Commentary and Rebuttal for the Record

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a. Introduction

My appearance as a witness at the captioned hearing was not as a defender of the *Insular Cases*. Nor do I serve as an apologist for any failures in U.S. territorial law and policy since "unincorporated" territory status was contrived by the federal courts and Congress, following the U.S. Supreme Court ruling in the 1901 case of *Downes v. Bidwell*.

Rather, I count myself among the critics of the *Insular Cases*, and tend to agree with Justice Harlan's dissent in that case. I also certainly embrace Judge Gelpi's view that, as noted in H. Res. 279, the Fuller Court "invented" the "unincorporated" territory doctrine in the 1901 *Downes v. Bidwell* case without constitutional predicate.

However, in all respects I also defend a discernably correct understanding of the jurisprudence at issue in H. Res. 279. As such, it was my pleasure to assist the Committee by suggesting deconstruction of complex inaccuracies in the narrative of the resolution and the testimony of other witnesses whose analysis supported H. Res. 279, with little or no exceptions or reservations.

At the conclusion of the hearing, the Chair invited two witnesses to offer rebuttals to my own earlier testimony regarding the 1898 *Wong Kim Ark* case. That occurred because I confirmed the *Wong Kim Ark* ruling contains racist words and assertions, as well as decisions by that court that had could only have serious racially discriminatory effects. Given my response to those two rebuttals was not available in the hearing, I submit the same here, requesting same be included in the record.

However, before addressing the W*ong Kim Ark* rebuttals in depth, there are some preliminary deficiencies and demerits in H. Res. 279 as written worth memorializing here, apart from a case study and *Wong Kim Ark* analysis:

1. H. Res. 279 cites the 2020 *FOMB v. Aurelius* case as a holding the *Insular Cases* "should not be further extended" because of questions about the "continued validity" of those rulings, but that adds nothing new to the precedent of the 1957 ruling in *Reid v. Covert,* an earlier opinion also stating the Insular Cases should not be "given any further expansion." Contrary to the narrative of H. Res. 279 both *Aurelius* and *Reid* actually have the effect of upholding the *Insular Cases* as to all court cases in which expansion of those rulings is not sought.

2. The resolution fails to inform Congress the *Insular Cases* were upheld in the 1957 *Reid* case by the same Warren Court that overruled the Fuller Court's ruling of 1896 in *Plessy v. Ferguson*, and that the first African American to serve on the U.S. Supreme Court, Justice Thurgood Marshall, joined the majority in the *Reid* ruling affirming the Insular Cases. Since H. Res. 279 is based on imputation of racial bias as the primary motive and effect of the Insular Cases in both 1901 and in the modern era, the Committee should be informed of evidence on both sides of that proposition, not limited to evidence that defends H. Res. 279 as written.

3. As written, H. Re. 279 fails to inform Congress the Burger Court and Roberts Courts upheld the Insular Cases, the latter as recently as the 2016 case of *Puerto Rico v. Sanchez Valle*, in which Justice Ruth Bader Ginsburg joined the majority, citing *Board of Examiners v. Flores de Otero*, which in turn cited and upheld the *Insular Cases*.

4. H. Res. 279 declares the *Insular Cases* to be rulings that are "contrary to the text…of the Constitution" and "have no place in U.S. constitutional law," but the resolution then cites the *Bush v. Boumediene* ruling handed down in 2008, which substantially expanded the place given to the *Insular Cases* in U.S. constitutional law by the Supreme Court outside and beyond the boundaries of territorial law, also contrary to the resolution's "non-expansion" narrative based on the *Reid* and *Aurelius* cases.

5. Specifically, the *Boumediene* ruling applied the *Insular Cases* by constitutional analogy for purposes of defining due process, not under the Territorial Clause in Article IV territories, but rather related to exercise of war powers through overseas military tribunals established by Congress in statutory law.

6. H. Res. 279 fails to inform Congress that the *Boumediene* ruling cited in the resolution relied on the unincorporated territory doctrine and "fundamental rights" principle articulated in the 1922 case of *Balzac v. Puerto Rico*, which is the leading post-*Downes* ruling in the *Insular Case* line that expanded the unincorporated territory doctrine to all U.S. citizens who reside outside a state in the unincorporated territories, not based on race but on location in a territory.

7. Contrary to the declaration in H. Res. 279 that the Insular Cases have "no place in U.S. constitutional law," the *Boumediene* ruling states that under the *Insular Cases* "ties between the U.S. and any of its unincorporated territories [may] strengthen in ways that are of constitutional significance."

8. As written, H. Res. 279 devalues the currency of its social and racial justice intent by treating the five current territories as one body politic with one undifferentiated racial and cultural identity, when federal organic acts, numerous federal laws and court decisions define each as a separate and distinct body politic, recognizing racial and cultural diversity of the five territories.

9. The resolution goes on to define that same fictitious single pan-territorial body politic as a population of over "3.5 million" persons, "95%" of whom are labeled as a racial minority, which appears, according to U.S. Census Bureau standards, to conflate race and ethnicity as criteria defining racial identity: In so doing, H. Res. 279 fails to disclose that over 3.2 million of that fictitious single pan-territorial body politic is in Puerto Rico, where the most recent census reports a 98% Hispanic population, 68% of whom identify as white Hispanics, clearly calling into question the validity of racial identity narrative underlying the resolution as written.

10. H. Res. 279 cites Chief Justice Marshall's opinion in the 1820 case of *Loughborough v. Blake*, selectively quoting words to suggest the court defined "United States" as a "republic…composed of States and territories." To the contrary, in the same case Marshall referred to the states, territories and the District of Columbia as a larger "American empire," not limited to the union of states. In 1820, the U.S. owned or claimed territorial lands as large as the union of states, converting territories into states was high on the national agenda. But the words "republic…composed of states and territories" did not mean a confederation of states and territories. *Loughborough v. Blake* held the Constitution does not apply in Washington D.C. as in the states, based on logic very similar to Insular Cases, concluding states alone are fully and equally represented in Congress and also are taxed uniformly, so Congress has power to tax or not tax territories and D.C., and do so uniformly or not. Marshall concluded lack of representation in Congress does not exempt territories or D.C. from non-uniform exercise of federal powers, so territory can be part of the republic but not in the union of states, arguably consistent with *Insular Cases* eight decades later.

b. <u>Wong Kim Ark, Fitisemanu and H. Res. 279</u>

At the May 12 hearing, a competing narrative emerged between the other witnesses and myself regarding the efficacy and implications of H. Res. 279, including Resolving Clause 4, which reads:

> "The U.S. House of Representatives…Rejects the *Insular Cases* and their application to all present and future cases and controversies involving the application of the Constitution in United States territories."

In a March 10 letter to the U.S. Attorney General, the Chairman and several members of the Committee had defined three "present cases" in federal courts to which Resolving Clause 4 would apply. That letter requested the U.S. government to abandon any legal defense based on the *Insular Cases* in the *Vaello-Madero*, *Peña Martínez* or *Schaller* lawsuits, seeking state-like federal social safety net benefits for the territories.

However, in the hearing witness testimony identified a relevant fourth lawsuit to which Resolving Clause 4 would apply. That case, *Fitisemanu v. U.S.*, seeks to overturn the Insular Cases based on the 1898 case of *U.S. v. Wong Kim Ark*. As noted below, this compelled me to address the Fitisemanu and Wong Kim Ark cases in the context of H. Res. 279.

