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Micah Allred

ARTICLE

AN ORIGINALIST APPROACH TO PUERTO RICO: ARGUMENTS AGAINST THE STATUS QUO

Micah Allred *

Few originalists have grappled with a fundamental question about Puerto Rico: whether the Constitution permits the United States to hold the island indefinitely as nonstate territory. There are reasons to doubt that it does. The main purpose of the Constitution's territorial provisions was to allow Congress to transition the then Western Territory into states. And, as a structural matter, Congress's direct authority over Puerto Ricans conflicts with important constitutional principles such as federalism. But for originalists, arguments from purpose and structure are helpful only insofar as they elucidate the original meaning of the Constitution's text. This Article lays out two possible arguments—one from the Territories Clause and one from the Admissions Clause—for why the United States' ongoing possession of Puerto Rico conflicts with that meaning. Of the two, the Admissions Clause argument is most compelling. If it is correct, then Puerto Rico's current status must change; granting Puerto Rico statehood is but one way to do so.

INTRODUCTION

Originalists on the Supreme Court are questioning long-held assumptions about Puerto Rico's place in our constitutional order. In *United States v. Vaello-Madero*, Justice Gorsuch's strongly worded concurrence called for the Court to overturn a series of century-old

* J.D., Notre Dame Law School, 2022; B.A., Whitworth University, 2017. I am grateful for the feedback on this Article from many colleagues, friends, and family, including Chad Allred, Nicole Garnett, Bruce Huber, Michael Bradley, Collin Berger, Shane Coughlin, Teresita Rios, Steven Schlesinger, and Owen Toepfer. I am also thankful to Anne Bennett Osteen, Sachit Shrivastav, and the other editors of the *Notre Dame Law Review Reflection*. All errors are my own.

precedents that limit the Constitution's application to Puerto Rico.[1] In *Financial Oversight and Management Board for Puerto Rico v. Centro de Periodismo Investigativo, Inc.*, Justice Roberts questioned at oral argument why courts have afforded Puerto Rico sovereign immunity when "the Plan of the Convention was to cover the territories with plenary authority on Congress's part, not with any notion of [sovereign immunity]."[2] These expressions of discontent suggest that the Court's originalist[3] majority could be open to major adjustments in its jurisprudence of the governance of Puerto Rico.

Even so, few originalists—either on or off the Court—appear to have grappled with a far more basic question about Puerto Rico: whether the United States has the ongoing, constitutional authority to hold Puerto Rico as a nonstate territory. One might imagine that originalists, who often emphasize the limited power of the federal government in relation to local governments and individual citizens,[4] would identify at least a prima facie concern with the federal government's plenary and indefinite authority over Puerto Rico. Instead, originalists have largely ignored this question.[5] Indeed, the majority of legal scholarship on this issue has come from a living-constitution or international law perspective.[6]

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1 United States v. Vaello-Madero, 142 S. Ct. 1539, 1556 (2022) (Gorsuch, J., concurring) (calling for the *Insular Cases* to be overruled and for courts to decide questions about Puerto Rico using "the Constitution's text and its original understanding").

2 Transcript of Oral Argument at 8, Fin. Oversight & Mgmt. Bd. for P.R. v. Centro de Periodismo Investigativo, Inc., 143 S. Ct. 1176 (2023) (No. 22-96). Ultimately, the Court chose not to use this case to decide the constitutional question of Puerto Rico's sovereign immunity. *See Fin. Oversight & Mgmt. Bd. for P.R. v. Centro de Periodismo Investigativo, Inc.*, 143 S. Ct. at 1180.

3 By "originalist," I refer to the family of theories that view the Constitution's meaning as fixed around the time of ratification and binding on Americans today. *See* Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1, 6–7 (2015) (identifying the core ideas of contemporary originalism).

4 *See, e.g.*, Chiafalo v. Washington, 140 S.Ct. 2316, 2333–34 (2020) (Thomas, J., joined by Gorsuch, J., concurring in judgment) (arguing that the limitation of the federal government's powers vis-à-vis the states and the people "is both embodied in the structure of our Constitution and expressly required by the Tenth Amendment," *id.* at 2333).

5 *But see* GARY LAWSON & GUY SEIDMAN, THE CONSTITUTION OF EMPIRE: TERRITORIAL EXPANSION & AMERICAN LEGAL HISTORY 203 (2004) (concluding that "the Constitution does not forbid" Congress from holding "legitimately acquired territory," including Puerto Rico, "as a permanent colony"). Lawson and Seidman provide the authoritative originalist account of the Constitution's provisions on territories. See also Cesar A. Lopez-Morales, *Making the Constitutional Case for Decolonization: Reclaiming the Original Meaning of the Territory Clause*, 53 COLUM. HUM. RTS. L. REV. 772, 794-806 (2022), for a discussion of the original meaning of the Territories Clause. Lopez-Moralez concludes, unlike this Article, that the Territories Clause does not permit Congress to govern territories indefinitely. *Id.* at 804.

6 *See, e.g.*, Juan R. Torruella, *Outstanding Constitutional and International Law Issues Raised by the United States-Puerto Rico Relationship*, 100 MINN. L. REV. HEADNOTES 79, 99–100

This Article attempts to fill that gap by putting forth and exploring two possible arguments for why Puerto Rico's current status conflicts with the original meaning of the Constitution. After providing historical background in Part I, Part II presents the first argument, which is based on the Territories Clause. That provision, which authorizes Congress to "make all needful Rules and Regulations" regarding U.S. territories,[7] provides the current legal basis for Congress's authority to govern territories. However, historical evidence suggests that the original meaning of "territory" was limited to territories in the process of transitioning to statehood. Thus, one possible argument is that Congress lacks authority over territories like Puerto Rico, which have no clear trajectory towards statehood.

While the Territories Clause argument is plausible, this Article concludes that it ultimately fails. As discussed below, evidence of the Framers' intentions and the original public meaning of the word "territory" show that it had a broad meaning, despite the fact that the Framers expected the first territories to become states.

Part III lays the groundwork for a second, stronger argument against the constitutionality of Puerto Rico's status. Originalist scholars Gary Lawson and Guy Seidman have argued that the United States' power to acquire territory flows from the Admissions Clause,[8] which authorizes Congress to admit new states.[9] They explain that, apart from a few exceptions, statehood is the only purpose for which the United States may acquire territory.[10] This Article builds on Lawson and Seidman's theory to develop an argument that the Constitution requires territories to become states within a reasonable period of time—and that a territorial possession that lasts unreasonably long becomes unconstitutional.

Part IV applies this Admissions Clause argument to Puerto Rico. Based on a variety of considerations, the United States' possession of

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(2016) (arguing that the International Covenant on Civil and Political Rights obligates the United States to grant Puerto Ricans suffrage and self-determination); Samuel Issacharoff, Alexandra Bursak, Russell Rennie & Alec Webley, *What is Puerto Rico?*, 94 IND. L.J. 1, 1 (2019) (calling for a "resumption of inventive statesmanship," since "the federal government's formalist absolutism is inconsistent with the text and history of the U.S. Constitution"); *Developments in the Law: The U.S. Territories*, 130 HARV. L. REV. 1616, 1633 (2017) (arguing for a "functionally federal relationship between the federal and territorial governments"); Puerto Rico v. Sanchez Valle, 136 S. Ct. 1863, 1884 (2016) (Breyer, J., dissenting) (suggesting that, for the purposes of the Double Jeopardy Clause, "the 'source' of Puerto Rico's criminal law ceased to be the U.S. Congress and became Puerto Rico itself, its people, and its constitution," as evidenced by a "history of statutes, language, organic acts, traditions, statements, and other actions").

7 U.S. CONST. art. IV, § 3, cl. 2.

8 *See* discussion *infra* Section III.A.

9 U.S. CONST. art. IV, § 3, cl. 1 ("New States may be admitted by the Congress into [the] Union . . . .").

10 *See* discussion *infra* Section III.A.

Puerto Rico appears to have lasted unreasonably long and is therefore likely unconstitutional. If so, then Congress and perhaps the courts are obliged to resolve that constitutional incongruence by ending Puerto Rico's indefinite territorial status. There are various ways to change the status quo. Statehood is only one of them.

I. THE UNITED STATES' POSSESSION OF PUERTO RICO

The history of the United States' possession of Puerto Rico illustrates both the nature of American territorial possession generally and the singular nature of America's dealings with Puerto Rico. The United States acquired Puerto Rico by treaty from Spain in 1898 at the conclusion of the Spanish-American War.[11] Puerto Rico was under military rule until 1900, when Congress passed the Foraker Act.[12] That law established a civil government in Puerto Rico that was headed by a presidentially appointed governor.[13] Additionally, the Act levied taxes on goods shipped between Puerto Rico and the mainland.[14]

Those taxes were challenged in what came to be known as the *Insular Cases*.[15] The most important of the *Insular Cases* was *Downes v. Bidwell*.[16] There, the narrow question was whether a duty on oranges imported into New York from San Juan violated the Uniformity Clause.[17] The broader question was whether the Constitution "follow[s] the flag" and applies in territories.[18] The Supreme Court's answer was "no." It held that the import duty was constitutional because Puerto Rico is "foreign to the United States in a domestic sense."[19] Thus, the United States could tax imports from Puerto Rico (as if Puerto Rico were "foreign"), but the United States could also possess Puerto Rico ("in a domestic sense").[20]

Downes relied on a theory of "incorporated" versus "unincorporated" territories.[21] According to *Downes*, until Congress decides to incorporate a territory by bringing it into close relationship with the United States, the Constitution has only limited application in the

11 Juan R. Torruella, *Ruling America's Colonies: The* Insular Cases, 32 YALE L. & POL'Y REV. 57, 59 (2013).

12 Torruella, *supra* note 6, at 86.

13 *Id.* Puerto Ricans were allowed to elect the lower house of the legislative branch. *Id.*

14 Torruella, *supra* note 11, at 65–66.

15 *Id.* at 66.

16 Downes v. Bidwell, 182 U.S. 244 (1901); Torruella, *supra* note 11, at 69.

17 *Downes*, 182 U.S. at 247–49; *see also* U.S. CONST. art. I, § 8, cl. 1.

18 Torruella, *supra* note 11, at 66.

19 *See Downes*, 182 U.S. at 341 (White, J., concurring).

20 *Id.* at 341–42 (White, J., concurring).

21 *Id.* at 346–47 (Gray, J., concurring).

unincorporated land.[22] Because the Court found Puerto Rico to be unincorporated, Puerto Ricans are entitled only to constitutional rights deemed "fundamental."[23] For example, Puerto Ricans may not be deprived of life or liberty without due process—but they may be convicted without a jury.[24]

Consequently, Puerto Ricans depend on Congress for non-fundamental rights. In 1917, Congress granted Puerto Ricans birthright citizenship.[25] In 1950, Congress allowed Puerto Ricans to elect their own governor.[26] Two years later, Congress passed what is known as "Law 600," which restructured Puerto Rico's government and created the Commonwealth of Puerto Rico.[27] The Commonwealth follows a constitution that was drafted and approved by Puerto Ricans, but which allowed the President to make amendments and required the approval of Congress.[28] The Commonwealth status allows Puerto Ricans greater representation in their local government than before, but they still cannot vote in national elections.[29]

While the scope of the Commonwealth's autonomy is unclear,[30] Congress continues to exercise broad power over Puerto Rico. A stark example of this is the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA).[31] In 2016, Puerto Rico encountered a massive debt crisis. In little over a decade, its public debt had risen from $39.2 billion to $71 billion.[32] Because of its unique status, Puerto Rico could not file bankruptcy, nor could it rely on its own public debt laws.[33] Consequently, Congress passed PROMESA, which established a Financial Oversight and Management Board (Board) consisting of

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22 *Id.* at 338–39 (White, J., concurring).

