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Democracy's Forgotten Possessions: U.S. Territories' Right to Statehood Through Constitutional Liquidation

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NOTES

DEMOCRACY'S FORGOTTEN POSSESSIONS: U.S. TERRITORIES' RIGHT TO STATEHOOD THROUGH CONSTITUTIONAL LIQUIDATION

*Joshua Stephen Ebiner**

INTRODUCTION

The United States has five permanently inhabited, unincorporated territories—American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands (the "Territories")—which account for approximately four million U.S. citizens and

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nationals.[1] The concept of an unincorporated territory is the Supreme Court's novel creation, advanced through a series of cases decided between 1901 and 1922, collectively coined the *Insular Cases*.[2] These decisions created the "unprecedented distinction between 'incorporated' and 'unincorporated' territories,"[3] where the former were "surely destined for statehood" and the latter were given "no such promise of eventual political equality."[4] Prior to the *Insular Cases*, acquired territory was "to be cut into states . . . [and] admitted into the Union on the basis of equality with the original states in 'all respects whatsoever.'"[5]

Scholars have spent much ink debating the merits of the *Insular Cases*. Proponents, offering qualified defenses, suggest that "group-differentiated rights are justifiable in the context of territorial peoples,"[6] that the decisions "were the natural and justifiable consequence of a political mandate issued by the legislature and the public,"[7] and

1 American Samoans are considered U.S. nationals, and federal courts have repeatedly held that "the Citizenship Clause does not extend birthright citizenship to those born in American Samoa." Tuaua v. United States, 788 F.3d 300, 302 (D.C. Cir. 2015); Fitisemanu v. United States, 1 F.4th 862, 864–65 (10th Cir. 2021) (reversing lower court's holding that persons born in American Samoa are U.S. citizens); *see also Developments in the Law—the U.S. Territories*, 130 HARV. L. REV. 1616, 1622 (2017). While American Samoans are "recognized as members of the American polity" and enjoy some of the rights and privileges of citizenship, they are denied the right to vote, cannot run for federal or state offices outside of American Samoa, cannot "serve on a jury and bear arms," and are "excluded from certain federal and state jobs." Rose Cuison Villazor, *American Nationals and Interstitial Citizenship*, 85 FORDHAM L. REV. 1673, 1676 (2017); *see also Fitisemanu*, 1 F.4th at 865.

2 The Insular Cases consist of twenty-three cases, the most prominent of which are: *De Lima v. Bidwell*, 182 U.S. 1 (1901); *Goetze v. United States*, 182 U.S. 221 (1901); *Dooley v. United States*, 182 U.S. 222 (1901); *Armstrong v. United States*, 182 U.S. 243 (1901); *Downes v. Bidwell*, 182 U.S. 244 (1901); and *Huus v. N.Y. & P.R.S.S. Co.*, 182 U.S. 392 (1901). For a discussion of holdings, see Juan R. Torruella, *Ruling America's Colonies: The* Insular Cases, 32 YALE L. & POL'Y REV. 57, 58 n.3 (2013); Adriel I. Cepeda Derieux, Note, *A Most Insular Minority: Reconsidering Judicial Deference to Unequal Treatment in Light of Puerto Rico's Political Process Failure*, 110 COLUM. L. REV. 797, 799 n.7 (2010); CHRISTINA DUFFY BURNETT, *A Note on the* Insular Cases, *in* FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION, AND THE CONSTITUTION 389, 389 (Christina Duffy Burnett & Burke Marshall eds., 2001).

3 Christina Duffy Burnett, *A Convenient Constitution? Extraterritoriality After* Boumediene, 109 COLUM. L. REV. 973, 982–83 (2009).

4 Adriel I. Cepeda Derieux & Neil C. Weare, *After* Aurelius*: What Future for the* Insular Cases*?*, 130 YALE L.J.F. 284, 287 (2020) (quoting Boumediene v. Bush, 553 U.S. 723, 757 (2008)).

5 C. Perry Patterson, *The Relation of the Federal Government to the Territories and the States in Landholding*, 28 TEX. L. REV. 43, 72 (1949).

6 Russell Rennie, Note, *A Qualified Defense of the* Insular Cases, 92 N.Y.U. L. REV. 1683, 1708, 1706–17 (2017).

7 Krishanti Vignarajah, *The Political Roots of Judicial Legitimacy: Explaining the Enduring Validity of the* Insular Cases, 77 U. CHI. L. REV. 781, 844 (2010).

that the decisions advance a "constitutional theory of secession"[8] that ultimately enabled American imperialism's retreat through territorial deannexation.[9]

Critics and skeptics far outnumber the proponents. Numerous judges and justices have routinely questioned the validity of the claim that some constitutional provisions do not apply to the territories.[10] Justice Gorsuch recently asserted that the *Insular Cases* "have no foundation in the Constitution and rest instead on racial stereotypes. They deserve no place in our law."[11] Scholars and commentators charge that the decisions contravene "the Constitution, constitutional precedent, and long-established historical practice,"[12] they undermine the "right to self-determination of all peoples,"[13] that the facts used to rationalize the decisions are no longer operative,[14] and that they should be overruled like similarly abhorrent cases like *Korematsu v. United States*[15] because they perpetuate inequalities premised on racialized justifications.[16] Others advocate for including the *Insular Cases* in law school

8 Riley Edward Kane, Note, *Straining Territorial Incorporation: Unintended Consequences from Judicially Extending Constitutional Citizenship*, 80 OHIO ST. L.J. 1229, 1237 (2019) (quoting Christina Duffy Burnett, Untied *States: American Expansion and Territorial Deannexation*, 72 U. CHI. L. REV. 797, 802 (2005)).

9 Burnett, *supra* note 8, at 877.

10 Reid v. Covert, 354 U.S. 1, 14 (1957) (stating that neither the *Insular Cases* "nor their reasoning should be given any further expansion"); Harris v. Rosario, 446 U.S. 651, 653 (1980) (Marshall, J., dissenting); *see* Torres v. Puerto Rico, 442 U.S. 465, 475–76 (1979) (Brennan, J., concurring in the judgment) (opining that the *Insular Cases* are "clearly not authority for questioning the application of the Fourth Amendment—or any other provision of the Bill of Rights—to the Commonwealth of Puerto Rico"); Fin. Oversight & Mgmt. Bd. v. Aurelius Inv., LLC, 140 S. Ct. 1649, 1665 (2020) (declining to extend the *Insular Cases* to address an Appointments Clause dispute).

11 United States v. Vaello Madero, 142 S. Ct. 1539, 1552, 1557 (2022) (Gorsuch, J., concurring) (concurring because neither party asked the Court to overrule the *Insular Cases*).

12 Torruella, *supra* note 2, at 58; *see also* Alan Tauber, *The Empire Forgotten: The Application of the Bill of Rights to U.S. Territories*, 57 CASE W. RSRV. L. REV. 147, 178 (2006) (same, but proposing that Congress legislatively end the doctrine of Territorial Incorporation).

13 Carlos Iván Gorrín Peralta, *Past, Present, and Future of U.S. Territories: Expansion, Colonialism, and Self-Determination*, 46 STETSON L. REV. 233, 253, 253–55 (2017); *see also* Andrés González Berdecía, *Puerto Rico Before the Supreme Court of the United States: Constitutional Colonialism in Action*, 7 COLUM. J. RACE & L. 80, 143–44 (2016).

14 *See* Nathan Muchnick, Note, *The Insular Citizens: America's Lost Electorate v. Stare Decisis*, 38 CARDOZO L. REV. 797, 832 (2016).

15 323 U.S. 214, 223–24 (1944) (upholding the forcible relocation of U.S. citizens to concentration camps solely for their Japanese ancestry during World War II). The Supreme Court formally overruled *Korematsu* in *Trump v. Hawaii*, 138 S. Ct. 2392 (2018).

16 Derieux & Weare, *supra* note 4, at 291, 297–98, 306.

curriculum to reveal the "particularities of American expansionism"[17] and their enduring harms from the "perspective of those most affected by them."[18] Although the Supreme Court has repeatedly cabined the *Insular Cases*, and despite exemplifying characteristics of the anticanon,[19] the doctrine remains good law with its own resilient gravitational pull.[20]

The *Insular Cases*' legacy permeates modern American law, creating disparities between the citizens of the fifty states and the citizens of the Territories that are increasingly difficult to rationalize. Because of the doctrine, "federal constitutional rights do not automatically apply" to the Territories.[21] Thus, citizens residing in the Territories are denied fundamental rights and privileges of citizenship: they cannot vote in presidential elections,[22] they lack a voting representative in Congress,[23] they can be denied (or provided less) federal aid so long as Congress provides a rational basis,[24] and both Congress[25] and the

17 Sanford Levinson, *Why the Canon Should be Expanded to Include* the Insular Cases *and the Saga of American Expansionism*, 17 CONST. COMMENT. 241, 250 (2000).

18 Susan K. Serrano, *Elevating the Perspectives of U.S. Territorial Peoples: Why the* Insular Cases *Should Be Taught in Law School*, 21 J. GENDER, RACE & JUST. 395, 414, 458 (2018).

19 Sanford Levinson, *Installing the* Insular Cases *into the Canon of Constitutional Law*, *in* FOREIGN IN A DOMESTIC SENSE, *supra* note 2, at 121, 123. The anticanon "is the set of legal materials so wrongly decided that their errors . . . we would not willingly let die." Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 386 (2011). The anticanon contains four cases: *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), *Plessy v. Ferguson*, 163 U.S. 537 (1896), *Korematsu v. United States*, 323 U.S. 214 (1944), and *Lochner v. New York*, 198 U.S. 45 (1905). *Id.* at 387. Blocher and Gulati contend that the first three cases were deeply "rooted in racism and a national self-conception that we would not tolerate today." Joseph Blocher & Mitu Gulati, *Puerto Rico and the Right of Accession*, 43 YALE J. INT'L L. 229, 245 (2018).

20 *See* Blocher & Gulati, *supra* note 19, at 245. The *Insular Cases*' longevity is attributed to the fact that "the Supreme Court has had relatively few opportunities to reconsider them." Brief for Amicus Curiae Equally American Legal Defense & Education Fund in Support of Neither Party at 8, Fin. Oversight & Mgmt. Bd. v. Aurelius Inv., LLC, 140 S. Ct. 1649 (2020) (Nos. 18-1334, 18-1475, 18-1496, 18-1514, 18-1521).

21 Guam v. Guerrero, 290 F.3d 1210, 1214 (9th Cir. 2002).

22 *See* Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 249 (2002); Igartua De La Rosa v. United States, 32 F.3d 8, 9 (1st Cir. 1994) ("Pursuant to Article II, . . . only citizens residing in *states* can vote for electors and thereby indirectly for the President.").

23 Ediberto Román, *The Alien-Citizen Paradox and Other Consequences of U.S. Colonialism*, 26 FLA. ST. U. L. REV. 1, 3 (1998).

24 *See* Serrano, *supra* note 18, at 411–12. The rational-basis test is the most deferential form of judicial scrutiny. Raphael Holoszyc-Pimentel, Note, *Reconciling Rational-Basis Review: When Does Rational Basis Bite?*, 90 N.Y.U. L. REV. 2070, 2071–72 (2015).

25 Burnett, *supra* note 8, at 877.

executive branch retain broad plenary powers over the Territories.[26] Finally, the Territories do not have an inherent right to govern themselves.[27]

This Note argues that the Territories must be granted statehood consistent with the equal footing doctrine.[28] This thesis does not challenge Congress's power to acquire or govern territory, or its constitutional authority to admit (and place reasonable conditions on the admission of) territory into the Union as states. These matters have long been settled through constitutional practice. Neither does this thesis suggest that acquired territory must be immediately annexed into the Union, since there are valid reasons to delay such a decision.[29] Instead, the claim is that permanently inhabited territories that have longstanding, constitutionally significant relationships with the United States must eventually be admitted as states.

The starting point is with the *Insular Cases* because these decisions allow the judicial and political branches to avoid discharging their respective constitutional obligations to American citizens. As this Note demonstrates, the *Insular Cases* represent a blatant manipulation of constitutional law and must be disqualified when considered in their proper context within the longstanding legislative practice of acquiring territory and admitting states. This practice will be organized under the framework of constitutional liquidation, which uses legislative practice as an interpretative modality for vague or ambiguous constitutional provisions.

This Note proceeds as follows. Part I briefly introduces the *Insular Cases* in their historical context and examines the doctrine's legal development. Part II uses Professor Baude's conception of constitutional liquidation to frame and analyze the historical practice of admission that preceded and followed the *Insular Cases*. This Section provides a comprehensive survey of state admission so as to clarify the

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26 Cleveland, *supra* note 22, at 240.

27 *See* Guam v. Guerrero, 290 F.3d 1210, 1214 (9th Cir. 2002).

28 *See* Pollard v. Hagan, 44 U.S. (3 How.) 212, 224 (1845) (noting that every new state is granted the right to "exercise all the powers of government, which belong to and may be exercised by the original states of the union").