That is why I was constrained to advise the Committee for its informed consideration that:

> "Limiting resolving clause four to the jurisprudence of the Insular Cases raises the problematic question of how to treat other cases…which includes the *Fitisemanu* case, where as we know the court and the plaintiff's lawyers relied on the 1898 case of *Wong Kim Ark*, which cites the *Dred Scott* case and favorably quotes the Court's own racist epithets aimed at Mexican and Chinese in the earlier Slaughterhouse Cases…If *Wong Kim Ark* is not purged from the Fitisemanu case then H. Res. 279 will be only selectively anti-racist."

Those observations apparently generated an understandably defensive response from witnesses relying on the *Wong Kim Ark* case in support of the plaintiffs in the *Fitisemanu* case. In any event, at the end of the hearing the Chair invited two rebuttals to my testimony of *Wong Kim Ark* and *Fitisemanu*.

One of the other witnesses, Professor Daniel Immerwahr, stated:

> "It is important to distinguish rulings made by racists from a racist ruling. The argument we're making here is that the Insular Cases are not only rulings made by racists, but the ruling itself has a racially discriminatory outcome. Wong Kim Ark goes the other way. If the suggestion is made that any ruling made by anyone who had discriminatory racial views should be overturned, that would be the entire

> 19th century right there. The *Insular Cases* are decided by a racist ruling that is relevant and the racism of the judges is at the core not incidental to the ruling."

Another statement on *Wong Kim Ark* was read by Rutgers Law School Professor Rose Cuison-Villazo:

> "I'm a bit surprised actually that *Wong Kim Ark* has been described here as a racist case. Far from that, I'd argue, because it was at a time when the Chinese Exclusion Act was operating to exclude Chinese from our borders. And, so, *Wong Kim Ark* is an important opinion with respect to strengthening what the 14th Amendment citizenship clause means."

It had not been my intention to focus on *Fitisemanu* or *Wong Kim Ark*. But the testimony by the witness who is counsel to plaintiffs in *Fitisemanu* combined with the March 10 letter on Insular Case defense in pending cases, along with the import of H. Res 279 and its Resolving Clause 4, left me with duty of disclosure to the Committee.

Further, I had no intention of focusing on the juridical nuances of the *Insular Cases* decided 120 years ago. My focus instead was the impact of *Insular Cases* doctrine on the right of self-determination for each territory, that is still defined by the courts and Congress in the modern era as "unincorporated."

That includes the effect on federal self-determination policy in light of the Supreme Court's ruling upholding the *Insular Cases* in *Puerto Rico v. Sanchez Valle* (2016), by relying on *Board of Examiners v. Flores de Otero* (1976). It also includes the SCOTUS ruling in B*ush v. Boumediene* (2008), cited in H. Res. 279, which relies on *Balzac v. Puerto Rico* among other *Insular Cases*.

Accordingly, I felt compelled to underscore the term "*Insular Cases"* is not an actual defined body of jurisprudence that can be characterized as a term of art, or even a consistent set of principles defined by federal decisional law or statute law. Even if one presupposes the *Insular Cases* can be distilled and defined as the category of cases based on the doctrine of territorial incorporation or non-incorporation, that category cannot be limited to one of even a few cases.

Depending on the criteria applied, scholars have attempted to delimit the "*Insular Cases*" to include from 6 to 16 cases. [See: "List of Insular Cases" at https://en.wikipedia.org/wiki/Insular_Cases.] But even the extended list does not count the dozens of federal court rulings falling within the jurisprudence of *Insular Case*, including several U.S. Supreme Court rulings affirming same. Thus, as a witness I properly questioned

how a court is to know which cases and what law of the cases would be rejected by H. Res. 279.

As for the assertion in H. Res. 279 that the *Insular Cases* "have no place" in U.S. constitutional law, this unlikely to be well-received by lawyers for inmates at GITMO in Cuba, who have a semblance of habeas corpus rights only because the Supreme Court ruled that the actual law of the *Insular Cases* renders outcomes "constitutional significance." In *Boumediene* rights of detained enemy combatants were defined by the court based on the *Insular Cases* principle that Congress must provide rights with some equivalence to the Constitution, even where not directly applicable as in the states.

c. Summary of Testimony

At the May 12 hearing, the Committee heard testimony on H. Res. 279 advising that the "*Insular Cases*" are "racist decisions" of the U.S. Supreme, made by "racist judges" on the Fuller Court (1888-1910). Both H. Res. 279 and witnesses before the Committee support that characterization by noting the *Insular Cases* were decided by Fuller Court that also decided *Plessy v. Ferguson*, an infamous ruling that upheld systemic racism under "separate but equal" racial segregation imposed at that time by federal and state law.

The term "*Insular Cases*" was not defined in H. Res. 279, and arguably could include dozens of cases in the 20th and 21st centuries. However, the 1901 case of *Downes v. Bidwell* was singled out as the source of racist territorial law in H. Res. 279, and in testimony by witnesses who support H. Res. 279 as written.

Specifically, H. Res. 279 and the witnesses at the hearing point to and rely on *Downes* as the best evidence and conclusive proof that all "*Insular Case*" rulings are as one witness expressed it "racist rulings" by "racist judges." On that basis, the Committee heard testimony that the H. Res. 279 narrative confirmed and justified grounds for U.S. Congress "rejection" of the "*Insular Cases*" (and as a matter of legal logic any federal court rulings to the extent of reliance on the "*Insular Cases*").

The record of the hearing also included testimony from a witness who referred to his own role as counsel in a pending federal court case (*Fitisemanu v. U.S.)*, in his special interest lobbying organization seeks court ordered application of the birthright U.S. citizenship clause of the U.S. Constitution to persons born in the U.S. territory of American Samoa. That witness testified adoption of H. Res. 279 "condemning" the "Insular Cases" was a first step in

a strategy that next must seek a Supreme Court ruling "overturning" the "Insular Cases," followed by an Article V "constitutional amendment" to give U.S. citizens in territories a status and rights equal to citizens in the states.

Thus, the Committee heard testimony linking the *Fitisemanu* case to Resolving Clause of H. Res. 279, which rejects reliance on *Downes* and the "Insular Cases" by the courts as well as U.S. as a party in all "*present* and future cases" implicating "application of the U.S. Constitution in the territories." That identified *Fitisemanu* as a case in which the U.S. Supreme Court could "overturn the Insular Cases" by applying the 14th Amendment directly to American Samoa.

The "present" cases within the scope of Resolving Clause 4 of H. Res. 279 include the preliminary Federal District Court ruling in the *Fitisemanu* lawsuit in favor of plaintiffs, stayed by the court so the far-reaching effects applying the 14th Amendment in unincorporated territories would be held in abeyance so an appeal could be heard. Both the ruling by the court in *Fitisemanu* and the plaintiff's opposition to the U.S. government's appeal rely entirely on the 1898 case of *Wong Kim Ark*, also decided by the same Fuller Court that handed down *Plessy v. Ferguson* in 1896 and *Downes* in 1901.

This commended specific disclosure on the record of the hearing that H. Res. 279 could impact more than three social safety net statutory equity cases now pending in federal courts (*Vaello Madero*, *Peña Martínez*, *Schaller)*, related to Supplemental Security Income (SSI), Medicare and other programs. Rather, under Resolving Clause 4 the adoption of H. Res. 279 as written also could impact the constitutional questions raised by the *Fitisemanu* case, in which the court and plaintiff's reliance on *Wong Kim Ark's* 14th Amendment birthright citizenship ruling is contested by the U.S. Department of Justice.