23 Torruella, *supra*, note 11, at 74.

24 Balzac v. Porto Rico, 258 U.S. 298, 304–05, 312–13 (1922); *see also* United States v. Vaello Madero, 142 S. Ct. 1539, 1544 (2022) (holding that while the Fifth Amendment Due Process Clause guarantees a fundamental right that applies to Puerto Ricans, it does not require Congress to provide the same Supplemental Security Income benefits to Puerto Ricans as to other Americans).

25 Torruella, *supra* note 6, at 87–88.

26 Torruella, *supra* note 11, at 80.

27 *Id.*

28 *See id.*

29 Torruella, *supra* note 6, at 88.

30 *Compare* Torruella, *supra* note 11, at 81 ("[N]o constitutional change really took place as a result of the Law 600 exercise . . . ."), *with* Puerto Rico v. Sanchez Valle, 136 S. Ct. 1863, 1876 (2016) ("[S]ince the events of the early 1950's, an integral aspect of that association has been the Commonwealth's wide-ranging self-rule, exercised under its own Constitution.").

31 Pub. L. No. 114-187, 130 Stat. 549 (2016) (codified as amended in scattered sections of 15, 29 & 48 U.S.C.).

32 Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC, 140 S. Ct. 1649, 1655 (2020).

33 *Id.* (citing Puerto Rico v. Franklin Cal. Tax-Free Tr., 136 S. Ct. 1938 (2016)).

seven members appointed by the President and Congress.[34] Puerto Rico's governor serves as an eighth, nonvoting member.[35] The Board is authorized to file bankruptcy on Puerto Rico's behalf and to "supervise and modify Puerto Rico's laws."[36] The Board's austerity measures "have affected the island's entire population," including pensions, education, and healthcare.[37]

Congress's power over Puerto Rico is manifested in other ways as well, such as its police power over local law enforcement and commerce. In 2016, the Supreme Court held that the Double Jeopardy Clause precludes the Commonwealth from prosecuting a defendant after he pleads guilty to federal charges.[38] The Court explained that "the ultimate source of Puerto Rico's prosecutorial power is the Federal Government."[39] More recently, Congress outlawed cockfighting in Puerto Rico.[40] Cockfighting is also illegal in the mainland, but that is because of state law.[41] By contrast, Congress decided the issue for Puerto Ricans when it included the prohibition in a farm bill, "catching even the Puerto Rican government by surprise."[42] These relatively recent developments illustrate the broad power Congress has long exercised over the lives of Puerto Ricans—now for over 125 years.

The length and breadth of Congress's authority over Puerto Rico make it all the more important to understand the source of Congress's authority and, more fundamentally, the basis for the United States as a whole to possess a nonstate territory like Puerto Rico indefinitely. This Article will answer each question in turn, focusing first on the Territories Clause and then on the Admissions Clause. Each of these two provisions provides the basis for an originalist argument against the ongoing possession of Puerto Rico. As will be seen, one argument is more convincing than the other.

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34 *Id.* at 1655.

35 *Id.* at 1674 (Sotomayor, J., concurring in judgment).

36 *Id.* at 1655.

37 *Id.* at 1674 (Sotomayor, J., concurring in judgment). In 2020, the Supreme Court upheld PROMESA after the constitutionality of the Board's appointment was challenged on Appointments Clause grounds. *Id.* at 1654–55 (reasoning that Board members are not subject to the Appointments Clause, since their "powers and duties are primarily local in nature and derive [from the Enclave Clause and the Territories Clause]").

38 Puerto Rico v. Sanchez Valle, 136 S. Ct. 1863, 1867–68 (2016).

39 *Id.* at 1876.

40 Patricia Mazzei, *The Last Days of Legal Cockfighting in Puerto Rico*, N.Y. TIMES (Nov. 9, 2019), https://www.nytimes.com/2019/11/09/us/puerto-rico-cockfighting-ban.html [https://perma.cc/GLP4-XBAN].

41 *Id.*

42 *Id.* The law was challenged unsuccessfully. Ortiz-Diaz v. United States, 142 S. Ct. 336 (2021) (mem.), *denying cert. to* Hernández-Gotay v. United States, 985 F.3d 71, 75 (1st Cir. 2021) (upholding the law).

II. THE TERRITORIES CLAUSE ARGUMENT

> The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.[43]

The Territories Clause provides the current legal justification for Congress's plenary power over territories, including Puerto Rico.[44] But the context in which the clause was drafted raises the question whether it has a limited meaning. The Framers included the Territories Clause so that the Western Territory, a vast stretch of land lying to the immediate west of the original colonies, could be admitted as states. Is it possible that when the Constitution says "Territory," it refers only to lands in the process of transitioning to statehood?

This Part proceeds in two Sections. The first presents evidence from text, history, practice, and structure to support a narrow meaning of "Territory." This evidence seems to suggest that Congress is authorized to govern only those territories that are transitioning to statehood—but not territories like Puerto Rico that are held indefinitely. The second Section, however, explains why this argument fails. Whether analyzed through the historical use of its constituent words or through its Framers' intentions, the Territories Clause is best interpreted as granting Congress a broad authority that extends even to indefinitely held territories. Although the argument falters, its account of constitutional history and structure inform the argument developed below in Part III, i.e., that newly acquired territory must be admitted as a state within a reasonable period of time.

A. Evidence of the Original Meaning of "Territory"

The first edition of Noah Webster's *American Dictionary of the English Language*, published in 1828, provides examples of how to use the word "territory."[45] Sample phrases include "the *territories* of the United States; the *territory* of Mishigan; [and the] Northwest *territory*."[46] "These districts of country," Webster notes, "when received into the union and acknowledged to be states, lose the appellation of

43 U.S. CONST. art. IV, § 3, cl. 2.

44 *See, e.g.*, Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC, 140 S. Ct. 1649, 1658 (2020); *see also* Sere v. Pitot, 10 U.S. (6 Cranch) 332, 336–37 (1810); Nat'l Bank v. County of Yankton, 101 U.S. 129, 133 (1879).

45 2 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (New York, S. Converse 1828) (defining "Territory" as "[t]he extent or compass of land within the bounds or belonging to the jurisdiction of any state, city or other body").

46 *Id.*

territory."[47] Webster's entry illustrates the possibility that when the Territories Clause uses the word "territory," it refers specifically to territories on a path to becoming states. The reasons for this narrow interpretation fall into familiar categories: text, history, practice, and structure.

1. Text

The Territories Clause's relation to other provisions in the Constitution provides the strongest textual support for the argument that the meaning of "territory" is restricted to territories that are headed towards statehood. Two features of the Constitution's text are salient.

First, the Constitution contemplates indefinite territorial authority by Congress in a separate part of the Constitution, Article I. The Enclave Clause provides that "Congress shall have Power . . . [t]o exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States."[48] If the Framers or ratifying public intended to grant Congress indefinite authority over all territories, they could have done so. Instead, the Territories Clause uses different language and is located in a different Section. Arguably, this means that the Territories Clause gives Congress a more limited power than the Enclave Clause.

A second clue to understanding the Territories Clause might be inferred from the company it keeps, i.e., the other sections in Article IV. Each Article IV section deals with issues unique to *states*: the full faith and credit to be given by one state to another, the privileges and immunities that citizens of one state are owed by another, the republican form of state government, etc.[49] This placement of the Territories Clause suggests its purpose is the administration of states, not the administration of provinces or colonies. This is confirmed by the Territories Clause's placement next to the Admissions Clause, suggesting an *in pari materia* construction.[50] Together, the Admissions and Territories Clauses provide everything needed for admitting new states, from prestatehood governance to the mechanisms of admission. This textual arrangement suggests that the Territories Clause refers only to territories that will become states, as opposed to a broader concept that includes territories held indefinitely.

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47 *Id.*

48 U.S. CONST. art. I, § 8, cl. 1, 17. The same power applies to "all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings." *Id.*

49 *See id.* art. IV.

50 LAWSON & SEIDMAN, *supra* note 5, at 74.

2. History

The argument for a limited interpretation of the Territories Clause is bolstered by the "obvious importance of the Northwest Territory and trans-Appalachian West" at the Constitutional Convention.[51] "The United States obtained the Northwest Territory as a result of Britain's cession of the trans-Appalachian West in the Treaty of Paris of 1783."[52] This ceded land, later known as the Western Territory,[53] stretched from Canada to the current states of Mississippi and Alabama.[54] It was sandwiched between the Allegheny Mountains and the Mississippi River.[55] Everything north of the Ohio River was eventually called the "Northwest Territory."[56]

Both before and after the American colonies declared their independence, the western colonies wanted to expand their borders into the Western Territory.[57] This concerned states along the seaboard, which had no room to grow. They argued that the lands should be owned not by individual states but by the nation as a whole.[58] In 1779, Maryland pressed her point by holding up ratification of the Articles of Confederation until the states with claims to the Western Territory agreed to give them up.[59]

Shortly after the Articles of Confederation were ratified, Maryland carried out that agreement by introducing legislation to give Congress—not the states—authority over the Western Territory.[60] The proposal passed. Not only did it provide that "the unappropriated lands . . . shall be disposed of for the common benefit of the United States," but it also required that they "be settled and formed into distinct republican states, *which shall become members of the federal union*, and

51 BARTHOLOMEW H. SPARROW, THE INSULAR CASES AND THE EMERGENCE OF AMERICAN EMPIRE 16 (2006); *see also* MAX FARRAND, THE LEGISLATION OF CONGRESS FOR THE GOVERNMENT OF THE ORGANIZED TERRITORIES OF THE UNITED STATES: 1789–1895, at 3–14 (Newark, Wm. A. Baker 1896) (explaining that Article IV, § 3 of the Constitution, which contains the Admissions and Territories Clauses, was drafted at the tail end of a long-standing controversy over what to do with the Western Territory).

52 SPARROW, *supra* note 51, at 15.

53 *See, e.g.*, 2 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 465–66 (rev. ed. 1937).

54 SPARROW, *supra* note 51, at 16.

55 FARRAND, *supra* note 51, at 3. The trans-Appalachian West passed from the French to the English in 1763, twenty years before Britain ceded it to the United States. *Id.*

56 SPARROW, *supra* note 51, at 16; FARRAND, *supra* note 51, at 3–4.

57 FARRAND, *supra* note 51, at 3–4.

58 *Id.* at 4.

59 *Id.* at 4–5.

60 *Id.* at 6.

have the same rights of sovereignty, freedom and independence, as the other states."[61]

This requirement that the Western Territory be transformed into states was a constant theme in Congress's territorial legislation leading up to the Constitutional Convention of 1787. In 1784, Thomas Jefferson proposed a plan for governing the Western Territory. Among other things, it provided that the territory should be "divided into distinct states."[62] The plan contemplated the formation of both temporary and permanent governments in the territories.[63] But it made clear that as soon as a territory became as populous as one of the original states, "such state shall be admitted by it's [sic] delegates into the Congress of the United states, on an equal footing with the said original states."[64] This part of Jefferson's plan attracted criticism. "There were those who felt that it was somewhat indefinite to promise certain sections of country admission into the Confederacy as soon as their population should equal in number that of the least populous of the original States."[65] Critics argued that unexpected changes in the populations of the original thirteen states could make it either too difficult or too easy for the territories to gain statehood. But, like Maryland's earlier proposal, Jefferson's proposal passed.[66]

The subsequent Ordinance of 1787, also known as the Northwest Ordinance,[67] provided myriad details on the administration of the Western Territory.[68] It would continue to influence territorial governance through the late nineteenth century.[69] As with earlier legislation, it expressly provided for territories' future statehood:

> There shall be formed in the said territory, not less than three nor more than five States . . . . And, whenever any of the said States shall have sixty thousand free inhabitants therein, *such State shall be admitted*, by its delegates, into the Congress of the United States, on an equal footing with the original States in all respects whatever, and shall be at liberty to form a permanent constitution and State government . . . .[70]

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61 18 LIBRARY OF CONGRESS, JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 915 (Gaillard Hunt ed., 1910) (emphasis added).