29 *See, e.g.*, David P. Currie, *The Reconstruction Congress*, 75 U. CHI. L. REV. 383, 384–90 (2008) (discussing the Congressional debates concerning readmitting the Southern states that seceded from the Union during the Civil War); DANIEL IMMERWAHR, HOW TO HIDE AN EMPIRE: A HISTORY OF THE GREATER UNITED STATES 227–41 (2019) (noting that after World War II, the United States occupied land belonging to Japan, Germany, Austria, and Korea. While it could have annexed this land, the United States instead conditionally returned it to the defeated sovereigns. It also disannexed its largest colony, the Philippines, which had suffered significant damage during the war due to Japanese occupation.).

relevant history surrounding the decision to expand the Union. Such a survey is necessary because commentators and judges often overlook or misrepresent this practice. For example, in *Vaello Madero*, Justice Kavanaugh tersely dismissed the complex history of the Territories, merely stating that "various historical and policy reasons" justify differential treatment between the states and the Territories under the widely criticized *Insular Cases* doctrine.[30] Part III advances a legislative proposal granting statehood to the Territories. Specifically, this Note proposes that Congress enact a bill analogous to the War Powers Resolution, affording statehood to the Territories unless Congress affirmatively votes to delay admission. Finally, this Note briefly concludes.

I. PRIMER ON THE *INSULAR CASES*

Given the robust literature evaluating the *Insular Cases*, this orienting discussion is fairly brief.[31]

The *Insular Cases* were "preceded by a decade of political controversy over imperialism and scholarly controversy over its constitutional implications."[32] In 1893, American businessmen, with American military support, illegally overthrew the Hawaiian Kingdom and imprisoned Queen Lili'uokalani.[33] President Cleveland staunchly resisted efforts to annex Hawaii after such a "substantial wrong," and called for restoring the monarchy.[34] Congress stalled until 1898, when the United States initiated the Spanish-American War, ostensibly to liberate Cuba from Spanish colonialism.[35] Emerging victorious, the United States acquired sovereignty over the Spanish colonies of Puerto

30 United States v. Vaello Madero, 142 S. Ct. 1539, 1541 (2022); *see also* Petition for Writ of Certiorari at 26, *Guam v. Davis*, 140 S. Ct. 2739 (2020) (No. 19-827) (asserting that the Ninth Circuit's invalidation of Guam's political-status plebiscite, limited to the native inhabitants of Guam, to inform the federal government of their self-determination preference "badly misunderst[ood] both the law and Guam's political history").

31 *See, e.g.*, Román, *supra* note 23, at 19–23; Gerald L. Neuman, *Whose Constitution?*, 100 YALE L.J. 909, 957–64 (1991); Sam Erman, *Citizens of Empire: Puerto Rico, Status, and Constitutional Change*, 102 CALIF. L. REV. 1181, 1200–13 (2014); Levinson, *supra* note 17, at 246–65.

32 Neuman, *supra* note 31, at 958.

33 Susan K. Serrano, *Collective Memory and the Persistence of Injustice: From Hawai'i's Plantations to Congress—Puerto Ricans' Claims to Membership in the Polity*, 20 S. CAL. REV. L. & SOC. JUST. 353, 382 (2011).

34 Joint Resolution of Nov. 23, 1993, Pub. L. No. 103-150, 107 Stat. 1510, 1511; Eric Steven O'Malley, Note, *Irreconcilable Rights and the Question of Hawaiian Statehood*, 89 GEO. L.J. 501, 512–13 (2001).

35 *See* Cleveland, *supra* note 22, at 212; IMMERWAHR, *supra* note 29, at 67.

Rico, the Philippine Islands, and Guam through the Treaty of Paris,[36] and Spain relinquished its claim of sovereignty over Cuba.[37] The war served as an impetus for annexing Hawaii that same year given the islands' economic and military value in the Pacific.[38]

Now a battle-tested imperial power, the United States was left to decide the social and political status of the native inhabitants.[39] Imperialism was the central issue of the presidential election of 1900.[40] And with President McKinley's reelection, defenders of imperialism secured "popular and political victories."[41] As some anti-imperialists predicted, McKinley committed the country to dealings with the territories which were difficult to undo.[42]

Abbott Lawrence Lowell, an influential contemporaneous scholar, opined that "apart from treaty or legislation, possessions acquired by conquest or cession do not become a part of the United States."[43] Unlike previous laws and treaties such as the Northwest Ordinance of 1787,[44] the Treaty with France,[45] or the Treaty of Guadalupe-Hidalgo of 1848,[46] the Treaty of Paris indicated that Congress

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36 Torruella, *supra* note 2, at 59.

37 Treaty of Peace Between the United States of America and the Kingdom of Spain, Spain-U.S., Dec. 10, 1898, 30 Stat. 1754 [hereinafter Treaty of Paris].

38 Joint Resolution of Nov. 23, 1993, Pub. L. No. 103-150, 107 Stat. 1510; Serrano, *supra* note 33, at 382–83.

39 Serrano, *supra* note 33, at 373–74.

40 *See* E. Berkeley Tompkins, *Scylla and Charybdis: The Anti-Imperialist Dilemma in the Election of 1900*, 36 PAC. HIST. REV. 143, 143–61 (1967) (discussing the anti-imperialists' political strategy for the 1900 presidential election).

41 Burnett, *supra* note 8, at 806.

42 Tompkins, *supra* note 40, at 148; *see* IMMERWAHR, *supra* note 29, at 112–13, 165, 189, 195, 201–07, 238 (discussing the United States' dealings with its territories from 1898 through the end of World War II, including a fourteen-year war against the Philippines after it declared independence in 1898, its role in shaping Cuba's constitution, and its skepticism against the inhabitants of the Philippines and Guam, resulting in the failure to adequately defend its own people against the Japanese invasion during World War II).

43 Abbott Lawrence Lowell, *The Status of Our New Possessions—a Third View*, 13 HARV. L. REV. 155, 176 (1899).

44 Northwest Territory Ordinance of 1787, ch. 8, 1 Stat. 50, 51 n.(a) ("The said territory, and the [s]tates which may be formed therein, shall forever remain a part" of the United States.).

45 Treaty Between the United States of America and the French Republic, Fr.-U.S., art. III, Apr. 30, 1803, 8 Stat. 200 ("The inhabitants of the ceded territory shall be incorporated in the Union of the United States, and admitted as soon as possible, according to the principles of the Federal constitution . . . .").

46 Treaty of Peace, Friendship, Limits, and Settlement with the Republic of Mexico, Mex.-U.S., art. IX, Feb. 2, 1848, 9 Stat. 922 (stating that the Mexicans who resided in the acquired territory and did not retain Mexican citizenship "shall be incorporated into the Union of the United States, and be admitted at the proper time (to be judged of by

would determine the "civil rights and political status of the native inhabitants of the territories."[47] Justice McKenna adopted Lowell's thesis in his dissent in *De Lima v. Bidwell*,[48] claiming that the Treaty of Paris did not provide "for incorporating the ceded territory into the United States," but expressly left that task for Congress.[49]

Subsequently in *Downes v. Bidwell*, in a plurality opinion, Justice Brown endorsed this view, forewarning of the "extremely serious" consequence of inhabitants becoming, "immediately upon annexation, citizens of the United States."[50] The emergent doctrinal rule maintained that some constitutional provisions "[do] not apply to territory which has been annexed but not incorporated into the Union, unless taken there by congressional action."[51] That is, the *Insular Cases* confirmed Congress's plenary power over territories[52] and established a new rule that the Constitution does not fully apply in unincorporated territories.[53]

This interpretation of treaties, however, is suspect. For a treaty to be binding, it "must not contravene the Constitution, nor contain any stipulations which transcend the powers therein given to the President and Senate."[54] Before *Downes*, nearly one hundred years of practice established that the Constitution fully applied to territories, which would eventually be admitted as states.[55] After *Downes*, five states were admitted into the Union, some of which were ostensibly thought to be unfit for statehood. This longstanding practice, from which the *Insular Cases* deviated, revealed a single purpose for territorial acquisition and

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[Congress] . . .) to the enjoyment of all the rights of citizens of the United States"); *Id.* art. XI (stating that the territory as described in article V is "comprehended for the future within the limits of the United States").

47 Treaty of Paris, *supra* note 37, 30 Stat. at 1759; *see also* Torruella, *supra* note 2, at 59.

48 182 U.S. 1, 200 (1901) (McKenna, J., dissenting).

49 *Id.* at 214; *see also* Burnett, *supra* note 8, at 860–63.

50 182 U.S. 244, 279 (1901).

51 Burnett, *supra* note 8, at 808 (quoting David K. Watson, *Acquisition and Government of National Domain*, 41 AM. L. REV. 239, 253 (1907)).

52 U.S. CONST. art. IV, § 3, cl. 2.

53 *See* Burnett, *supra* note 8, at 816–24.

54 13 ANNALS OF CONG. 44 (1803) (statement of Rep. Pickering).

55 *See* Sanford Levinson & Bartholomew H. Sparrow, *Introduction* to THE LOUISIANA PURCHASE AND AMERICAN EXPANSION, 1803–1898, at 1, 12 (Sanford Levinson & Bartholomew H. Sparrow eds., 2005); United States v. Vaello Madero, 142 S. Ct. 1539, 1555–57 (2022) (Gorsuch, J., concurring).

incorporation: the promise of eventual statehood so as "to make this nation one."[56]

The Court embraced a functional approach when creating the doctrine.[57] That is, the Court used a "nontextual, normative valuation of the importance of the particular right under consideration" over a bright-line rule.[58] In *Dorr v. United States*, the Court held that only fundamental "privileges and immunities contained in the bill of rights of the Constitution were intended to apply from the moment of annexation."[59] *Downes* specifically, and the *Insular Cases* generally, confounded contemporary observers over the Court's decisions and its jurisprudential reach.[60] Modern scholars note that it "remains unclear what constitutional rights residents of unincorporated territories lack."[61]

The Court's reluctance to address the citizenship issue for these residents transformed the question "from a judicial to a political one."[62] Moreover, the Court was deferential to the political branches, having waited two decades for the latter's approval before unequivocally embracing the *Insular Cases*.[63] More poignantly, the *Insular Cases* "contravened established doctrine that was based on sound constitutional principles, substituting binding jurisprudence with theories . . . which were specifically created to meet the political and racial agendas of the times."[64] Indeed, some contemporaneous scholars supported

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56 PETER J. KASTOR, THE NATION'S CRUCIBLE: THE LOUISIANA PURCHASE AND THE CREATION OF AMERICA 144 (2004) (quoting 22 ANNALS OF CONG. 485 (1811) (statement of Rep. Macon)).

57 Gerald L. Neuman, *The Extraterritorial Constitution After* Boumediene v. Bush, 82 S. CAL. L. REV. 259, 271 (2009).

58 *Id.* at 273.

59 195 U.S. 138, 144 (1904) (quoting Hawaii v. Mankichi, 190 U.S. 197, 217–18 (1903)).

60 Burnett, *supra* note 3, at 989–90; *see* Christina D. Ponsa-Kraus, *Political Wine in a Judicial Bottle: Justice Sotomayor's Surprising Concurrence in* Aurelius, 130 YALE L.J.F. 101, 126 (2020) ("The *Insular Cases* left the question of which provisions did apply to these territories to case-by-case determination . . . .").

61 Erman, *supra* note 31, at 1238.

62 *Id.* at 1237.

63 *Id.* at 1239; GARY LAWSON & GUY SEIDMAN, THE CONSTITUTION OF EMPIRE: TERRITORIAL EXPANSION AND AMERICAN LEGAL HISTORY 121 (2004) ("[T]he fate of American imperialism largely turned on the Supreme Court's willingness to look the other way if Congress tried to govern territories without such constitutional staples as jury trials.").

64 Juan R. Torruella, *The* Insular Cases*: The Establishment of a Regime of Political Apartheid*, 29 U. PA. J. INT'L L. 283, 346 (2007); *see* Cleveland, *supra* note 22, at 262 (arguing "[b]oth nation-building and xenophobia pervaded the ensuing debate over the legal status of these islands."); Burnett, *supra* note 8, at 878 (noting that the debate over expansion was partly rooted in the public's "recollections of the Civil War and its aftermath, and in their

the doctrine by opining, "if the Constitution made [the Territories'] inhabitants fully American citizens and required that they should be governed in the same manner as citizens of one of our organized American Territories, it would extend to semicivilized or savage races guaranties fit only for an intelligent and educated people."[65]

The functional approach enabled the Court to "use its power sparingly and where it would be most needed,"[66] creating a new doctrine that allowed the Constitution to "embrace a colonial empire."[67] By framing its relationship with the Territories as "temporary entanglements," the Court endowed the Union with a peculiar constitutional theory of secession that allowed it to "simply walk away" from the Territories.[68] While that may have been the case with the Philippine Islands[69] and Cuba,[70] it is not so with the Territories. Excepting the Northern Mariana Islands, the Territories have been a part of the Union for more than a century.[71] In fact, the Supreme Court has acknowledged that "[i]t may well be that over time the ties between the United States and any of its unincorporated Territories strengthen in ways that are of constitutional significance."[72]

Indeed, these ties have grown in a constitutionally significant manner. Excepting *Balzac v. Porto Rico*,[73] the Court has "consistently found provisions or safeguards 'applicable' in U.S. territories when it has considered them" over the last one hundred years.[74] This trend

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apprehension that the colonial governance of distant territories could give rise to renewed civil strife.").

