Journal of Legislation

Volume 48 | Issue 2 Article 3

6-20-2022

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INTRODUCTION

What does it mean to be American and from a place called the United States of America? States are part of the country's name and are the cornerstone of American democracy. However, Americans see themselves as part of the United States first and from a particular state second. Yet state identity binds us and signifies common interests, values, and experiences. American democracy is rooted in states as they are directly related to Congressional representation through Article I of the Constitution.[1] The people inhabiting tracts of land located within specific boundaries determine who represents them in the House of Representatives and the Senate. The statehood concept is relatively simple; however, its implementation is complicated and political. It should be no surprise that, since statehood is tied to political representation in Congress, state admission has always been highly partisan. As such, statehood movements do not exist in a vacuum. They are tied to political issues and the balance of political parties in Congress.

The last states to be admitted to the Union were Alaska and Hawaii in 1958 and 1959, respectively. For the past sixty years, it seems that the statehood discussion—which dominated national politics in the early part of American history—is dead. This Article will demonstrate that statehood is far from dead, but very much alive in local and regional politics. Regional statehood movements exist in different parts of the country but lack national attention. Washington D.C.'s statehood movement is the most well-known; however, it lacks real political momentum. Puerto Rico's status as a territory and interest in statehood is rarely part of the national conversation. History and the present teach us that the Senate's balance is always a major discussion point in any statehood issue and that the clamor for D.C. statehood should encompass regional and territory statehood movements as ways to address the Senate balancing problem. "Politics is the art of the possible"[2] and in that vein, a variety of statehood movements should be part of this discussion.

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1. U.S. CONST. art. I, § 1–3.

2. Partial quote by Otto von Bismarck. The quote in its entirety reads: "Politics is the art of the possible, the attainable—the art of the next best." This quote is from an August 11, 1867 interview between Otto von

In addition to Congressional representation, state governments serve their citizens in concrete, impactful ways through taxing, spending, and legislating. These fundamental governmental acts should reflect the people's needs, priorities, and values. Democracy begins to erode when citizens feel disenfranchised and effectively become disenfranchised by their elected leaders. Thus, this Article will explore: (1) the legal requirements for statehood; (2) how historically this process has played out through single issue and party politics; and (3) how this process translates to the twenty-first century. Ultimately, statehood is political and relevant to twenty-first century Americans to enhance democratic representation on the state and national levels.

I. THE PATH TO STATEHOOD

States or Commonwealths existed as British colonies prior to American independence. The Articles of Confederation created a "perpetual union" between the twelve original colonies to be called the United States of America.[3] The Continental Congress grappled with statehood and seemed to almost omit the issue entirely from the Articles of Confederation, which makes mention of admitting Canada into the confederation but "no other colony shall be admitted" without agreement of nine states.[4] The Articles of Confederation were adopted in 1777 under the First Continental Congress, but not ratified by all thirteen states until 1781 and in force until the present day Constitution went into effect in 1789.[5]

While the Articles of Confederation were silent on statehood from new land (presumably new states could be made from existing colonies), the Continental Congress addressed these concerns by specifying requirements for Western territories to become states first in 1784 and then again in 1787.[6] The Northwest Land Ordinance of 1787 provided six articles that required a territory to: exhibit a republican form of government; abolish slavery and involuntary servitude; and require that the population of the new state include at least sixty thousand free inhabitants.[7] The Ordinance also allowed for a minimum of three and maximum of five new states to be created out of the Northwest territory.[8] The new states would be admitted on equal footing with the original states and its Congressional delegates would gain voting rights.[9] Although this framework was established and specific to

Bismarck and Friedrich Meyer von Waldeck of the St. Petersburgische Zeitung . 1 FÜRST BISMARCK: NEUE TISCHGESPRÄCHE UND INTERVIEWS 248 (1895).

3. ARTICLES OF CONFEDERATION of 1781, pmbl.

4. *Id.* art. XI.

5. *Articles of Confederation*, NAT'L ARCHIVES, https://www.archives.gov/historical-docs/articles-of-confederation (last visited Apr. 30, 2022).

6. LAND ORDINANCE OF 1784 (Apr. 23, 1784). This Resolution was very specific and required territories wishing to become states to hold a constitutional convention when the territory reached 20,000 free inhabitants. Additionally, the convention needed to: (1) choose to become subject to the Articles of Confederation and acts of the United States Congress; (2) form a republic government; and 4) reach a free population of the least numeration of the existing states. In addition, Congress needed to approve the new state's entrance to the Union with a two-thirds vote. This resolution was superseded and repealed by the Northwest Ordinance of 1787.

7. NORTHWEST ORDINANCE of 1787, art. V–VI.

8. *Id.* art. V.

9. *Id.*

lands outside of the colonies and in the specified Northwest Territory,[10] it was never exercised prior to the Constitutional convention and adoption of the current Constitution. One of the first Acts of Congress under the new Constitution was to adopt the Northwest Ordinance, including Articles V and VI in its entirety, to be applied only to lands in the Northwest Territory.[11]

A. The Constitution and Statehood

States are the foundation of American democracy. The Constitution is clear on the significance of states in Article I; Article I encompasses the Great Compromise that uses state population to determine representation in the House and the number of states in the Union to make up representation in the Senate.[12] Article I of the Constitution is clear on the state's role in creating representative government; however, it is not until Article IV that the statehood process is laid out stating that:

> New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.[13]

Article IV provides three paths to statehood that all require Congressional consent (1) from land that is not a pre-existing state, better known as territories; (2) by splitting a current state up into new states; and (3) by combining two or more states at their borders.[14] In addition to Congressional consent, which consequently included Presidential approval under the Presentation Clause, the latter two methods also require consent from the state legislatures of the states concerned.[15]

Compared to other parts of the Constitution, this language is rather clear and straightforward but lacking in any requirements or details. Where the Continental Congress through the Northwest Land Ordinance placed population and admittance requirements on new states, the Constitution is silent on these points. Ironically, the most important factor to American governance met with little debate or comment

10. *Northwest Territory*, ENCYC. BRITANNICA, https://www.britannica.com/place/Northwest-Territory (last visited Apr. 30, 2022). States that comprised the Northwest Territory include Ohio, Indiana, Illinois, Michigan, and Wisconsin. *Id.*

11. LAND ORDINANCE OF 1784 (Apr. 23, 1784); An Act to Provide for the Government of the Territory Northwest of the River Ohio, ch. 8, 1 Stat. 50 (1789). Article V specifies the number and geographic placement of states within the territory along with population requirement. Article VI abolishes slavery and indentured servitude in the territory, but it allows for fugitive slave laws from the original states to be enforced. *See also* Strader v. Graham, 51 U.S. 82, 96 (1850).

12. U.S. CONST. art. I. §§ 2–3; *see* Igartua v. United States, 626 F.3d 592, 596–97 (1st Cir. 2010).

13. U.S. CONST. art. IV § 3, cl. 2. Here is the whole proviso again, for easy reference: "[B]ut no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress."

14. *Id.*

15. *Id.* art. I.

from the Constitution Convention and was written on sparingly. James Madison wrote in The Federalist Number 43 that "[t]he particular precaution against the erection of new States, by the partition of a State without its consent, quiets the jealousy of the larger States; as that of the smaller is quieted by a like precaution, against a junction of States without their consent."[16]

Although debate and Constitutional language are sparing on the statehood issue, the Supreme Court did weigh in on two important statehood principles. The Equal Footing doctrine was specifically left out of the Constitution but became a requirement for all state admissions. The Guarantee Clause requires a republican form of government that the Supreme Court interpreted to include state governments. These overarching principles are discussed in detail below but, outside of the Constitution's Article IV, are the only legal requirements imposed on every statehood process.

1. Equal Footing Doctrine

An overarching principle dating back to the Continental Congress is that new States enter the Union on equal footing with old states.[17] This seems like a rather innocuous principle, but it was one of the primary issues relating to the Admissions Clause debated during the Constitutional Convention.[18] The original language proposed for the Admissions Clause stated that "the new states shall be admitted on the same terms with the original states."[19] Objections to this language stemmed from concerns that Congress would be bound to admit States under these terms and from fears of domination by the western territories when they became States.[20] The equal footing language was supported by James Madison who argued that the western territories would not want to become part of the Union if they were offered terms lesser than the terms that had been offered to other States. However, the language was struck by a nine to two vote in favor of the least restrictive approach to statehood admission.[21]

The Constitution does not include language guaranteeing that newly admitted States enter the Union on equal footing. However, since Tennessee's admission in 1796, Congress has included language in each State's admission clause that it enters the Union on equal footing with the original States.[22] The Equal Footing Doctrine was formalized by the Supreme Court in *Pollard v. Hogan*, where the issue was whether the new State of Alabama was entitled to the shores of the navigable water and soils underneath them within her limits or if these lands would be considered

16. THE FEDERALIST NO. 43, at 271 (James Madison).

17. NORTHWEST ORDINANCE OF 1787, art. V, VI.

18. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 454 (Max Farrand ed., rev. ed. 1937).

19. *Id.*

20. *Id.* This short but intriguing debate further demonstrates the Framer's conception that statehood decisions are made with the consent of the people through popular vote and legislative acts. Any constraints placed on this notion, even equal footing, are removed from the Constitutional text.

21. *Id.* at 1–2. Those in favor of striking the equal footing language included New Hampshire, Massachusetts, New Jersey, Pennsylvania, Delaware, North Carolina, South Carolina, and Georgia. Those against were Maryland and Virginia.

22. An Act for the Admission of the State of Tennessee into the Union, ch. 47, 1 Stat. 491, 491–92 (1796).

public land controlled by the United States.[23] The parts of Alabama land at issue were ceded by Georgia to the United States in April 1802.[24] The Georgia cession deed made specific reference to, and incorporated portions of, the Northwest Land Ordinance of 1787 to include population requirements and the requirement that the land should be used to form a State to be admitted on equal footing with the original states.[25]

Alabama's admission declaration stated, "that all navigable waters within the said state shall forever remain public highways, free to the citizens of said state, and of the United States, without any tax, duty, impost, or toll therefor, imposed by the said state." The Supreme Court asked whether Congress could impose these same restrictions on navigable waters under the Constitution to the other states and found that yes it certainly can under the Commerce clause.[26] What, then, of the shores and soils under the navigable waters? The Court found that control of these jurisdictions belongs exclusively to the states and that new states have "the same rights, sovereignty, and jurisdiction over this subject as the original states."[27] And thus the Equal Footing doctrine was codified in Supreme Court precedent as a requirement for the admission of new States.

The Admission Clause's final wording shows that the Framers were most concerned about who was to be involved in the statehood decision-making process rather than imposing restrictions on the process itself. And this is as it should be; statehood is political and partisan and should be left to the democratic process.[28] Over time a clearer process has emerged, but it has not always followed. The ultimate deciders of when and how a territory becomes a State are the people, through the ballot box and elected legislatures.

2. Republican Form of Government

Although not expressly stated in the Admissions Clause, Article IV Section 4 of the Constitution guarantees "every state in this union a republican form of government."[29] This section is known as the "Guarantee Clause," and it was justified by James Madison as a protection against state experimentation in antirepublican forms of government produced by "the ambition of enterprising leaders, or by the intrigues and influence of foreign powers."[30] Beyond combatting antirepublican forces from outside and within, Madison made a key point that a nation formed on republican values will best thrive by ensuring those values to present and future state governments.[31] It's the innate interest in the political institutions of each other that

23. Pollard v. Hagan, 44 U.S. 212, 225 (1845).

24. *Id.* at 221.