62 Thomas Jefferson, Revised Report of the Committee (Mar. 22, 1784), *in* 6 THE PAPERS OF THOMAS JEFFERSON 607 (Julian P. Boyd ed., 1952).

63 *Id.* at 608.

64 *Id.* at 608–09.

65 FARRAND, *supra* note 51, at 8.

66 *Id.*

67 SPARROW, *supra* note 51, at 14.

68 FARRAND, *supra* note 51, at 9.

69 *Id.* at 54.

70 An Ordinance for the Government of the Territory of the United States Northwest of the River Ohio art. V (July 13, 1787), *in* DOCUMENTS ILLUSTRATIVE OF THE FORMATION

Despite the passage of the Northwest Ordinance, along with Congress's other legislation on territorial matters, there was a problem. The Articles of Confederation limited Congress to powers expressly enumerated, but "[t]he power to acquire, the right to retain and the right to govern territory [were] nowhere in the articles."[71] As James Madison observed:

> Congress have undertaken to do more: they have proceeded to form new States, to erect temporary governments, to appoint officers for them, and to prescribe the conditions on which such States shall be admitted into the Confederacy. All this has been done; and done without the least color of constitutional authority.[72]

Madison's comment demonstrates that Congress's power to govern territories and admit states was in question at the time of the Constitutional Convention.[73] It was this doubt that made it "eminently necessary to have [these powers] expressly stated and conferred in the instrument under which all the other functions of the government were to be exercised."[74] Madison proposed that the national government's powers to administer territories and admit states be expressly enumerated.[75] The Framers responded by drafting the Admissions and Territories Clauses.[76] After ratification, Congress used its newly enumerated powers to reenact the Northwest Ordinance.[77]

The debate over the Western Territory, which lasted from before the Revolution until after the Constitutional Convention, provides two insights into the original meaning of the Territories Clause. First, the Framers' reason for drafting the clause appears to have been to grant Congress temporary power over the Western Territory before its admission as states. Second, the long-standing debate over the Western Territory is evidence of common usage of the word "territory"—at least in the context of constitutional and legislative documents. One might argue that "the Territory" referred specifically to the *Western* Territory, which the Framers and ratifying public expected to become states.[78]

OF THE UNION OF THE AMERICAN STATES 47, 53–54 (Charles C. Tansill ed., 1927) (emphasis added).

71 FARRAND, *supra* note 51, at 12.

72 THE FEDERALIST NO. 38, at 279 (James Madison) (Benjamin Fletcher Wright ed., 1961).

73 *See* FARRAND, *supra* note 51, at 13.

74 *Id.*

75 *Id.*

76 *Id.* at 13–14.

77 *Id.* at 14.

78 *See, e.g.*, 2 FARRAND, *supra* note 53, at 454 (discussing how the Western Territory would be admitted as states).

3. Practice

While the text and history of the Territories Clause provide the most probative evidence of the Territories Clause's original meaning, subsequent practice offers insight as well. In 1820, Chief Justice Marshall described territories as being "in a state of infancy advancing to manhood, looking forward to complete equality so soon as that state of manhood shall be attained."[79] Chief Justice Marshall's concept of "territory" is part of an almost entirely unbroken tradition that lasted nearly until the twentieth century. In 1896, constitutional historian Max Farrand could declare that "the Territories are to be regarded as inchoate States, as future members of the Union," and that this proposition "has been and is the fundamental basis of our Territorial system."[80]

This long-standing conception of territories as being in transition is demonstrated by historical practice. From the ratification of the Constitution until the Spanish-American War, each new territory, with the possible exception of Alaska, was acquired with the understanding that it would become a state (or states).

The United States' first postratification acquisition was the territory conveyed in the Louisiana Purchase, formalized by the Treaty of Paris in 1803.[81] The treaty provided that "[t]he inhabitants of the ceded territory shall be incorporated in the Union of the United States, and, admitted as soon as possible, according to the principles of the Federal [C]onstitution."[82] Then, Spain ceded Florida to the United States in the Adams-Onís Treaty of 1819.[83] That treaty provided for admission "as soon as may be consistent with the principles of the Federal Constitution."[84] Next was Texas, which the United States

79 Loughborough v. Blake, 18 U.S. (5 Wheat.) 317, 324–25 (1820) (holding that Congress has authority to impose a direct tax on the District of Columbia).

80 FARRAND, *supra* note 51, at 53; *see also* SPARROW, *supra* note 51, at 14 ("Until 1898 . . . members of Congress, presidents and their cabinet officers, and the American public had always taken for granted that the government's authority over these nonstate areas was to be temporary."); Torruella, *supra* note 11, at 62 (arguing that until the Spanish-American War, "the nation's fundamental goal in extending its borders was creating more States—*not* the acquisition of colonies"); Arnold H. Leibowitz, *United States Federalism: The States and the Territories*, 28 AM. U. L. REV. 449, 454 (1979) ("The assertion of federal power over the territories operated within a framework that envisioned the settlement of the ceded territories and their formation into distinct republican states.").

81 SPARROW, *supra* note 51, at 24–25.

82 Treaty, Fr.-U.S., art. III, Apr. 30, 1803, 8 Stat. 200. *But see* LAWSON & SEIDMAN, *supra* note 5, at 79 ("It is possible to read the term ["incorporated"] as implying a promise of statehood, but it is also possible to read it as promising some other, lesser association with the American polity.").

83 Treaty of Amity, Settlement, and Limits, Spain-U.S., Feb. 22, 1819, 8 Stat. 252; SPARROW, *supra* note 51, at 23.

84 Treaty of Amity, Settlement, and Limits, *supra* note 83, art. VI.

annexed and instantly admitted as a state in 1845.[85] The treaty transferring the Oregon Territory from Great Britain in 1846 did not mention statehood, but the territory was "reasonably . . . pegged for ultimate statehood" nonetheless.[86] As for the Mexican-American War, the resulting acquisitions occurred through two treaties: the Treaty of Guadalupe Hidalgo in 1848 and the Gadsden Purchase Treaty in 1854.[87] Both provided that the people living in the former Mexican territory "shall be incorporated into the Union" and "admitted, at the proper time."[88] Alaska's acquisition in 1867 presents a possible exception to the trend, since its future statehood was unclear when the United States purchased the territory from Russia.[89] But statehood was clearly a live option.[90] Finally, Hawaii was annexed in 1898, months before the Spanish-American War, and "was generally recognized as a prime candidate for statehood."[91]

While this practice does not determine the Territories Clause's meaning, it provides persuasive insight into how past Americans understood the provision's original meaning and provides support for the argument that "territory" refers only to territories becoming states.

4. Structure

The final piece of evidence for a limited interpretation of the Territories Clause is the Constitution's structure. Assuming the Framers and ratifying public viewed the principles of democracy and federalism as essential to the Constitution, they would have understood each of the Constitution's provisions to conform to such principles. A Territories Clause that allows Congress to exert indefinite plenary power over a people unrepresented in Congress would violate both.

The Framers and ratifying public followed at least three principles when they structured the American government. The first was republicanism. Because Americans recognized the natural human "zeal for different opinions,"[92] they designed the Constitution to allow a "small number of citizens" to make decisions for "the greater number of citizens."[93] But the Constitution would also be democratic. Not only would the people elect their local governments, but they would elect

85 SPARROW, *supra* note 51, at 25.

86 LAWSON & SEIDMAN, *supra* note 5, at 95, 94–95.

87 *See id.* at 103–04.

88 Treaty of Peace, Friendship, Limits, and Settlement, Mex.-U.S., art. IX, Feb. 2, 1848, 9 Stat. 922.

89 LAWSON & SEIDMAN, *supra* note 5, at 106.

90 *Id.* at 108 ("A number of public figures openly contemplated eventual statehood for Alaska.").

91 *See id.* at 109, 108–09, 111.

92 THE FEDERALIST NO. 10, at 48 (James Madison) (Ian Shapiro ed., 2009).

93 *Id.* at 51.

Representatives and indirectly elect Senators and the President. Finally, there was federalism. The national government could exercise only enumerated powers; any other powers were reserved to the states or the people.[94] Through federalism, Americans intended that the government that would impact their lives the most—legislating for their health, safety, and morals—would be a local body, not Congress.

While Congress's temporary authority over territories might fit these principles, indefinite authority is antithetical to such ideals. This disconnect was noted by the dissenting Justices in *Downes v. Bidwell*.[95] For example, Chief Justice Fuller wrote:

> [The majority's] theory assumes that the Constitution created a government empowered to acquire countries throughout the world, to be governed by different rules than those obtaining in the original States and territories, and *substitutes for the present system of republican government, a system of domination* over distant provinces in the exercise of unrestricted power.[96]

This "system of domination" conflicts most sharply with the principles of democracy and federalism. Contradicting democracy, territorial inhabitants are subject to the unrepresentative authority of Congress. Against federalism, Congress exercises police power over territorial inhabitants the way that states do over their citizens.[97] And unlike states, which give up aspects of their sovereignty to facilitate the existence of a national government, local territorial governments exist at the pleasure of Congress.[98] The result is that territorial inhabitants—most of them American citizens—live under governments that emanate not from themselves but from overseas.[99] Surely these

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94 *See* U.S. CONST. amend. X; *see also* Leibowitz, *supra* note 80, at 453–54 (arguing that the principles of federalism "suggest an area beyond the reach of national authority and posit a basic symbiotic relationship between the states and the federal government," *id.* at 454).

95 182 U.S. 244 (1901).

96 *Id.* at 373 (Fuller, C.J., dissenting) (emphasis added).

97 *See* Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC, 140 S. Ct. 1649, 1658 (2020) ("But the Constitution recognizes that for certain localities, there will be no state government capable of exercising local power. Thus, two provisions of the Constitution . . . give Congress the power to legislate for those localities in ways 'that would exceed its powers, or at least would be very unusual' in other contexts." (quoting Palmore v. United States, 411 U.S. 389, 398 (1973))); *see also supra* notes 38–42 and accompanying text (discussing congressional power over law enforcement and local commerce).

98 *See, e.g.*, Torruella, *supra* note 11, at 80–81 (arguing that although Puerto Rico enjoys a measure of self-government, it does so because Congress chooses not to exercise the full extent of its plenary authority).

99 *Compare* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 404–05 (1819) ("The government of the Union . . . is, emphatically, and truly, a government of the people. In form and in substance it emanates from them."), *with* Puerto Rico v. Sanchez Valle, 136 S. Ct. 1863, 1866 (2016) (noting that federal laws and Puerto Rican commonwealth laws are

apparent violations of democratic and republican principles could only fit the original meaning of the Constitution if they were provisional measures for transitioning territories to statehood.