65 Simeon E. Baldwin, *The Supreme Court and the* Insular Cases, 10 YALE REV. 129, 129 (1901).

66 Boumediene v. Bush, 553 U.S. 723, 759 (2008); *see* Neuman, *supra* note 57, at 273 (quoting *Boumediene*, 553 U.S. at 759).

67 Burnett, *supra* note 8, at 879.

68 *Id.* at 877–79.

69 IMMERWAHR, *supra* note 29, at 229.

70 *Id.* at 112–13.

71 Tom C.W. Lin, *Americans, Almost and Forgotten*, 107 CALIF. L. REV. 1249, 1254–64 (2019).

72 Boumediene v. Bush, 553 U.S. 723, 758 (2008); *see* Neuman, *supra* note 57, at 282; Rayphand v. Sablan, 95 F. Supp. 2d 1133, 1139 (D.N. Mar. I. 1999) ("[T]he extent to which a territory's inhabitants are entitled to the protections afforded by the U.S. Constitution is dependent upon the degree to which the territory has been 'incorporated' into the United States.").

73 258 U.S. 298 (1922).

74 Brief Amici Curiae of the American Civil Liberties Union and the ALCU of Utah, Supporting Plaintiffs-Appellees at 6, Fitisemanu v. United States, 1 F.4th 862 (10th Cir. 2021) (Nos. 20-4017, 20-4019); *see* LAWSON & SEIDMAN, *supra* note 63, at 193–94 (arguing that Article I, Section 9 and the first eight amendments, but not the Tenth Amendment,

transforms unincorporated territories into political entities that are functionally more analogous to a state and has spurred considerable debate over their current political status.[75] Further complicating the temporary entanglements thesis is the fact that the Territories are treated as states for the purposes of various federal regulations.[76] Moreover, commentators suggest that the citizens of the Territories have the right to both "resist expulsion" and "demand statehood."[77]

Thus, while the Territories have become a permanent fixture of the American polity, they remain on very unequal footing relative to the states. Congress is authorized to annul legislation enacted by the Territories' legislatures,[78] and it may revoke citizenship, since it was codified by statute rather than established through Constitutional right.

II. CONSTITUTIONAL TEXT, LIQUIDATION, AND CONGRESSIONAL PRACTICE OF ADMISSION

This Note now turns to the modalities of constitutional interpretation. As with any project of interpretation, the starting point is the "plain, necessary, or historical meaning of the constitutional text."[79] When there is a single clear meaning, that meaning is treated as dispositive.[80] However, when the text is ambiguous or vague, other interpretative tools become necessary. Here, arguments about

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apply to some degree to territorial residents); Cleveland, *supra* note 22, at 239–50 (arguing that the First, Fourth, Fifth, Eighth, Eleventh, and Fourteenth Amendments apply).

75 *See, e.g.*, Blocher & Gulati, *supra* note 19, at 269 ("[I]nternational and domestic law give the people of Puerto Rico some right to control their destiny by resisting expulsion or perhaps even seeking accession. . . . If a territory can resist deannexation . . . it cannot be an unincorporated territory. . . . [I]f it is not an *un*incorporated territory, then it must be an incorporated territory."); Cleveland, *supra* note 22, at 248–49 (Some courts have concluded that constitutional rights apply to the unincorporated territories because they "are the functional equivalents of states."); José R. Coleman Tió, Comment, *Six Puerto Rican Congressmen Go to Washington*, 116 YALE L.J. 1389, 1395 (2007) ("Puerto Rico is analogous to a state in virtually every significant aspect except for its lack of voting power.").

76 *See, e.g.*, P.R. Sun Oil Co. v. U.S. Env't Prot. Agency, 8 F.3d 73, 74 (1st Cir. 1993) (treating Puerto Rico as state with respect to the Clean Water Act); United States v. Maldonado-Burgos, 844 F.3d 339, 350–51 (1st Cir. 2016) (treating Puerto Rico as state with respect to § 2421(a) of the Mann Act); Northern Marina Islands v. United States, 279 F.3d 1070, 1071 (9th Cir. 2002) (the Northern Mariana Islands with respect to the Quiet Title Act).

77 Blocher & Gulati, *supra* note 19, at 269.

78 *See, e.g.*, Examining Bd. of Eng'rs, Architects & Surveyors v. Flores de Otero, 426 U.S. 572, 607 (1976) (Rehnquist, J., dissenting in part).

79 Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1189 (1987).

80 Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1894 (2021).

historical intent, practice, constitutional theory derived from text, judicial precedent, and value arguments are useful.[81]

Section II.A evaluates the relevant constitutional provisions concerning the acquisition of territory and admission of new states into the Union. Because the Constitution provides little textual guidance as to the exercise of these powers, Congress used practice to liquidate their meaning. Thus, Section II.B turns to constitutional liquidation. This framework organizes the practice of state admission, revealing the motivating factors behind this political process. Additionally, the forthcoming discussion challenges the claim that the acquisition of territory is the "constitutionally relevant moment" for the prospect of statehood.[82] Section II.C analyzes Congressional practice of admission under the liquidation framework. Section II.D synthesizes the major rules in support of the Territories' right to statehood.

A. The Ambiguities of Constitutional Text

Determining the parameters of Congress's power of admission requires answering two prerequisite questions: whether the Constitution grants Congress the power to acquire territory; if so, whether the Constitution grants the power to admit that territory as a state.[83]

Some Founding-era figures were concerned that admitting states from territory that was not a part of the Union at ratification would disrupt the "preexisting balance among the states" that formed the original compact.[84] The Supreme Court rejected this so-called state compact theory, which postulates that because ratifying the Constitution was an "act of sovereign and independent States," the federal government's powers are "delegated by the States, who alone are truly sovereign."[85] Instead, the Court held that the federal "government proceeds directly from the people,"[86] and its power is "given by the people of the United States."[87]

Concerning the first question, the Constitution contains "no express clause concerning the acquisition of territory."[88] Its attention

81 *See* Fallon, *supra* note 79, at 1189–90.

82 LAWSON & SEIDMAN, *supra* note 63, at 203.

83 *See* David P. Currie, *The Constitution in Congress: Jefferson and the West, 1801–1809*, 39 WM. & MARY L. REV. 1441, 1460 (1998).

84 *See* LAWSON & SEIDMAN, *supra* note 63, at 77–78.

85 McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 402–03 (1819).

86 *Id.* at 403–04.

87 *Id.* at 429.

88 LAWSON & SEIDMAN, *supra* note 63, at 2–3.

to this topic is limited to the Territory Clause in Article IV, which states: "Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."[89] The clause authorized the governance of the Northwest Territory, which preceded the Constitution, and any subsequent territory ceded to the United States.[90] However, as Thomas Jefferson observed, the Constitution did not expressly grant the federal government the power to hold or incorporate foreign territory.[91] Jefferson believed that a constitutional amendment was required "to remedy the perceived want of power."[92]

This interpretation would similarly restrict the Admissions Clause in Article IV,[93] which led to sharp debates surrounding the constitutionality of the Louisiana Purchase.[94] The interpretation that emerged from this saga was that the Admissions Clause empowered Congress to admit new states, regardless of when that territory was acquired.[95] The sole qualification is that a so-called breakaway state, one which formed from within an existing state's jurisdiction, must have both the parent state and Congress's consent for admission.[96] Further, Congress may acquire territory by treaty so long as the acquisition is "in pursuance of some enumerated power other than the [treaty power]," such as to admit the territory for the purpose of establishing a new state.[97] That is, two constitutional powers must be exercised: first, the president's power vested in the Treaty Clause of Article II,[98] and subsequently, Congress's power under the Necessary and Proper Clause of Article I.[99]

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89 U.S. CONST. art. IV, § 3, cl. 2.

90 LAWSON & SEIDMAN, *supra* note 63, at 28.

91 *Id.* at 21.

92 Currie, *supra* note 83, at 1460.

93 *See* LAWSON & SEIDMAN, *supra* note 63, at 73–74; U.S. CONST. art. IV, § 3, cl. 1 ("New States may be admitted by the Congress into this Union . . . .").

94 *See* LAWSON & SEIDMAN, *supra* note 63, at 75–78.

95 *See id.* at 78; *infra* subsection II.C.3.

96 U.S. CONST. art. IV, § 3, cl. 1; *see* Currie, *supra* note 83, at 1468; Vasan Kesavan & Michael Stokes Paulsen, *Is West Virginia Unconstitutional?*, 90 CALIF. L. REV. 291, 368, 395–400 (2002) (discussing West Virginia's admission as a breakaway state during the Civil War after Virginia seceded from the Union in 1861).

97 LAWSON & SEIDMAN, *supra* note 63, at 83; *see* Currie, *supra* note 29, at 473–76 (discussing the congressional debates surrounding President Grant's plea to Congress to acquire the Dominican Republic in 1870).

98 U.S. CONST. art. II, § 2, cl. 2.

99 *Id.* art. I, § 8, cl. 18.

Although legislative debate and practice have resolved the constitutional questions concerning the powers to acquire territory and to admit new states, the lingering question is whether Congress may deny in perpetuity the right to statehood to a territory in which citizens permanently live. As Section II.C indicates, settling this question required significant liquidation through congressional practice. However, this practice in its entirety suggests that this question must be answered in the negative. That is, the *Insular Cases* is an unconstitutional deviation from the rule governing state admissions, which preceded the doctrine uninterrupted for over one hundred years and continued for another fifty years after it. To orient that practice, Section II.B introduces Professor Baude's constitutional liquidation framework.

B. Seeking Clarity Through Liquidation

Historical practice is a powerful interpretative tool, but it requires "an account of which practice and whose practice is most authoritative."[100] That is because the political branches do not always act "based on constitutional analysis . . . [and] can be motivated by any number of nonconstitutional reasons."[101] Moreover, "not all precedents are created equal—earlier precedents are more important than later ones."[102] The guiding principle is that "an interpretation of the Constitution by early Congresses is entitled to weight as a correct understanding of the Constitution, especially if it was uncontroversial at the time."[103]

Similarly, the federal government's powers are limited. While the federal government has discretion in exercising its vested powers, the manner must be that which is "most beneficial to the people."[104] Further, the end to which the government exercises its powers must be legitimate, "within the scope of the constitution, . . . [and] not prohibited, but consistent with the letter and spirit of the constitution."[105] Thus, constitutional interpretation and construction must "remain faithful to the Constitution" and promote its purposes.[106]

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100 Alison L. LaCroix, *Historical Gloss: A Primer*, 126 HARV. L. REV. F. 75, 85 (2013).

101 Shalev Roisman, *Constitutional Acquiescence*, 84 GEO. WASH. L. REV. 668, 673 (2016).

102 Kesavan & Paulsen, *supra* note 96, at 363.

103 *Id.* at 382.

104 McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819).

105 *Id.*

106 Jack M. Balkin, *Arguing About the Constitution: The Topics in Constitutional Interpretation*, 33 CONST. COMMENT. 145, 158 (2018).

To apply these principles, Baude's constitutional liquidation framework is useful because it helps sort and understand various, and sometimes conflicting, practices. It begins by recognizing that "[a]ll new laws . . . are considered as more or less obscure and equivocal, until their meaning [is] liquidated and ascertained by a series of particular discussions and adjudications."[107] That is, legal texts "do not have a fully determined meaning," but subsequent practice will settle indeterminacies.[108] The framework then advances three elements: textual indeterminacy, a "course of deliberate practice" interpreting the Constitution, and settlement.[109]

The first element, textual indeterminacy, includes both ambiguity and vagueness.[110] "A term is ambiguous if 'it has more than one sense' . . . [while] [a] term is vague if it has one sense with borderline cases."[111] The Court's holding in *National Labor Relations Board v. Noel Canning* is an illustrative example of how the judiciary resolves an ambiguous term.[112] There, the Court was asked to interpret the proper meaning of the word "[r]ecess" as it pertains to the Recess Appointments Clause.[113] Specifically, the Court had to determine whether the term "recess" authorized the President to make appointments while the Senate was away during an "inter-session" or "intra-session" recess.[114] The narrow interpretation would authorize the President to make appointments only during intersession recesses, referring "to the single break separating formal sessions of Congress."[115] The broad interpretation would encompass both types of recesses, with an intrasession recess referring to those periods where the Senate adopts a "resolution stating that it will 'adjourn' to a fixed date," and that adjournment was of "substantial length."[116] Acknowledging that the text was ambiguous, the Court turned to historical practice.[117]

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107 William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1, 4 (2019) (quoting THE FEDERALIST NO. 37, at 236 (James Madison) (Jacob E. Cooke ed., 1961)).

108 *Id.* at 9.

109 *Id.* at 1, 13–18.

110 *Id.* at 14.

111 *Id.* (quoting Lawrence B. Solum, Essay, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95, 97 (2010)).

112 573 U.S. 513 (2014); *see* Baude, *supra* note 107, at 6.

113 U.S. CONST. art. II, § 2, cl. 3.

114 *Noel Canning*, 573 U.S. at 526–27.