25. *Id.* at 222.

26. *Id.* at 229–30.

27. *Id.* at 230.

28. *See supra* discussion at note 19. *Luther v. Borden* held that recognition of who constituted the lawful government of a state were political questions committed by the Guarantee Clause to the judgement of Congress and the President. 48 U.S. 1, 42–43 (1849).

29. U.S. CONST. art. IV, § 4.

30. THE FEDERALIST NO. 43, at 275 (James Madison).

31. *Id.*

will form a strong union, and those institutions should be similar in their republican form.[32] Similarly, although the Articles of Confederation did not impose a republican form of government restriction on new States, the Continental Congress specified in the Northwest Land Ordinance of 1787 that new States must adhere to a republican form of government.[33] The Constitution's republican form of government guarantee is wide sweeping and understandably nondescript, allowing Congress to ultimately decide if a State's government is republican.[34]

The rather straightforward and clear Guarantee Clause was meant to preserve and promote republican forms of government within the Union. The question of who decides the rightful form of a state's government and when that government is formed was at issue in *Luther v. Borden*. Trespass by Mr. Borden into Mr. Luther's home to find and arrest him was the underlying issue of this case, but the fascinating facts concerning Rhode Island's state government leading up to the alleged trespass make this a watershed case on interpreting the Guarantee Clause.[35] Rhode Island was a founding state under the Constitution. Unlike other States, Rhode Island did not choose to adopt a new state constitution but continued the form of government established by the Charter of Charles the Second in 1663.[36] There was dissatisfaction with the charter government due to its voting restrictions, and in 1842, a group of citizens formed their own constitutional convention and submitted the new constitution to citizens for a vote.[37] Upon return of the votes, the convention declared the constitution adopted and on May 3, 1842, a newly appointed assembly and governor sat and began organizing a new government.[38]

Unsurprisingly, the charter government did not approve of the new constitution or government, declared martial law, and activated the state militia to quell violent actions taken by the new government under Governor Thomas Dorr.[39] The plaintiff, who supported Governor Dorr and the new government, alleged that the trespass onto his property by the defendant occurred during the time that the charter government was arguably displaced and that the defendant had no authority under the charter government to enter his home.[40] In the midst of the Rhode Island uprisings in 1842 and 1843, the charter government held a constitutional convention where it drafted a new constitution that was ratified by the people and took effect in May 1843.[41] Under

32. The importance of maintaining a republican government and how that government looked was a great political concern of the time. Madison stated that:

> In a confederacy founded on republican principles, and composed of republican members, the superintending government ought clearly to possess authority to defend the system against aristocratic or monarchial innovations. The more intimate the nature of such a union may be, the greater interest have the members in the political institutions of each other; and the greater right to insist that the forms of government under which the compact was entered into should be *substantially* maintained. *Id.* at 274.

33. ARTICLES OF CONFEDERATION OF 1781, art. XI; LAND ORDINANCE OF 1784 (Apr. 23, 1784).

34. *See generally Luther*, 48 U.S. 1.

35. *Id.*

36. *Id.* at 34.

37. *Id.* at 35–36

38. *Id.* at 36.

39. *Id.* at 49.

40. *Id.* at 35.

41. *Id.* at 37.

this constitution, Thomas Dorr was tried and convicted of treason.[42] The Court takes note that the judges who decided Dorr's case were given judicial authority under the charter government's ratified constitution, and this in turn implies the charter government's legitimacy as judicial power "presupposes an established government."[43]

The question before the court was to determine which government was in legal force at the time of the trespass—the charter government or new government.[44] Chief Justice Taney held that this is ultimately a political question and under the Guarantee Clause it "rests with Congress to decide what government is the established one in a State . . . . before it can determine whether it is republican or not."[45] The Court held that "the political department has always determined whether the proposed constitution or amendment was ratified or not by the people of the State, and the judicial power has followed its decision."[46] This cemented the issue squarely as a political question and outside the realm of judicial authority until the political power determines the governing body. In this case, the usurping government did not last long enough for Congress to determine its legitimacy by acknowledging or denying its delegates.

The Court upheld the circuit court's ruling for the defendants and supported the charter government's legitimacy finding that its agents did not trespass but lawfully entered the plaintiff's house during a period of martial law.[47] *Luther v. Borden* further established that Congress determines when and how states are admitted and acknowledged as part of the Union.[48] Congress under its political powers, not the courts, ultimately decides what constitutes a republican form of government.

B. A Process Unfolds

As described above, the Constitution provides no process on how new states are formed but only requires consent of the people in the new states and of Congress.[49] This process plays out in two different ways depending upon if the proposed state is a territory or a state formed from an existing state. Congress has plenary power to organize and regulate United States' territories.[50] The population within the territory expresses popular opinion to become a state, usually through a referendum, but there

42. *Id.* at 50.

43. *Id.* at 40, 56. The Court essentially said that Rhode Island figured this out on its own and that federal courts follow decisions of the State courts with regards to questions concerning the U.S. Constitution and laws of the State. *See id.*

44. *Id*. at 39–40. Justice Taney in his decision for the Court noted the gravity of this issue and repercussions of finding that the charter government was not in effect at the time to include nullifying governmental laws, acts, and public accounts. He rightly began his analysis by asking if the Court had judicial authority to even review such a question.

45. *Id.* at 42.

46. *Id*. at 39.

47. *Id*. at 38, 46. The Court sees the political issue as decided by the people through ratifying the charter government's new constitution. Therefore, judicial proceedings stemming from acts taken by the charter government are legitimate.

48. *Id.* at 40–43.

49. U.S. CONST. art. IV, § 3.

50. *Id*. art. IV, § 3, cl. 2.

is no established process.[51] After a territory expresses its desire to become a state, Congress reviews its proposal and, if approved, will pass an Enabling Act that specifies the requirements for the territory to become a state.[52] Enabling Acts varied in length but included that the new state be admitted on equal footing, establish a capital, and that the territory holds a constitutional convention to write a state constitution that does not contradict the Federal Constitution.[53] The final step in the process is Congress' and the President's acknowledgement of the new state, which often is expressed through sitting the new state's congressional representatives and the President issuing a referendum or proclamation.[54]

The 60,000 free-inhabitant-population threshold was only for states formed out of the Northwest Territory.[55] Indiana followed what became a familiar process for territories requesting statehood. In 1815, Indiana territory's population had reached the 60,000 free-inhabitant threshold, prompting the Indiana Legislative Council and House of Representatives to send a Memorial for Statehood to Congress to request admittance into the Union.[56] Indiana's Enabling Act passed both houses of Congress and was signed by President Madison on April 19, 1816; it directed the people of Indiana territory to form a constitution and state government to be admitted into the union "upon the same footing with the original states."[57] The Act further laid out the new state's borders and number of elected representatives to the state constitutional convention.[58] Indiana soon after called an election for forty-two convention delegates that met in June 1816 and, in nineteen days, drafted and adopted by majority the state's constitution.[59]

Indiana's senators and representatives were sworn into Congress in December 1816 and, soon after, Congress passed, and President Madison signed, a resolution acknowledging Indiana as admitted to the Union on equal footing with the original States.[60] Few legal requirements and flexibility define the American statehood process; however, politics create and remove barriers to the process as best demonstrated by history.

51. Indiana territory's House of Representatives voted in favor of the memorial to Congress which laid out its qualifications and request to become a state.

52. *See generally* Coyle v. Smith, 221 U.S. 559, 569–70 (1911).

53. *Id.* at 566–68.

54. *Id.* at 579

55. *See* ORDINANCE OF 1787: THE NORTHWEST TERRITORIAL GOVERNMENT, art. V; An Act to Provide for the Government of the Territory North-West of the River Ohio, ch. 8, 1 Stat. 50 (1789) (enacted). States formed out of the Northwest Territory include: Ohio, which was admitted as a state April 30, 1802; Indiana, which was admitted on December 11, 1816; Illinois which was admitted on December 3, 1818; Michigan which was admitted on January 26, 1837; and Wisconsin admitted on May 29, 1848.

56. Mem'l of the Legis. Council and H.R. of the Ind. Territory (1815). Indiana was part of the Northwest Territory and required by statute to meet the 60,000 population threshold.

57. Indiana Enabling Act, ch. 57, 3 Stat. 289–91 (1816) (enacted).

58. *Id.*

59. Resolution for admitting the state of Indiana into the Union, ch. 57, 3 Stat. 399 (1816) (enacted).

60. *Id.*

II. THE PATH TO STATEHOOD IS PAVED IN POLITICS

The Constitution and subsequent case law provide few requirements for statehood. This was intentional and created an atmosphere throughout American history where state admission rested almost solely on the political climate and issues of the time. This Section will reveal just how much state admission is tied to partisanship and that the admission process itself is oftentimes determined by the parties in power and only by limited legal framework.

The Constitution went into effect on June 21, 1788, and, as soon as 1791, new states began to join the Union from either existing states or territories.[61] Twenty states joined the Union between 1788 and 1860.[62] As the eastern United States engaged and recovered from the Civil War, western expansion continued throughout the nineteenth century. States' status and entry were at the heart of this tumultuous time in American history. President Lincoln's theory on state succession to justify the Civil War led to West Virginia becoming a state and had lasting effects through Reconstruction. The twin state solution was a political mechanism to, at first, balance the free and slave state equation and, then later through western expansion, maintain party balance in the Senate. These lasting legacies reverberate in American politics today but the mechanisms, primarily the twin state solution, has been abandoned in national discourse. This section provides a historical overview of how political interests ultimately determined when and how states became states.

A. The Twin State Solution

The twin state solution is as simple as the name; it is comprised of admitting two states at or near the same time that represent different political parties or ideologies. This solution most definitively took effect in the decades leading up to the Civil War by admitting a free and slave state at the same time. One example was Indiana's admittance as a free state in December 1816 and the subsequent admittance of Mississippi as a slave state in December 1817.[63] However, the twin state strategy was not a permanent solution and was surrounded by uncertainty.

1. Free and Slave States

The Missouri Compromise of 1820 attempted to regulate slavery for states entering the Union from the Louisiana Purchase Territory.[64] Leading up to 1820, Northern state populations were outpacing the South and, by 1820, Southern state held less than forty-five percent of House seats and the Senate was evenly balanced

61. State v. Elliott, 616 A.2d 210, 217 (Vt. 1992).

62. Samuel Shipley, *List of U.S. States' Dates of Admission to the Union*, ENCYC. BRITANNICA, https://www.britannica.com/topic/list-of-U-S-states-by-date-of-admission-to-the-Union-2130026 (last visited Apr. 30, 2022).

63. Resolution for Admitting the State of Indiana Into the Union, ch. 57, 3 Stat. 399 (1816) (enacted); Resolution for the Admission of the State of Mississippi Into the Union, ch. 23, 3 Stat. 472–73 (1817) (enacted).