One potential response to this structural argument is that the Constitution permits democracy and federalism to apply differently to people living in states than to people living in territories. But this theory is belied by the original understanding of territories as training grounds for full participation in the nation's constitutional structure. The Northwest Ordinance, the cornerstone of the nation's territorial administration for nearly a century, provided for the formation of local, representative governments in territories prior to statehood.[100] The purpose of these was to prepare territorial inhabitants for full participation in the nation's federalist system.[101] So, not only did the Founding generation view territories as future states, but it viewed the territories' *inhabitants* as future participants in the constitutional structure. It seems, then, that the Framers and ratifying public would not have been content to withhold indefinitely the practices of democracy and federalism from territorial inhabitants.

B. Scrutinizing the Territories Clause Argument

While the text, history, practice, and structure presented above do much to commend a narrow interpretation of the Territories Clause, this originalist argument ultimately fails. This is for two reasons. First, the meaning of the word "territory" was as broad at the time of ratification as it is now. Second, the Framers' intentions were not as pure as an initial review of the clause's history suggests. Neither an original-public-meaning interpretation nor an intentionalist interpretation of the Territories Clause can show that Congress's present-day, indefinite power over territories is unconstitutional.

1. Original Public Meaning

Generally, original-public-meaning originalism (OPM) asks what the ratifiers or relevant public would have understood the Constitution

"creations emanating from the same sovereignty [of the United States]" (quoting Puerto Rico v. Shell Co., 302 U.S. 253, 264 (1937))). *But see Sanchez*, 136 S. Ct. at 1866 (explaining that the creation of the Commonwealth of Puerto Rico "made Puerto Rico 'sovereign' in one commonly understood sense of that term"); P.R. CONST. art. I, § 1 ("The Commonwealth of Puerto Rico is hereby constituted. Its political power emanates from the people . . . .").

100 *See supra* notes 67–70 and accompanying text.

101 *Id.*

to mean at the time of ratification.[102] On this view, the intentions of the Framers are important but not dispositive.[103] The Framers' intentions provide evidence of how the public understood the Constitution but, unlike the intentionalist theory, are not the focus of the interpretive inquiry.[104]

An OPM analysis of the Territories Clause must account for the ratification-era meaning of the terms "all" ("all needful Rules and Regulations") and "territory" ("Territory or other Property belonging to the United States").[105] While language can change with time, there is no reason to think that the meaning of "all" was different at the time of ratification than it is now.

The same must also be true of the word "territory," despite the various plausible arguments for a narrow interpretation. In this case, the word's dictionary meaning leaves no room for doubt. Samuel Johnson defined "territory" broadly: a "[l]and; country; dominion; [or] district."[106] So did Noah Webster, despite his suggestions to the contrary. Webster's definition of "territory," apart from any examples or commentary, is as follows:

> 1. The extent or compass of land within the bounds or belonging to the jurisdiction of any state, city or other body. . . .
>
> 2. A tract of land belonging to and under the dominion of a prince or state, lying at a distance from the parent country or from the seat of government . . . .[107]

Both definitions show that nothing in the meaning of "territory" makes special reference to future statehood. While Webster's entry includes examples that suggest that connotation,[108] his actual definition is broad.

Indeed, "territory" was commonly used before and after ratification to refer generally to land owned by a sovereign. For example, when France ceded the Western Territory to Britain in 1763, the treaty

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102 *See* Solum, *supra* note 3, at 4 & n.16; Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599, 609 (2004); LAWSON & SEIDMAN, *supra* note 5, at 9 ("What would a fully informed public audience at the relevant point in time, in possession of all relevant information about the Constitution and the world around it, have understood the Constitution to mean?"). Lawson and Seidman separate their approach from "much of contemporary originalism" because they do "not believe that original meaning necessarily represents historically real mental states." *Id.*

103 Whittington, *supra* note 102, at 610; *see* Solum, *supra* note 3, at 7.

104 Whittington, *supra* note 102, at 610.

105 U.S. CONST. art. IV, § 3, cl. 2 ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . . .").

106 2 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (6th ed., London, 1785) (defining "Territory").

107 2 WEBSTER, *supra* note 45.

108 *See supra* notes 45–49 and accompanying text.

referred to "British and French *territories* on the continent of America."[109] Of course, no one knew at the time that the territories would become states. Further, samples of the word's use at the state ratifying conventions and in ordinary parlance at the time of ratification confirm that "territory" was not a technical term.[110]

Given the broad meaning of the words in the Territories Clause, it is highly unlikely that the ratifying public would have understood Congress's power to be limited to territories transitioning to statehood. This is true despite the plausible arguments to the contrary based on the Constitution's textual organization, history, practice, and structure. Thus, under an OPM interpretation, the plain meaning of "territory" controls.

2. Original Intentions

What about an intentionalist approach? Generally, this method interprets the original meaning of constitutional provisions by looking to the "authorially intended meanings."[111] The most common form of intentionalism focuses on what the Framers intended.[112] Since the Territories Clause was drafted in response to debate over the Western Territory, there is a strong intentionalist case that the clause grants Congress only temporary power over territories. But this argument has its own problems.

First, as with the OPM approach, intentionalists must account for the broad meaning of "territory." The Framers' word choice offers insight as to what they intended. If they intended to grant Congress only temporary power over territories, why did they use such expansive language?

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109 The Definitive Treaty of Peace and Friendship Between His Britannick Majesty, the Most Christian King, and the King of Spain art. VII, Feb. 10, 1763, 278 Consol. T.S. 279 (emphasis added).

110 I searched for the word "territory" in the BYU Law *Corpus of State Conventions on the Adoption of the Constitution* and found broad usage apart from references to future States. *See Corpus of State Conventions on the Adoption of the Constitution*, BYU LAW: LAW & CORPUS LINGUISTICS, https://lawcorpus.byu.edu/coscac/concordances [https://perma.cc/GZ9E-ZHBV] (last visited Nov. 25, 2021) (search for "territory" producing references to, *inter alia*, Swiss Cantons, land already held by states, and the size of ancient confederacies). I found similar results when querying a mix of legal and nonlegal sources. *See Corpus of Founding Era American English*, BYU LAW: LAW & CORPUS LINGUISTICS, https://lawcorpus.byu.edu/cofea/concordances [https://perma.cc/VZF4-DNRH] (last visited Nov. 25, 2021) (search for "territory" producing references to, *inter alia*, early cities, the nation's capital district, a hypothetical country's taxation system, and the concept of sovereign territory generally).

111 Larry Alexander, *Originalism, the Why and the What*, 82 FORDHAM L. REV. 539, 543 (2013); *see also* John O. McGinnis & Michael B. Rappaport, *Unifying Original Intent and Original Public Meaning*, 113 NW. U. L. REV. 1371, 1382 (2019).

112 Solum, *supra* note 3, at 7; Whittington, *supra* note 102, at 609–10.

The answer might be found in additional evidence of the Framers' intentions. While Madison supported the Territories Clause because it expressly delegated the national government's powers over matters of statehood,[113] it was Gouverneur Morris who actually drafted the provision.[114] Later, Morris offered his own reason for the clause: "I always thought that, when we should acquire Canada and Louisiana it would be proper to govern them as provinces, and allow them no voice in our councils."[115] He added: "In wording the third section of the fourth article, I went as far as circumstances would permit to establish the exclusion."[116] If Morris is to be believed, then at least one Framer intended Congress's territorial power to include more than governing future states.

It may well be that most Framers[117] shared Morris's intended meaning. The Framers, while focused on the Western Territory, might also have entertained thoughts of future imperialism. The "view of the United States as an empire [has] had a long history."[118] While any imperial ambitions at the time of the Convention probably focused on westward, continent-bound expansion,[119] the Framers would have easily seen the advantage of governing territories as provinces instead of states. No doubt the Framers would have disavowed ambitions to replicate the oppressive treatment of King George III. But they were visionaries, and they could have imagined the United States governing far-off territories, just as how Great Britain would soon govern Australia.[120] Thus, a broad intended meaning of the Territories Clause is perfectly compatible with its primary purpose of administering the Western Territory. An intentionalist interpretation, therefore, cannot exclude Congress's indefinite power over territories.

In sum, neither an OPM nor intentionalist account can get around the broad meaning of "territory" to show that Congress's power under the Territories Clause is limited. This is true despite the plausible arguments to the contrary that are based on the

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113 *See supra* notes 72–75 and accompanying text.

114 LAWSON & SEIDMAN, *supra* note 5, at 73.

115 Letter from Gouverneur Morris to Henry W. Livingston (Dec. 4, 1803), *in* 3 THE LIFE OF GOUVERNEUR MORRIS, WITH SELECTIONS FROM HIS CORRESPONDENCE AND MISCELLANEOUS PAPERS 192 (Jared Sparks ed., Boston, Gray & Bowen 1832).

116 *Id.*

117 *See* McGinnis & Rappaport, *supra* note 111, at 1383 (discussing different thresholds among intentionalists for the required level of agreement among authorial intentions to establish meaning).

118 SPARROW, *supra* note 51, at 23 (indicating Madison and Franklin may have had imperialist ambitions).

119 *Id.*

120 *See History of Australia*, BRITANNICA, https://www.britannica.com/place/Australia/History [https://perma.cc/5YPD-4GS3] (last visited Jan. 28, 2023) (explaining that Captain Cook arrived in 1770 followed by British settlement in 1788).

Constitution's text, history, practice, and structure. As to text, the plain, unrefuted meaning of "territory" controls. As for history, the Framers' intentions were not as pure as they might initially appear. Arguments from practice and structure are stronger, but they are insufficient by themselves to limit the meaning of the word "territory" in the Constitution. If Congress really is limited in its power over territories, then that limit does not come from the Territories Clause; it must come from somewhere else.

III. THE ADMISSIONS CLAUSE ARGUMENT

> New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned . . . .[121]

Another possible originalist argument for why Puerto Rico's status is unconstitutional centers on the federal government's authority to acquire new territory. Originalist scholars[122] Gary Lawson and Guy Seidman have argued that because the national government enjoys only limited and enumerated powers, a constitutional grant of authority is required to justify its acquisition of territory. They argue that this grant of authority comes from a combination of the Treaty Clause and Admissions Clause. The President's power to make treaties authorizes him to acquire new territory for the purpose of implementing Congress's power to admit new states. This means that the acquisition power is conditional: Lawson and Seidman argue that in most cases the United States can acquire territory only on the condition that the territory be a plausible candidate for statehood. This Article contends that for Lawson and Seidman's theory to be consistent, it must also require that newly acquired territory become a state within a reasonable period of time. In short, the Admissions Clause argument is that if a territory is not admitted within a reasonable period of time, the United States' ongoing possession of that territory becomes unconstitutional.

A. Lawson and Seidman's Theory of the Acquisition Power

Lawson and Seidman start with the assumption that the federal government must act only on the basis of constitutionally delegated

121 U.S. CONST. art. IV, § 3, cl. 1.

122 LAWSON & SEIDMAN, *supra* note 5, at 7 (Lawson and Seidman identifying their approach to constitutional interpretation as "originalist" and describing originalism as "a theory about the point in time at which the meaning of the federal Constitution is fixed").

power.[123] For the federal government to lawfully acquire new territory, there must be one or more provisions in the Constitution that allow it to do so. Lawson and Seidman argue that the primary source of that authority is the Treaty Clause,[124] which provides that the President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties."[125] Treaties are how the federal government has historically acquired new territory,[126] and the Treaty Clause provides a mechanism for doing so. However, Lawson and Seidman do not consider the Treaty Clause by itself sufficient authorization for the federal government to acquire territory.[127] They view the Treaty Clause as an implementational power,[128] i.e., nothing more than "a vehicle for implementing otherwise-granted national powers . . . ."[129] Thus, the federal government may only acquire territory by treaty if the treaty furthers some other power already granted to the federal government.