115 *Id.* at 527.

116 *Id.* at 526–27.

117 *Id.* at 527–28.

As the Court opined, "longstanding 'practice of the government' can inform our determination of what the law is."[118] Similarly, "[l]ong settled and established practice is a consideration of great weight in a *proper* interpretation of constitutional provisions."[119] But liquidation is subject to a critical limiting principle: expounding the meaning of ambiguous or vague provisions is permissible to "the extent of indeterminacy, but not beyond."[120] Thus, practice may expound, but not alter, the Constitution's meaning.[121]

The second element suggests that a particular line of practice is dispositive only if it is regular, consistent, deliberate, and intended to interpret the Constitution rather than be a product of "sheer political will."[122] This element necessarily presents a high bar to ensure that the practice in question is not inappropriate, problematic, or an outlier.[123] Returning to *Noel Canning*, the Court had to consider several lines of practice. The first line took place between the Founding and the Civil War. The Court conceded that this pre–Civil War line was not helpful because of the infrequency of significant intrasession breaks.[124] During that period, there were only four substantial intra-session breaks, but in each, "the President made intra-session recess appointments."[125]

However, a second line of practice emerged in 1929, where Congress began taking more frequent intra-session breaks, and Presidents "correspondingly made more intra-session recess appointments."[126] Throughout this second line, Presidents made "countless recess appointments," even for vacancies that occurred when the Senate was in session, without the Senate taking any formal action to restrict or question this practice.[127] Thus, the Court found that this latter line of practice liquidated the ambiguities of the Recess Appointments Clause in favor of the established practice.[128] Moreover, such an interpretation was consistent with the Clause's purpose, namely, to "ensure

118 *Id.* at 525 (citation omitted) (quoting McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 401 (1819)).

119 The Pocket Veto Case, 279 U.S. 655, 689 (1929) (emphasis added).

120 Baude, *supra* note 107, at 15–16.

121 *Id.* at 20.

122 *Id.* at 16–18.

123 *See id.* at 17.

124 NLRB v. Noel Canning, 573 U.S. 513, 528–29 (2014).

125 *Id.* at 529.

126 *Id.*

127 *Id.* at 530–33.

128 *Id.* at 538.

the continued functioning of the Federal Government while the Senate is unavailable."[129]

The third element maintains that practice liquidates ambiguous or vague constitutional text only after it "culminated in some kind of settlement."[130] This requires that the practice "justifie[s] calling an end to the dispute and 'overruling individual judgments.'"[131] Settlement consists of two types: acquiescence (i.e., that which is settled enjoys some form of acceptance) and public sanction (i.e., "evidence of the Public Will").[132] Both principles are intertwined by the nature of our republican form of government, ensuring that the public "retain control" of government as the law developed and a clearer interpretation of indeterminate laws emerged.[133]

In *Noel Canning*, the dispositive feature of settlement was the Senate's acquiescence to the Presidents' longstanding practice of intrasession recess appointments.[134] The operative unit of analysis is the Senate as an institution, not individual senators.[135] The Court acknowledged that individual senators, even some principal officers within the Executive, submitted their objections to the executive's interpretation of the Recess Appointments Clause.[136] However, the Senate as a body did not take formal action on the Presidents' appointment practices under the broad interpretation of the Clause.[137] Thus, the textual ambiguities were settled in favor of the existing line of practice.

C. Historical Practice of State Admissions

This Note now turns to the practice of state admissions. As this Section reveals, there are five lines of practice, all of which remain viable today.[138] What follows is, at best, a sketch of a complex and

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129 *Id.* at 552.

130 Baude, *supra* note 107, at 18.

131 *Id.* (quoting Letter from James Madison to George McDuffie (May 8, 1830), *in* 9 THE WRITINGS OF JAMES MADISON 364, 365 (Gaillard Hunt ed., 1910)).

132 *Id.* at 19, 18–19 (quoting Letter from James Madison to C.E. Haynes (Feb. 25, 1831), *in* 9 THE WRITINGS OF JAMES MADISON, *supra* note 131, at 442, 443).

133 *Id.* at 19–20.

134 *Noel Canning*, 573 U.S. at 533.

135 Baude, *supra* note 107, at 18–19.

136 *Noel Canning*, 573 U.S. at 530–31.

137 *Id.* at 532–33.

138 The corresponding dates represent the predominant period in which Congress employed the lines of practice. While the practice emerging from the Antebellum Period no longer exists to balance power between slave and free states, it now exists to balance political power at the federal level.

politically malleable set of overlapping lines of practice of state admissions. But these lines of practice neatly align with President Woodrow Wilson's constitutional theory of American democracy: "Our democracy . . . was a stage of development. . . . [It] was not a piece of developed theory, but a piece of developed habit. It was not created by mere aspirations or by new faith; it was built up by slow custom. Its process was experience . . . ."[139]

1. The Breakaway States, 1791–1863

The first line of practice consists of the admission of five breakaway states: Vermont, Kentucky, and Tennessee (and later Maine[140] and West Virginia[141]). These states were admitted after having been formed within the jurisdiction of, and containing territory formerly belonging to, another existing state (i.e., the parent state). The nature of these states triggers Article IV, Section 3, which requires both Congress and the parent state to consent to the breakaway state's admission.[142] The former's consent is subject to the requirements of bicameralism and presentment—a favorable majority vote in both Houses of Congress, and the approval of the Executive.[143]

Vermont's admission as the fourteenth state on March 4, 1791,[144] is somewhat of an outlier because Congress did not explicitly adhere to the abovementioned constitutional rules.[145] Although the Framers envisioned Vermont as a state,[146] its admission was delayed by both a territory dispute with New York and the southern states' concern of being "further outnumbered."[147] During this delay, Vermont functioned as an independent state: it coined money, negotiated treaties, and "provid[ed] for the common defense and general welfare of

139 3 WOODROW WILSON, *Character of Democracy in the United States*, *in* SELECTED LITERARY AND POLITICAL PAPERS AND ADDRESSES OF WOODROW WILSON 85, 99 (1921); *see also* Denis P. Duffey, *The Northwest Ordinance as a Constitutional Document*, 95 COLUM. L. REV. 929, 948 (1995).

140 *See infra* notes 291–92 and accompanying text.

141 *See supra* note 96.

142 U.S. CONST. art. IV, § 3, cl. 1; *see* Luis R. Dávila-Colón, *Equal Citizenship, Self-Determination, and the U.S. Statehood Process: A Constitutional and Historical Analysis*, 13 CASE W. RSRV. J. INT'L L. 315, 320 (1981).

143 Dávila-Colón, *supra* note 142, at 320.

144 Act of Feb. 18, 1791, ch. 7, 1 Stat. 191; Kesavan & Paulsen, *supra* note 96, at 371–72.

145 *See* Kesavan & Paulsen, *supra* note 96, at 373.

146 Dávila-Colón, *supra* note 142, at 320.

147 David P. Currie, *The Constitution in Congress: Substantive Issues in the First Congress, 1789–1791*, 61 U. CHI. L. REV. 775, 838 n.379 (1994).

her people."[148] Alexander Hamilton, conceding Vermont could not be recovered to New York, advocated for statehood out of fear that Great Britain would attempt to "cultivate Vermont" to preserve its colonial presence in North America.[149]

It took Vermont nearly a decade to settle its territorial dispute with New York.[150] This settlement entailed compensating the holders of New York land grants within Vermont's borders to the tune of $30,000.[151] Thereafter, President Washington informed Congress that New York consented to Vermont's admission, and that Vermont formally petitioned for statehood.[152] Congress admitted Vermont in short order, but it was silent on whether New York's consent was constitutionally required.[153]

While Vermont left the consent requirement unsettled, Kentucky's admission directly addressed it. Beginning in 1782, the inhabitants of Kentucky petitioned Congress for statehood—to no avail.[154] But by 1788, both the separatists and Virginia concurred that Kentucky's separation was inevitable and "mutually beneficial."[155] In 1790, President Washington sent Congress a "petition from a popularly elected convention seeking the admission of Kentucky as a state."[156] Congress subsequently passed an enabling act acknowledging Kentucky's petition and Virginia legislature's consent to satisfy Article IV.[157]

However, Congress did not address other constitutional requirements. For instance, Congress did not require Kentucky to submit a state constitution which would have ensured that the state provided a republican form of government.[158] Whether this is constitutionally significant is no longer a live question. But throughout Kentucky's ordeal to statehood, there was "a constant threat (and a

148 Kesavan & Paulsen, *supra* note 96, at 372.

149 Alexander Hamilton, Speech on Acceding to the Independence of Vermont, *in* 8 THE WORKS OF ALEXANDER HAMILTON 42, 51–55 (Henry Cabot Lodge ed., Federal ed. 1904).

150 Ryan C. Williams, *The "Guarantee" Clause*, 132 HARV. L. REV. 602, 641–44 (2018).

151 *Id.* at 643.

152 2 ANNALS OF CONG. 1960 (1791).

153 *See* Act of Feb. 18, 1791, ch. 7, 1 Stat. 191.

154 Kesavan & Paulsen, *supra* note 96, at 376.

155 *Id.* at 376–77.

156 Currie, *supra* note 147, at 837.

157 Act of Feb. 4, 1791, ch. 4, 1 Stat. 189.

158 U.S. CONST. art. IV, § 4; Currie, *supra* note 147, at 837; *see* Act of Feb. 4, 1791, 1 Stat. 189.

substantial fear among federal officials) that Kentucky might secede or seek annexation by Spain."[159]

Tennessee, which became the sixteenth state on June 1, 1796,[160] was formed out of land ceded by North Carolina to the federal government.[161] In 1785, a separatist movement sought to create the independent state of Franklin.[162] Proponents interpreted a provision in North Carolina's constitution that allowed for the establishment of new governments within North Carolina as implied consent for Franklin's cession.[163] Franklin functioned as a de facto state for four years, during which time it repeatedly petitioned Congress for admission.[164] Initially, Franklin was met with political resistance within Congress because its government supported Republican Thomas Jefferson.[165] Meanwhile, Congress was split: the Senate was "Federalist by a good majority [and] the House of Representatives was safely Jeffersonian."[166] Federalists feared that admission would tip the presidential election of 1800 in favor of Jefferson.[167] Senate Federalists prevailed in initially delaying admission, and later conditioning Tennessee's admission on entitling the state to one representative until the next census in 1800 (after the election).[168] The latter condition reduced Tennessee's electoral vote from four to three, effectively placating Senate Federalists.[169] Despite this politicking, Jefferson won the presidential election over incumbent President John Adams of the Federalist Party.[170]

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159 Eric Biber, *The Price of Admission: Causes, Effects, and Patterns of Conditions Imposed on States Entering the Union*, 46 AM. J. LEGAL HIST. 119, 132 (2004).

160 Act of June 1, 1796, ch. 47, 1 Stat. 491.

161 Kesavan & Paulsen, *supra* note 96, at 378–79; Blocher & Gulati, *supra* note 19, at 260.

162 Kesavan & Paulsen, *supra* note 96, at 379; Samuel C. Williams, *The Admission of Tennessee into the Union*, 4 TENN. HIST. Q. 291, 291 (1945).

163 Kesavan & Paulsen, *supra* note 96, at 379.

164 *Id.* at 379–80.

165 Williams, *supra* note 162, at 301.

166 *Id.* at 304. In 1788, and after Franklin's unsuccessful petitions for statehood, North Carolina reasserted control over Franklin. TRE HARGETT, TENNESSEE BLUE BOOK 608 (2022). In 1789, North Carolina ratified the Constitution and ceded its western lands to the federal government. *Id.* This region subsumed Franklin and became known as the Southwest Territory. *Id.* From 1794 until statehood in 1796, "the people of the Southwest Territory governed their local affairs through a general assembly." Williams, *supra* note 162, at 291. Daniel Smith of Sumner County chose the name "Tennessee" during the state constitutional convention. *Id.* at 302–03.

167 *See* Blocher & Gulati, *supra* note 19, at 261–62.

168 Williams, *supra* note 162, at 305–10.

169 *Id.* at 310–12.

170 10 ANNALS OF CONG. 1021–34 (1801).

This gloss of the legislative practice of the breakaway states reveals two themes. First, Congress was chiefly concerned with the political implications of both admitting new states into the Union and the terms under which admission took place. Second, while the Founders envisioned some of these territories would eventually become states, the historical record does not suggest that they considered an incorporated-unincorporated distinction to be constitutionally dispositive toward statehood eventuality (if such a distinction was ever contemplated).

Instead, the debate during the Founding era gravitated toward whether the Constitution flatly prohibited the admission of breakaway states. Luther Martin of Maryland and James Madison, representing the Antifederalists and Federalists respectively, agreed during the Philadelphia Convention that the Constitution did not provide such a prohibition.[171] This agreement was based on a mutual concern over security and political power between larger and smaller states. For Martin, the larger states that housed the eventual breakaway states—New York, Virginia, Massachusetts, and North Carolina—took land that was "unsettled when the American revolution took place—lands which were acquired by the common blood and treasure, and which ought to have been . . . for the common benefit of the Union."[172] This "superiority of power and influence over the other states" was both an act of injustice, and (conjoined with prohibiting breakaway states) increased the likelihood of insurrection within the larger states.[173] Martin worried that smaller states like Maryland would be called upon to assist the larger states in suppressing insurrectionists, which would benefit the latter at the former's expense.[174] Thus, permitting the admission of breakaway states provided a safety valve of sorts to mitigate armed conflict by providing a relatively peaceful route toward self-determination, as demonstrated in the cases of Vermont, Kentucky, and Tennessee.