64. Missouri Compromise of 1820, ch. 22, 3 Stat. 545, § 8 (1820).

at eleven slave and eleven free states.[65] State admittance came down to keeping a balance in the Senate. In 1818, Missouri sent its petition[66] for statehood to Congress and, soon after in 1819, Maine also sent its petition.[67] As Congress debated Missouri's Enabling Act, James Tallmadge from New York proposed amendments that prohibited further introduction of slavery and emancipated slaves born in Missouri when they reached age twenty-five.[68] The bill passed the House but was defeated in the Senate.[69] The Northern-dominated House was flexing its political muscle to see how much it could restrict slavery's spread. This alarmed the Southern delegates who saw this as a threat to the entire slavery institution. Into the fray, Maine entered its petition for statehood, deadlocking the entire debate as slave states feared Maine being admitted as a free state prior to Missouri. This gave anti-slavery members a further majority in the House and changed the balance in the Senate, allowing them to add Missouri as a free state and tipping the balance in favor of anti-slavery in the Senate. Under the Missouri Compromise, slavery was prohibited north of the 36° 30' north latitudes, running west from Missouri's southern border, with Missouri being excepted.[70] Maine was then admitted as a free state and Missouri as a slave state.

The Missouri Compromise held. States continued to be admitted in pairs—one free and one slave—although the law provided a geographic cutoff that clearly delineated where slave and free states would be located. The addition of Arkansas as a slave state and Michigan as a free state is an example of states that were admitted on the same day, June 15, 1836, while maintaining a pro and anti-slavery balance in the Senate.[71] However, questions loomed over how to admit states in territories outside of the Missouri Compromise territory and what happens when a slave is taken to a free state—does that slave then become free? Slavery containment and the Missouri Compromise hinged on this question that was answered by the Supreme Court in *Scott v. Sandford*, where the Court not only ruled that a slave's entering a free state where slavery is illegal does not change the slave's status to free once the slave reenters a slave state,[72] but fatefully held the Missouri Compromise

65. Shirelle Phelps & Jeffrey Lehman, *Missouri Compromise of 1820*, 7 WEST'S ENCYC. OF AM. L. 88, 88 (2005).

66. *Missouri Statehood Petition*, SHOW ME MISSOURI, https://showmemo.org/collection/missouri-statehood-petition/ (last visited on May 5, 2022)

67. Faith Joseph Jackson, Dred Scott v. Sandford*: A Prelude to the Civil War*, 15 RICH. PUB. INT. L. REV. 377, 382 (2011).

68. Phelps & Lehman, *supra* note 65, at 88

69. *Id.*

70. Missouri Compromise of 1820, ch. 22, 3 Stat. 545, § 8 (1846). Section 8 of the Act states:

> And be it further enacted, That in all that territory ceded by France to the United States, under the name of Louisiana, which lies north of thirty-six degrees and thirty minutes north latitude, not included within the limits of the state, contemplated by this act, slavery and involuntary servitude, otherwise than in the punishment of crimes, whereof the parties shall have been duly convicted, shall be, and is hereby, forever prohibited.

71. H.R. JOURNAL, 24th Cong., 1st Sess. 1011, 1017 (1836).

72. Scott v. Sandford, 60 U.S. 393, 452 (1857); *see also* Strader v. Graham, 51 U.S. 82, 83, 95 (1850). This is the "once free always free" argument that the Court essentially ignored here but relied upon *Strader v. Graham.* In that case, the Supreme Court held that the applicable laws in cases where slaves are taken in and out of free states is dependent upon the laws of the territory/state that they returned to, not those that they visited. *See Strader*, 51 U.S. 82 (1851).

unconstitutional under the Fifth Amendment.[73] Holding that Congress cannot legislate types of property differently and, therefore, cannot regulate slavery (a form of property) in its territories to include portions of the Louisiana Purchase north and west of Missouri.[74]

The Supreme Court's decision in *Scott v. Sandford* determined that plaintiff Dred Scott who was taken from Missouri, a slave state, to Illinois, a free state and then to Upper Louisiana territory was not a citizen and the Circuit Court had no jurisdiction to hear his suit against defendant John Sandford for trespass, assault, and imprisonment upon him and his family.[75] The Court further held that Mr. Scott was found to still be a slave and therefore, courts had no jurisdiction over his case. The Court's ruling that "neither the class of persons who had been imported as slaves, nor their descendants, whether they had become free or not" are citizens of the United States stripped free African Americans of their rights under the Constitution, including for a court to have jurisdiction over their legal matters.[76] The Court then analyzed the Constitutionality of the Missouri Compromise finding it to be unconstitutional.

2. Congressional Balance and Dominance

With several large territories left in the West, Democrats and Republicans used the statehood process to further their political interests. Partisan politics were on full display during the debate and passing of The Great Enabling Act of 1889, which created Montana, Washington, and split the single Dakota territory into two states.[77] Democrats were the losers, as Republican-leaning Dakota territory was split in two and the languishing Democratic-leaning New Mexico territory was not admitted. Republicans made an obvious and effective power grab in 1889 in a moment where they had large majorities in both Houses and Presidential control and importantly several territories were ripe for state admission.

Prior to the Enabling Act, the Dakota territory was united, and no dividing line was apparent.[78] This area was known as the New Northwest and underwent large population shifts throughout the 1880s, making political allegiances unclear.[79] Washington, Montana, and Dakota politicians jump started their statehood movements and wrote constitutions in 1878, 1884, and 1885 respectively prior to Congress passing the 1889 Enabling Act.[80] Although these documents were ratified

73. *Scott*, 60 U.S. at 452.

74. *Id*. at 451–53. The *Scott* opinion dealt a massive blow to the anti-slavery movement. Justice Taney's opinion reaches beyond the issue presented to the Court and further opines to the constitutionality of the Missouri Compromise. Some believe this determination and discussion is dicta and is non-binding. However, at the time, the entire opinion was treated as a binding decision.

75. *Id.*

76. *Id*. at 407.

77. The Great Enabling Act, 25 Stat. 676, §§ 1, 2 (1889).

78. *See generally* Kenneth N. Owens, *The Prizes of Statehood*, MONT. MAG. OF W. HIST., Autumn 1987, available at https://www.jstor.org/stable/pdf/4519088.pdf (last visited on May 22, 2022).

79. *Id*. at 4.

80. *Id*. at 5–6.

in territorial elections, Congress rejected these efforts along party lines.[81] On the national scene, Grover Cleveland was the first post-Civil War Democrat elected to the Presidency in 1884 when Democrats also gained control of the House, leaving Republicans with a slim Senate majority.[82] By the 1888 presidential election, political sands again shifted to the Republican's favor with Benjamin Harris being elected president and Republicans winning both the House and Senate.[83] After their crushing losses, Democrats realized that they had to push statehood through for the New Northwest states or risk Republicans admitting only Republican leaning states in the new Congress. Territories requesting statehood included the Democratic leaning New Mexico and Montana and Republican Washington and Dakota;[84] thus, three Republican-leaning states and one Democratic-leaning state were admitted.

As a new century dawned, Western Continental expansion was ending with only the Oklahoma, New Mexico, and Arizona territories vying for statehood. Oklahoma Territory bordered Indian Territory, which was comprised of "Five Civilized Tribes" that recognized that their self-government would end in March 1906 as prescribed by the Curtis Act of 1898.[85] Therefore, these tribes held a statehood convention for the State of Sequoyah where they drafted a constitution and petitioned Congress for statehood.[86] The state constitution was ratified by the Indian Tribes; however, Congress refused to consider a statehood bill in part because the Republican-led Congress would not admit a heavily Democratic Indian Territory.[87]

Arizona leaned Democratic, and the more populous New Mexico now leaned Republican, so a compromise was struck during Oklahoma's admittance; Oklahoma would come in as one state and, if the people of Arizona and New Mexico agreed, the Arizona and New Mexico territories would be combined to enter as one state in the future.[88] The Congressional math was, again, advantageous for Republicans. By combining New Mexico's larger population with that of Arizona, Congress expected to dilute Arizona's Democratic votes and swing the new state Republican.[89] Congress passed an Enabling Act for the Oklahoma Territory (including Indian Territory), New Mexico and Arizona Territories on June 16, 1907.[90] After fulfilling the Enabling Act terms and voting to become a state, Oklahoma was admitted as a state by Proclamation by President Roosevelt on November 16, 1907.[91]

81. *Id*. at 6

82. *Id*.

83. *Id.* at 8.

84. *Id*.

85. Richard Mize, *Sequoyah Convention*, ENCYC. OF OKLA. HIST. & CULTURE, https://www.okhistory.org/publications/enc/entry.php?entry=SE021 (last visited on Apr. 30, 2022).

86. *Id*.

87. *Id.*, *see also Party Divisions of the House of Representatives, 1789 to Present*, HIST., ART, AND ARCHIVES: U.S. HOUSE OF REPRESENTATIVES,

https://history.house.gov/Institution/Party-Divisions/Party-Divisions/ (last visited on Apr. 30, 2022).

88. Dianna Everett, *Enabling Act (1906)*, ENCYC. OF OKLA. HIST. & CULTURE, https://www.okhistory.org/publications/enc/entry.php?entry=EN001 (last visited on Apr. 30, 2022).

89. DAVID R. BERMAN, POLITICS, LABOR, AND THE WAR ON BIG BUSINESS: THE PATH OF REFORM IN ARIZONA, 1890-1920 56–57 (2012).

90. Oklahoma and New Mexico Enabling Act, 34 Stat. 267, ch. 3335 (June 16, 1906) (enacted). Section 24 of the Act directs Arizona and New Mexico territories to hold an election to include the question "Shall Arizona and New Mexico be united to form one State?".

91. Proclamation No. 780 (Nov. 16, 1907).

As in the Enabling Act of 1889 that directed the Dakota territory to become two states, the 1907 Enabling Act directed Arizona and New Mexico to join their territories with little concern for the territories' lifestyles and economies. However, Senator Benson Foraker, a Republican from Ohio, was Arizona's lobbyist and successfully inserted language into the legislation that required a majority of voters in each territory to approve joint statehood.[92] The people of the Arizona territory overwhelmingly rejected the proposal and voted eighty-four percent against joint statehood; however, New Mexico voted in favor.[93] Lacking Arizona's consent, the joint statehood venture was dead. President Roosevelt's warned "it is my belief that if the people of Arizona let this chance go by they will have to wait very many years before the chance again offers itself, and even then it will probably be only upon the present terms of being joined with New Mexico."[94] The vote against joint statehood doomed the 1907 Enabling Act for Arizona and New Mexico, leaving them as territories for the intermediate future.

This was until the political winds began to shift anew and the Democrats won majorities in both Congressional houses in 1910. In many ways, it was difficult to predict exactly how Western states would vote for Congressional representatives. The populations in these territories expanded and changed over time. However, under a Democratic Congress, Arizona (a Democratic/Progressive territory), and New Mexico (a Republican-leaning territory) were both admitted under Joint Resolution on August 10, 1911.[95] President Taft proclaimed New Mexico a state on January 6, 1912,[96] and Arizona on February 14, 1912.[97] Thus entered the last of the contiguous states into the Union.

B. Secession, Readmittance, and the Republican Form of Government

The States' relationship with the Union and Congress was at the center of President Lincoln's basis for fighting the Civil War. Not only did his theories shape reconstruction, but also, they had far-reaching impacts on Congress readmitting states based on adopting the Thirteenth and Fourteenth Amendments. Lincoln entered office as southern states were actively seceding from the Union and saw these acts to be illegal and unconstitutional. Lincoln argued that under the Constitution and universal law, national governments are formed under the implied concept of perpetuity that is reinforced in the Constitution's text "to form a more perfect union."[98] Further, under simple contract law, where two parties enter into an agreement, the unilateral act of one party leaving the agreement results in recission of the entire agreement. It takes consent from inhabitants of states/territories and Congress to enter the Union and therefore, secession by a state without the Union's

92. BERMAN, *supra* note 89, at 58.

93. *Id*. at 59.