In that context, it was my suggestion that in the event H. Res. 279 is to be further considered as written, the same standard as to racial speech applied to the *Insular Cases* by the text of the resolution and the witnesses supporting it should be applied to the *Wong Kim Ark* case. This drew the two rebuttals called for by the Chair from two witnesses who aligned themselves with the majority ruling in *Wong Kim Ark*, insisting that it is a case free of "racially discriminatory effects" simply because we all agree with the outcome of that case for the individual plaintiff.

The rebuttal requested and granted to two other witnesses went further, insisting that the racism of Fuller Court's 1896 ruling in *Plessy v. Ferguson* did not taint the Fuller Court's ruling in the 1898 case of *Wong Kim Ark*. Rather, it was argued that any actual racial animus at play when *Plessy* was decided in 1896 somehow was not a factor in the 1898 *Wong Kim Ark* case, and that racism of the Fuller Court only later re-emerged and

attached instead to the 1901 case of *Downes v. Bidwell,* and all other unidentified "*Insular Cases*."

Specifically, the rebuttal argument was that Fuller Court members were racists, but not all Fuller Court rulings are racist. This was based on the highly subjective and speculative opinion of the rebuttal witness about what they deemed selectively and subjectively to be racism that was at the "core" of some Fuller Court rulings, instead merely "incidental" in other rulings.

The arguments made in rebuttal insisted that the *Wong Kim Ark* case was constitutionally and even morally correct because according to the witness from Rutgers University Law School "strengthened citizenship law" without racism, or, at least, racism that actually mattered to that witness.

Those oversimplifications about *Wong Kim Ark* may be consistent with a law school case outline, but it is at variance with the inconvenient truth that *Wong Kim Ark* prolonged a form of systemic racism under the Chinese Exclusion Act of 1882 and the Geary Act of 1892 that was akin to that perpetrated by the *Plessy* ruling in 1896.

d. Wong Kim Ark Overview

In the 1898 case of *Wong Kim Ark,* the Fuller Court majority joining in that ruling included Justice Brown, who also is identified in H. Res. 279 as the author of both the *Plessy* ruling and racially biased dictum in the Insular Cases. The *Wong Kim Ark* majority also included Justice White, who is identified in H. Res. 279 as author of the concurring in *Downes v. Bidwell* that included racially biased dictum.

As discussed below in some detail, the substantive content and law of the case in the *Wong Kim Ark* ruling enabled and for decades perpetuated overt systemic racism under U.S. immigration laws toward persons of Chinese culture. Even though the *Wong Kim Ark* case rejected the attempt by racist federal customs agents and a racist U.S. Attorney to deny 14th Amendment birthright citizenship for a single Chinese person born in a state, the court side-stepped and failed to address the constitutionality of the Chinese Exclusion Act (1982) and the anti-Chinese provisions of the Geary Act (1892).

Under those federal statutes, persons of Chinese culture and race who were subject to the exercise of U.S. government authority under federal immigration laws were denied entry to the U.S. as well as due process at the hands of federal customs agents, law enforcement officers and federal prosecutors, solely on the basis of culture and race. Under the color of

these laws federal authorities took action that had an obvious and glaring "racially discriminatory effect."

Before adopting witness Immerwahr's subjective criteria for absolving "racist judges" of issuing a "racist ruling," the Committee may want to consider discussion below on the issue of whether the *Wong Kim Ark* court practiced the same race driven discrimination and even segregationist bias as it had two years earlier in *Plessy*. Did the *Wong Kim Ark* court take the easy way out by ruling the Chinese Exclusion Act and Geary Act did not apply, and thereby avoid ruling on the constitutionality of those race discrimination statutes that were consequently allowed to stand?

Did the fact that *Wong Kim Ark* clearly was a U.S. citizen under federal law at the time prevent the court from addressing the constitutionality of the laws under which he was brought before the court? Was the court's racism a factor in the decision to leave those racist statutes untouched? This and other questions are addressed in the discussion below.

In a meaningful sense the *Wong Kim Ark* ruling arguably facilitated, and by abdication of judicial authority and responsibility perpetrated, jurisprudence and law that had material "racially discriminatory effects" on persons of Chinese origin. Yet, witnesses in the hearing on H. Res. 279 attributed material racism only to the In*sular Cases*, even though the currently pending *Fitisemanu* case that relies on the *Wong Kim Ark* case was cited by the witness who is counsel in the *Fitisemanu* case.

That is why, in particular, I wanted to explain the *Wong Kim Ark* ruling so the Committee was not left with the false impression the Chinese Exclusion Act and the Geary Act were not relevant because those laws applied only to non-citizens from China. If that is deemed an excuse not to address racism in the *Wong Kim Ark* case, it is even more important to note the *Insular Cases* applied to non-citizens in 1901, and were extended to U.S. citizens decades later on terms the courts have affirmed as non-racial in the modern era.

Race bias in any court ruling needs to be analyzed for effect, but it is especially relevant that the Committee record reflect that at the time *Downes v. Bidwell* was decided the people of the U.S. territories ceded by Spain whose status was before the court in 1901 were not recognized under U.S. law or treaty as U.S. citizens or a U.S. nationals.

Rather, the 6.1 million people of the Philippines (New York State had a population of 7.2 million at the time), along with the people of Puerto Rico and Guam, were Spanish citizens who depending on perspective had been abandoned by or liberated from their mother country.

Under American rule in these U.S. occupied territories, there were inequities and injustices perpetrated under the law of the *Insular Cases* holding that the U.S. Constitution did not apply and provide remedies in those territories as in states and territories incorporated under the Northwest Ordinance tradition. However, that included inequities and injustices applied to all persons in the territories, based on presence or residence in unincorporated territory, regardless of race.

That is not to say white Americans who went and lived in the Philippines, Puerto Rico, Guam, Hawaii and Alaska were not privileged under the colonialist regime. But, for example, all Americans residing in the territories who thereby became ineligible to vote under state and federal laws lost not only their right to vote in federal elections, but other rights they had in states and incorporated territories where the U.S. Constitution applied.

In that context, all persons in the unincorporated territories also ceased to have the same or equal duties of U.S. citizenship under the U.S. Constitution as in the states and incorporated territories. Thus, for example, the actual most specific legal effect of a Supreme Court ruling overturning the *Downes v. Bidwell* decision - which related to federal taxation in territories - would be that the Uniform Taxation Clause in Article I, Sec. 8, Clause 1 of the U.S. Constitution and all federal tax laws would apply in all five territories as in the states and incorporated territories.

In contrast to the *Insular Cases* that applied to all persons in the territories, the Chinese Exclusion Act and Geary Act, upheld in *Wong Kim Ark* without even any comment or questions by the court on obvious racist intent and effect, were then enforced for decades because the W*ong Kim Ark* ruling allowed that outcome. Yet, the Geary Act applied based solely, exclusively and invidiously on the race and culture of all Chinese people before, during and after arrival at our shores.

Not surprisingly given its history of racism two years earlier in the *Plessy* case, in *Wong Kim Ark* the Fuller Court declined to exercise the power of judicial review over the overtly racist Chinese Exclusion Act and Geary Act.. Yet, those latter two racist immigration statutes targeting Chinese for exclusion, and which were not applied to other persons not of Chinese race, were brought before the court by the U.S. government in W*ong Kim Ark* to justify its actions detaining and depriving a Chinese person who turned out to be an American of his personal freedom.

