in the manner of a 'quasi-sovereign tribal entity' and to provide them with a measure of self-determination, infringed his right to vote under the Fourteenth and Fifteenth Amendments. In *Davis v. Commonwealth Election Commission*, John Davis Jr claimed violation of the same voting rights, attacking as illiberal CNMI's effort to provide people of Northern Marianas descent with control over alienation of their lands. Finally, in *Davis v. Guam*, Arnold Davis cited the same rights to challenge Guam's effort to provide native inhabitants with self-determination.

Second, in all three cases the plaintiffs employed a specific strategy involving dual moves of destruction and then construction. I suggest this strategy reflects Wolfe's assessment that settler colonialism 'destroys to replace'.<sup>88</sup> Even more precisely, I suggest these dual moves were presciently discerned by Rohrer, who, in analysing *Rice*, observed that the plaintiff sought to 'problematize collective native identity' and then 'naturalize white settler subjectivity via a color-blind ideology'.<sup>89</sup> Let me try to trace this dynamic.

In bringing their cases, Freddy Rice, John Davis Jr and Arnold Davis all claimed violation of rights of the second-order variety, concerning what Issacharoff and others call laws of democracy. Again, such laws govern the democratic process and attach to individuals, not polities. Such laws may thus appear quite removed from such meta-political questions as 'who are the people?' But clearly, these impugned laws of democracy in Hawaii, CNMI and Guam were all downstream effects of distinct structures of democracy, designed to treat Indigenous peoples as first-order demoi. In Hawaii, the law governing OHA voting flowed downstream from the state's attempt to acknowledge Native Hawaiians as a tribal entity. In CNMI, the law governing voting in land-alienation referenda flowed from the commonwealth's effort to affirm Northern Marianas descendants as a pre-political polity whose land rights were enshrined in the commonwealth's founding covenant. In Guam, the law limiting who could vote on decolonisation flowed from the

government's attempt to treat native inhabitants as a first-order demos owed self-determination under international law.

In all three cases, the plaintiffs' attacks on downstream voting laws produced effects that rippled back upstream. In this manner, as Rohrer put it, 'collective native identity' was 'problematized'. Consequently, the three courts were called upon to examine these collective identities – to determinate the legal status of the Hawaiian, Marianan and Guamanian Indigenous demoï. Were these demoï, like the US Senate, constitutionally enshrined? Or were they more like the Alabama state senate districts in *Reynolds* – groupings that 'never were and never have been considered as sovereign entities'? In each case the courts concluded the latter, that the Indigenous groups were not first-order rights-bearers. This result undermined Indigenous political selfhood. It may be seen as an example of Wolfe's destructive dimension of settler colonialism.

But of course, Rice, Davis Jr and Davis appealed not merely for Indigenous voter-preferencing to be invalidated, but for voting to be liberalised. As Rohrer again discerned, this move 'naturaliz[ed] white settler subjectivity via a color-blind ideology'. While liberalising voting in each case may have seemed an innocuous second-order reform, the effect of course again flowed upstream. Opening decisions concerning Indigenous affairs to every resident of Hawaii, CNMI and Guam has the consequence of redefining the structure of democracy that governs those affairs. The boundaries of the relevant demoï have been redrawn so as to encompass not just 'Native Hawaiians', 'Northern Marianas descendants' and 'native inhabitants of Guam', but all state voters. Of course, this empowers settlers, who in each case comprise the islands' overwhelming majorities. Settlers now have the opportunity to control management of the Hawaiian OHA, land-alienation in CNMI, and decolonisation in Guam. This may be seen as exemplifying Wolfe's constructive dimension of settler colonialism.

Third, all three cases show how the success of the forgoing settler legal strategy hinged on how justice was framed. Clearly, Justice Kennedy approached *Rice* through a second-order, law-of-democracy frame. Finding Native Hawaiians to lack federally protected status, he concluded that the relevant rights-bearers were downstream individuals, not upstream demoï. From this perspective, the rights of Freddy Rice were clearly abridged. Justice Stevens, meanwhile, approached *Rice* through a first-order, structure-of-democracy frame, seeing the key subjects of justice as demoï. From his perspective, Native Hawaiians were a rights-bearing demos the protection of which trumps downstream individual voting rights.

Similarly, Judge Thomas approached *Davis v. Commonwealth Election Commission* through a second-order frame. Finding individual voting rights to apply in CNMI due to the commonwealth covenant and despite the *Insular Cases*, and conversely finding 'Northern Marianas descendants' to lack quasi-sovereign status, he too concluded that the only germane rights-bearers in the case were individuals. From this perspective, the downstream rights of John Davis Jr were clearly abridged, while the upstream Indigenous demos had no rights to stand on. This was a dramatically different framing than had been applied in *Wabot*, where the rights of non-Indigenous individuals to buy land were trumped by the aim of averting the 'genocide' of, and fulfilling 'international obligations' to, Indigenous Chamorros.

In *Davis v. Guam*, the framing of Judge Tydingco-Gatewood's decision mirrored that of the Hawaii and CNMI rulings. Citing the *Organic Act*, and despite the *Insular Cases*, the judge framed Arnold Davis as a legitimate bearer of individual voting rights. At the same



time, despite Congressional reports and international obligations, she found Indigenous Guamanians to lack an actionable right of self-determination. Framing the case through a second-order rather than first-order lens, the result was all but foreordained.

Fourth and finally, *Rice*, *Davis* and *Davis* show that, when settler colonists strategically assert individual voting rights, and where justice is framed so as to validate that strategy, a meta-political conquest may result. Settlers, able to dissolve the Indigenous ‘them’ into the settler ‘we’, may achieve power over Indigenous peoples and lands. They may ‘colonise the demos’. That is, at least for now, what has happened on the utmost frontier of American settler expansion, the US Pacific.

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## Disclosure statement

No potential conflict of interest was reported by the author.

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