94. *Id*.

95. H.R.J. Res. 14, 62nd Cong. (1911).

96. Proclamation No. 1175 (January 1912).

97. H.R.J. Res. 14, 62nd Cong. (1911); Proclamation No. 1180 (February 14, 1912).

98. 2 ABRAHAM LINCOLN, SPEECHES & WRITINGS, 1859–1865: SPEECHES, LETTERS, MISCELLANEOUS WRITINGS, PRESIDENTIAL MESSAGES & PROCLAMATIONS 217–18 (Libr. of Am ed., 1989).

consent is an illegal act.[99] To Lincoln, there was no secession but only insurrection, resulting in rebel states.[100]

An early test to Lincoln's secession theory was West Virginia's formation. The Virginias are separated by the Blue Ridge Mountains. Importantly, northwest Virginia had few slaves and was a perpetual minority in state politics.[101] When Virginia seceded from the Union, delegates from northwest Virginia voted twenty-six to five against the secession resolution and voters in the region rejected secession by a three-to one margin.[102] Shortly thereafter, on June 11, 1861, a convention met in Wheeling and declared the legislature in Richmond to be illegal and established itself as the restored government for all of Virginia and appointed Francis H. Pierpont as governor.[103] Governor Pierpont then appointed two new senators and three new representatives from Virginia, which were recognized and sat in Congress on July 13, 1861.[104] Lincoln and Congress stayed consistent with their view that seceded states were engaged in insurrection and that loyal unionist within those states were then seen as the legitimate constituents of the state. This interpretation is in line with the Supreme Court's holding in *Luther v. Borden* that Congress decides what government is established in a state and then determines under the Guarantee Clause if it is Republican or not.[105]

If history stopped here, there would not be a West Virginia. However, the new Virginia legislature and governor reassembled in August 1861 to propose a new state for the northwestern counties and to hold an election in October. The proposal was approved, and a constitutional convention met to draft a constitution, which was ratified by voters in April 1862. As discussed earlier in this article, the Constitution's primary requirement for statehood is consent from Congress and inhabitants of the new state. In this case, since the new state was part of an existing state, consent from the existing state is also required. This is where West Virginia's statehood really gets dicey (or does it). The existing state is Virginia, but under whose government?[106] The answer goes back to *Luther v. Borden*, and it is the state government that is recognized by Congress. Although Congress and Lincoln's cabinet underwent

99. *Id.*

100. *Id*. at 218.

101. Vasan Kesavan & Michael Stokes Paulsen, *Is West Virginia Unconstitutional?* 90 CAL. L. REV. 291, 297–98 (2002).

102. *Id*. at 298.

103. *Id*. at 299.

104. *Id*. at 300.

105. 48 U.S. 1, 33 (1849).

106. *See generally*, JAMES GARFIELD RANDALL, CONSTITUTIONAL PROBLEMS UNDER LINCOLN 434–36 (University of Illinois Press, rev. ed. 1951) (1926); JAMES M. MCPHERSON, BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA 297–98 (1988). These historians do not see West Virginian statehood as simple, but rather, as extralegal and complicated as consent requirements under the Constitution's Article IV were not met. *See id.* The fifty northwestern counties that became West Virginia cast 50,049 ballots in the 1860 Presidential election. *See A State of Convenience: The Creation of West Virginia*, W. VA. DEPT. ARTS, CULTURE, & HISTORY, [https://web.archive.org/web/20200707114313/http://www.wvculture.org/history/statehood/1860presidentialvote.html] (last visited May 22, 2022). However, total votes for West Virginia's statehood referendum and constitutional ratification were 19,189 and 19,376 respectively. *See* RANDALL, *supra* note, at 451–52. It is important to note that approximately 20,000–22,000 soldiers from West Virginia fought in the Civil War, decreasing the number of voting eligible men in 1861–62. MARK A. SNELL, WEST VIRGINIA AND THE CIVIL WAR 28 (2011).

vigorous debate on West Virginia's statehood bill, it was ultimately passed by Congress and signed by President Lincoln.[107]

Three factions emerged with differing views on West Virginia's legal status. The prevailing position applied Lincoln's secession theory to Virginia's population. Representative John Bingham laid out a strong legal argument using the Constitution's Guarantee Clause to support his theory that, "where the majority become rebels in arms, the minority are the State" and the Federal Government must protect the minority "against domestic violence."[108] This argument legitimizes the non-rebel minority to form a state government and for Congress—under both Congress's plenary power and the Supreme Court's decision in *Luther v. Borden*—to decide which Virginia legislature to recognize.[109] Once Congress recognized and seated members from the Wheeling Virginia delegation, then it had to follow its own logic and consent to that same legislature's request to create the new State of West Virginia.[110]

The other two factions had opposing views on rebel states' status. The Radical Republicans, led by Thaddaeus Stevens, advocated the "Conquered Province Theory" that promoted the idea that seceded States should be treated as conquered provinces and that Congress could administer the territories and set requirements for readmission in anyway it chose.[111] The effect was that under Congress's "war powers," it could treat Virginia how it wished even though it was clear that the entire state of Virginia was not represented by the Wheeling government and therefore, it could not consent to creating a new state from parts of pre-existing Virginia.[112] However, treating rebel states as conquered territories, in line with Radical Republican proposals, implied that these states could secede.[113]

On the other end of the spectrum was Representative John Crittenden who believed that West Virginia was unconstitutional because at the end of the Civil War rebel states should be returned to the Union with undisturbed boundaries.[114] Representative Crittenden was concerned about the slippery slope and the precedent created by allowing rebel states to be carved up without the consent of the entire

107. An Act for Admission of the State of "West Virginia" into the Union, 12 Stat. 633 (1862).

108. CONG. GLOBE, 37th Cong., 3d Sess. 57 (1862) (statement of Rep. Bingham) (citing U.S. CONST. art. IV, § 4).

109. *Id.*

110. Kesavan & Paulsen, *supra* note 101, at 318. The West Virginia bill passed twenty-three to seventeen in the Senate, and ninety-six to fifty-five in the House. *Id.*

111. CONG. GLOBE, 39th Cong, 2d Sess. 251–53 (1867) (remarks of Rep. Stevens).

112. CONG. GLOBE, 37th Cong., 3d Sess. 50 (1862) (remarks of Rep. Stevens). Specifically, Stevens stated:

> Now, sir, it is but mockery, in my judgment, to tell me that the Legislature of Virginia has ever consented to this division . . . . The State, as a separate and distinct body, was the State of a majority of the people of Virginia, whether rebel or loyal, whether convicts or freemen . . . . Now, to say that the Legislature which called this seceding convention was not the Legislature of Virginia, is asserting that the Legislature chosen by a vast majority of the people of a State is not the Legislature of that State. That is a doctrine which I can never assent to.

113. CONG. GLOBE, 37th Cong., 3d Sess. 39 (1862) (statement of Rep. Brown) (arguing against territorial view).

114. CONG. GLOBE, 37th Cong., 3d Sess. 47 (1862) (remarks of Rep. Crittenden).

state.[115] Ironically, both extremes agreed that the Wheeling government did not represent the entire State of Virginia "except by a mere fiction."[116]

By placing statehood at the center for justifying the Civil War, Lincoln shrouded an inherently political process in legal rhetoric. Congress' requirements for readmittance were similarly linked to rebel states demonstrating a republican form of government.

1. Whose Republican Form of Government? The Political Process Decides

The Civil War was long, bloody, and resulted in significant human tragedies. Once the fighting was done, the period that would become known as "Reconstruction" loomed. Southern states enjoyed increased representation in the House due to the full count of former slaves. However, those states were loath to allow former slaves to vote and began introducing "Black Codes" for the express purpose of disenfranchising African Americans. Congress, dominated by northern Republicans, opposed readmitting southern delegates as it viewed disenfranchisement of southern Blacks as a non-republican government that violated the Guarantee Clause.[117]

In order to address the southern "Black Codes," Congress published its Joint Committee on Reconstruction Report, finding that a Republican government required enfranchisement of a majority of the adult male population and that this was Congress' responsibility to achieve during Reconstruction.[118] The First Reconstruction Act of 1867 placed former Confederate states under military rule and registered former male slaves to vote.[119] It also established conditions for state readmission to include adopting a new state constitution under which a new state legislature would be formed, and adopting the Fourteenth Amendment.[120] Under this formula, seven rebel states were readmitted, and the Fourteenth Amendment was ratified in July 1868.[121] Following Article IV of the Constitution, Congress, by enforcing the Guarantee Clause, determined the terms and timing of readmission. Even when a state was readmitted, Congress exercised its power to expel the state's delegation if it no longer met the requirements for a Republican government. Georgia's congressional delegates were expelled, and military rule was reevoked when the state legislature refused to seat duly-elected Black state representatives.

115. *Id.* Representative Crittenden argued, "If you can do this, can you not also, without any consent on the part of the people of North Carolina, divide that State and make up new States just as your armies progress, setting aside the necessity of consent on the part of the Legislature?"

116. *Id.*

117. *A Century of Lawmaking for a New Nation: U.S. Congressional Documents and Debates, 1774-1875*, CONG. GLOBE (Dec. 9, 1862), https://memory.loc.gov/cgi-bin/ampage.

118. H.R. REP. NO. 30, at xiii, xviii–xxi (1866).

119. An Act to Provide for the More Efficient Government of the Rebel States, ch. 153, §§ 5–6, 14 Stat. 428 (1867). The House and Senate overrode President Johnson's veto with a two-thirds vote in each chamber.

120. *Id.*

121. 2 ENCYC. OF THE RECONSTRUCTION ERA 296, app. 3 at 833 (Richard Zuczek ed., 2006). States readmitted under this framework included Arkansas (June 22, 1868), Florida (June 25, 1868), North Carolina (July 4, 1868), Louisiana (July 9, 1868), South Carolina (July 9, 1868), Alabama (July 13, 1868), and Georgia (July 21, 1868).

Georgia was not readmitted until 1870, along with Virginia, Mississippi, and Texas, which were required to ratify both the Fourteenth and Fifteenth Amendments.[122]

Southern states' ratification of the Fourteenth and Fifteenth Amendments was necessary for the amendments to become law under Congress' theory of statehood, and it required them to maintain a Republican form of government by recognizing former slaves as citizens and guaranteeing their right to vote. As the Civil War and Reconstruction eras ended, nothing demonstrated the politics of the time more than the Reconstruction Amendments and Congress' control over southern state readmission. From West Virginia's unlikely creation to readmitting and then revoking Georgia's state status, the dominant political forces saw the federal government's role in statehood as ensuring consent from "loyal citizens" and guaranteeing a republican form of government through enfranchisement of former slaves.