Lawson and Seidman consider various national powers that acquiring new territory could implement. One candidate is the Navy Clause, which authorizes Congress "[t]o provide and maintain a Navy."[130] Acquiring territory by treaty could be said to implement Congress's navy power by providing land for a naval base.[131] In most cases, however, the only national power that territorial acquisition can be said to implement is Congress's Admissions Clause power.[132] Since the admission of new states requires territory, the President (with the

123 *Id.* at 22–23; *see also* THE FEDERALIST NO. 38, *supra* note 72, at 279 (James Madison) (questioning Congress's authority to admit states without an enumerated power).

124 LAWSON & SEIDMAN, *supra* note 5, at 32–72. Lawson rejects other possible sources, like the General Welfare Clause or Enclave Clause, as well as clauses that could be construed to give Congress general spending power. *Id.* at 23–32.

125 U.S. CONST. art. II, § 2, cl. 2.

126 *See supra* notes 79–91 and accompanying text.

127 *See* LAWSON & SEIDMAN, *supra* note 5, at 35.

128 *Id.* at 51–52. Lawson and Seidman view as consistent with the nature of the other Article II provisions, the majority of which they also consider to be implementational powers. *Id.*

129 *Id.* at 35. In fact, Lawson and Seidman argue that the Article II, Section 1 vesting of "executive Power" would have been enough to delegate an implementational treaty power to the President. *Id.* at 48. But because the Framers wanted to place a limitation on power—the advice and consent of the Senate—they had to address the treaty power explicitly. *Id.*

130 U.S. CONST. art. I, § 8., cl. 13; *see also* LAWSON & SEIDMAN, *supra* note 5, at 81.

131 *See* LAWSON & SEIDMAN, *supra* note 5, at 81, 111.

132 *See id.* at 83, 90, 94, 95, 105, 110 (noting that "[t]he most obvious power that would justify the addition of territory is the power to admit new states" and explaining how the acquisitions of Louisiana, Florida, Texas, Oregon, Alaska, and Hawaii were constitutionally justified as implementations of Congress's power to admit states); *see also id.* at 82–83 (questioning whether the Navy Clause could justify the acquisition of Louisiana).

advice and consent of the Senate) may use his treaty power to implement the admission of new states through the acquisition of new territory.[133]

That acquisition power is not unlimited, however. Lawson and Seidman posit that the implementational nature of the Treaty Clause imposes limits on the President's authority to acquire territory, even when exercised to admit new states. They argue that when the Constitution delegates an implementational power, the power carries with it an implied limitation of reasonableness.[134] As support for this claim, they cite to the law of eighteenth-century England. At common law, delegated discretionary powers were understood to include a requirement that they be exercised reasonably.[135] Given this historical background, Lawson and Seidman argue, the executive powers delegated by the Constitution, including the treaty power, would have been originally understood to include that same limitation.[136]

Lawson and Seidman point to the Necessary and Proper Clause as another example of an implementational power that is bound by a principle of reasonableness.[137] That power authorizes Congress to "carry[] into Execution" separately enumerated powers[138] and must be exercised in a way that is "necessary and proper."[139] Lawson and Seidman argue that just as this power is bound by limits of reasonableness—summarized in the phrase "necessary and proper"—so too is the President's treaty power.[140] Both powers must be exercised within the bounds of reason, with the limit on the treaty power implied by its nature as a discretionary executive power and the limit on the necessary-and-proper power included in the clause's text.[141]

Limits of reasonableness, whether explicit or implicit, require that there be a fit—a "causal, or telic, relationship"—between means and ends.[142] If the means are the federal government's exercise of some

133 *See id.* at 32–72. Of course, the Constitution also contemplates the possibility that new states be formed out of existing states. U.S. CONST. art. IV, § 3, cl. 1.

134 LAWSON & SEIDMAN, *supra* note 5, at 56.

135 *Id.* at 52–53.

136 *Id.* at 53, 55.

137 *Id.* at 51.

138 U.S. CONST. art. I, § 8, cl. 18. ("Congress shall have Power . . . [t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.")

139 *Id.*

140 LAWSON & SEIDMAN, *supra* note 5, at 56–57.

141 *Id.* According to Lawson and Seidman, the Framers had to make the Necessary and Proper Clause's reasonableness limit explicit because at common law, the normal, implicit reasonableness principle did not apply to the implementational powers of Parliament. *Id.* To avoid confusion, the Framers explicitly limited Congress's implementational power to making laws that are "necessary and proper." *Id.*

142 *Id.* at 52 (footnote omitted).

implementational power, then the ends are the powers it seeks to implement. When, for example, Congress relies on the Necessary and Proper Clause to implement the Commerce Clause, the resulting laws must be reasonable in light of the purpose of regulating commerce "among the several States."[143] Likewise, when the President relies on the Treaty Clause to implement the Admissions Clause, the resulting territorial acquisition must be reasonable in light of the purpose of admitting new states.[144]

Lawson and Seidman describe this requirement of an appropriate means-ends relationship as entailing three distinct aspects: "proportionality, efficacy, and substantive reasonableness."[145] *First*, an exercise of implementational power "must be measured, in the sense of [being] reasonably proportionate to the end sought."[146] Proportionality in the context of implementational powers can be illustrated by examples of what is *not* proportional. The power to implement the repair of public roads would normally *not* justify destroying a home. Nor would it be reasonable to eradicate a pest by burning a town.[147] *Second*, the use of implementational power must be efficacious. Because "considerations of cause and effect are a basic facet of rational thinking," Lawson and Seidman explain, an "implementational decision could be thought of as unreasonable if the chosen means are ill-suited to achieve the desired ends."[148] *Third*, exercises of an implementational power must be substantively reasonable. "[A] discretionary decision could be seen as unreasonable, however measured and efficacious it might be, if it trenches on substantive rights or represents an inappropriate consideration of manifestly relevant factors."[149]

Applying these three aspects of reasonableness to the treaty and admissions powers, the federal government's acquisition of territory must be measured, efficacious, and substantively reasonable.[150] What does that mean in practice? One possible implication considered by Lawson and Seidman is that the Constitution requires every territory acquired by treaty to become eventually a state.[151] After all, what the Admissions Clause grants is the power to admit "New States,"[152] not to admit "New Territory." Reasonableness might require that any

143 U.S. CONST. art. I, § 8, cl. 3; *see* LAWSON & SEIDMAN, *supra* note 5, at 52.
144 LAWSON & SEIDMAN, *supra* note 5, at 83–84.
145 *Id.* at 54–55, 56, 57.
146 *Id.* at 54 (emphasis omitted).
147 *See id.*
148 *Id.*
149 *Id.* at 55.
150 *Id.* at 57, 83–84.
151 *Id.* at 81.
152 U.S. CONST. art. IV, § 3, cl. 1.

exercise of the treaty power to implement the admissions power result in an actual state.

To explore this possible implication, Lawson and Seidman consider the example of Oklahoma, which was acquired by the Louisiana Purchase Treaty in 1803[153] but not admitted as a state until 1907.[154] It seems doubtful that the century-plus possession of Oklahoma as a territory was a proportionate, efficacious, and substantively reasonable means of achieving Oklahoma statehood. Did the delay in admission therefore "retroactively invalidate" Oklahoma's acquisition as a territory?[155]

Lawson and Seidman reject that conclusion.[156] Instead, they present an alternative view of how the reasonableness principle limits the power to acquire territory. For them, the Treaty Clause simply "give[s] Congress the raw material over which to exercise its discretionary power of admission under Article IV."[157] Rather than requiring that an acquired territory eventually become a state, Lawson and Seidman see the principle of reasonableness as placing a more modest limit on territorial acquisition: "[W]hat is necessary to validate an acquisition," they assert, "is not an actual or implied promise of statehood, but simply the promise of *eligibility* for statehood if and when Congress deems it appropriate."[158] "If Congress never chooses to exercise that power, that is Congress's business."[159]

B. Building on Lawson and Seidman's Theory

Lawson and Seidman's conclusion that the Treaty and Admissions Clauses allow the United States to possess territory indefinitely is inconsistent with their theory of the acquisition power. They are right that a principle of reasonableness implied in the Treaty Clause would require territory to be eligible for statehood at the time of acquisition. Eligibility for statehood is therefore a condition precedent to lawful territorial acquisition. But they overlook a condition subsequent. If their theory is correct, then the United States may only acquire

153 LAWSON & SEIDMAN, *supra* note 5, at 20.

154 *Id.* at 79.

155 *Id.*

156 *Id.*

157 *Id.* at 80.

158 *Id.*

> Once it is established that territory acquired from foreign sovereigns after ratification of the Constitution is fair game for statehood, the result is that the Constitution places no limits at all upon the acquisition of territory. Every acquisition affords Congress the opportunity to exercise its discretion concerning statehood, and every acquisition therefore implements the admissions power.

Id.

159 *Id.*

territory—an act that implies ongoing possession—if that territory becomes a state within a reasonable time.[160] What counts as reasonable will be explored in the next Part. For now, this Article builds on Lawson and Seidman's three dimensions of reasonableness—proportionality, efficacy, and substantive reasonableness—to show why the United States' indefinite possession of nonstate territories is unreasonable and therefore unconstitutional.

1. Proportionality

The power of indefinite territorial possession is disproportionate to the admissions power because indefinite possession is a power far greater than that needed to effect the admission of new states. Implementational power "must be *measured*, in the sense of [being] reasonably proportionate to the end sought."[161] It is true that the power of indefinite possession can contribute to the admission of new states by giving Congress unlimited time to decide on a territory's admission. But the power of indefinite possession is so great in comparison to what is actually needed to admit new states that it is disproportionate to that end. There is no doubt that Congress may take significant time in deciding whether to admit a new state. Congress may even adopt a wait-and-see approach, so long as there is a defined endpoint to that period.[162] As such, Congress has ample time to decide on a territory's admission even without the federal government possessing the territory indefinitely. For the federal government to indefinitely possess a territory so that Congress can have unlimited time to decide whether to admit that territory as a state would be excessive to what is needed and therefore unreasonable.

Part of what makes disproportionate powers unreasonable for implementing an existing, enumerated power is that they often come with highly negative downsides. Like burning a town to eradicate a pest, or destroying a home to complete a road repair,[163] the exercise of a disproportionate power brings negative consequences that are not worth achieving the original end. Similarly, when the United States possesses a territory indefinitely, it results in negative consequences, discussed in greater detail below, including the abandonment of important constitutional principles. These downsides outweigh the original goal of admitting a new state.

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160 The exception is when territory is acquired by treaty to implement some other power, like the Navy Clause power. *See supra* notes 130–34 and accompanying text.

161 LAWSON & SEIDMAN, *supra* note 5, at 54.

162 Congress could even choose not to admit a territory, work with the President to relinquish American control over the territory, then change its mind and admit that territory as a state after all.