By limiting its ruling to the obvious mandate of the Constitution's 14th Amendment as to his citizenship, as noted below, the *Wong Kim Ark* case permitted federal officials to impose

decades of overt and invidious racism akin to the *Plessy*, but bearing far less in common with the *Insular Cases.*

e. Wong Kim Ark - Plessy Equivalence

In the year 1898 when the case of *Wong Kim Ark* was decided by the Fuller Court, the 1856 *Dred Scott* ruling that held U.S. citizenship could be denied based on race had been nullified by the 13th, 14th and 15th Amendments. Even the *Plessy* ruling recognized that black Americans born in a state acquired birthright citizenship, and the *Wong Kim Ark* ruling cited the *Slaughter House Cases* affirming that all races and persons of color were protected by those post-Civil War amendments.

So, it would have been a change in the direction of U.S. civil rights law in 1896 if the *Wong Kim Ark* ruling had not held that a person of Chinese origin and race born in a state of the union is a U.S. citizen under Section 1 of the 14th Amendment. Like all other races at that time, including all people of color, Wong Kim Ark acquired birthright U.S. citizenship under Section 1 of the 14th Amendment. But in so doing the same Fuller Court members who were in the majority for the *Plessy* and *Downes* case were in the *Wong Kim Ark* majority that upheld the racist Geary Act of 1892.

The case of *U.S. v. Wong Kim Ark* was not simply about 14th Amendment birthright citizenship for persons of color, a question that had already been settled for black Americans and minority races other than native tribes. Instead, Wong Kim Ark was about enforcement of the 1882 Chinese Exclusion Act, requiring the discriminatory exclusion of Chinese people based solely on origin and race, which had been extended in 1892 for ten more years by the Geary Act.

The U.S. Attorney's argument in the case seemed to presuppose under the Geary Act that U.S. Congress had exercised its power under the Uniform Naturalization Clause in Art. I, Sec. 8, Cl. 4 to exclude Chinese people from immigrating, being naturalized or even acquiring birthright citizenship in the U.S. under the 14th Amendment.

Thus, detention of Wong Kim Ark by the Collector of Customs under the Geary Act, demand for his exclusion by the U.S. Attorney in Federal District Court in San Francisco, and the U.S. Attorney's appeal of the District Court's ruling in Wong Kim Ark's favor, arguably and in fact gave the U.S. Supreme Court jurisdiction to review the constitutionality of the Geary Act and its enforcement.

In other words, in *Wong Kim Ark*, the Fuller Court had the same choice it had in Plessy v. Ferguson, to uphold or strike down a form of overt statutory racial segregation. The Fuller Court could have ruled that applying the Geary Act to any Chinese person, citizen or not based solely on race and culture as well implicitly as origin was unconstitutional.

Ruling that a Chinese person born in a state is a citizen was not the "landmark case" we are told it was in law school, and as we heard the witness from Rutgers law school repeat at the hearing. The only reason *Wong Kim Ark* was before the court was that the Chinese Exclusion Act and Geary Act had been applied to him because he was Chinese, there is no record he otherwise was deprived of his rights as a 14th Amendment birthright citizen under any other law.

So, what would have been a real game changer and "landmark case" strengthening nationality and civil rights law would have been is the court had ruled that those acts are invitations to deny all Chinese due process based solely on being Chinese, including Americans citizens to whom these immigration laws do not apply.

Instead, the court *in Wong Kim Ark* glibly notes without comment much less judicious scrutiny of any degree, "The fact, therefore, that acts of Congress or treaties have not permitted Chinese person born out of this country to become citizens by naturalization…" The provisions barring entry of Chinese to the U.S. and ensuring the deportation of "coolies" exploited as cheap labor were no problem for the "racist judges," who according to witness Immerwahr did not issue a "racist ruling" in *Wong Kim Ark.*

Indeed, in addition to upholding the aggressively racist statutes under which *Wong Kim Ark* was brought before the court, it did not apparently cause concern to Rutgers Law School Professor Rose Cuison-Villazo or Professor Immerwahr that the *Wong Kim Ark* ruling cited favorably both the Civil Rights Act of 1866 and its incorporation into the 14th Amendment, without objecting in any way to the exclusion from birthright citizenship those Americans classified as "Indians not taxed."

What would have made *Wong Kim Ark* truly a "landmark" case is if the court had declared all systemic racism under court made law and federal statute law based on race alone unconstitutional. Of course, having decided Plessy two years earlier, the court was not about to do that in *Wong Kim Ark*.

That makes *Wong Kim Ark* more a part of the court's "racist discriminatory effect" jurisprudence than the *Insular Cases*, which did not base the discrimination against people in the unincorporated territories solely and explicitly on race. Instead the *Insular Cases* applied

based on location in a territory in which Congress had not conferred citizenship, and in that case Congress also had not even defined the status and rights of the people located in the territories under national as well as local law, as required by Article IX of the treaty of cession being interpreted in the *Downes* case.

Unlike the *Wong Kim Ark* ruling that upheld statutes applied on based on Chinese race, the Insular Cases ruling on taxation in the territories concerned such matters as jury trial and voting rights applied to all persons of all races.

Other witnesses spoke out about racism in the *Insular Cases* but did not inform the Committee and in fact denied that the Wo*ng Kim Ark* ruling being relied on in the 2021 Fitisemanu case upheld the Chinese Exclusion Act that virtually closed U.S. borders to all Chinese based on race alone. The Wong Kim Ark case upheld the Geary Act of 1892 under which the anti-Chinese ban persisted as a form of race segregation until the 1920's.

Thus, by letting the Geary Act stand the *Wong Kim Ark* case enabled systemic racism that was converted into a "national origin" exclusion until 1943. National origin based exclusion that began with the statutes *Wong Kim Ark* left standing was not finally eradicated until Congress enacted the Immigration Act of 1965.

f. Imputing Racism: *Downes* and *Wong Kim Ark*

The *Downes v. Bidwell* decision was over 58,000 words long. H. Res. 279 quotes 28 words that offend us in 2021. According to witnesses supporting H. Res. 279 as written, and who defend the *Wong Kim Ark* case as relied on in the *Fitisemanu* case, those 28 words make the Insular Cases "racist rulings by racist judges."

Those same witnesses assert *Wong Kim Ark* is a ruling by "racist judges" that is "not racist." When pivoting from condemnation of racism at the "core" of *Downes* and the *Insular Cases*, and instead defending the *Wong Kim Ark* ruling as non-racist, Professor Immerwahr runs aground on multiple contradictions.

First, we are told in defense of H. Res. 279 that the Insular Cases were not just contaminated in a way that is injurious, but fatally poisonous racism. But when it comes to *Wong Kim Ark* suddenly the professor opportunistically adopts a relativistic 'don't throw the baby out with the bathwater' standard.

xx I too agree with the outcome of the *Wong Kim Ark* case for Wong Kim Ark himself. But my subjective opinion alone without evidence and analysis does not mean the Fuller Court was any more or less racist in the *Wong Kim Ark* case than in *Plessy*, much less the *Insular Cases.*

Yet, according to Immerwahr and other witnesses, the fact that the P*lessy v. Ferguson* segregation case was decided by the same Fuller Court in 1896, two years before *Wong Kim Ark* was handed down in 1898, does not impute racism as the core intent of *Wong Kim Ark*.

In contrast, when it comes to the Insular Cases handed down in 1901, five years after *Plessy*, the witnesses defending H. Res. 279 uncritically impute the racism of the *Plessy* case to the Fuller Court's ruling in *Downes v. Bidwell* and the *Insular Cases*.

In support of that illogical theory of a cause-and-effect transmission of the *Plessy* virus to *Downes,* but not *Wong Kim Ark*, the text of H. Res. 279 as written, offers as evidence of racist motives in the *Insular Cases* statements by two Justices in the opinions filed in the 1901 *Downes* decision.