C. It's the Wild, Wild West of Statehood: Politics Override Population Concerns

The most practical consideration for statehood is population; however, even this most basic factor lacks legal requirements and is impacted by the political winds. Historically, Congress was concerned that a territory's population would be able to maintain government, order, and a tax base. Under the Constitution's Article IV Section 3, Congress is granted power to manage and control all territories and properties of the United States.[123] Territory inhabitants must consent to statehood under the Admissions Clause, but the territory's boundary lines are established by Congress.[124] The only statute passed by Congress that placed restrictions on statehood admittance outside of the Constitution was the Northwest Ordinance that required 60,000 inhabitants in a territory prior to applying for statehood.[125] However, this only applied to states formed out of the Northwest Territory[126] and Congress did not expand the population or other requirements in the Ordinance to apply to other territories, leaving state admission to the political process and Constitutional requirements discussed above.

The most blatant example of politics prevailing over population concerns was Nevada's admittance to the Union in 1864. Nevada's population was only 40,000 and although in 1864 its admittance was premature, President Lincoln needed additional votes to pass the Thirteenth Amendment abolishing slavery as it had failed to get the required two-thirds majority in the House in 1864.[127] Nevada was expected to be a strong anti-slavery state and therefore, Lincoln and Congressional Republicans supported senators and representatives that would in turn support the

122. *Id*. at 833.

123. U.S. CONST. art. IV, § 3.

124. *Id*.

125. NORTHWEST ORDINANCE of 1787, art. V.

126. *Id*. at Article V (These states included: Illinois, Indiana, Ohio, Michigan, and Wisconsin).

127. *To Pass H.J. Res. 16, A Bill Submitting to The Legislatures of the Several States a Proposition To Amend The Const. of The U.S. To Abolish Slavery. (P. 2995-1)*, 38th Cong.

Thirteenth Amendment. Congress passed its Enabling Act in March 1864[128] and Nevada convened a constitutional convention from July 4–27, 1864. Soon after, the people of Nevada voted overwhelmingly in favor of the constitution on September 7, 1864.[129] However, copies of the Nevada Constitution failed to reach Washington, D.C. either by land or sea. Therefore, on October 26, 1864, James Nye, Nevada Territory's governor, began sending the text via telegram, transmitted in Morse Code, of the entire Nevada Constitution.[130] It took two days to transmit the entire document as there was no direct telegraph link from Carson City to Washington, D.C.[131] Therefore, it was sent to Salt Lake City, then resent to Chicago, then Philadelphia, and finally to Washington, D.C.[132] The 175-page transcription consisted of 16,543 words costing $4,313.27 (approximately $59,299 in today's dollars).[133] Nevada was declared a state by President Lincoln on October 31, 1864,[134] just nine days before the 1864 Presidential election.[135] The political strategy worked as Lincoln was reelected and the Thirteenth Amendment barely cleared the two-thirds (117 votes) threshold in the House with a 119-56 vote, including Nevada's newest representative.[136]

Although population is an important factor for statehood, it is certainly not the deciding factor. As demonstrated by Colorado's statehood timeline, politics is the overriding factor in statehood decisions. Colorado's population based off of the 1870 census was 40,000[137] and although it's Admissions Act was passed by Congress in 1865 it was vetoed twice by President Johnson.[138] Colorado finally became a state in 1876 after President Grant indicated his approval.[139] Colorado leaned Republican and although its population did not vote in the 1876 Presidential election, it did send three electors to the Electoral College that were picked by Colorado's Republican

128. Nevada Enabling Act, 13 Stat. 30–2 (1864).

129. *Utah-Nevada Territory*, NEV. STATE LIBR. ARCHIVES & PUB. RECS., https://nsla.nv.gov/utah-nevada-territory (last visited May 22, 2022).

130. *National Archives Celebrates the 145th Anniversary of Nevada Statehood: 1864 record-length telegram relaying Nevada Constitution on Exhibit in DC*, NAT'L ARCHIVES (Sep. 23, 2009), https://www.archives.gov/press/press-releases/2009/nr09-127.html.

131. *Id.*

132. *Id*.

133. *Id*.

134. Presidential Proclamation Declaring The Admission Of The State Of Nevada Into The Union, (Oct. 31, 1864).

135. F. Lauriston Bullard, *Abraham Lincoln and the Statehood of Nevada*, 26 A.B.A. J. 210 (1940) (noting that Nevada's Enabling Act included a provision that if Nevada submitted a constitution to the President, he could declare it a state).

136. *See* S.J. Res. 16 (P. 531-32). *See To Pass S.J. Res. 16 (P. 531-2)*, GOVTRACK, https://www.govtrack.us/congress/votes/38-2/h480 (last visited May 22, 2022) for a vote break down.

137. HISTORICAL STATISTICS OF THE U.S: COLONIAL TIMES TO 1970, U.S. CENSUS 25 https://www2.census.gov/library/publications/1975/compendia/hist_stats_colonial-1970/hist_stats_colonial-1970p1-chA.pdf (last visited May 22, 2022).

138. President Andrew Johnson's Veto Message on Admitting Colorado into the Union dated January 28, 1867. Johnson's primary reason for vetoing the Colorado bills was due to its small population. *Id.*

139. Ulysses S. Grant, Proclamation 230—Admission of Colorado Into the Union (Aug. 1, 1876).

legislature where the Republican candidate, Rutherford B. Hayes won the Presidency by one electoral vote.[140]

The history of state admission shows a process dominated by politics, informed by major political questions of the time, and bound legally only by the limited requirements of the Constitution. Statehood, in other words, has been the art of the politically possible. From West Virginia's creation and admittance to creating two Dakotas from one, new states are admitted only when politically feasible, and no sooner.

It's difficult to imagine today that 100 years ago, new states were staples in the political conversation. After the continental United States territories became states in 1912, what was left? Were the stars fixed at forty-eight? Part Three of this paper will look to what is left in the statehood toolbox. There are parts of America that are poorly represented by local state government—places like Washington, D.C.—where tax-paying citizens are not represented in Congress as well as territories outside of the continental United States that could be part of a statehood discussion.

What is certain is that the current political climate is so partisan and closely divided that neither party will ever agree to allow one new state that heavily favors the opposing party without some balance. A serious statehood discussion cannot be made in a vacuum. In an era of fierce political polarization and a closely divided Senate, it must include ideas that will allow two states to enter and maintain Senate balance. Fifty-one stars is highly unlikely, but how about fifty-two?

III. RETHINKING STATEHOOD FOR THE TWENTY-FIRST CENTURY

States are the bedrock of American government; because the people who live within states determine Congressional representation, this has large impacts on which political party drives the national agenda. Part I discussed the legal requirements for statehood. Part II demonstrated how politics impacted state admissions throughout American history. The remainder of this paper will look to modern statehood movements and their importance to life in twenty-first century America.

The statehood discussion is certainly not dead, especially if you live in or around Washington, D.C. where approximately 700,000 citizens do not have Congressional representation. However, the issue is dead on arrival in Congress if the discussion fails to overcome the highly partisan Senate balance. Further, beyond the partisan concerns, less discussion is devoted to if current state lines make sense to the people living within those lines. The Tenth Amendment gives states the power to organize their own governments and create laws specific to the people living within the state.[141] Citizens should feel heard and represented by their local governments and without consensus on major issues, people begin to feel disenfranchised. State legislatures make laws and budget determinations that have concrete effects on people's everyday lives. This Section will first look to a state's significance to its inhabitants and to the nation and then explore the status of remaining United States

140. Robert E. Smith, *Thomas M. Patterson, Colorado Statehood, and the Presidential Election of 1876*, 53 COLO. MAG. 157, 160–62 (1976).

141. U.S. CONST. amend. X.

territories and current statehood movements through the lens of statehood as a political and partisan process with little legal basis or guidance.

A. States' Impact on Democracy

Former Speaker of the House Tip O'Neil often said, "all politics is local", an adage that accurately describes American politics. This principle is enshrined in the Tenth Amendment and final amendment included in the Bill of Rights, which reserves all powers to the States not previously delegated to the federal government.[142] Remaining powers left to the states allow states to organize their own governments within the broad parameters set by the Constitution; this local self-determination uniquely shapes American democracy and differentiates a state from a territory or non-state region.

Twenty-first century American politics seems to focus on national, moral, and abstract type issues such as abortion, gun rights, immigration policy, and civil rights. These issues are important and shape our country as a whole; they evoke an emotional and strong response, but do not necessarily directly affect everyday lives. Unlike the federal government, a state has un-enumerated powers to make and enforce laws for the general welfare of its people.[143] State laws and budgets more directly affect its citizens. State lines that were drawn without consideration for geography and economic livelihoods currently result in a portion of the population that do not feel part of the state and do not see their interests represented at the state level. More than a majority/minority problem some states include regions that are separated by mountains, like Washington and Oregon, creating a geographic part of the state that is clearly different and underrepresented by the state legislature. Large, populous states, such as California and Texas have various economic, lifestyle, and geographic interests that are impossible to fully represent in their state legislature. Like West Virginia's separation from Virginia in 1862, consideration of state boundaries based on local control and self-determination is consistent with the entire purpose of statehood.

Why should people who live east of the Cascade Mountains in Washington state, who feel no connection to their state government and are geographically separated from the rest of the state, not be given the opportunity to become part of a state that represents their interests and way of life? Why is the statehood status of the remaining United States territories not even part of political conversation? Partisanship plays a large role in stifling conversations that alone may seem ridiculous, but if brought into a larger discussion expands statehood possibilities.

142. *Id.*; *see generally* Elizabeth Anne Reese, *Or to the People: Popular Sovereignty and the Power to Choose a Government*, 39 CARDOZO L. REV. 2052 (2018) (providing an in-depth and fascinating discussion on state and popular sovereignty powers under the Tenth Amendment).

143. *Id.*

B. Creating New States From Existing States

Modern statehood movements exist in several parts of the country and are mostly regional; based upon frustrations with state politics and urban versus rural interests. States such as Illinois[144] and New York[145] have made several attempts to sever the rural parts of the state from Chicago and New York City. These efforts have failed but are driven by differences in lifestyle, economy, and political priorities in which rural citizens see their voices smothered by the more populous cities. These tensions are almost always apparent in places with large urban populations surrounded by rural counties. However, it becomes problematic for democracy when collectively, large swathes of the populations' concerns are being ignored by state legislatures. Other movements not only embody these tensions but also incorporate economic and geographic differences into their efforts to redraw state lines.

This section will focus on efforts in Washington and Oregon to redraw state lines to better represent people in very different geographical parts of these states and proposals to split California into three equally populated states that better represent the economies and lifestyles of their inhabitants. Many of these concerns are echoed by citizens in Illinois and New York and should not be ignored by their states or national politics.

1. The Cascade Mountains: Washington, Oregon, and Idaho

It was clear from the beginning that the Cascade Mountains geographically splitting Washington and Oregon but not actually used as a natural line to create state borders were problematic. Exploring statehood movements within this region is an important step to enhancing local democratic representation by examining portions of states that are underrepresented in their state legislatures, in addition to creating statehood possibilities that address Senate balancing and could increase Washington D.C. and Puerto Rico's statehood prospects.

The Inland Northwest is a complex area with mountains dividing the land in many directions, not easily lending itself to large states. In the 1860s, when Washington and Idaho were still territories, delegates from Washington tried to adjust the territory's lines and create a Columbia Territory that would include Washington east of the Cascades and Northern Idaho; even eastern Oregon was eager to join.[146] The idea finally got momentum from local legislatures but met several obstacles in Washington, D.C. The primary obstacle was that creating a new territory would delay admitting the states of Idaho and Washington.[147] Ultimately the territory lines

144. Jim Meadows, *23 Counties and Counting: Downstate Separation Referendum Wins Favor in November Election*, ILL. NEWSROOM (Nov. 12, 2020), https://illinoisnewsroom.org/23-counties-and-counting-downstate-separation-referendum-wins-favor-in-november-election/.