171 Kesavan & Paulsen, *supra* note 96, at 367–68.

172 1 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION 385 (Jonathan Elliot ed., Washington, Jonathan Elliot 2d ed. 1836) (emphasis omitted).

173 *Id.*

174 *Id.*

2. The Northwest Ordinance, 1787–1858

The second line of practice commenced with the Northwest Ordinance of 1787 (Ordinance).[175] Passed by a vote of 17–1,[176] the Ordinance encompassed land that eventually became Ohio, Indiana, Illinois, Michigan, Wisconsin, and Minnesota. This Section discusses the first four states.

The Ordinance was an outgrowth of the Founding-era debate contemplating westward expansion,[177] and it ultimately served as a "blueprint for American colonization of the West."[178] Its "living principles"[179] so closely coincided with the Constitution that commentators suggest the Admissions Clause was "clearly designed to facilitate admission of states formed out of the Northwest Territory."[180] The Ordinance provides that at least three, but no more than five states, shall be formed therein, and that the territory shall forever remain a part of the United States.[181]

It outlined a two-stage process for admission, following republican principles that states of a moderate size promote happier residents and a durable society.[182] At the first stage—and until the territory reached five thousand free male inhabitants of voting age—the territory was overseen by a congressionally appointed governor, and three judges who exercised complete authority.[183] Once the population exceeded this threshold, it formed its own general assembly.[184] Second,

175 The First Congress reaffirmed the Ordinance "in 1789 [when it] passed a statute to make the [Ordinance] consistent with the Constitution so the Ordinance would 'continue to have full effect.'" Matthew J. Hegreness, Note, *An Organic Law Theory of the Fourteenth Amendment: The Northwest Ordinance as the Source of Rights, Privileges, and Immunities*, 120 YALE L.J. 1820, 1837 (2011) (quoting Northwest Territory Ordinance of 1787, ch. 8, 1 Stat. 50, 51).

176 32 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 334–43 (Roscoe R. Hill ed., 1936).

177 *See* Andrew R.L. Cayton, *The Northwest Ordinance from the Perspective of the Frontier*, *in* THE NORTHWEST ORDINANCE 1787: A BICENTENNIAL HANDBOOK 1, 17 (Robert M. Taylor, Jr. ed., 1987).

178 PETER S. ONUF, STATEHOOD AND UNION: A HISTORY OF THE NORTHWEST ORDINANCE, at xxx (Univ. Notre Dame Press 1st Midland book ed. 2019) (1992).

179 *Id.* at 134 (internal quotation marks omitted).

180 LAWSON & SEIDMAN, *supra* note 63, at 73; *see* Duffey, *supra* note 139, at 934–40 (describing the legislative history of the Northwest Ordinance and the contemporaneous concerns surrounding the Northwest Territory).

181 Northwest Territory Ordinance of 1787, ch. 8, 1 Stat. 50, 52 n.(a).

182 *See* ONUF, *supra* note 178, at 52.

183 Northwest Territory Ordinance of 1787, 1 Stat. at 51 n.(a).

184 *Id.*; *cf.* ONUF, *supra* note 178, at 76–85 (discussing the debate over whether a territory's right to statehood was an unconditional right).

upon reaching sixty thousand free inhabitants, Congress would admit the territory as a state on equal footing with the original states.[185] The purpose was to promote economic development and settlement on the assumption that "[p]rosperity and abundance would be the true cement of union."[186]

The Ordinance formally prohibited slavery, encouraged education, and codified numerous rights, including the freedom of religion, habeas corpus, trial by jury, and a republican form of government.[187] As a condition of admission, the Ordinance required the states emerging from the Northwest Territory to include these liberties in their constitutions.[188] However, the extent to which Congress enforced such provisions "depended upon its preoccupation with other issues."[189]

Ohio's admission in 1803[190] was preceded by the territorial residents' sharp criticism of their unequal status relative to the states.[191] Residents believed their governments were effectively colonies, a "true transcript of our old English Colonial Governments."[192] Because the Ordinance afforded Congress plenary powers over the territorial governments, including appointment and removal powers over offices within the general assembly, it was a forceful comparison: inhabitants ruled by a distant government not of their choosing.[193]

Arthur St. Clair, the governor of the Northwest Territory,[194] saw this governance dynamic as evidence that the territories were not only inferior to and dependent upon the United States, but that the territories were not a part of the United States at all.[195] It followed that the

185 Northwest Territory Ordinance of 1787, 1 Stat. at 53 n.(a) (providing that the Ordinance allowed for states to be admitted when there were less than sixty thousand inhabitants, provided that it was "consistent with the general interest of the confederacy"); Duffey, *supra* note 139, at 939.

186 ONUF, *supra* note 178, at 59, 66.

187 Northwest Territory Ordinance of 1787, 1 Stat. at 52 n.(a).

188 *Id.*

189 James A. Edstrom, *"With . . . Candour and Good Faith": Nathaniel Pope and the Admission Enabling Act of 1818*, 88 ILL. HIST. J. 241, 241 (1995).

190 Act of Feb. 19, 1803, ch. 7, 2 Stat. 201.

191 Gregory Ablavsky, *Administrative Constitutionalism and the Northwest Ordinance*, 167 U. PA. L. REV. 1631, 1654–60 (2019).

192 *Id.* at 1654 (quoting Letter from William Goforth to Thomas Jefferson (Jan. 5, 1802), *in* 3 THE TERRITORIAL PAPERS OF THE UNITED STATES 198, 198 (Clarence Edwin Carter ed., 1934)).

193 *Id.* at 1657; *see* Northwest Territory Ordinance of 1787, ch. 8, 1 Stat. 50, 51 n.(a).

194 Patrick J. Furlong, *Putting the Ordinance to Work in the Northwest*, *in* THE NORTHWEST ORDINANCE 1787: A BICENTENNIAL HANDBOOK, *supra* note 177, at 79, 80.

195 Ablavsky, *supra* note 191, at 1657.

residents "ceased to be citizens of the United States and became their subjects."[196] Even if the territories' inhabitants were citizens, "they are, at least, upon a very unequal footing with their brethren."[197] At base, the status of territory contradicts the fundamental democratic-republican principles upon which the Union was founded—that citizens choose their government, and such a government derives its "just powers from the consent of the governed."[198] St. Clair's views were so popular among Northwest Territory residents that Republicans sought to remove him from office.[199] They instead granted Ohio statehood as a means to consolidate their political power.[200]

Indiana petitioned for, and was granted, statehood despite lacking the requisite sixty thousand free inhabitants.[201] Both chambers of Congress unanimously passed the resolution admitting Indiana with little debate.[202] Despite the Ordinance's formal ban on slavery and involuntary servitude,[203] Indiana permitted these practices through the Civil War.[204] Indeed, southern politicians correctly calculated that the formal slavery ban "implicitly guaranteed its legality in . . . Kentucky, Tennessee, Alabama, and Mississippi."[205] Moreover, Indiana's failure to deliver its promise of freedom to its black citizens was compounded by other deliberate forms of disenfranchisement: blacks "could not vote, serve on juries, hold office, serve in the militia, practice law, testify against whites, or even legally reside [in Indiana] without proof of their freedom."[206]

Illinois was similarly admitted with a population less than sixty thousand.[207] Both chambers of Congress questioned the accuracy of

196 ONUF, *supra* note 178, at 71 (quoting Letter from Arthur St. Clair to Oliver Wolcott (1795), *in* 2 THE ST. CLAIR PAPERS 378, 379 (William Henry Smith ed., Cincinnati, Robert Clarke & Co. 1882)).

197 Ablavsky, *supra* note 191, at 1657–58 (quoting Letter from Arthur St. Clair to Oliver Wolcott, *supra* note 196).

198 THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776); Ablavsky, *supra* note 191, at 1657–58.

199 *See* Ablavsky, *supra* note 191, at 1658–59.

200 ONUF, *supra* note 178, at 68; Act of Apr. 30, 1802, ch. 40, 2 Stat. 173.

201 Act of Apr. 19, 1816, ch. 57, 3 Stat. 289; Williams, *supra* note 162, at 314.

202 30 ANNALS OF CONG. 20–21 (1816); *id.* at 254.

203 Northwest Territory Ordinance of 1787, ch. 8, 1 Stat. 50, 53 n.(a).

204 *See* Paul Finkelman, *Almost a Free State: The Indiana Constitution of 1816 and the Problem of Slavery*, 111 IND. MAG. HIST. 64, 65, 72–79 (2015).

205 *Id.* at 70.

206 *Id.* at 66 (footnotes omitted).

207 Act of Apr. 18, 1818, ch. 67, 3 Stat. 428, 428–29; Williams, *supra* note 162, at 314.

Illinois's population, which was an estimated forty thousand.[208] Uncertainty notwithstanding, Congress considered sufficient the representations contained in the preamble of Illinois's constitution.[209] Slavery dominated the debate over Illinois's admission as some representatives were concerned Illinois's constitution did not sufficiently ensure the prohibition of slavery.[210] Ironically, Representative Tallmadge of New York pointed to Indiana's constitution as an ideal toward which Illinois should strive, since Indiana "carefully and scrupulously . . . guarded against slavery in any shape, and in the strongest terms reprobated it."[211]

Michigan's admission in 1837 was contentious due to a border dispute with Ohio.[212] In 1836, Representative Mason of Ohio took exception to the Territory of Michigan's attempt to "force herself into the family" by taking steps toward statehood without congressional authorization.[213] Evidently, Michigan followed Vermont and Tennessee's practice of ratifying a permanent state constitution and functioned as an independent state.[214] To resolve this dispute, Washington officials proposed a compromise which gave Michigan the Upper Peninsula—a region rich in natural resources—and Ohio the Toledo Strip—"a narrow wedge of land . . . which included the mouth of the Maumee River."[215] When the House reconsidered admission in 1837, most representatives appeared more sympathetic. For example, Representative Vanderpoel opined that the "sovereignty of the people; their right to change their Government whenever they please; the right . . . to change their organic law whenever it becomes oppressive or inadequate . . . had not been, and would not . . . be denied."[216]

If prior practice carried any weight, Michigan's population should have weighed in favor of admission. By 1837, Michigan had nearly one hundred thousand inhabitants, which exceeded the

208 31 ANNALS OF CONG. 363 (1818); 33 ANNALS OF CONG. 296–298 (1818).

209 33 ANNALS OF CONG. 298 (1818).

210 *Id.* at 305–06.

211 *Id.* at 307.

212 Act of June 15, 1836, ch. 99, 5 Stat. 49; Susan E. Gray, *Writing Michigan History from a Transborder Perspective*, 34 MICH. HIST. REV. 1, 19–20 (2008).

213 12 REG. DEB. 4659 (1836). *See generally* Gray, *supra* note 212, at 19–22.

214 12 REG. DEB. 4659 (1836); *see* subsection II.C.1 (discussing the line of practice concerning breakaway states, which commonly operated as independent states before congressional authorization).

215 Gray, *supra* note 212, at 18–20.

216 CONG. GLOBE, 24th Cong., 2d Sess. app. 133 (1837) (statement of Rep. Vanderpoel).

Ordinance's threshold for statehood.[217] But during the 1830s, Congress abandoned the requirement to comply with the "Ordinance as a condition for admission."[218] Representative Vanderpoel was adamant that Congress should grant Michigan statehood, concluding that Congress was sent by the people to "originate measures, and enact laws that may conduce to their permanent happiness and prosperity."[219] Representative Toucey concurred: Michigan was both a de facto and de jure state; its inhabitants were citizens who "cannot be put out of the Union by act of Congress."[220] Further, "the people are the source of all political authority."[221] It is the people's power and right to govern themselves.[222] Congress granted Michigan statehood a few days later.[223]

This line of practice fundamentally demonstrates Congress's ability to "dictate the nation's political future" by granting, delaying, denying, and conditioning statehood.[224] Some scholars trace Congress's plenary power in these decisions back to the Philadelphia Convention debates.[225] Representative Morris of Pennsylvania proposed the permissive phrasing in Article IV, Section 3—"[n]ew states may be admitted by the Legislature into this Union"—on the grounds that "Congress ought to enjoy the freedom to attach conditions to new state admission."[226] Morris wanted to ensure that the United States could govern Canada and Louisiana as provinces *once* they were acquired.[227] Subsequent legislative practice reinforced Congress's power to use admission as a tool of social engineering, loyalty, or fitness.[228]

Despite this plenary power, Congress was not authorized to use this power to permanently create "second-class members of the Union."[229] While territories structurally resemble colonies, this inferior

217 *Id.*

218 Biber, *supra* note 159, at 135; *see also* Strader v. Graham, 51 U.S. (10 How.) 82, 96–99 (1850) (defending slavery and holding that the Ordinance was no longer in force).