Those statements by two justices included reference to territories "inhabited by alien races, differing from us in religion, customs…modes of thought…Anglo-Saxon principles…" and "evils of…millions of inhabitants…unknown islands, peopled with an uncivilized race…absolutely unfit…" to be Americans in 1901.

These words in *Downes* are more provocatively biased but in some respects have meanings not entirely unlike words from the 1957 case of *Reid v. Covert.* In that ruling Justice Thurgood Marshall joined the majority opinion describing the Insular Cases as concerning territories with, "…entirely different cultures and customs from those of this country...and involved the power of Congress to provide rules and regulations to govern temporarily territories with wholly dissimilar traditions and institutions."

So, if we are going to apply the same standard to *Wong Kim Ark* as we do to the *Insular Cases*, it should be noted the record created by the Fuller Court opinion in *Wong Kim Ark* includes reliance on a passage quoted by the majority at length from Justice Miller's opinion in the *Slaughterhouse Cases*. In that text included approvingly and cited favorably in the *Wong Kim Ark* case, a form of the word "peon" and the name "coolie" were used to describe Mexican and Chinese workers, respectively.

Those terms used in *Wong Kim Ark* were common in those times. But those remarks properly are deemed racist and/or culturally demeaning, dehumanizing and discriminatory today.

Similarly, the *Wong Kim Ark* case cites favorably and relies on the dissenting opinion of Justice Curtis in the *Dred Scott* case of 1856, in which Curtis refers to lands ceded by France in the Louisiana Purchase of 1803 as territory "inhabited only by savages." That language

dehumanizing the indigenous peoples of U.S. territories was subsumed in the record of the *Wong Him Ark* ruling by the citation of the Curtis dissent.

Calling people "savages" is dictum in a cited opinion, not the law of the *Wong Kim Ark* case. But the same also can and must be said of the racially and culturally biased dictum of Brown and White in the *Insular Cases.*

Of course, the witnesses before the Committee would say race bias expressed by racist judges in *Wong Kim Ark* is not cognizable by the Committee as such. But that's likely a function of many liking and agreeing with the outcome of *Wong Kim Ark* for those blessed to have been born or naturalized in a state of the union under the 14th Amendment.

As explained already, in W*ong Kim Ark* the court side-stepped away from the real issue of racism in the Chinese exclusion statutes. The racism prevailing under the outcome of the *Wong Kim Ark* case for persons of Chinese culture and race targeted by the Chinese Exclusion Act and Geary Act would be regarded as "core" not "incidental."

Less easily rationalized than preceding examples of race dictum is the *Wong Kim Ark* majority's affirmative citation and favorable reliance on the Curtis dissent, without disclosing its racist dictum. Specifically, the Wong Kim Ark decision does not repudiate the argument made by Justice Curtis supporting the 1920 federal statute known as the Missouri Compromise that was nullified by the majority in the Scott case.

Thus, the record of the *Wong Kim Ark* opinion includes favorable citation without distinguishing or noting non-concurrence with content of the Curtis dissent that advocated continuation of slavery in the states and territories, in which involuntary servitude would have been allowed by the Missouri Compromise.

Historical honesty/accuracy requires noting the record of the *Wong Kim Ark* case cites favorably and includes approvingly the argument that the U.S. would be better to have continued slavery in half the nation under the Missouri Compromise. That pro-slavery argument may not have been cited or adopted as the law of the *Wong Kim Ark* case, but it is every bit and in every degree as much a part of the content and record of the case as the dictum of Justice Brown and Justice White in the *Insular Cases*.

g. Understanding What Insular Cases Got Wrong

Personally, one concurs with Justice Harlan's dissent in *Downes v. Bidwell*, embracing the anti-imperialist, anti-colonialist paradigm of the Northwest Ordinance tradition. Harlan, who also was the lone dissenter on the *Plessy v. Ferguson* ruling, believed that under the

circumstances that existed in 1901 the American government shouldn't govern conquered foreign peoples in the foreign lands under U.S. federal territorial laws applicable in domestic territories populated by U.S. citizens.

Harlan even more emphatically argued that the U.S. could not govern territory of people to which the Constitution and laws made thereunder do not apply as the source of federal powers. That was a logical and reasonable analysis, especially given the fact that in 1901 when *Downes* was decided the U.S. Congress had not met its responsibility to define the "political status and civil rights" of the inhabitants under Article IX of the treaty under which Spain ceding the territory to the United States.

Instead, the territorial organic act for Puerto Rico enacted in 1900 defined the inhabitants who had no nationality recognized by the U.S. at the time as citizens of the territory. That did not define the political status of the territory or the people under U.S. national law.

Justice Harlan did not want the court to decide the political question of whether the territory would be in permanent union with the U.S. until Congress decided if the people were U.S. citizens. Even Justice Brown who wrote the *Downes* opinion expressly stated in the ruling that Congressional "assent" to U.S. citizenship had been the basis for treating territories acquired from foreign incorporation.

Yet, the court aligned itself behind the self-identified pro-imperialist caucus in Congress, influenced by distinguished law professors who proclaimed America's destiny now reached beyond the North American continent to rule an overseas empire for the good of America and the world. Because the people of the ceded lands were not U.S. citizens, one way of understanding the *Insular Cases* is that the court wanted to give Congress time to decide whether to confer citizenship.

In that sense, the judicial activism of the court in fabricating the unincorporated territory doctrine was in part judicial restraint due to the court's reluctance to do the work of Congress under Article IX of the cession treaty. Thus, the court declined to decide the political question of citizenship and future status of the territories and the people thereof.

Perhaps one of the most important truths about the why and how *Insular Cases* and the unincorporated territory doctrine came about is that Congress had balked on the status and citizenship questions.

In contrast, citizenship had been conferred in the Louisiana Purchase treaty, the treaty for purchase of Alaska, and in the annexation of Hawaii, all cases in which the U.S. acquired territory inhabited by foreign peoples. That is why the courts ruled in all those cases

defining territorial status as a path to statehood consistent with the Northwest Ordinance tradition.

Yet, H. Res. 279 declares racism was – in the word used by my fellow witness Professor Immerwahr - the "core" motive of the *Insular Cases.* But when the *Plessy* court under Chief Justice Fuller was presented in 1903 and 1905 with the question of incorporation of racially diverse Alaska and Hawaii, respectively, the imperialist impulse to expand empire was greater than whatever racism was implicated.

So, in Hawaii and Alaska it was citizenship not race that made the difference for the court. The outcome was full integration and application of the Constitution, as in the 27 territories populated by a majority of white Americans that had become states at that point in our history.

Still, one also concurs with Judge Gelpi of the Federal District Court in Puerto Rico that the "unincorporated" territory doctrine of the *Insular Cases* was "invented" without constitutional precedent or predicate. As Judge Torruella of the First Circuit Court of Appeals liked to remind us, the Court majority in *Downes* embraced the imperialist doctrines espoused at the end of the Spanish-American War by the referenced distinguished law professors.

In contrast, one is unable to concur with the assertion by witnesses at the hearing that the word "incorporation" also was categorically an unprecedented invention with racist intent. Indeed, the word "incorporation" was part of the lexicon of the Northwest Ordinance tradition long before *Downes v. Bidwell*.

For example, the 1803 treaty with France for the purchase of a territory that became all or part of 15 states expressly stated in Article III that the people of the territory were "incorporated" into the United States as citizens under the Constitution. This was even though the people of the territory were French and Spanish speaking, still loyal to their mother countries, and practicing a religion viewed as different by most Americans.