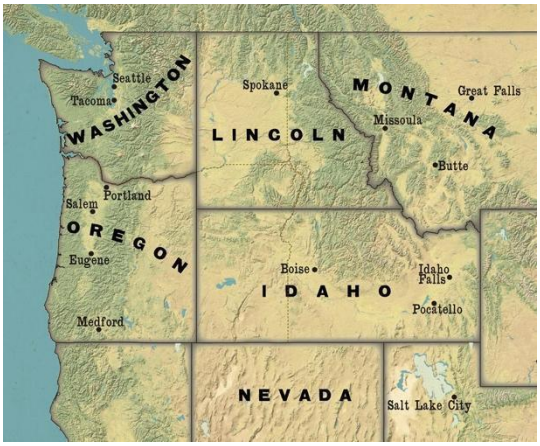
145. The Associated Press, *Split New York into 2 States? Upstate NY Lawmaker Wants Study for Idea*, SYRACUSE.COM (Feb. 25, 2019), https://www.syracuse.com/news/2019/02/split-new-york-into-2-states-upstate-ny-lawmaker-wants-study-for-idea.html.

146. Merle W. Wells, *Territorial Government in the Inland Empire: The Movement to Create Columbia Territory, 1864-69*, 44 PAC. NW. Q. 80, 85–86 (1953).

147. *Id*. at 86.

stayed the same and states were born, but the geographic difficulties encompassing this area continued into statehood. Efforts continued to redraw territory and state lines. In 1888 Congress passed an act to cut off Idaho's panhandle and attach it to Washington; this act was vetoed by President Cleveland.[148] By 1907 a new proposal to create the state of Lincoln was made that included the panhandle of Idaho, northeastern Oregon, and eastern Washington.[149] This proposal would have required the consent of each state legislature and Congress, which it did not receive.

Figure 1: Image of proposed Lincoln state[150]



The same grievances and problems surrounding state lines in Oregon, Washington, and Idaho are alive today, as are movements to adjust these lines to better represent the people living in these areas. The most ambitious statehood movement is to establish "Liberty" state. Beginning in 2015, a group of Washington state legislators began introducing a bill that called for a task force to study the impact of creating a new state, east of the Cascade Mountain range.[151] These bills were not given a committee hearing or floor vote in Washington's state legislature.[152] Lawmakers tried a different track by petitioning federal lawmakers to create Liberty state in 2017, and they continued their petitions in 2019 and 2020.[153] In addition, they resubmitted their bills in 2019 and 2020, but instead of a task force, they sought to "establish the

148. *Spokane People Demand Brand New Western State*, WASH. TIMES, Apr. 22, 1907, at 3.

149. *Id*.

150. *Id*.

151. H.R. 1818, 64th Legis., 2015 Regular Sess. (Wash. 2015). Washington's H.R. 1818 bill only split Washington state. The subsequent bill, H.R. 1832 split Washington and Oregon along the Cascade Mountain range to create a new state., 64th Legislature, 2015 Regular Sess. (Wash. 2015).

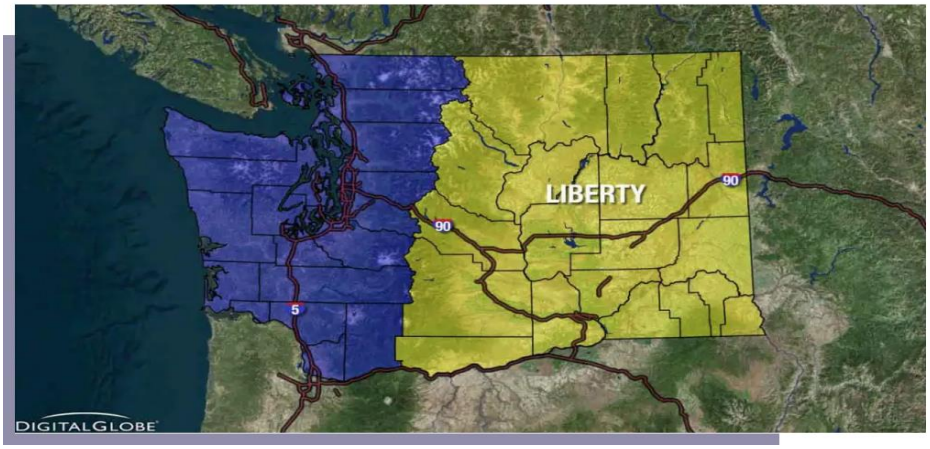
152. *Washington State Legislature Bill Information for HB 1832*, WASH. STATE LEGIS. https://app.leg.wa.gov/billsummary?BillNumber=1832&Initiative=false&Year=2015#documentSection (last visited Apr. 30, 2022).

153. H.J.M. 4000, 65th Legislature, 2017 Regular Sess. (Wash. 2017); H.J.M. 4003, 66th Legislature, 2019 Regular Session (Wash. 2019). The 2020 Bill was reintroduced by resolution, and it retained the status of the 2019 bill. *H.B. 1509 – 2019-20*, WASH. STATE. LEGIS., https://app.leg.wa.gov/billsummary?BillNumber=1509&Year=2019 (last visited Apr. 30, 2022).

new state of Liberty".[154] These bills and resolutions include the following text to support their request, "Since statehood, the lifestyles, culture, and economies of eastern and western Washington have been very distinct and dramatically different, while the urbanization and rapid growth in the western portions of the state has progressively heightened this divergence of cultural and economic values between the western and eastern portions of the state."[155]

The current Liberty state proposal would encompass a conservative part of Washington and would certainly lean Republican. Although opponents do not outright state this as their reason for denying either a vote on the Washington bill or as support for a referendum, it must be a consideration. In addition, the opposition stated that Liberty state would be unable to support itself, as it currently receives more in services than it pays in taxes.[156] Liberty advocates disagree with this assessment and argue that the new state would rely on an economy based on agriculture, manufacturing, and education,[157] with a population of approximately 1.5 million people.[158] According to Liberty state's website, this is a popular idea in Eastern Washington, where an informal Facebook poll conducted by KAPP-KVEW news (serving the Tri-Cities Washington area) found that 71% of the 12,000 participants favored creating Liberty state.[159]

Figure 2: Image of proposed Liberty state[160]



154. H.B. 1509, 66th Legis., 2019 Regular Sess. (Wash. 2019); H.B. 1509, 66th Legis., 2019 Regular Session (Wash. 2020)

155. H.J.M. 4000, 65th Legis., 2017 Regular Sess. (Wash. 2017); H.J.M. 4003, 66th Legis., 2019 Regular Sess. (Wash. 2019).

156. *Lawmakers Submit Bill to Split Washington in Half, Create 51st State of Liberty*, KOMO NEWS (Jan. 25, 2019), https://komonews.com/news/local/lawmakers-submit-bill-to-split-wash-in-half-create-51st-state-of-liberty.

157. Pia Hallenberg, *A 51st State, Called Liberty, Would Have Political Clout and an Ag-Based Economy*, SPOKESMAN-REV. (Feb. 12, 2017), https://www.spokesman.com/stories/2017/feb/12/a-51st-state-called-liberty-would-have-political-c/.

158. Brandon Hansen, *Liberty Movement Continues to Speak Throughout Eastern Washington*, INDEPENDENT (June 22, 2018), https://chewelahindependent.com/liberty-movement-continues-to-speak-throughout-eastern-washington/.

159. *About Liberty State*, LIBERTY STATE, https://libertystate.org/about (last visited May. 22, 2022).

160. *Latest News*, LIBERTY STATE, https://libertystate.org/news/greateridaho (last visited May 22, 2022)

The Liberty state movement is one of the most organized and advanced statehood movements. On its face, it may seem like something that extreme partisans are proposing to create a more conservative state; however, there is more to it than just political wrangling. There is a serious difference in values, lifestyles, and economies within this state, with one side being almost completely silenced by the more populous, urban based constituency.[161] This is an example of democratic breakdown, where minority populations see themselves as unrepresented in their local state politics. Lower taxes and less regulation may really work for the proposed state of Liberty in a way that would be detrimental to Western Washington industry. Why not create a task force to report on the feasibility of Liberty state? Perhaps Liberty state is the vehicle that opens a larger conversation for Washington, D.C. or Puerto Rican statehood.

Moving Idaho and Oregon's borders was part of the original state of Lincoln project and has manifested into the current Greater Idaho project that encompasses the Move Oregon's Border initiative.[162] The initiative proposes removing three partial counties and nineteen southern and eastern Oregon counties from Oregon state and placing them in Idaho state.[163] This includes 76% of Oregon's land area but only 21% of the population, or 873,000 people.[164] Although this increases Idaho's population, it does not alter either state's Senate representation. Greater Idaho's website explains why state lines matter: "If the United States were governed as a single state, we wouldn't have the opportunity for state governance to vary according to the culture of a local area. The purpose of having state lines is to allow this variance. The Oregon/Idaho border was established 161 years ago and is now outdated."[165]

As in Washington, as of March 2022, Democrats have a super majority in the Oregon legislature, and the governor is a Democrat. Eastern Oregonians argue that they are economically and politically more like Idaho and, importantly, redrawing these lines changes little nationally but makes a big difference locally.[166] *Move Oregon's Border's* strategy is to first show through county referendums that people living in the effected counties want to become part of Idaho.[167] The movement is in its early stages and may never gain real traction in the conservative areas of Oregon where it hopes to show citizens' desire to join conservative Idaho, but the reasons for the movement show why state governments are vital to American democracy. The Oregon and Washington state lines have been controversial since their territory days. It is certainly a place where portions of the population's economy, lifestyle, and geography do not align with their state capitals nor most of the population's priorities.

161. *See generally About Liberty State*, *supra* note 159.

162. *Spokane People Demand Brand New Western State*, *supra* note 148, at 3; *An Introduction to Move Oregon's Borde*r, GREATER IDAHO, https://www.greateridaho.org/introduction-to-move-oregons-border/ (last visited May 22, 2022).

163. *See Backgrounder: Intro to Greater Idaho*, GREATER IDAHO, https://www.greateridaho.org/backgrounder-intro-to-greater-idaho/ (last visited May. 22, 2022).

164. *Id.*

165. *Id*.

166. *See generally Southern and Eastern Oregon, and Northernmost California Can Become Part of Idaho*, GREATER IDAHO, https://www.greateridaho.org/wp-content/uploads/2021/06/Greater-Idaho-Proposal-r22.pdf (last visited Apr. 30, 2022).

167. *Our Strategy*, GREATER IDAHO, https://www.greateridaho.org/our-strategy/ (last visited Apr. 30, 2022).