163 LAWSON & SEIDMAN, *supra* note 5, at 54.

2. Efficacy

Indefinite territorial possession is relatively inefficacious at admitting new states, since it gives Congress the option to delay, possibly forever, the decision whether to admit a given territory as a state. The requirement of efficacy requires "considerations of cause and effect."[164] For a territory to be admitted as a state, Congress must make a choice about statehood. The power of temporary possession, limited to a reasonable period of time, encourages Congress to decide. This is because the government's power of continual possession over a territory will eventually end. If Congress wishes to admit a territory as a state, it must do so within the period of reasonable possession. Of course, Congress has the constitutional discretion to choose against statehood. But a territory *never* becomes a state if Congress fails to make a decision. Because the power of indefinite possession provides no incentive for decisionmaking but rather incentivizes indecision, it is less likely to cause the admission of a new state.

3. Substantive Reasonableness

Finally, indefinite territorial possession lacks substantive reasonableness since it "trenches on substantive rights" and "represents an inappropriate consideration of manifestly relevant factors."[165] History has shown that the indefinite possession of a territory can be used to ignore the rights of the territory's inhabitants. The *Insular Cases* held that territorial inhabitants are entitled to some but not all constitutional rights.[166] This doctrine relied on the assumption that the United States could hold Puerto Rico as a territory indefinitely.[167] The *Insular Cases* are still in effect today, despite the fact that Puerto Ricans are American citizens.[168] While the *Insular Cases* have recently undergone scrutiny by the Supreme Court,[169] their harm would have ended if the United States had not continued to hold Puerto Rico indefinitely as a territory.

Even apart from the *Insular Cases*, indefinite territorial possession is substantively unreasonable because it ignores a manifestly relevant factor: the Constitution's structure. As discussed in the previous Part, the indefinite exercise of police power by Congress over territorial inhabitants is antithetical to democratic representation and

164 *Id.*
165 *See id.* at 55.
166 *See supra* notes 16–22 and accompanying text.
167 *See supra* note 21–22 and accompanying text.
168 *See supra* notes 1, 25 and accompanying text.
169 *See, e.g.*, *supra* note 1 and accompanying text.

federalism.[170] Unlike in the case of the Territories Clause, where the plain meaning of the word "territory" was enough to override arguments from structure,[171] here the implementational nature of the Treaty Clause invites considerations of constitutional structure to elucidate what is substantively reasonable. While the temporary exercise of Congress's Territories Clause power may be consistent with the Constitution's structure, the indefinite exercise of that power is not. The indefinite possession of territory has resulted in millions of people being ruled indefinitely—possibly forever—by lawmakers they did not elect. That is substantively unreasonable.

C. Scrutinizing the Admissions Clause Argument

There are at least two important objections to the idea that the lawful acquisition of a territory requires it to become a state within a reasonable period of time—a contention that this Article refers to as the Admissions Clause argument. Both objections, at their core, ask how a condition subsequent on the acquisition power is consistent with Congress's broad discretion over the admission of states.

1. The Problem of Retroactive Invalidation

An initial objection, shared by Lawson and Seidman, is that the acquisition of a territory cannot be retroactively invalidated.[172] Lawson and Seidman view acquisition as a once-and-done event: after the United States acquires territory, Congress can do with the territory as it pleases.[173] This matters because, as discussed further below, Article IV grants Congress discretion over whether to admit new states.[174] Congress can never be in the position of having to admit a new state. The United States must be able to acquire a territory without committing Congress to that territory's admission. More specifically, the validity of the United States' act of taking of possession cannot depend on the territory becoming a state at some point in the future.

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170 *See supra* note 96–99 and accompanying text; *see also* Downes v. Bidwell, 182 U.S. 244, 380 (1901) (Harlan, J., dissenting). In *Downes*, Justice Harlan's dissent cogently identified the problem of indefinite territorial possession:

> The idea that this country may acquire territories anywhere upon the earth, by conquest or treaty, and hold them as mere colonies or provinces—the people inhabiting them to enjoy only such rights as Congress chooses to accord to them—is wholly inconsistent with the spirit and genius as well as with the words of the Constitution.

Id.

171 *See supra* notes 105–10 and accompanying text.

172 *See supra* note 155–56 and accompanying text.

173 *See supra* note 158–59 and accompanying text.

174 U.S. CONST. art. IV, § 3, cl. 1. ("New States may be admitted by the Congress into [the] Union . . . .").

This objection is resolved, however, by looking more closely at what the concept of acquisition implies. To *acquire* something entails both an initial taking and an ongoing possession.[175] It would be meaningless to talk about taking possession of an object if that possession did not continue, at least for some period, through time. This is certainly true when the United States takes possession of a territory pursuant to the Treaty and Admissions Clauses. Together, those clauses authorize the United States to take initial possession of a territory *and* to continue possessing that territory for at least some length of time.

Lawson and Seidman suggest that the Territory and Admissions Clauses authorize the United States to continue possessing a territory indefinitely. But, as discussed above, this does not square with the principle of reasonableness that limits the government's authority to acquire territory. Rather, the acquisition power is more accurately conceived of as giving the United States power to possess territory for a temporary, reasonable period of time. The failure of a territory to be admitted as a state within a reasonable period of time invalidates the United States' ongoing possession of that territory. This does not mean that the United States' initial taking of possession is retroactively invalidated. Nor does it mean that the period of possession prior to the point of unreasonableness is invalid. Rather, it is the ongoing possession of a territory after its possession has lasted unreasonably long that becomes constitutionally defunct.[176]

2. Congress's Control over the Admissions Timeline

The second objection to the Admissions Clause argument is that limiting the possession of a territory to a reasonable period of time is incompatible with Congress's broad discretion over the admission of states. That discretion would seem to include the choice of how and when to admit a territory. Holding territories indefinitely could help Congress exercise its discretion by allowing Congress to take as long as it wants in deciding whether to admit a territory.[177]

The problem with this argument is that the Admissions Clause does not grant Congress the discretion to act generally; it merely gives

175 *See Acquire*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("To gain possession or control of.").

176 Of course, what is legal for the United States under its own Constitution may be different from what is legal under international law. Presumably, the United States' acquisition of territory is unconditional under international law (assuming a treaty does not provide otherwise). What this Article argues is that the Constitution holds the United States to a more stringent standard. Even if the United States may possess territory indefinitely under international law, it may not do so under the Constitution.

177 Lawson and Seidman appear to hold this view. *See* LAWSON & SEIDMAN, *supra* note 5, at 80 ("Every acquisition affords Congress the opportunity to exercise its discretion concerning statehood, and every acquisition therefore implements the admissions power.").

Congress the discretion whether to admit states. Any implementational power exercised for the admission of states must be reasonable for achieving that end.

Whenever the federal government exercises one power in order to implement another, there is the possibility that it will cross the line from being a minor power to being a "great power."[178] Great powers are separate from implementational powers and must have an independent basis in the Constitution.[179] In the context of the Treaty and Admissions Clauses, the power to possess territories indefinitely is separate from the power to admit states. This is evident from the long-standing distinction between a state and a province or colony.[180] Because there is no province clause or colony clause, the authority to possess nonstate territory indefinitely is a great power that exceeds the bounds of reasonableness.

This can be seen further by comparing the Treaty Clause to the Necessary and Proper Clause. Consider, for example, two rather fanciful powers that most originalists would agree Congress may *not* exercise. Suppose Congress wished to implement measures, using the Necessary and Proper Clause and Admissions Clause, to prepare Puerto Rico for statehood. Imagine that Congress wanted to increase consumption of Puerto Rican oranges (once a significant export)[181] in order to strengthen the island's economy ahead of statehood. Could Congress prohibit Americans in the United States from growing oranges for personal consumption?[182] Alternatively, could Congress force citizens to buy Puerto Rican oranges?[183]

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178 *Cf.* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819) (distinguishing between "great powers" and their means).

179 *Id.*

180 *See* Morris, *supra* note 115, at 192 (suggesting it would "be proper to govern [Canada and Louisiana] as provinces" so as to "allow them no voice in our councils"); Downes v. Bidwell, 182 U.S. 244, 380 (1901) (Harlan, J., dissenting) (disputing that territories may be held as "mere colonies or provinces"); *see also* 2 WEBSTER, *supra* note 45 (defining "Province" as "a country belonging to a kingdom or state"); 2 JOHNSON, *supra* note 106 (defining "Province" as "[a] conquered country; a country governed by a delegate"); 1 WEBSTER, *supra* note 45 (defining "Colony" as "[a] company or body of people . . . subject to the jurisdiction of the parent state"); 1 JOHNSON, *supra* note 106 (defining "Colony" as "[a] country planted").

181 *See supra* note 17 and accompanying text.

182 *Cf.* Wickard v. Filburn, 317 U.S. 111, 128–29 (1942) (allowing a prohibition on growing wheat under the Commerce Clause).

183 *Cf.* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012) (Roberts, C.J.) (finding that the Commerce Clause does not authorize the federal government to impose a health-insurance mandate).

Both hypothetical measures would broaden Congress's discretion over the admission of new states,[184] but most originalists would agree that the Necessary and Proper Clause does not authorize either. The problem with these measures is that the authority to prohibit personal farming or to compel economic transactions are too significant in themselves to be derived from Congress's authority to admit new states. Most originalists would agree that such measures are not authorized for implementing the Commerce Clause,[185] but at least that clause contains some textual basis for the regulation of commercial activity. By contrast, the Admissions Clause has none. If the Necessary and Proper Clause does not authorize such actions for implementing the Commerce Clause, then such measures would be even less permissible for implementing the Admissions Clause.

Further, if certain powers are too great to implement the Admissions Clause by way of the Necessary and Proper Clause, then the same must be true by way of the Treaty Clause. The power of indefinite territorial possession is one of them. If the only requirement for the acquisition of a territory were that the territory be eligible for statehood, then the United States could acquire as many territories as it pleased without ever admitting them. Congress would be authorized to administer a shadow union of unadmitted territories alongside the fifty states. But such powers are too great to be authorized by the Admissions Clause. The Constitution does not grant the federal government the authority to possess provinces or colonies, and such authority cannot be brought in through the back door of the Admissions Clause.[186]

In sum, any discretion exercised by Congress pursuant to the Admissions Clause is limited to discretion over the admission of states. Sometimes, the United States' exercise of a minor power to implement this discretion shades into the unconstitutional exercise of the great and separate power of indefinite territorial possession. The next Part argues that this has happened with the United States' possession of Puerto Rico.

IV. APPLYING THE ADMISSIONS CLAUSE ARGUMENT TO PUERTO RICO

The last Part built on Lawson and Seidman's theory of territorial acquisition to develop an originalist argument for why indefinite

184 *See* LAWSON & SEIDMAN, *supra* note 5, at 80 (noting that territorial acquisitions "give Congress the raw material over which to exercise its discretionary power of admission under Article IV").

185 *See, e.g.*, *Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 647–48 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting) (describing *Wickard* as the "*ne plus ultra* of expansive Commerce Clause jurisprudence").

186 *But see* LAWSON & SEIDMAN, *supra* note 5, at 203 (identifying Puerto Rico as a possible example of "back-door colonialism").

territorial possession is unconstitutional. This Part applies that argument to Puerto Rico. It begins by discussing what it means for territorial possession to have lasted unreasonably long. It then explains how the United States' indefinite possession of Puerto Rico is an example of this. If this argument is correct, then the United States' ongoing possession of Puerto Rico is unconstitutional. Congress could fix this problem. Possible solutions include ratifying a constitutional amendment, admitting Puerto Rico into the Union, or relinquishing the United States' possession of Puerto Rico altogether.