The Purchase of Louisiana and incorporation of its people as citizens occurred in 1803, the same year the territory of Ohio was admitted as a state under the Northwest Ordinance. The territory and then state of Louisiana was formed within the larger territory purchased from France in 1803, and admitted to the union just nine years later in 1812.

As noted below, the same result pertained in the case of Hawaii and Alaska, where the Fuller Court treated those two racially diverse territories as incorporated under the Constitution based primarily on Congressional conferral of citizenship.

It was in that historical context that I expected the hearing on May 12 grounded in history, not an ideological debate about the Insular Cases. I thought the purpose was to address the merits of H. Res. 279 to inform the Committee's work based on accurate historical narratives, not simply to defend that proposal as written.

h. *Wong Kim Ark* Contradicts H. Res. 279's Intent

For reasons set forth and I believe well demonstrated below, it was apt and justified for one to reference that *by the legal and political standard applied by H. Res. 279 and the witnesses of the hearing to Downes v. Bidwell and the Insular Cases*, the case of *Wong Kim Ark* also could and arguably must be included in the proposed condemnation and purge of the Fuller Court's jurisprudence tainted by the *Plessy* ruling, as proposed by H. Res. 279.

The *Wong Kim Ark* case is the legal authority relied on by the Federal District Court in Utah who ruled in the case of *Fitisemanu v. U.S.* that 14th Amendment birthright citizenship applies in the territory of American Samoa in the same manner it applies in states of the union. Lawyers for the plaintiffs in that case also are relying on *Wong Kim Ark* in opposing the U.S. Department of Justice appeal seeking to reverse the trial court ruling in *Fitisemanu*.

What stood out clearly at the hearing was that witnesses and Committee members were referring only to the *Vaello Madero*, *Peña Martínez*, and *Schaller* cases challenging the *Insular Cases*. Only the lawyer for Plaintiffs in the *Fitisemanu* case, who also was a hearing witness, mentioned the *Fitisemanu* case.

I thought it was important for the hearing record to reflect that resolving clause 4 of H. Res. 279 also had potential to influence the Department of Justice and the Court of Appeals in the *Fitisemanu* case. Because that might even be intended by resolving clause 4 it is important this be revealed to the Committee and sponsors of H. Res. 279.

That was not illogical when considered in tandem with the letter of March 10, 2021, addressed to Attorney General Garland Merrick from 13 Members of Congress, including co-sponsors of H. Res. 279. That letter asked DOJ not to rely on the unincorporated territory doctrine of the Insular Cases in legal briefs or arguments before the federal courts in the *Vaello Madero*, *Peña Martínez*, and *Schaller*

There seemingly was every reason to include the *Fitisemanu* case in the March 10 letter to the Attorney General. Even if there is another logical explanation for that omission, there was more reason to include all four pending cases challenging the Insular Case doctrine than to exclude any one of the four. I thought the resolution should so inform the Committee,

but by even mentioning the *Wong Kim Ark* ruling as it related to the *Fitisemanu* case, one apparently triggered requests by two other witnesses for rebuttals at the end of the meeting.

The explicit language of H. Res. 279 Resolving Clause 4 making it applicable to all present and future cases takes on a much more specific meaning, and from a separation of powers perspective raises a more problematic question, when viewed in the context of the March 10 letter to the Attorney General. That is because the three cases discussed in that letter deal with issues of social and political equity arising from when and how Congress extends federal social safety net programs to the unincorporated territories.

Those three cases go to the question of whether Congress has the power and discretion under the Territorial Clause in Art. IV, Sec. 3, Cl. 2 to apply some federal laws in the territories differently than the states. Those three cases also give rise to the question of whether applying any federal law in one territory requires that the same law must be applied in all the territories.

Those three statutory equity cases possibly but not necessarily will be decided on constitutional grounds with ramifications for future reliance on the Insular Cases. In contrast, the *Fitisemanu* case is a constitutional not a statutory case. The Federal Trial Court in Utah ruled the 14th Amendment applies in American Samoa as it applies in the states. By extrapolation that ruling would apply to the other unincorporated territories if upheld in the *Fitisemanu* case.

If that legal conclusion prevails based on the *Wong Kim Ark* ruling as asserted by the court and plaintiffs in *Fitisemanu*, then arguably all the current unincorporated territories would in effect become incorporated permanently into the union of states. If that were to be the outcome, it would mean that the courts would be altering and by judicial mandate deciding the political status of the territories.

At least as to Puerto Rico and Guam, defining the rights and status of the people of the territories concerned is still a responsibility of Congress under Article IX of the treaty of cession. Yet, the ruling in *Fitisemanu* purports to define a judicially mandated political status.

It does so without democratic self-determination, which is recognized by the U.S. as a human right of all less than fully self-governing people, under the U.N. Charter and applicable international conventions to which the U.S. is a party. Indeed, the U.S. is still obligated under Article 73(e) of the U.N. Charter to report to the U.N. on self-determination and progress toward equal participation in the U.S. national political process for Guam, American Samoa and the U.S. Virgin Islands.

Accordingly, it can be urged with utmost respect to the Committee chair at the May 12 hearing that H. Res. 279 and the record of that hearing are as much or more about self-determination as about whether the *Insular Cases* are relied upon in present or future litigation in federal court concerning application of the Constitution in the territories.

Yet, without any mention of the right for each territory to exercise self-determination, the letter of March 10, 2021, from 13 members of Congress asks the U.S. Department to in essence forfeit in the *Vaello Madero*, *Peña Martínez*, *Schaller* and *Fitisemanu* cases. Similarly, resolving clause 4 in H. Res. 279 implicates the same abandonment of the Insular Cases without a substitute status framework.

That proposed juridical surrender creating a vacuum of law is perhaps seen by lawyers for plaintiffs in those cases as the only way to "win" the *Fitisemanu* and other cases. The idea of uncontested outcomes favoring plaintiffs in all those cases is no doubt appealing. No wonder the lawyers for plaintiffs in those cases would like the U.S. government to simply jettison the *Insular Cases*, instead of doing the hard work of proving and persuading the courts to do what Congress can do by simple majority vote in both houses of Congress.

If the federal courts rule the same federal constitutional equal protection and uniformity provisions apply in the territories as in the states, as in the Utah Federal District Court ruling under appeal in the *Fitisemanu* case, that arguably will have a legal meaning that the territories are incorporated into the union. The next question will be how can the citizenship clause in the 14th Amendment apply, but not the uniform taxation provisions of the Constitution? Normally, we can't have equality of benefits without equality of burdens.

The Federal District Court in Puerto Rico and the First Circuit Court of Appeals apparently have ruled in the *Vaello-Madero* case that the 5th Amendment equal protection and due process clauses apply to Puerto Rico. Does that mean is the same manner as in the states?

If so, that arguably is at odds with the 1976 ruling in *Board of Examiners v. Flores de Otero*. In the case of *Examiners v. Flores de Otero* the court seemed to rely on equal protection under the "fundamental right" doctrine of the Insular Cases, without declaring reliance on direct application of the 5th or 14th Amendment.

i. If throwing out the Insular Cases is the answer, what is the question?

It is of paramount importance that the people of the ceded territories did not have U.S. nationality or citizenship in 1901 when the *Downes* case was decided. So, the *Downes* case applied only to former Spanish citizens who in effect had no political status or civil rights in a national context.

But hedging its bets, the Court appears to have interposed non-incorporation status as a temporary holding action. One clear purpose was to give Congress time to fulfill its responsibility to define the present or future political status at a national level of the peoples concerned under Article IX of the cession treaty.