2. Breaking Up Large States

In addition to the Pacific Norwest, legislatures in large, populous states, such as California and Texas are unable to fully represent the array of diverse people and interests within their states. On a national level, population migration patterns have resulted in one-third of the American population living in the four most populous states; meaning that one-third of the American population is represented by eight senators in the Senate, while the thirty-four smallest states have a supermajority of sixty-eight senators.[168] The Senate's power to block legislation plays a key role in presidential appointments, most importantly judicial appointments. America's population has increased by over 150 million people since 1960 (when the last states joined the Union), but no new states have been added to represent changes in demographics and larger populations.[169] Further, since 1980, approximately forty percent of the population growth has been concentrated in California, Texas, and Florida.[170]

The problem with large states that have large populations harkens back to why state governments are important to American democracy: to tax, legislate, and create budgets for people living within a particular area. These acts on a local level produce concrete results for the people residing within the state. In states like California, the state legislature is expected to equally represent the diverse (and often conflicting) interests of farmers in the Central Valley with technology giants in the Bay Area. In addition, education and housing policy, major concerns in California, are largely addressed in a legislature that cannot meet the needs of such diverse communities.

One solution, called Cal 3, is to break up California into three separate states.[171] Proponents of Cal 3 sought to include it as a ballot initiative in 2018.[172] The California constitution extends legislative powers to the electorate through the initiative process, allowing for ballot initiatives to become laws, bypassing the legislative process.[173] Therefore, if the legislature can pass a statute, then the electorate may also approve a statute through the initiative process.[174] In 2018, the required signatures were gathered to place the Cal 3 proposal on the ballot as California Proposition 9, which stated:

> California is the nation's third largest state by geography, over two times larger than the average of the fifty states, with enormous and diverse economies, including agriculture, energy, technology, and entertainment. As a consequence of these and other socio-economic factors, political representation of California's diverse population and economies has rendered the state nearly ungovernable. Additionally, vast parts of California are poorly served by a

168. Noah Millman, *America Needs to Break Up Its Biggest States*, N.Y. TIMES (July 13, 2021, 3:00 PM), https://www.nytimes.com/2021/07/07/opinion/us-states.html?searchResultPosition=1.

169. *Id.*

170. *Id*.

171. *Analysis of A.G. File No. 17-0018*, LEGIS. ANALYST'S OFF. (Oct. 9, 2017), https://lao.ca.gov/BallotAnalysis/Initiative/2017-018.

172. *Id*.

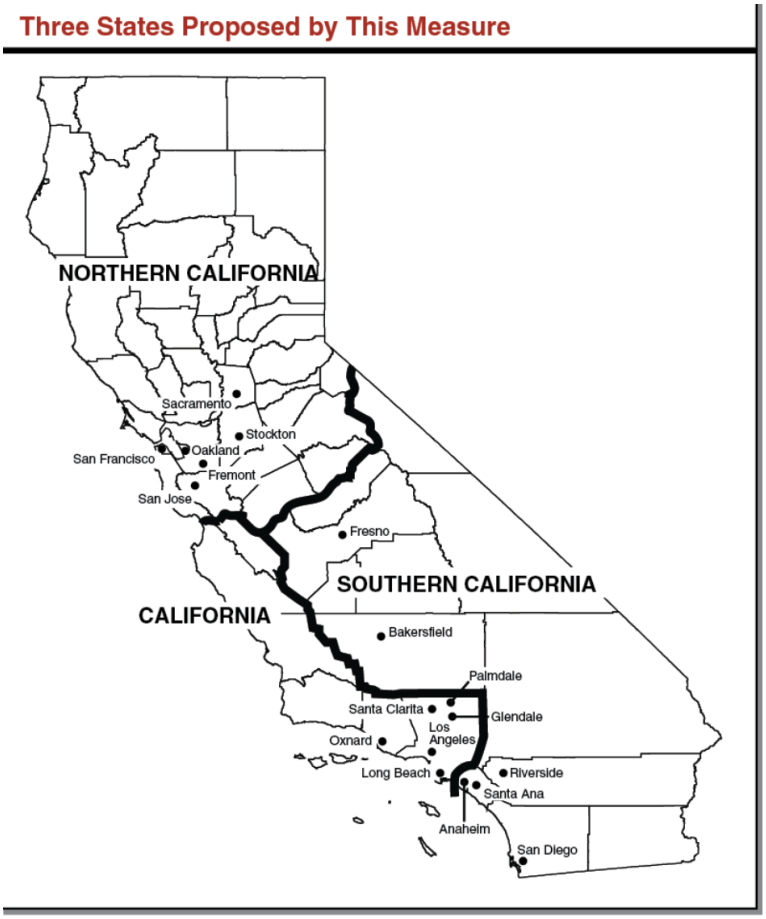
173. *Id*.

174. *Id*.

> representative government dominated by a large number of elected representatives from a small part of our state, both geographically and economically[175] and sought to "[e]stablish new boundaries for three new states within the boundaries of the State of California."[176]

California's current population is approximately 39.5 million; under Cal 3 each new state would receive approximately 13 million people.[177] Impact on federal elections is interesting. Based off county voting trends from the 2016 election, the new Northern California and California states would lean heavily Democratic; whereas the new Southern California state, which includes the agricultural heavy Central Valley is seen as competitive between Democrats and Republicans.[178]

Figure 3: Cal 3 Proposed States[179]



175. Timothy Draper, *Initiative 17-0018*, OFF. OF THE ATT'Y GEN. (Sept. 7, 2017), https://www.oag.ca.gov/system/files/initiatives/pdfs/17-0018%20%28Three%20Californias%29_1.pdf.

176. *Id*.

177. LEGIS. ANALYST'S OFF., *supra* note 171.

178. *Id.*

179. *Id*.

Not surprisingly, this ballot initiative met legal challenges examining if this type of statutory based ballot initiative is a constitutional amendment or revision.[180] Electors may amend the state constitution by initiative but revision may only be accomplished by convening a constitutional convention or through a proposal by the legislature.[181] The California State Supreme Court has consistently held that revisions are substantial changes to the "quantitative and qualitative effects" of the constitutional scheme.[182] Drastically changing the state's geographic and population sizes poses substantial quantitative and qualitive effects to the state constitution's reach. The Cal 3 proposal was challenged in court as a revision and an illegal ballot initiative.[183] The California Supreme Court agreed that the initiative required further review prior to being placed on the ballot and ordered the Secretary of State to remove it from the November 2018 ballot.[184] The Cal 3 advocates did not challenge the Secretary of State's decision or respond to the court to provide further briefing.[185] The proposal seems to have faded as quickly as it appeared.

Splitting up California into two or more states continues to be a popular grass roots initiative, primarily advocated by conservatives in rural parts of the state. The New State of California movement has held seven constitutional conventions, beginning in January 2018 and the most recent in October 2020, where they are actively drafting a state constitution.[186] Constitutional convention members are comprised of the Council of Counties Committee, which includes representatives from counties who would like to be part of New California.[187] From the movement's materials, it is unclear how these counties selected county representatives to serve on the council. Further, there is no information on how signatures or votes were collected to determine each county's interest level in being part of New California. However, each county that has shown interest does have a separate website with information for local citizens to show their support and become involved in the movement. [188] The ballot initiative route seems to be closed to splitting the state; therefore, the New California movement will need the approval of California's legislature and Congress to create a new state.[189]

Like the Washington and Oregon movements, New California seeks to create a state that includes only rural parts of California, excluding densely populated Santa Clara, Sacramento, Los Angeles, and Alameda counties. The movement wants to "attain real representation by our New California State elected public servants."[190] California's state and federal representation is overwhelming from the Democratic

180. *Id*.

181. CAL. CONST., art. XVIII, §§ 2-3.

182. Raven v. Deukmejian, 801 P.2d 1077, 1085 (Cal. 1990).

183. Planning & Conservation League v. Padilla, No. S249859, 2018 Cal. LEXIS 6817 at *1-*2 (Cal. Sept. 12, 2018).

184. *Id*.

185. *Id.*

186. *7th Constitutional Convention*, NEW CAL. STATE (Oct. 15, 2019), https://www.newcaliforniastate.com/_files/ugd/b63455_958de6d875aa4443b0f9aef03ba5a0e8.pdf.

187. *See Why New California*, STATE OF NEW CAL., https://www.newcaliforniastate.com/a-new-state (last visited Apr. 30, 2022).

188. *See generally New California State: 56 Counties*, STATE OF NEW CAL., https://www.newcaliforniastate.com/new-california (last visited May 22, 2023).

189. U.S. CONST. art. IV § 3.

190. *Id.*

party. Although a new border has not been proposed, the New California State movement claims that fifty-six out of California's fifty-eight counties are involved in the movement.[191] New California state would include approximately 15 million people with an estimated twenty-five to twenty-seven Congressional House seats being ceded to the new state, leaving California with 25 million people and approximately twenty-six to twenty-eight House seats.[192] New California is a largely conservative,[193] Republican leaning, movement; statehood is political and partisan movements either from the right or left provide an opportunity to utilize the twin state solution to maintain a Senate balance by admitting a Republican and Democratic leaning state at the same time.

The California and Oregon/Washington movements are similar in that they preface their reasons for separation in part on partisan political differences. The New California Movement's website is extremely partisan and pro Trump; Move Oregon's Border uses voting statistics to show that Eastern Oregon's large support for Donald Trump in the 2016 election makes them overwhelming different from the Western, liberal part of the state.[194] This paper's premise is that statehood is a political, partisan process but up to this point the examples and points were geared towards how territories and states on the national level are admitted into the Union. Modern statehood movements are also steeped in partisan politics but on a local level. We are living in an age of identity politics and to say that a person is pro Trump means more than voting for a bundle of conservative policies, it translates to lifestyle and values.

In 2022 America, partisan politics is often a proxy for lifestyle differences encompassing economic, geographic, and moral issues. Therefore, this paper does not support splitting states along purely political lines as people and politics change and the idea is not to change state lines every fifty years but to challenge us to think about politics and statehood in different ways. Even though the New California movement is led by a conservative radio host with questionable messaging, it does symbolize a persistent problem in California: the state is too big, and the legislature is unable to represent the concrete interests of the myriad of people within its boundaries. This is a problem that Republicans in the state recognize; Democrats, who dominate state politics, should not miss the opportunity to be part of the discussion and consider breaking up the state. The Cal 3 proposal created two Democratic leaning states and a competitive state, allowing for less partisanship and better representation for people living within these new states.[195] On a national level,

191. *New California State: 56 Counties*, *supra* note 188.

192. *Making of a State in the United States of America New California*, https://img1.wsimg.com/blobby/go/720c6a07-3594-44b7-8098-94fc11bae240/downloads/1bs7g2fao_444861.pdf (last visited May 22, 2022).

193. *See Meet Paul Preston, Founder*, NEW CAL. STATE, https://ncs51.com/journey/paul-preston/ (last visited May 22, 2022). The New California State movement was founded by Paul Preston who is a conservative radio host and appears to promulgate right-wing media agendas on his website and radio show. *About Paul Preston's Agenda 21 Radio*, RADIO 21, https://www.agenda21radio.news/about-paul-prestons-agenda-21-radio/ (last visited May 22, 2022). Mr. Preston makes outrageous claims such as that the United Nations Council on Local Environmental Initiatives "works with local communities to impose United Nations law on your and is designed to strip you of your property and ultimately your freedom." *Id.* This author does not support or condone such misleading and false messaging.

194. *See Learn More*, GREATER IDAHO, https://www.greateridaho.org/about-greater-idaho/ (last visited May 11, 2022).

195. *See* discussion at *supra* note 175.

this increases a large population's representation in the Senate and may provide some grease to the gridlock currently gripping national politics.