219 CONG. GLOBE, 24th Cong., 2d Sess. 135 app. (1837).

220 *Id.* at 185.

221 *Id.* at 186.

222 *Id.*

223 *Id.* at 126.

224 Ablavsky, *supra* note 191, at 1635.

225 *See* James E. Pfander & Elena Joffroy, *Equal Footing and the States "Now Existing": Slavery and State Equality Over Time*, 89 FORDHAM L. REV. 1975, 1977, 1982–87 (2021).

226 *Id.* at 1984 (alteration in original) (quoting 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 455 (Max Farrand ed., 1911)).

227 *Id.* at 1984 n.63.

228 Biber, *supra* note 159, at 119–20; *infra* subsection II.C.5.

229 DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD 1789–1801, at 104 (1997).

political status was meant to be temporary—"[w]e were not to retain colonies in our own country."[230] And the territorial residents' protests against their unequal status often served as a flashpoint that motivated Congress to exercise its constitutional power to grant statehood. That is, contemporaneous constitutional controversies often served as an animus to how Congress exercised its discretion.[231] Like the previous line of practice, Congress worried that disgruntled territorial residents would separate "from our confederacy and becom[e] it's [sic] enemies."[232] Still, the original thirteen states sought to balance this concern with their desire to preserve the Atlantic primacy.[233]

3. The Louisiana Purchase, 1803–1812

The third line of practice commenced with the Treaty with France (i.e., Louisiana Purchase).[234] The Treaty more than doubled the United States' territory, and would later consist of fourteen states: Louisiana, Missouri, Arkansas, Iowa, Minnesota, Kansas, Nebraska, Colorado, North Dakota, South Dakota, Montana, Wyoming, and Oklahoma, respectively.[235] In adjudicating the *Insular Cases*, the Supreme Court principally relied upon this line of practice to promulgate the novel distinction between incorporated and unincorporated territories.[236] This subsection discusses Louisiana, saving the remaining states for subsection II.C.4 and subsection II.C.5.

The Louisiana Purchase was controversial among Founding-era politicians because it tested the Constitution's silence as to whether Congress could acquire and incorporate new territory.[237] Thomas Jefferson privately doubted that the Constitution provided such authority: "[t]he general government has no powers but such as the

230 *Id.*

231 *See* Ablavsky, *supra* note 191, at 1635–36.

232 ONUF, *supra* note 178, at xxix (quoting Letter from Thomas Jefferson to James Monroe (July 9, 1786), *in* 5 THE WORKS OF THOMAS JEFFERSON 131, 132–33 (Paul Leicester Ford ed., 1904)).

233 *See* Pfander & Joffroy, *supra* note 225, at 1986.

234 Treaty Between the United States of America and the French Republic, Fr.-U.S., Apr. 30, 1803, 8 Stat. 200.

235 Letter from Thomas Jefferson to Horatio Gates (July 11, 1803), *in* 10 THE WORKS OF THOMAS JEFFERSON, *supra* note 232, at 12, 12–13; LAWSON & SEIDMAN, *supra* note 63, at 20.

236 *See, e.g.*, Downes v. Bidwell, 182 U.S. 244, 252–53, 330, 390–91 (1901) (claiming that article III of the Treaty with France "evidently committed the government to the ultimate . . . admission of Louisiana as a State," and contradistinguished this text with that of the Treaty of Paris and the Foraker Act to conclude Puerto Rico is unincorporated).

237 LAWSON & SEIDMAN, *supra* note 63, at 22–45.

constitution has given it; and it has not given it a power of holding foreign territory, [and] still less of incorporating it into the Union. An amendment of the Constitution seems necessary for this."[238] The breadth of the Treaty, namely the transfer of all of France's North American territory and its diverse population of foreigners, further exacerbated these textual deficiencies.[239] Jefferson eventually dismissed his reservations for pragmatic considerations. First, the treaty yielded economic benefits by granting the fledgling country control of the Mississippi River, which was vital for western exports, and by maintaining the nation's neutrality vis-à-vis European powers, which "allowed it to profit handsomely in exports and trade."[240] Relatedly, it promoted national security by effectively removing European powers from the western territory.[241] Absent the treaty, France—"the world's then-most powerful army"[242]—would have likely retained the territory; had it established colonies, the "United States would have been forced to maintain a large standing army."[243] Finally, Napoleon Bonaparte reportedly had "seller's remorse," and was looking for any reason to withdraw from the treaty.[244] If Jefferson publicly announced that the Louisiana Purchase required a constitutional amendment, he would have given France a reason to rescind.[245] This would be especially true if the amendment was proposed and failed, or if a powerful member of Congress stalled the debate until the opportunity passed.[246]

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238 Letter from Thomas Jefferson to John Dickinson (Aug. 9, 1803), *in* 10 THE WORKS OF THOMAS JEFFERSON, *supra* note 232, at 28, 29.

239 KASTOR, *supra* note 56, at 40–43.

240 John Yoo, *Jefferson and Executive Power*, 88 B.U. L. REV. 421, 435–36 (2008); *see* Robert Knowles, *The Balance of Forces and the Empire of Liberty: States' Rights and the Louisiana Purchase*, 88 IOWA L. REV. 343, 367–69 (2003) (describing the precipitating political and economic concerns motivating the Louisiana Purchase).

241 Yoo, *supra* note 240, at 436.

242 Levinson & Sparrow, *supra* note 55, at 2.

243 10 EVERETT SOMERVILLE BROWN, THE CONSTITUTIONAL HISTORY OF THE LOUISIANA PURCHASE, 1803–1812, at 35 (Herbert E. Bolton ed., 2000); *see* Letter from Alexander Hamilton to H.G. Otis (Jan. 26, 1799), *in* 6 THE WORKS OF ALEXANDER HAMILTON 390, 390–91 (John C. Hamilton ed., New York, Charles S. Francis & Co. 1851), *reprinted in* 4 THE ANNALS OF AMERICA: 1797–1820, DOMESTIC EXPANSION AND FOREIGN ENTANGLEMENTS 101, 101–102 (1968) (noting Hamilton's military concerns over France's imperial ambition in the Americas, and his interest to take Louisiana and the Floridas).

244 Yoo, *supra* note 240, at 439.

245 *See* Letter from Thomas Jefferson to John C. Breckenridge (Aug. 12, 1803), *in* 10 THE WORKS OF THOMAS JEFFERSON, *supra* note 232, at 5, 5–7.

246 *See* Jeremy David Bailey, *Executive Prerogative and the "Good Officer" in Thomas Jefferson's Letter to John B. Colvin*, 34 PRESIDENTIAL STUD. Q. 732, 735–36 (2004).

Years later, Jefferson justified his decision, stating: "A strict observance of the written laws is doubtless *one* of the high duties of a good citizen, but it is not *the highest*. The laws of necessity, of self-preservation, of saving our country when in danger, are of higher obligation."[247] In other communication, Jefferson conceded that his so-called "(in)fidelity to the Constitution"[248] was driven by his primary desire to expand the country's territory; national defense was secondary.[249] He defended the Purchase during his second inaugural address in 1805, assuring that a larger republic will be less likely to be "shaken by local passions," and that the region would "live in harmony and friendly intercourse" as American citizens settled the region.[250] Because of his shifting rationales, modern commentators liken Jefferson's decision as "more of an impulse buy than a considered purchase."[251]

Article III of the Louisiana Purchase provided that the "inhabitants of the ceded territory shall be incorporated in the Union . . . and admitted as soon as possible, according to the principles of the Federal constitution, to the enjoyment of all the rights, advantages and immunities of citizens of the United States."[252] Although "it was widely assumed" that the territory transferred under the Purchase would become states, contemporaneous scholars questioned the Treaty's constitutional implications.[253] For example, Allan Magruder believed acquiring Louisiana gave "rise to several new political questions," including whether the territory: (1) can be immediately admitted as states, (2) would be incorporated as a territory like Indiana, or (3) would be a colony held on the same principles as England's colonies of Jamaica and Canada.[254]

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247 Letter from Thomas Jefferson to John B. Colvin (Sept. 20, 1810), *in* 11 THE WORKS OF THOMAS JEFFERSON, *supra* note 232, at 146, 146.

248 Levinson, *supra* note 17, at 255.

249 Eric A. White, Note, *Examining Presidential Power Through the Rubric of Equity*, 108 MICH. L. REV. 113, 134 (2009).

250 Thomas Jefferson, Second Inaugural Address (Mar. 4, 1805), *in* 45 THE PAPERS OF THOMAS JEFFERSON 652, 654 (James P. McClure et al. eds., 2021); Bailey, *supra* note 246, at 737.

251 IMMERWAHR, *supra* note 29, at 31.

252 Treaty Between the United States of America and the French Republic, Fr.-U.S., art. III, Apr. 30, 1803, 8 Stat. 200, 202.

253 Knowles, *supra* note 240, at 369–70; BROWN, *supra* note 243, at 65–74.

254 ALLAN B. MAGRUDER, POLITICAL, COMMERCIAL AND MORAL REFLECTIONS, ON THE LATE CESSION OF LOUISIANA, TO THE UNITED STATES 95 (Lexington, Ky., D. Bradford 1803); Knowles, *supra* note 240, at 369 & n.132 (citing MAGRUDER, *supra*, at 95).

During the House debates, Representative Samuel Mitchill of New York opined a theory of "apprenticeship to liberty."[255] That is, the inhabitants could choose to either remain in or leave the Union.[256] If they stayed, the United States would promptly train the inhabitants in the Union's laws and institutions, teach them "the lessons of freedom," and raise them in the "enjoyment and practice of independence."[257] After a "sufficient length of time," the inhabitants would be admitted as citizens and entitled to the full privileges of citizenship.[258]

Jefferson anticipated that the Louisiana Territory would eventually be settled and admitted as new states.[259] Concerned with balancing admission between the north and the south, Jefferson drafted constitutional amendments proposing the gradual admission of new states once its "population achieved the proper density."[260] While he kept these amendments private and urged his friends to do the same,[261] Congress debated a governance plan for Louisiana.[262] Eastern politicians worried over the inhabitants—"Anglo settlers, Catholics, free blacks, Indians, and mixed-race folk."[263] Critics of admission thought Louisianians were "unprepared to be Americans,"[264] were "incapable of performing the duties or enjoying the blessings of a free government,"[265] and that allowing them to vote "would be a dangerous experiment."[266]

These concerns manifested during the congressional debates in 1803, where Congress added a new initial governance phase—a military government—for Louisiana.[267] The bill authorized the President to take possession of and occupy the territories, employ the military as he deemed necessary, and vest "all the military, civil, and judicial

255 *See* 13 ANNALS OF CONG. 476, 479–81 (1803).

256 *Id.* at 480.

257 *Id.*

258 *Id.* at 480–81.

259 *See* Knowles, *supra* note 240, at 392 (citing Letter from Thomas Jefferson to John C. Breckenridge, *supra* note 245, at 5).

260 *Id.* at 391–92.

261 *See* BROWN, *supra* note 243, at 25.

262 Ablavsky, *supra* note 191, at 1660.

263 IMMERWAHR, *supra* note 29, at 30–31.

264 KASTOR, *supra* note 56, at 48.

265 *Id.* (quoting WILLIAM PLUMER'S MEMORANDUM OF PROCEEDINGS IN THE UNITED STATES SENATE, 1803–1807, at 110, 111 (Everett Somerville Brown ed., 1923) (Statement of Sen. Pickering)).

266 IMMERWAHR, *supra* note 29, at 31.

267 *See* 13 ANNALS OF CONG. 497–98 (1803).

powers" in the President until Congress established a temporary government.[268]

In 1804, Congress ratified a bill to establish that temporary government.[269] During the Senate debates, then Senator John Quincy Adams opposed the bill because it proposed "forming a government for that people without their consent and against their will. All power in a republican government is derived from the *people*."[270] A colonial system of government embodied "arbitrary principles—principles repugnant to our Constitution. . . . It is a bad precedent—the U.S. in time will have many colonies . . . ."[271] Adams believed that the absence of elected offices created an inequality between the territories and the states, and "imposed unacceptable distinctions within the national community."[272] Despite his impassioned opposition and accurate prediction about American imperialism, the bill passed the Senate 20–5, and was later signed into law.[273]

The 1804 bill served as "the real spark of political mobilization" for Louisianians.[274] Criticizing the United States as being "nothing more than ethnic cronyism," Louisianians asserted that they were neither incorporated into, nor citizens of, the Union, since their colonial government deprived them "of all the [rights, advantages, and] 'immunities' of American citizens."[275] They continued: "[w]ithout any vote in the election of our Legislature, without any check upon our executive, without any one incident of self-government . . . what 'right' do we enjoy . . . except, indeed, the degrading exemption from the cares of legislation, and the burden of public affairs . . . ."[276]

Louisianians' resistance prompted Congress to pass a new governance bill in 1805, which established the Territory of Orleans and provided that it would be governed by the Northwest Ordinance.[277] Congress authorized a general assembly consisting of twenty-five elected representatives, and upon reaching sixty thousand free

268 Act of Oct. 31, 1803, ch. 1, 2 Stat. 245.

269 Act of Mar. 26, 1804, ch. 38, 2 Stat. 283.

270 Everett S. Brown, *The Senate Debate on the Breckinridge Bill for the Government of Louisiana, 1804*, 22 AM. HIST. REV. 340, 362 (1917).