That would have brought the indigenous peoples of the territories under domestic laws promulgated by Congress in the exercise of the Territorial Clause powers conferred on it by Art. IV, Sec. 3, Cl. 2 of the U.S. Constitution, or treated U.S. rule as military occupation of a foreign land and people under War Powers, and either nullified or interpreted the statutes passed by Congress for governance of the territories in that light.

Consistent with the understanding of the Insular Cases as a holding action, it came to pass that Congress decided by 1916 to deny U.S. citizenship in the Philippines, and by 1917 to confer citizenship in Puerto Rico, but we have all been waiting for a status resolution policy since then…104 years and counting.

Clearly, whatever the merits or demerits of the *Insular Cases* in law or policy practiced thereunder, the solution for America and its territories is not to go back to 1901 and start over again with a new judicially mandated outcome. The solution to move not backwards as if history can be undone, but to move forward to make a better future.

The solution is for Congress finally to meet its obligation under Article IX of the treaty of cession as to Guam and Puerto Rico, by providing a mechanism consistent with post-WWII and modern era self-determination principles for each territory as a separate body politic to give consent to its present and/or future political status.

j. Insular Cases and New World Order

Amid growing calls by Americans in each of the locally self-governing U.S. territories for more democratic and equitable treatment in the national political process, the 117th Congress is searching for a new path forward to reach those ends. Demands for virtual equality with the states recently have been based on political tactics in Congress and litigation tactics in federal courts aimed at condemning and overturning late 19th and early 20th century federal court rulings that enabled America's imperialist experiments in the Pacific and Caribbean.

Without any clear precedent, in 1901 the federal courts invented the legal premise that Congress and the courts can delay or decide against "incorporation" of a territory

into the union and full application of the U.S. Constitution. On that basis, Congress and the courts could then decide when, if and how the U.S. Constitution applies in territories classified first by the court in 1901.

From that first ruling in 1901 to the present the U.S. Congress has ratified and codified the "unincorporated" territory doctrine. Now successful advocacy for correction and remedial measures in proposals like H. Res. 279, seeking to overturn colonialist territorial policy and imperialist rulings of the U.S. Supreme Court known as the *Insular Cases,* are so singularly based on repudiation of racism that there are signs of political backlash.

Over statement of the real flaws in the Insular Cases has caused many to point out that even though it is undeniable these rulings were in varying degree anti-democratic, colonialist and racist, at the same time these rulings also have evolved and been accepted in the territories and Congress as having brought about some democratic, anti-colonialist and anti-racist outcomes as well.

Selectively focusing on the *Downes v. Bidwell* ruling defining Puerto Rico's status as colonial in 1901 ignores the evolution of territorial policy since 1901. For example, the decision to deny U.S. citizenship to the Philippines and open the path to independence was in many ways a tragedy that mimicked in painful ways the conquest of the Native American tribal peoples.

In the new post-WWII world order, the fact that the U.N. was established, and decolonization was both in the U.S. interest and affirmed democratic values, if not national virtues, giving Philippines independence without further delay became the anti-imperialist, anti-colonialist "right thing to do."

Also, as noted, the U.S. had granted citizenship in Alaska and Hawaii, so, in 1903 and 1905 the *Insular Case* rulings in the *Mankichi* and *Rassmussen* cases, these two "incorporated" racially diverse imperial possessions were incorporated into the union with a path to full equality of national citizenship through statehood. In the new world order of 1950's, admitting two new states was also good anti-colonial and anti-imperialist branding.

That does not mean there was not racism implicit in the imperialism practiced in the annexation of Hawaii. Since America practiced legalized systemic racism at the time, and as noted below, if every juridical act of government done by racists it to be repudiated as racist, in the expansive sweep of my fellow witness Professor Immerwahr, "that would be the whole 19th century right there."

Of course, any positing that every court opinion in the 19th century is written by racists requires a determination in every case whether the ruling of racist judges is racist or not, same naturally requiring some supportable proof and logic: The professor's declamation at the hearing *Wong Kim Ark* is not racist but *Downes* is regrettably free of either.

As we have seen, differentiating decisions by "racist judges" that are "racist rulings" with "racially discriminating effects" from decision by "racist judges" that are not "racist decisions" with no "racially discriminating effects" is a tricky horse for the finest contemporary jurist to triage.

But for the U.S. territories that are still stuck in *Insular Cases* unincorporated status limbo and have not become nations or states, the new world order is not without remedies and paths to full decolonization. During the period from 1901 to the present as the Insular Cases "unincorporated territory" doctrine was expanded by the courts and codified by Congress. As a result, the self-determination principles adopted by the U.S. and the international community in the Atlantic Charter and the U.N. Charter defined new political status remedies to attain decolonization based on democratically expressed will of the people in each territory.

The irony of the post-WWII era is that regimes of home rule Congress established in the territories were so successful the elected leaders thriving in the territorial government unexpectedly seemed to become reluctant about transition to full equality of citizenship at the national level. That was in part because full integration into the union would replace local home rule with the disciplines and accountability of statehood or nationhood as the options for full decolonization.

Instead, for several decades experiments in "autonomy" in local affairs as a substitute for equality delayed self-determination on non-territorial status options. In the end, what has become clear is that for U.S. citizens in each territory not "incorporated" into the union the more autonomy for the territory the less equality is justified, and the more equality the less autonomy is justified.

Thus, going into a federal court in 2021 to seek a federal court order overturning a 1901 decision on territorial status merely asks a federal court in post-imperialist America to commit the same offence as the original by imposing a new status by judicial edict without local self-determination. Will the court declare the territory to be permanently joined in the union, and if so will that lead to application of the uniformity clause on federal taxation?

Will the 14th Amendment citizenship clause apply, along with state-like status in every respect except voting rights in Congress and the Electoral College? Wil the territories still

have a right of self-determination on nationhood if the terms of permanent union leading to statehood are no longer desired?

Overturning the 1901 *Downes* case would not resolve these post-WWII self-determination issues. It reminds us that the "unincorporated territory" doctrine of the 1901 *Downes v. Bidwell* case originally applied without any basis in U.S. statutory or court made law before Congress conferred statutory citizenship in the territories. Only in 1917 did Congress grant citizenship of the U.S. in an unincorporated territory as defined by *Downes*, starting with Puerto Rico.

H. Res. 279 focuses on the 1901 case as an affront to U.S. citizens in 2021, because *Downes* was tainted by racial notions expressed by some on the court in common vernacular 120 years ago. Yet, it was not until the *Balzac v. Puerto Rico* case in 1922 that the court extended "unincorporated" territory doctrine of the 1901 *Downes* ruling to U.S. citizens in Puerto Rico and later other territories. In doing so Chief Justice Taft and a unanimous court stated the ruling did not discriminate based on race because it applied to all Americans in the territories of any race, and instead discriminated based on "location."

That is, since *Balzac* if you are resident of a territory, under Article IV, Sec. 3, Cl. 2, Congress decides whether you do or do not get the same status and rights as Americans in a state. That means as long as Congress does not discriminate based on race or some other impermissible criteria the territories can be treated like as state or not like a state. That ruling has been upheld repeatedly by U.S. Supreme Court majorities on the Warren, Burger and Roberts courts by majorities that have included Thurgood Marshall and Ruth Bader Ginsburg.

k. Ball is in Congress' court

As the Vice Speaker of the Guam legislature concluded at the end of the hearing, Congress needs to move aggressively now to address self-determination. Congress has had 120 years to meet the responsibility it assumed when it ratified the treaty of cession with Spain.