A. Determining What Counts as Unreasonable

The ongoing possession of a territory by the United States must be reasonable in light of what the Constitution usually mandates as the purpose of acquiring territory: the admission of states. Determining what counts as a reasonable length of possession is therefore a teleological inquiry. While a sufficiently detailed discussion of this inquiry merits a separate paper, three important considerations are readily apparent. The first two are the readiness of a territory to function as a state and any discretionary concerns on the part of Congress. If a territory is ready to function as a state and Congress's discretionary concerns are either satisfied or incapable of being resolved, it is probably unreasonable for the United States to continue possessing that territory without admitting it. The third consideration is the length of territorial possession itself. This consideration alone could cause the continued possession of a territory to become unreasonable.

First, it is reasonable for the United States to possess a territory without admitting it as a state when that territory is not yet ready to function as one. Thomas Jefferson's Plan for Government of the Western Territory, discussed in Part II, provides examples of what is required for a territory to function as a state: at the very least, the territory must have an adequate population and be capable of self-government.[187] Thus for example, it might be reasonable for the United States to hold territory *A*, which is sparsely populated and lacks an organized government, longer than territory *B*, which has a population as large as several existing states and a long-standing government. Once these requirements are satisfied, however, some other reason is needed for the United States' continued possession of a nonstate territory to be reasonable.

One such reason might be Congress's own discretion over how to best admit a state. Reasonable discretionary concerns must have some relationship to the territory's admission as a state. They might include the territory's economic health, its capacity for cultural assimilation,

187 *See supra* notes 62–64 and accompanying text; *see also* LAWSON & SEIDMAN, *supra* note 5, at 84 (observing that [i]nsufficient population" is a reason to decline statehood).

the will of its inhabitants, and the desires of the existing states. For example, it might be reasonable for the United States to continue holding a territory without admission, despite it having an adequate population and functioning local government, if Congress believed that the territory's economy would improve in the foreseeable future. Importantly, such discretionary concerns must be capable of being resolved in the foreseeable future, and there must be some reason to think that they will be. Once these discretionary concerns are resolved—or once there is no longer reason to think they can be—it is probably unreasonable for the United States to continue holding that territory without admission.

The third concern readily apparent in determining the reasonable length of territorial possession is the length of possession itself. This concern is relevant because the lengthy possession of a territory without admission eventually turns into the de facto possession of a province or colony. It is difficult to say exactly how long the United States may possess a territory before the length of time makes the possession unreasonable. For example, it seems intuitive that if Congress were to put a territory on a 300-year plan for statehood, the length of prestate possession would be unreasonable, even if Congress had reason to believe the territory would become ready for statehood. But *why* this would be unreasonable is less clear.

One reason might be that a 300-year possession exceeds the lengths of possession of past United States territories. One might view the possessions of past territories as a rough guide to what is reasonable. For example, a territorial possession that lasts less than a decade, like with the State of Louisiana,[188] is almost certainly reasonable. At the other end of the spectrum, a possession that lasts over a century, like with the State of Oklahoma,[189] is probably unreasonable.

Alternatively, 300 years of territorial possession might be viewed as unreasonable because of its dissonance with the Constitution's structure. In the last Part, this Article argued that indefinite territorial possession is substantively unreasonable because it violates the constitutional norms of democratic representation and federalism.[190] Indefinite possession is just one example of a territory having been held unreasonably long. Though Congress's 300-year authority over a territory would technically be temporary, the reasons for finding it unreasonable are likely the same as why indefinite authority is unreasonable.

Together, a territory's readiness for statehood, Congress's discretionary concerns, and the length of territorial possession itself help

188 *See* LAWSON & SEIDMAN, *supra* note 5, at 79.

189 *See id.*

190 *See* discussion *supra* subsection III.B.3.

elucidate whether the length of a territorial possession is reasonable. Each of these considerations flows from the fact that the Treaty and Admissions Clauses authorize Congress to acquire territory for the purpose of admitting states. If the ongoing possession of a territory does not reasonably advance the purpose of it becoming a state, then its possession is unconstitutional.

B. The Unreasonably Long Possession of Puerto Rico

The United States' ongoing possession of Puerto Rico appears to be indefinite. While members of Congress periodically introduce bills related to Puerto Rican statehood, there is little reason to think that Congress will admit the territory in the foreseeable future.[191] This indefinite possession of Puerto Rico is an extreme example of territorial possession that has lasted unreasonably long. This is evident by multiple measures, whether that be Puerto Rico's readiness for statehood, discretionary considerations on the part of Congress, or the amount of time that the United States has possessed Puerto Rico. Of these considerations, the length of possession is the clearest evidence that the possession of Puerto Rico has become unreasonable. The United States has possessed Puerto Rico for over 125 years, longer than any other American territory.[192]

The other two considerations point towards the same conclusion. First, Puerto Rico has long been ready to function as a state. Puerto Rico's population is greater than that of at least a dozen existing states,[193] and it has had a local, representative government since at least 1950 (albeit one that exists at the pleasure of Congress).[194]

Second, it is hard to identify any possible discretionary consideration by Congress that is capable of resolution but still not resolved after 125 years. Puerto Ricans have long assimilated into American culture, shown, for example, by the large numbers of Puerto Ricans that live in

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191 *See, e.g.*, Nicole Acevedo & Eric Bazail-Eimil, *Will a New Congress Stall Momentum on Resolving Puerto Rico's Territorial Status?*, NBC NEWS (Dec. 23, 2022, 5:45 AM), https://www.nbcnews.com/news/latino/will-new-congress-stall-momentum-resolving-puerto-ricos-status-rcna62927 [https://perma.cc/T9S8-9BX2] (explaining that a House bill to hold a binding plebiscite on Puerto Rican statehood would "face significant headwinds" due in part to the difficulty of overcoming the Senate filibuster).

192 *See supra* note 11 and accompanying text. Many are surprised to learn that it took over seventy-five years for Congress to admit Montana, the Dakotas, and Wyoming, and over a hundred years to admit Oklahoma. *See* LAWSON & SEIDMAN, *supra* note 5, at 79. Does this mean past territorial possessions were unconstitutional? That may be, although other factors, such as the size of the territories' populations, may have justified waiting longer to admit them.

193 *See Historical Population Change Data (1910–2020)*, U.S. CENSUS BUREAU (Apr. 26, 2021), https://www.census.gov/data/tables/time-series/dec/popchange-data-text.html [https://perma.cc/T3EC-SRBZ].

194 *See supra* notes 26–29 and accompanying text.

the United States.[195] As for the will of Puerto Ricans, multiple plebiscites have provided evidence as good as there will ever be on Puerto Ricans' opinions about statehood,[196] and there is nothing to indicate that some change of popular opinion is in sight. Similarly, the desires of the existing states are static: both Democrats and Republicans are open to Puerto Rican statehood on paper,[197] but in practice many Republicans oppose Puerto Rican statehood out of concern that its admission would advantage Democrats.[198] Perhaps the strongest discretionary concern is Puerto Rico's weak economy.[199] But, after 125 years of possession by the United States, it seems unlikely that some economic breakthrough is in the offing.

In short, not only has the United States possessed Puerto Rico longer than any other territory, but the territory has long been ready for statehood, and any discretionary concern could have been resolved by now. Based on these considerations, it seems clear that the United States' possession of Puerto Rico has lasted unreasonably long.

This conclusion is reinforced by the United States' decision to create the Commonwealth of Puerto Rico in 1952.[200] By that point, the United States had possessed Puerto Rico for the better part of a century and allowed Puerto Ricans birthright citizenship for decades.[201] Faced with international pressure to give Puerto Ricans some measure of autonomy,[202] the United States could have granted Puerto Rico statehood

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195 *See* Brian Glassman, *More Puerto Ricans Move to Mainland United States, Poverty Declines*, U.S. CENSUS BUREAU (Sept. 26, 2019), https://www.census.gov/library/stories/2019/09/puerto-rico-outmigration-increases-poverty-declines.html [https://perma.cc/J89P-9DXZ]; *see also* Kyle Sammin, *A Conservative Case for Puerto Rican Statehood*, NAT'L REV. (Mar. 26, 2019, 6:30 AM), https://www.nationalreview.com/2019/03/puerto-rico-statehood-conservative-case/ [https://perma.cc/62K4-82T7] (arguing that the fact that "Puerto Rico differs in significant ways from the rest of the United States . . . should be seen as an asset, not a liability").

196 Patricia Guadalupe, *Amid Historically Low Turnout, Puerto Ricans Vote for Statehood*, NBC NEWS (June 11, 2017, 6:00 PM), https://www.nbcnews.com/news/latino/amid-historically-low-turnout-puerto-ricans-vote-statehood-n770801 [https://perma.cc/B2WC-P7XU] (noting plebiscites in 1993, 2012, and 2017); Cristina Corujo, *Puerto Rico Votes in Favor of Statehood. But What Does It Mean for the Island?*, ABC NEWS (Nov. 8, 2020, 11:21 AM), https://abcnews.go.com/US/puerto-rico-votes-favor-statehood-island/story?id=74055630 [https://perma.cc/E7UX-6TYD] (reporting that fifty-two percent of voters in a 2020 plebiscite preferred statehood).

197 *See* REPUBLICAN PLATFORM 2016, at 30 (2016) (supporting statehood); 2020 DEMOCRATIC PARTY PLATFORM 59 (2020) (supporting self-determination).

198 *See, e.g.*, Mariana Alfaro, *Making D.C. and Puerto Rico States Would Dilute GOP Power, Graham Says in Ga.*, WASH. POST (Nov. 7, 2022, 8:45 PM), https://www.washingtonpost.com/politics/2022/11/07/election-2022-live-updates/ [https://perma.cc/G38L-BC5U].

199 *See* Acevedo & Bazail-Eimil, *supra* note 191 (listing Puerto Rico's "financial woes" as one reason that some in Congress oppose changes to Puerto Rico's status).

200 *See supra* notes 26–29 and accompanying text.

201 *See supra* notes 11, 25 and accompanying text.

202 *See* Torruella, *supra* note 6, at 93–94.

or independence. Instead, the United States chose a third option: the creation of a quasi-state institution called a commonwealth.

The creation of the commonwealth marks a clear point at which the United States' continued possession of Puerto Rico had become unreasonable. By creating the commonwealth, the United States demonstrated that it deemed Puerto Rico to have the requisite population and capacity for self-governance. And even if Congress had discretionary concerns over the admission of Puerto Rico in 1952, it is unclear which of those concerns could have been expected to be resolved in the future. The United States had already possessed Puerto Rico for over half a century; any resolvable concerns would likely have been solved by then.

By making Puerto Rico a commonwealth in 1952, the United States delayed the decision whether to admit it as a state. The continued possession of Puerto Rico as a territory was likely unreasonable then, and, seventy-plus years later, seems even more likely to be unreasonable today.

C. Possible Solutions

If it is true that the United States' possession of Puerto Rico has lasted unreasonably long, then the ongoing possession of the territory is unconstitutional. Of course, one way to fix this is to amend the Constitution. Apart from this unlikely scenario, the United States could admit Puerto Rico as a state or choose to relinquish control over the territory. Congress has the primary obligation to resolve this constitutional contravention, but the courts may also have a role.

1. Congress

Just as courts have an obligation to follow the original meaning of the Constitution, so does Congress.[203] If the possession of Puerto Rico is unconstitutional, then Congress should seek to implement the original meaning of the Constitution by working with existing states to pass an amendment, or by ending the United States' possession of Puerto Rico as a territory.