C. Territories Outside of the Continental United States ("OCONUS")

Expanding the statehood discussion should include United States' territories along with adjusting current state lines. Western expansion in the United States began by creating territories that eventually became states. Alaska and Hawaii are the only U.S. territories Outside of the Continental United States ("OCONUS") to become states in 1958–59 respectively. The United States currently controls five inhabited territories throughout the world. These territories include Puerto Rico, U.S. Virgin Islands, Guam, Northern Mariana Islands, and America Samoa. Puerto Rico is the most well-known U.S. territory and ripest for statehood.[196]

Statehood is an issue that dominates Puerto Rican politics and their political parties with the pro-commonwealth Poplar Democratic Party ("PDP") and pro-statehood New Progressive Party ("NPP").[197] Puerto Rico has held several plebiscites or referendums on the question of statehood over the past forty years.[198] Voters are almost equally divided on the question to remain a commonwealth or actively work towards statehood. The most recent plebiscite held on November 3, 2020, asked Puerto Ricans: "Should Puerto Rico be immediately admitted into the Union as a state." Fifty-two point five two percent of voters voted "yes" and forty-seven point four eight percent voted "no."[199] The referendum created a seven-member commission to petition Congress for Puerto Rican statehood. This resulted in H.R. 1522, "Puerto Rico Statehood Admission Act," and S. 780, each introduced in Congress in 2021.[200] The House Committee on Natural Resources held a hearing on the bill, but it has not received a floor vote; the Senate bill is awaiting a committee hearing.[201] Politically, Puerto Rico leans Democratic; however, it is a territory that in many respects is on the cusp of statehood and may well achieve its goals if and when a second state option comes along.

D. The Ongoing Saga for Statehood in the District of Columbia

And finally, we come to the most well-known non state in America, Washington, D.C., which is America's capital city with a population of approximately 670,000 people who pay federal taxes but do not have Congressional

196. Treaty of Peace, U.S.–Spain, art. II, Dec. 10, 1898, 30 Stat. 1754; An Act to Provide for the Organization of a Constitutional Government by the People of Puerto Rico 64 Stat. 319 (1950) (codified at 48 U.S.C.§§731b–731c (2006). In 1898, Puerto Rico became a U.S. colony following the Spanish-American War. Over the next 50 years, it became more autonomous. Eventually in 1952, Puerto became a Commonwealth, enabling the people to vote for their own governor.

197. Lani E. Media, Note, *An Unsatisfactory Case of Self-Determination: Resolving Puerto Rico's Political Status*, 33 FORDHAM INT'L L.J. 1048, 1075 (2010).

198. *Id*. at 1077–80.

199. *Puerto Rico Statehood Referendum (2020)*, BALLOTPEDIA, https://ballotpedia.org/Puerto_Rico_Statehood_Referendum (last visited Apr. 30, 2022).

200. Puerto Rico Statehood Admission Act, H.R. 1522, 117th Cong. (2021); Puerto Rico Statehood Admission Act, S. 780, 117th Cong. (2021). H.R. 1522 has eighty co-sponsors and S. 780 has fifty-three.

201. *Id*.

representation in the House or Senate.[202] States determine Congressional representation and allow for local self-governance; these basic democratic principles are denied to citizens living within Washington, D.C. due primarily to partisan politics.

Under the Constitution's Article I, Section 8, nestled between the State Militia and Necessary and Proper clauses, Congress is given the power to create and legislate the "District" (not to exceed ten miles square) that will become "the Seat of the Government of the United States."[203] The Founders are curiously specific and vague about the District. The size is to be no more than ten square miles, and the land should come from other states. But is this place to be a populated city, military type installation, or only encompass government buildings? The Constitution does not specify, but history decided that the District would become a city. The Constitution also does not specify where the District is to be located, that was left to politics. The Compromise of 1790 was made at a dinner party where Alexander Hamilton and Thomas Jefferson agreed that the national capital would be placed on the Virginia-Maryland border in exchange for Southern support for the Residence and Funding (Assumption) Acts, which would allow the federal treasury to assume state war debts.[204] Soon after, in July 1790, the Potomac site was selected, and in 1800, Congress convened for the first time in the District of Columbia.[205]

The practical effects of this new city were not felt by citizens, who were previous residents of Virginia and Maryland, until Congress passed the Organic Act of 1801 that placed the District under Congress' jurisdiction and stripped residents of their Congressional representation.[206] Fast forward to The Home Rule Act of 1973 where Congress finally tired of legislating over local District matters, allowed District residents to elect their own local government (with restraints).[207] Poignantly, Congress still controls the District's budget and passes a yearly appropriations bill as if it were a federal agency that often takes up to eighteen months to execute.[208] Congress has placed restrictions on the use of appropriated dollars such as banning

202. *Quick Facts, District of Columbia*, U.S. CENSUS BUREAU (2021), https://www.census.gov/quickfacts/DC (last visited Apr. 30, 2022). Compare to Wyoming's population which is estimated to be 578,000 people as of 2019. *Quick Facts, Wyoming*, U.S. CENSUS BUREAU (2021), https://www.census.gov/quickfacts/WY.

203. U.S. Const. art. I, § 8, cl. 17 states in full:

> To 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, and to exercise like Authority over 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.

204. Jacob E. Cooke, *The Compromise of 1790*, WM. & MARY Q.: A MAG. OF EARLY AM. HIST. & CULTURE, 523, 524–45 (1970).

205. Johnny Barnes, *Towards Equal Footing: Responding to the Perceived Constitutional, Legal, and Practical Impediments to Statehood for the District of Columbia*, 13 D.C. L. REV. 1, 13 (2010).

206. The District of Columbia Organic Act of 1801, 2 Stat. 103 (1801).

207. District of Columbia Self-Government and Governmental Reorganization Act, Pub. L. No. 93-198, 87 Stat. 774 (1973) (codified as D.C. Code § 1-221 (1973)). The District's history and undemocratic organization is fascinating but beyond the scope of this Article. For further information on this topic, I recommend reading Barnes, *supra* note 210, which gives a full history and discussion of the many legal challenges and problems resulting from the Congressional control over local District governance.

208. Barnes, *supra* note 205, at 6.

needle exchange programs.[209] Congress' control over the District's budget has allowed it to interfere in local laws and policies such as gun control, AIDS prevention measures, marijuana, and domestic partnership benefits.[210]

The most recent efforts to grant the District statehood occurred in 2021 when the House passed H.R. 51, the Washington, D.C. Admission Act.[211] The bill was also introduced in the Senate,[212] and a hearing was held on June 22, 2021.[213] Clever legal scholars advocating for each side testified to the legality and practicality of shrinking the District and repealing the Twenty-Third Amendment, which provides the District electors to the Electoral College based upon the number of Senators and Representatives the District would have if it were a state.[214]

Advocates for H.R. 51 and S. 51 argue that these bills solve this problem by repealing the Twenty-Third Amendment and as this process takes time, repealing the amendment's implementing statute, 3 U.S.C. § 21.[215] With statehood realized, the Twenty-Third Amendment's purpose, to provide citizens residing in the District representation in the Presidential and Vice-Presidential election process, becomes moot. The solution presented by S. 51 § 223 is to repeal the Twenty-Third Amendment's implementing legislation, 3 U.SC. § 21, and substitute it with alternative language that fulfills the Twenty-Third Amendment's requirements but does not interfere with Presidential election results.[216] There are those that find the Twenty-Third Amendment an impassable hurdle to statehood that is not adequately addressed by S. 51, primarily that Section 223 of the bill does not adequately address the District's three electoral votes by ignoring the Electoral Count Act.[217] D.C. statehood legal arguments are intricate and many; the purpose of this paper is not to discuss them all, but to present the reader with reasonable arguments for and against statehood. The point is that there are clear barriers to D.C. statehood, but like all political issues, there are also creative, legal solutions that make statehood possible.

Why are the 700,000 people that live in the District in 2022 still deprived of self-governance and Congressional representation? It really does come down to politics. The answer for the District is political because the entire statehood process is political. Should the District become a state? It depends on who you ask. Many Republicans would say no; the District is a very liberal area and would immediately add two Democratic Senators to Congress. And they are right. What about also adding a Republican state—Liberty state perhaps? And yes, Washington, D.C. as we know it could go back to Maryland.[218] Get rid of the whole place, shrink the District

209. *See* District of Columbia Appropriations Act, S. 1446, 109th Cong. (2006).

210. Barnes, *supra* note 205, at 8.

211. Washington, D.C. Admission Act, H.R. 51, 117th Cong. (2021).

212. Washington, D.C. Admission Act, S. 51, 117th Cong. (2021).

213. *On the Constitutionality of Congressional Action Admitting a Portion of the District of Columbia as a State of the Union: Hearing on S. 51 Before the S. Comm. on Homeland Sec. & Gov't Affair*s, 117th Cong. (2021).

214. U.S. CONST. amend. XXIII § 1.

215. *On the Constitutionality of Congressional Action Admitting a Portion of the District of Columbia as a State of the Union: Hearing on S. 51 Before the S. Comm. on Homeland Sec. & Gov't Affair*s, 117th Cong., at 5–6 (2021) (written statement of Professor Richard Primus).

216. *Id*. at 7. Professor Primus offers three ways to amend 3 U.S.C. § 21. *Id.*

217. *Id*. (written statement of Professor Derek T. Muller).

218. *Id*. at 38–39. *See also* District of Columbia-Maryland Reunion Act, H.R. 381, 108TH CONG. § 3 (2003) (explaining that retrocession of the District back to Maryland was proposed in the House and would give District residents Congressional and local representation and could be done without Maryland's consent but

to the Capitol complex and preserve the current Senate balance. Does that really solve the problem? As a result, we have people who live in a city that has been under effective local rule since 1973. Perhaps this solves the representation issue, but this would also require Maryland's consent.

Statehood in the twenty-first century is not dead but is taking on different forms at different points in the political process. Once a national, constant, political issue, it is now regional and confined to grassroots efforts. The reasons for creating new states, adjusting state lines, and looking to OCONUS territories as potential states are the same as they were 100 years ago: to promote self-governance and to promote democratic representation.

CONCLUSION

States are the backbone of the American democratic process. The residents within state borders determine the size and make up of Congress. The Constitution provides few requirements and little guidance on state admissions. The Supreme Court concluded early in the nation's history that the state admission and recognition process is a political question to be determined by Congress. There are few legal requirements to statehood; states become states due to politics.

Throughout America's history, state admissions were predicated on the political situation; the early nineteenth century was dominated by slavery: would the territory be a free or slave state? Entering the twentieth century, Western territories were admitted with the political goal of Senate dominance and balance. Senate politics continue to dominate any statehood discussion. As we enter the twenty-first century, massive population shifts, and identity politics degrade state level representation. Statehood movements are no longer part of the national conversation but are grassroots movements that represent enmity between diverse parts of a state and the state's legislative body. Every so often, these grassroots movements percolate up to an opinion piece in a major newspaper but are rarely discussed by Congressional lawmakers.

This Article is meant to reignite and open new facets of this hugely important and timely conversation to create state and national level legislatures that better represent constituents and contribute to a vibrant more robust democracy. State lines should encompass people within a similar geography that result in the same types of lifestyles and economies. Statehood is a political process that cannot be accomplished in a vacuum, politics is the art of the possible and in America all politics is local, it is time to revisit statehood as a democratic vehicle and recognize the vast national and local power states have on citizens.

would alter Maryland's elections landscape and local government). The House held a hearing on this bill, and the bill was never taken up in the Senate.