Article IX of the treaty required that Congress must "define the political status and civil rights" of person in the territories. Unlike then in 1901, the people of the territories are now U.S. citizens. One shares the view that Congress needs to presently deliver on self-determination; Consent of the governed to territorial status is suboptimal. Statehood, merger with an existing state or nationhood are the non-territorial, non-colonial and non-imperialist options.

The U.S. House of Representatives, Committee on Natural Resources, confirmed that reality in its hearing regarding H. Res. 279 on May 12, 2021.

For example, the witness for the "Equally American" organization advocates full equality for the territories without a commitment to statehood. In doing so, he predicted that the political status and rights of American Samoa and other territories will be decided by the U.S. Supreme Court in the *Fitisemanu* case, in which he is the attorney of record for plaintiffs.

The Equally American witness went on to urge passage of H. Res. 279 in order to "condemn" the *Insular Cases* as unconstitutionally racist. After which he intends to ask the U.S. Supreme Court to overrule the *Insular Cases*, and then pursue a constitutional amendment to gives citizens in the territories citizenship rights equal to citizens of the states. That implicates overturning and overruling the Insular Cases, without a substitute legal or policy framework for the status of the territories or the civil rights of the people.

The witness predicted the territories would be governed by Congress under the Territorial Clause in Article IV of the Constitution during this period. But that means the federal Constitution would apply as in the 32 territories that have become states. That means the 14th Amendment, 5th Amendment, Uniformity Clause apply as in the states and territories Congress determines to be joined in permanent union.

But it does not mean Congress will have agreed to permanent union, or that it will ever lead to full equality of citizenship rights attainable only through statehood or a constitutional amendment providing the same rights of citizenship as statehood.

l Fitisemanu and Wong Kim Ark

In the *Fitisemanu* case, the federal judge's ruling for plaintiff, as well as the plaintiff's legal position seeking to uphold the ruling, are being appealed by the U.S. Government. The ruling and the plaintiff's legal position are based entirely on the U.S. Supreme Court case of U.S. v. Wong Kim Ark, 169 U.S. 649 (1898). In that case, the Court simply determined that regardless of race or other discriminatory criteria, all persons born in a state of the union under U.S. jurisdiction acquire U.S. national citizenship under Section 1 of the 14th Amendment, in accordance with U.S. and international law of birthright citizenship.

Specifically, like the judge's ruling, the plaintiff in *Fitisemanu* now argues on appeal that *Wong Kim Ark* establishes that the U.S. citizenship clause in Section 1 of the 14th Amendment to the U.S. Constitution applies to American Samoa in exactly the same manner as it applies in a state of the union. If upheld that would mean all persons born in any U.S. territory have the same constitutionally conferred national citizenship of the U.S. as Americans born in a state of the union.

None of the witnesses supporting H.R. 279 as written pointed out that the *Wong Kim Ark* case applied to a person born in a state of the union, and did not decide the nationality

of a person born in U.S. territory not within a state. Indeed, the Congressional Research Service has reported that Wong Kim Ark does not even provide legal authority for citizenship in the case of a child born to parents who are present in the U.S. unlawfully (RL33079, August 12, 2010).

Accordingly, Congress did not embrace the *Wong Kim Ark* case handed down by the Fuller Court in 1898 as the legal source of citizenship in the U.S. territories acquired a year later by treaty of session from Spain in 1899. Rather, as it had in the case of foreign peoples populating Louisiana in 1803, Alaska in 1867 and Hawaii in 1900, Congress provided by treaty and/or statute for the U.S. citizenship status of those diverse peoples.

Specifically, in 1899, the U.S. Congress ratified the Spanish cession treaty for Guam, Puerto Rico and the Philippines territories, including the requirement in Art. IX that Congress would by statute define the "political status and civil rights" of the inhabitants. Instead, however, Congress adopted a 1900 local home rule "organic act" that defined the inhabitants as citizens only of the local territorial government, and was silent on the status of the territory or its peoples at the national level.

When the lack of a status under national law was challenged in court, Congress embraced as the legal framework for citizenship in the U.S. territories the *Downes* ruling that came from the same Fuller Court three years after its ruling in *Wong Kim Ark.* That was the *Downes* by the same Fuller Court that decided *Wong Kim Ark*.

Downes placed the unincorporated U.S. territories outside direct application of the 14th Amendment as it applies in the states. In lieu of extending U.S. 14th Amendment birthright citizenship to the Spanish cession territories, the U.S. Congress embraced the "unincorporated territory" doctrine of the *Insular Cases* and conferred statutory U.S. citizenship instead. The territorial organic act provisions as codified appear at 8 U.S.C. 1401-1408.

Against that backdrop, it is significant that no one at the May 12 hearing on H. Res. 279 save two witnesses pointed out that the *Fitisemanu* case if upheld by the federal courts would directly change the constitutional and political status of the people of a territory. Only two of six witnesses pointed out that a court order applying the 14th Amendment to American Samoa would end the current "national but not citizen" status of persons born in that territory, create permanent political rights to the same political union and citizenship as states, and thereby – in the context of the *Insular Cases* - "incorporate" American Samoa into the United States.

Only two witnesses noted this would be political status determination by a court without self-determination of the people concerned. That, in turn, is significant because the

Fitisemanu case is the only territorial case currently pending in the federal courts that could be impacted by H. Res. 279, but that was not cited in a letter dated March 10, 2021, signed by several members of the Natural Resources Committee, asking the U.S. Attorney General to cease and desist reliance on the Insular Cases in pending federal lawsuits.

Instead, the letter to Attorney General Garland Merrick from 13 members of Congress referred only to three territorial rights cases that are seeking equity under federal programs through equal statutory benefits compared to states. These include the *Vaello Madero, Pena Martinez* and *Schaller* cases, presenting issue such as whether Supplemental Security Income (SSI) benefits being paid in New York should continue for a citizen who moves to Puerto Rico.

Fitisemanu is the only case in which the plaintiffs are not seeking only social equity in proportional or equivalent if not equal federal benefits that are in the nature of discretionary statutory spending. Only the plaintiff's in *Fitisemanu* seek permanent equal constitutional rights as 14th Amendment citizenship mandated by court order without democratic self-determination. Of course, the federal courts do not need permission of the people to decide what the Constitution means, the Constitution is all the permission the courts need.

It is not hard to understand how much the witness at the May 12 hearing who is an attorney in the *Fitisemanu* case might prefer to deprive the U.S. Department of Justice lawyers access before the court to the last 120 years of federal case law that is the supreme law of the land over the issues in that case.

What does defy logic is how, since Resolving Clause 4 of H. Res. 279 states that the Insular Cases should be barred for "all present and future cases" in which the "application of the Constitution in the territories," only two of six witnesses pointed out to the Committee that the Fitisemanu case is the only pending constitutional case affected Yet, that case name was not included in the March 10 letter to the U.S. Attorney

m. Conclusion

As critical as we all may be about *Downes v. Bidwell* and the saga of the Court's judicial activism, arguably the only thing worse would have been if the Court had declared the permanent status of ceded territories instead of Congress, and most importantly without democratic self-determination in each of the territories. Similarly, if a court declares the Insular Cases unconstitutional, what legal framework will replace the Insular Cases that preserves the right of self-determination on all territorial and non-territorial status options compatible with the U.S. Constitution?

The concern that a federal court could alter the political status and civil rights of Americans in the last five territories governed locally under federal territorial law, rather than Congress, is real. So are concerns that Congress will defer or decide status the territories though inaction or action without sponsoring a mechanism for self-determination on terms acceptable to each territory and Congress. As is evident from the above, adopting H. Res. 279 as written is counterproductive to having Congress put full-focus on manifesting the long-delayed fundamental rights of the territories. Thank you.