271 *Id.*

272 KASTOR, *supra* note 56, at 49.

273 Brown, *supra* note 270, at 363; *see* Act of Mar. 26, 1804, 2 Stat. at 283–89.

274 KASTOR, *supra* note 56, at 57.

275 *Id.* at 57–58 (quoting 14 ANNALS OF CONG. 1597, 1599 (1804) (Remonstrance of the People of Louisiana).

276 BROWN, *supra* note 243, at 158 (quoting 14 ANNALS OF CONG. 1597, 1605 (1804) (Remonstrance of the People of Louisiana)).

277 *See* KASTOR, *supra* note 56, at 80.

inhabitants, Orleans was authorized to form a state constitution and be admitted into the Union.[278]

Over the next few years, then Secretary of State James Monroe and other American officials critiqued the administrative structure of the territories as one of diminishing returns: it weakened the administration of justice, was difficult to administer, and was inefficient to the point of undermining the authority of the laws.[279] Meanwhile, Orleans gradually overcame the "geographic and cultural distances that separated [it] from the rest of the nation."[280] It did so through attachment—a prerequisite for incorporation and membership in the national community—by convincing the United States that Orleans was no longer foreign, was learned in democratic principles, and would perpetuate the Union and its ideals.[281] On March 20, 1812, Congress admitted Louisiana as the eighteenth state of the Union.[282]

The doctrinal lesson is that a broad reading of the treaty power under Article II and the Admissions and Territory Clauses in Article IV permits territorial acquisitions so long as it is related to an enumerated power, such as eventual statehood or military necessity.[283] Equally important is the fact that some constitutional realities are fashioned out of pragmatic concerns, irrespective of their contradictions with constitutional or republican governance principles.[284] The constitutionality of the Louisiana Purchase as a foreign treaty was largely irrelevant and set aside by the practical concerns of economics, defense, governance, and expansion.[285] This manner of expounding the meaning of the Constitution created and exacerbated its inherent flaws, namely, the inferior status of citizens residing in territories relative to those in the states. But through mobilization in the "ideal American political manner," Louisianians made their case for statehood and fulfilled the great object of territorial acquisition and incorporation: "to make this nation one."[286]

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278 Act of Mar. 2, 1805, ch. 23, 2 Stat. 322.

279 KASTOR, *supra* note 56, at 142.

280 *Id.* at 144.

281 *Id.* at 144–47.

282 24 ANNALS OF CONG. 1228 (1812).

283 *Cf.* Lauren Benton, *Constitutions and Empires*, 31 LAW & SOC. INQUIRY 177, 181–82 (2006).

284 *See* Levinson & Sparrow, *supra* note 55, at 13.

285 *See* KASTOR, *supra* note 56, at 46.

286 *Id.* at 144 (quoting 22 ANNALS OF CONG. 485 (1811) (statement of Rep. Macon)).

4. The Antebellum Period, 1812–1861

The Louisiana Purchase also set the stage for the fourth line of practice, which emerged in the wake of the Civil War. Before the Civil War, northern and southern states debated whether the Northwest Ordinance's prohibition of slavery applied to the territory acquired under the Purchase.[287] Indeed, the "conflict between liberty and slavery" laid at the heart of territorial expansion during the Antebellum Period.[288] This conflict prefaced the Missouri Compromise of 1820, which ushered in a forty-one-year practice of admitting states in pairs—free states above, and slave states below, the 36° 30′ line—so as to preserve the balance of power in Congress between the sectional divide.[289] During this period, the main motivation for organizing territory and admitting new states was consolidating political power.[290]

Maine and Missouri were the first set of companion states to codify this practice. As a breakaway state, Maine's petition for statehood in 1820 acknowledged that its parent state, Massachusetts, consented to Maine's admission.[291] Although initially considered separate matters, the House conditioned Maine's statehood to Missouri's subsequent admission as a slave state.[292] Proponents of Missouri's statehood maintained that Congress "was bound to admit Missouri" whenever it met the Northwest Ordinance's population requirement, while neglecting its prohibition of slavery.[293] They also echoed previous territorial residents' claim that their political status was analogous to that of a colony.[294] When Missouri was admitted, Congress stipulated that the territory acquired through the Louisiana Purchase that lie "north of thirty-six degrees and thirty minutes north latitude, not included within the limits of" Missouri would be free states.[295] Thus, states that emerged from the territory below this line would become slave states.

Subsequent state admissions proceeded in similar fashion. In 1834, upon discovering that Michigan's protracted statehood ambitions might materialize, slavery proponents urgently sought Arkansas's

287 Paul Finkelman, Essay, *The Dred Scott Case, Slavery and the Politics of Law*, 20 HAMLINE L. REV. 1, 8–9 (1996).

288 Pfander & Joffroy, *supra* note 225, at 1981.

289 *See* Act of Mar. 6, 1820, ch. 22, 3 Stat. 545.

290 *See* Louise Weinberg, Dred Scott *and the Crisis of 1860*, 82 CHI.-KENT L. REV. 97, 101–02 (2007).

291 *See* Act of Mar. 3, 1820, ch. 19, 3 Stat. 544.

292 *See* 35 ANNALS OF CONG. 85 (1820) (statement of Sen. Roberts).

293 *Id.* at 86–88 (statement of Sen. Smith).

294 *Id.* at 88–89.

295 Act of Mar. 6, 1820, ch. 22, § 8, 3 Stat. 545, 548.

statehood; otherwise, they risked destroying the "happy balance of political power" in the Senate by a free state's unaccompanied admission.[296] Without consulting the people of Arkansas, territorial delegate Ambrose Hundley Sevier introduced a resolution that permitted Arkansas to form a constitution and become a state.[297]

The congressional debate over the conditions of Arkansas's admission was contentious and hurried. One focal point of the debate was a provision stating that "[t]he General Assembly shall have no power to pass a law for the emancipation of slaves without the consent of the owners."[298] Indeed, this provision was debated at such length that some members complained of fatigue, requesting the session be adjourned for respite.[299] Representative Hard objected to this provision because it gave Arkansas "all power, and [left] the General Government none."[300] Equally problematic was section eight of Arkansas's enabling act, which sought to perpetuate slavery as a condition of admission for all future states.[301] Such an instrument not only contravened the Constitution's letter and spirit, but it also threatened to undermine the guarantee of a republican form of government. In the end, however, Arkansas was admitted on the same day that Michigan's enabling act was ratified to maintain the sectional balance.[302]

This seesaw method of admitting states continued with Florida (slave state) in 1845,[303] Texas (annexed as a slave state) in 1845,[304] Iowa

296 *See* 1 CENTENNIAL HISTORY OF ARKANSAS 220–21 (Dallas T. Herndon ed., 1922) (quoting A.H. Sevier, Letter to the Editor, ARK. GAZETTE, Jan. 21, 1834, at 2).

297 *Id.* at 220–21.

298 12 REG. DEB. 4017–18 (1836) (quoting KY. CONST. of 1799, art. VII, § 1).

299 *Id.* at 4267.

300 *Id.* at 4269.

301 *Id.*; Act of June 15, 1836, ch. 100, § 8, 5 Stat. 50, 51–52.

302 Act of June 15, 1836, ch. 99, 5 Stat. 49; Act of June 15, 1836, ch. 100, 5 Stat. 50.

303 Act of Mar. 3, 1845, ch. 48, 5 Stat. 742. The northern states opposed Florida's admission on the grounds that it would tilt political power to the south, and that the territory had too small a population relative to Ohio, New York, and Pennsylvania. 14 CONG. GLOBE, 28th Cong., 2d Sess. 273 (1845); *id.* at app. 217 (statement of Rep. Belser) (responding to such critiques); Dorothy Dodd, *Florida in 1845: Statistics—Economic Life—Social Life*, 24 FLA. HIST. Q. 3, 3 (1945); N.J. DEP'T OF LAB., NEW JERSEY POPULATION TRENDS 1790 TO 2000, at tbl. 1 (2001), https://dspace.njstatelib.org/xmlui/bitstream/handle/10929/42812/p8252000.pdf [https://perma.cc/QG44-FN46] (showing United States resident population by state); *see* Stephanie D. Moussalli, *Florida's Frontier Constitution: The Statehood, Banking & Slavery Controversies*, 74 FLA. HIST. Q. 423, 437 (1996) (discussing Florida's admission with Iowa as its companion state).

304 S.J. Res. 8, 28th Cong., 5 Stat. 797, 798 (1845). Texas's annexation was controversial for several reasons. First, the northern states opposed annexation because Texas represented a new slave state. LAWSON & SEIDMAN, *supra* note 63, at 92. Second, precedent strongly suggested that the acquisition of a sovereign land be conducted through a treaty,

(free state) in 1846,[305] Wisconsin (free state) in 1848,[306] California (free state, without a companion) in 1850,[307] Minnesota (free state) in 1858,[308] Oregon (free state) in 1859,[309] and Kansas (free state) in 1861.[310] The political consequences of this line of practice, which culminated with the Civil War in 1861, is most evident in the admissions of California and Kansas. California's admission "ignited a tinder box" for a nation sharply divided on the issue of slavery as it "all but nullified" the principles of the 1820 Compromise.[311] But it came at the cost of "a new, more draconian fugitive slave law," and left open the possibility of slavery in the newly created territories of Utah and New Mexico

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which requires a two-thirds majority vote in the Senate. Currie, *supra* note 29, at 474–75; Sarah Elizabeth Lewis, *Digest of Congressional Action on the Annexation of Texas December, 1844, to March, 1845*, 50 SW. HIST. Q. 251, 264 (1946). But such a maneuver failed in 1844, requiring proponents to switch to a joint resolution, which required only a simple majority in both Chambers. LAWSON & SEIDMAN, *supra* note 63, at 92. The Supreme Court has since upheld this method of admission. Ralph H. Brock, *"The Republic of Texas Is No More": An Answer to the Claim that Texas Was Unconstitutionally Annexed to the United States*, 28 TEX. TECH L. REV. 679, 729–30 (1997).

305 Act of Mar. 3, 1845, ch. 48, 5 Stat. 742. While Iowa was a free state, its residents overwhelming voted against an equal suffrage referendum, which was presented to the public for a vote contemporaneously with the state constitution (which itself was narrowly ratified by 2,544 votes). Mark S. Cady, *A Pioneer's Constitution: How Iowa's Constitutional History Uniquely Shapes Our Pioneering Tradition in Recognizing Civil Rights and Civil Liberties*, 60 DRAKE L. REV. 1133, 1139 (2012). Iowa's statehood was delayed due to a dispute over territory between the Territory of Iowa and Congress. *See* Act. of Aug. 4, 1846, ch. 82, § 1, 9 Stat. 52. By modifying Iowa's boundaries from the previous Congressional Act in 1845, Congress effectively established a new condition of admission for the territory. *Compare id.*, *with* Act of Mar. 3, 1845, ch. 48, § 2, 5 Stat. 742. Thus, the residents of the Territory of Iowa had to ratify a new state constitution that accepted the boundaries established by Congress. Upon the successful ratification, Congress formally admitted Iowa as the twenty-ninth state of the Union. *See* Act of Dec. 28, 1846, ch. 1, § 1, 9 Stat. 117.

306 Act of May 29, 1848, ch. 50, 9 Stat. 233.

307 Act of Sept. 9, 1850, ch. 50, 9 Stat. 452. California was admitted as an unorganized territory, which created further animosity among Southerners. *See* 8 THE ANNALS OF AMERICA, at xviii (1968); Mary Joan Patricia Reilly, The Old Northwest and the Compromise of 1850, at 21–26 (Dec. 1943) (M.A. thesis, Loyola University Chicago) (Loyola eCommons).

308 Act of Mar. 3, 1849, ch. 121, § 12, 9 Stat. 403, 407 (granting Minnesota inhabitants the same rights, privileges, and immunities afforded to the inhabitants of Wisconsin, which was admitted as a free state).

309 Act of Feb. 14, 1859, ch. 33, 11 Stat. 383; *see* Biber, *supra* note 159, at 204 (noting that "Oregon was admitted with essentially the same conditions as Wisconsin").

310 Act of Jan. 29, 1861, ch. 20, 12 Stat. 126.; Act of May 30, 1854, ch. 59, 10 Stat. 277 (organizing the Territories of Nebraska and Kansas).

311 Ronald C. Woolsey, *A Southern Dilemma: Slavery Expansion and the California Statehood Issue in 1850—a Reconsideration*, S. CAL. Q., 123, 123, 136. Southerners, viewing California's admission as a direct assault on their political influence, unsuccessfully tried to divide California into two states to preserve the 1820 Compromise. *Id.* at 125.