Changing the Constitution would be least disruptive to Puerto Rico's status quo but most harmful to our constitutional order. Congress and the States could amend the Constitution to pass a Territorial Acquisition Clause that grants Congress carte blanche authority to acquire new territory. This would allow the United States to acquire new

203 Amy Coney Barrett & John Copeland Nagle, *Congressional Originalism*, 19 U. PA. J. CONST. L. 1, 9–13 (2016); *see also* Lopez-Morales, *supra* note 5, at 806-07 (discussing Congress's constitutional obligation to change Puerto Rico's status and proposing statehood or independence as the options for doing so).

territory without ever needing to admit that territory as a state. The benefit of such an amendment would be to strengthen the authority of the Constitution by aligning the nation's conduct with what the Constitution requires. But there are clear downsides to this approach. The most obvious is that constitutional amendments are hard to achieve. More importantly, changing the Constitution would do nothing to address the structural problems raised by Congress's indefinite, unrepresentative legislative authority over Puerto Rico and other territories. Such an amendment would rework the constitutional structure in a way that weakens the principles of democracy and federalism.

A second way to rectify the unconstitutional possession of Puerto Rico would be for Congress to end the United States' possession of Puerto Rico as a nonstate territory. This could take one of two forms. Congress could admit Puerto Rico as a state, or it could work with the President to relinquish United States control over Puerto Rico.

While Puerto Rican statehood is controversial, it is still the most feasible option from a political perspective for rectifying Puerto Rico's unconstitutional status. Both Democrats and Republicans have included provisions in their national party platforms that signal a willingness to support Puerto Rican statehood.[204] While some Republicans are concerned that Puerto Rican statehood would advantage Democrats, the fact that Puerto Ricans have repeatedly elected Republican or Republican-affiliated candidates to statewide office may help dispel the notion that Puerto Rico would vote only Democrat.[205] Thus, it is plausible that enough congressmen from both parties could form a majority to admit Puerto Rico.

If Congress chooses not to admit Puerto Rico, the remaining option is to relinquish American control over the territory. The United States could do this by granting Puerto Rico independence or by conveying Puerto Rico to another nation. Either route would require the participation of the President.[206] Importantly, even if the United States were to relinquish Puerto Rico, Congress could still admit Puerto Rico as a state later on.[207]

Relinquishing Puerto Rico or admitting it as a state would end the United States' unreasonably long possession of Puerto Rico as a nonstate territory. Until the Constitution is amended, Congress must

204 *See supra* note 197 and accompanying text.

205 *See* Sammin, *supra* note 195 (noting Republicans elected in Puerto Rico).

206 For example, President Truman granted independence to the Philippines in 1946 via a proclamation that he issued under the Philippine Independence Act, which Congress had passed earlier. Proclamation No. 2695, 3 C.F.R. 64 (Supp. 1946). Alternatively, a treaty to convey territory to another country would also require the President's participation. *See* U.S. CONST. art. II, § 2, cl. 2.

207 The example of Texas, a nation at the time of its admission, shows that Congress may admit a nation like it can a territory. *See* SPARROW, *supra* note 51, at 25.

choose one or the other. If Congress wants to admit Puerto Rico, it may. If not, it must work with the President to relinquish American control over the territory. What Congress may not do is maintain the status quo.

2. Courts

In addition to Congress, it is possible that the courts might also have a role in resolving Puerto Rico's unconstitutional status. The Supreme Court could find if presented with an appropriate case that the United States' ongoing possession of Puerto Rico is unconstitutional. It could do this by reasoning that the United States' possession of Puerto Rico no longer implements Congress's admissions power and is therefore the exercise of an unenumerated power.

One obstacle to the Supreme Court doing so, however, is the political question doctrine. Generally speaking, that doctrine prohibits courts from passing on questions that elude judicially manageable standards or that the Constitution has committed to a political branch.[208] A review of these two grounds, however, suggests that neither would apply to the question of whether Puerto Rico's status is constitutional. While further analysis is warranted to determine whether there are other grounds for invoking the doctrine, the courts' role in deciding the constitutionality of Puerto Rico's status cannot be dismissed out of hand.

The first major ground for applying the political question doctrine is that the question raised lacks judicially manageable standards for resolution.[209] In the Supreme Court's most recent application of the political question doctrine, it relied on this articulation of the doctrine to find that federal courts may not review claims of partisan gerrymandering.[210] In *Rucho*, voters from various states argued that officials from the opposing, majority parties had gerrymandered congressional districts so that the proportion of representatives from either party differed greatly from the percentage of voters from either party in the states as a whole.[211] The Supreme Court held that these claims presented nonjusticiable questions because they would require deciding how much gerrymandering is constitutional and how much is not.[212] The Court reasoned that because the Constitution does not provide specifically for the right of proportional representation, it would be forced to make a judgment about what amount of

208 Rucho v. Common Cause, 139 S. Ct. 2484, 2494 (2019); Baker v. Carr, 369 U.S. 186, 217 (1962).

209 *Rucho*, 139 S. Ct. at 2494 (citing *Baker*, 369 U.S. at 217).

210 *Id.* at 2491, 2507.

211 *Id.* at 2491–93.

212 *Id.* at 2504–05.

proportionality is "fair"—a concept too indefinite on which to base a judicial decision.[213] Without a manageable standard by which to choose among alternative visions of fairness, the Court concluded that the question should be left to the states and to Congress.[214]

At first glance, the lack of judicially manageable standards in *Rucho* might appear similar to the question of Puerto Rico's status. Like the Court's quandary in *Rucho*, where it would have had to choose between alternative conceptions of fairness, the Court reviewing Puerto Rico's status would have to decide on metrics to determine reasonableness. As discussed, likely considerations include the size of the island's population, its capacity for self-government, Congress's discretionary concerns, and the length of possession. Many of these considerations present questions of degree. The Supreme Court sought to avoid these types of questions in *Rucho*,[215] and it might also seek to avoid them by finding the question of Puerto Rico's status nonjusticiable.

However, there are important differences between the question presented in *Rucho* and the question of the United States' possession of Puerto Rico. For one, the question of what counts as a reasonable implementation of the Admissions Clause is a narrower inquiry than the question of proportionality presented in *Rucho*. There, the Court was asked to decide what type of gerrymandering is constitutional by deciding what is fair.[216] By contrast, the question of Puerto Rico's status asks what length of territorial possession is reasonable by asking what is needed for a given territory to become a state.[217] Unlike *Rucho*, where the open-ended inquiry into fairness lacked any guiding principle, a Court reviewing Puerto Rico's status would be guided by the Admissions Clause's purpose of admitting new states.

Additionally, the Puerto Rico question is different from *Rucho* because courts have long decided what constitutes the reasonable exercise of an implementational power. As discussed above, Lawson and Seidman have observed that English courts conducted this inquiry before the American Founding.[218] Unlike in *Rucho*, where the Supreme Court observed that the Framers had never heard of courts refereeing questions of gerrymandering,[219] the Framers would have heard of courts conducting reasonableness inquiries.

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213 *Id.* at 2499–500.

214 *Id.* at 2508.

215 *See, e.g.*, *id.* at 2504 (asking how many "door knocks must go unanswered," "petitions unsigned," or "calls for volunteers unheeded" for partisan gerrymandering to constitute First Amendment political discrimination against the minority party).

216 *Id.* at 2499–500.

217 *See* discussion *supra* Section IV.A.

218 *See* LAWSON & SEIDMAN, *supra* note 5, at 52–53.

219 *Rucho*, 139 S. Ct. at 2496.

In the American context, the courts conduct this type of inquiry every time they decide whether an exercise of power by Congress is necessary and proper for the implementation of some enumerated power, such as the Commerce Clause power.[220] The Supreme Court has admitted the lack of clear standards for this question[221] but has nonetheless continued to articulate Commerce Clause doctrine. Given courts' experience with these types of questions, it is unclear why the difficulty of the Puerto Rico question should trigger the application of the political question doctrine.

The second major ground for applying the political question doctrine applies when there is a "textually demonstrable constitutional commitment" of the issue at hand to a "coordinate political department."[222] Because the Admissions Clause gives Congress exclusive authority to admit new states, it could be read as granting Congress exclusive authority to decide when a territory is ready for statehood. That view, however, is likely mistaken. It is true that Congress almost always makes this decision before admitting a state, but that does not mean that Congress is the only branch that may do so. The Admissions Clause would not preclude the Supreme Court from determining that a territory is ready for admission, that this readiness outweighs Congress's discretionary concerns, and that the territory's continued possession outside the Union is therefore unconstitutional.

In sum, the political question doctrine raises questions about the ability of courts to pass on the constitutionality of the United States' possession of Puerto Rico, but neither of the doctrine's two main prongs clearly applies. While additional reasons for invoking the political question doctrine merit further analysis,[223] it is also true that the

220 *See* LAWSON & SEIDMAN, *supra* note 5, at 52 (explaining that the Necessary and Proper Clause is an example of an implementational power with an explicit reasonableness limit).

221 *See, e.g.*, United States v. Lopez, 514 U.S. 549, 566 (1995) ("[T]he Commerce Clause always will engender 'legal uncertainty.'" (quoting *Lopez*, 514 U.S. at 630 (Breyer, J., dissenting))).

222 Baker v. Carr, 369 U.S. 186, 217 (1962); *see also Rucho*, 139 S. Ct. at 2494 (addressing whether an issue has been "entrusted to one of the political branches" (quoting Vieth v. Jubelirer, 541 U.S. 267, 277 (2004) (plurality opinion))).

223 *See, e.g.*, *Baker*, 369 U.S. at 211–12 (identifying foreign relations and the recognition of foreign governments as two areas where the judiciary most often follows the determinations of Congress and the President); Goldwater v. Carter, 444 U.S. 996, 1002–06 (1979) (plurality opinion) (Justice Rehnquist writing for a plurality to explain that a question involving the President's authority to terminate a treaty raised political questions and that the case should therefore be dismissed without oral argument); Zivotofsky v. Clinton, 566 U.S. 189, 196–97 (2012) (declining to apply the political question doctrine but distinguishing between normal, justiciable questions of statutory interpretation and "supplant[ing] a foreign policy decision of the political branches"); Jones v. United States, 137 U.S. 202, 213 (1890) (noting that courts are bound by the executive branch's determination of a territory's sovereign).

Supreme Court has tended in recent years to refrain from applying it.[224] Therefore, the courts' role in reviewing the constitutionality of Puerto Rico's status cannot be dismissed out of hand.

CONCLUSION

With an originalist Supreme Court looking closer at the constitutional assumptions surrounding Puerto Rico, the original meaning of the Constitution's provisions affecting territories is more important than before. The Territories and Admissions Clauses are good places to start since they shed light on an important and fundamental question: whether the United States may indefinitely possess Puerto Rico as a nonstate territory. The Constitution's structural principles, along with the significance of the Western Territory in the drafting of the Territories Clause, raises the possibility that Congress was delegated only temporary legislative authority over territories. However, this argument is foreclosed by the Framers' mixed intentions on the question of provinces and the clause's plainly broad language. A stronger originalist argument is based on the Admissions Clause. If the treaty and admissions powers are the source of the United States' acquisition power, then it is unconstitutional for the government to possess a nonstate territory for an unreasonably long time. If this argument is correct, then the United States' possession of Puerto Rico likely violates the Constitution. More analysis is needed on the role of the courts in resolving this problem, but Congress could take action immediately. The question of how is for it to decide.

224 *See* Richard H. Fallon Jr, *Political Questions and the Ultra Vires Conundrum*, 87 U. CHI. L. REV. 1481, 1483 (2020) (noting that since the 1930s the Supreme Court has dismissed a case only three times on the basis of the political question doctrine).