(the latter of which was carved out of Texas to counterbalance California).[312]

The Kansas-Nebraska Act of 1854 deepened the national divide, as Congress deferred to the remaining territories the decision whether to be a slave or free state.[313] The Act permitted white male inhabitants who were "actual resident[s] of said Territory" the right to vote at the first election, which differed from previous enabling acts that otherwise required proof of previous residency in the territory.[314] Although the Act also required the Governor to call a county-level census before the first election,[315] this provision was ineffectively enforced, leading to "[t]he participation of nonresidents in the Kansas elections," and subsequent violence and voter fraud.[316] Nonresidents supporting proslavery and antislavery sentiments entered Kansas to sway the territory toward their respective faction. But by 1861, Kansans successfully rejected several proslavery constitutions, and the territory was admitted as a free state.[317] Only a few months later, the southern states would secede from the Union, sparking the beginning of the Civil War.

5. Admission as a Tool of Social Engineering and Status Manipulation, 1862–1959

The final line of practice consists of admissions that were motivated by status manipulation and consolidating political power after Reconstruction. This line of practice includes fourteen states: Nevada, Nebraska, Colorado, North Dakota, South Dakota, Montana, Washington, Idaho, Wyoming, Utah, Oklahoma, New Mexico, Arizona, Alaska, and Hawaii.

The western territories, which included land acquired under the Louisiana Purchase and the Treaty of Guadalupe Hidalgo, presented unique challenges to a country which sought to expand the Union while manipulating the political enfranchisement of the

312 Louise Weinberg, *Overcoming* Dred*: A Counterfactual Analysis*, 24 CONST. COMMENT. 733, 737 n.15 (2007); Reilly, *supra* note 307, at 25; Act of Sept. 9, 1850, ch. 49, 9 Stat. 446, 446–47.

313 Act of May 30, 1854, 10 Stat. at 283–84; Weinberg, *supra* note 312, at 737 n.16.

314 Act of May 30, 1854, 10 Stat. at 279; Brenden Rensink, *Nebraska and Kansas Territories in American Legal Culture*, *in* THE NEBRASKA-KANSAS ACT OF 1854, at 47, 56 (John R. Wunder & Joann M. Ross eds., 2008).

315 Act of May 30, 1854, ch. 59, 10 Stat. 277.

316 Rensink, *supra* note 314, at 56.

317 Weinberg, *supra* note 290, at 122–23.

inhabitants.[318] In Utah, the Mormon church dominated the territory's politics and economy during the 1850s.[319] Congress, viewing the territory's substantial Mormon population as a threat to national politics, tried to suppress "the Mormon power" by carving its western border into the new Territory of Nevada.[320] When this maneuver failed to achieve its intended outcome, Congress attempted to "Americanize[]" the Mormons by prohibiting polygamous marriages both by legislation[321] and through the state's enabling act.[322] As one commentator claimed, "Utah was not trusted with statehood until Congress was satisfied that the Mormon church had abandoned polygamy and explicit involvement in Utah politics."[323]

New Mexico encountered similar opposition from Congress. Although the United States was largely successful in annexing the thinly populated northern territories of Mexico through the Treaty of Hidalgo, the land which would become New Mexico hosted a substantial Mexican population.[324] A "self-righteous Anglo-Saxon America"[325] pejoratively viewed the Spanish-speaking majority as superstitious, sexually immoral, and corrupt; the Catholic Church was blamed for allowing these conditions to persist, and for "meddling in politics."[326] Beyond these cultural differences, congressional Republicans considered New Mexico "too Democratic," adding another rationalization to delay admission.[327] When admission was seriously considered at the turn of

318 *See* IMMERWAHR, *supra* note 29, at 77–80 ("We have never dreamt of incorporating into the Union any but the Caucasian race . . . . Are we to associate with ourselves, as equals, companions, and fellow-citizens, the Indians and mixed races of Mexico? " (quoting CONG. GLOBE, 30th Cong., 1st Sess. 98 (1848) (statement of Sen. Calhoun))) (noting this pattern).

319 Biber, *supra* note 159, at 150 n.111 (first citing SARAH BARRINGER GORDON, THE MORMON QUESTION: POLYGAMY AND CONFLICT IN NINTEENTH CENTURY AMERICA 27, 58–60 (2002); and then citing JEAN BICKMORE WHITE, THE UTAH STATE CONSTITUTION: A REFERENCE GUIDE 1–4 (1998)).

320 H.R. REP. NO. 35-375, at 4–5 (1858).

321 *See* Edmunds Act, ch. 47, 22 Stat. 30 (1882); Proclamation, *reprinted in* 28 Stat. 1213 (1894) (discussing this legislation and granting amnesty).

322 Act of July 16, 1894, ch. 138, § 3, 28 Stat. 107, 108; Biber, *supra* note 159, at 161–62.

323 Biber, *supra* note 159, at 195.

324 IMMERWAHR, *supra* note 29, at 77 (stating that while U.S. forces occupied Mexico City and could have conquered Mexico's remaining territory, the prevailing view advised against such a move because "[w]e have never dreamt of incorporating into the Union any but the Caucasian race" (quoting CONG. GLOBE, 30th Cong., 1st Sess. 98 (1848) (statement of Sen. Calhoun))); Biber, *supra* note 159, at 120.

325 ROBERT W. LARSON, NEW MEXICO'S QUEST FOR STATEHOOD, 1846–1912, at 70–72 (1968).

326 Biber, *supra* note 159, at 165.

327 Susan Schulten, *The Civil War and the Origins of the Colorado Territory*, 44 W. HIST. Q. 21, 45 (2013).

the twentieth century, Congress initially contemplated New Mexico and Arizona as a single state.[328] But neither territory wanted this arrangement: Arizona feared "they would be absorbed by the Mexican population of New Mexico,"[329] and New Mexico did not want to assume Arizona's debt.[330] Thus, statehood for both territories was delayed until 1911, when Congress mustered sufficient political willpower to admit both as separate states.[331]

The other major theme from this era is that of political expediency, where political parties used state admissions to bolster political power.[332] As the Civil War entered its third year, congressional Republicans under President Lincoln's leadership passed legislation to organize Nevada, Colorado, and Dakota as a means to consolidate their power.[333] Nevada's admission was hastily conducted so that it might become a state before the 1864 presidential election.[334] To this end, Congress not only waived its right to inspect and approve the territory's proposed constitution, but it also created a state that had less than 40,000 residents.[335]

A similar tactic was used to stunt political power, which was accomplished by "requiring voters to approve the proposed state constitution in a referendum."[336] This was the case for Nebraska[337] and Colorado,[338] where such a provision materially slowed their respective admissions to the disadvantage of Republicans in the 1864 election.[339]

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328 Biber, *supra* note 159, at 167–68. New Mexico's statehood was delayed "until a bare majority of its population was English-speaking." Juan F. Perea, *A Brief History of Race and the U.S.-Mexican Border: Tracing the Trajectories of Conquest*, 51 UCLA L. REV. 283, 300 (2003).

329 Biber, *supra* note 159, at 168

330 LARSON, *supra* note 325, at 229.

331 S.J. Res. 57, 62d Cong., (1911).

332 *See* DAVID MILLER DEWITT, THE IMPEACHMENT AND TRIAL OF PRESIDENT ANDREW JOHNSON 64 (1903) (noting that one of the two ways to gain a majority in the Senate was by admitting new states).

333 *See* Schulten, *supra* note 327, at 22.

334 MICHAEL W. BOWERS, THE SAGEBUSH STATE: NEVADA'S HISTORY, GOVERNMENT, AND POLITICS 29 (5th ed. 2018); Act of Mar. 21, 1864, ch. 36, 13 Stat. 30.

335 *See* BOWERS, *supra* note 334, at 29 (noting that there were 11,659 votes cast in the Nevada statehood convention); U.S. CENSUS OFF., CENSUS BULLETIN NO. 35, POPULATION OF NEVADA BY COUNTIES AND MINOR CIVIL DIVISIONS (1901) (indicating state population was 6857 in 1860 and 42,491 in 1870).

336 Roderick M. Hills Jr., *The Unwritten Constitution for Admitting States*, 89 FORDHAM L. REV. 1877, 1885 (2021).

337 Act of Apr. 19, 1864, ch. 59, § 5, 13 Stat. 47, 48–49; *see* Biber, *supra* note 159, at 142 (noting that Nebraska, for a variety of reasons, did not enter the Union until 1867).

338 Act of Mar. 21, 1864, ch. 37, § 5, 13 Stat. 32, 34.

339 Hills, *supra* note 336, at 1885.

Colorado was carved out of portions of Utah, Kansas, Nebraska, and New Mexico, the latter of which was most controversial because it "fragmented [its] strongly Democratic population."[340] A combination of internal and external resistance to Colorado's statehood delayed its admission until 1876.[341] However, the main impediment appeared to be President Johnson's belief that new states should not be created "until the eleven Southern states had been accepted back into the fold."[342]

The contest between Democrats and Republicans intensified during the 1880s as Dakota, Montana, Washington, Idaho, and Wyoming sought statehood.[343] The southern portion of Dakota was a strong Republican territory, and congressional Democrats delayed admission out of partisan interests.[344] This posture was successful until the presidential election of 1888, when Republicans won control of Congress and the White House under President Benjamin Harrison.[345] Defeated, but hoping for some national credit for enfranchising the western territories, congressional Democrats proposed a bill that would admit Washington, Montana, New Mexico, and Dakota.[346] But Senate Republicans wanted Dakota to be divided into two states, and threatened to block statehood for all future territories unless Democrats conceded.[347] After extensive politicking, the final bill split Dakota and omitted New Mexico.[348]

The themes from this line of practice are particularly salient for the noncontiguous territories of Alaska and Hawaii, as well as other decisions concerning the scope of membership in the Union. During his presidency from 1869 to 1877, President Grant was eager to purchase and annex the Dominican Republic, because the kingdom offered a strategic location for a naval base and "prime sugar and coffee

340 Schulten, *supra* note 327, at 42.

341 *See* DEWITT, *supra* note 332, at 169–70 (noting President Johnson's 1867 veto message on admitting Colorado stipulated that another vote should be conducted by the territory's residents, and that the territory lacked a "sufficient population to support the expenses of a State government").

342 LARSON, *supra* note 325, at 92.

343 Robert Edwin Albright, *Politics and Public Opinion in the Western Statehood Movement of the 1880's*, 3 PAC. HIST. REV. 296, 296 (1934).

344 Patrick M. Garry & Candice Spurlin, *History of the 1889 South Dakota Constitution*, 59 S.D. L. REV. 14, 17 (2014).

345 *Id.* at 18.

346 Albright, *supra* note 343, at 300-01.

347 *Id.* at 296–97.

348 Act of Feb. 22, 1889, ch. 180, 25 Stat. 676.

real estate."[349] But there was strong opposition against this proposal from the same camps that supported (directly or as a matter of principle) the annexation of Louisiana, Texas, Alaska, and territory under the Treaty of Guadalupe-Hidalgo.[350] While proponents of annexation claimed that this acquisition only required a joint resolution, opponents interpreted their power narrowly.[351] The latter claimed that Congress must pass a treaty, the difference being that Congress could admit states by joint resolution—as was the case with Texas—but it could not do the same for admitting territories—which was the manner by which the Dominican Republic would enter.[352] Constitutional issues momentarily aside, the hesitancy could be explained by the broader concern of Reconstruction, including how to secure the rights and privileges of citizenship for blacks, and how to incorporate racially heterogeneous people of a foreign nation into the Union.[353] And as the United States entered the height of its imperialist era, it preferred to engage in so-called dollar diplomacy, where it "seized the levers of finance and trade [of smaller nations] but left sovereignty formally intact," rather than undertake the more complex matter of annexation.[354]

Congress's annexation of Hawaii by joint resolution in 1898 directly contradicted the stated grounds for its opposition against annexing the Dominican Republic.[355] Indeed, Congress pursued this maneuver after President McKinley failed to muster up the requisite two-thirds majority vote in favor of annexing the territory through legislation.[356] Once a territory, members of Congress routinely questioned Hawaii's loyalty and fitness, fearing "Communists could take control of the Hawaiian state government, shut down Hawaii's economy in the event of war, disrupt military shipments, and gain access to sensitive military intelligence in Congress."[357] But Communism was often a proxy for fears over the territory's racial heterogeneity.[358]

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349 IMMERWAHR, *supra* note 29, at 78; Merline Pitre, *Frederick Douglass and the Annexation of Santo Domingo*, 62 J. NEGRO HIST. 390, 391 (1977).

350 Pitre, *supra* note 349, at 395 (quoting Frederick Douglass, *Santo Domingo—No. 4*, NEW NAT'L ERA, Apr. 27, 1871).

351 Currie, *supra* note 29, at 474–75.

352 *Id.* at 475.

353 Nicholas Guyatt, *America's Conservatory: Race, Reconstruction, and the Santo Domingo Debate*, 97 J. AM. HIST. 974, 976 (2011).

354 IMMERWAHR, *supra* note 29, at 114.

355 H.R.J. Res. 55, 55th Cong., 30 Stat. 750 (1898).

356 O'Malley, *supra* note 34, at 512.

357 Biber, *supra* note 159, at 169.

358 *Id.* at 171.

Alaska and Hawaii were concurrently considered for statehood as the prevailing wisdom held that the former would favor the Democratic Party, and the latter the Republican Party.[359] The House Committee on Interior and Insular Affairs expressed the sentiment that Alaska's statehood was in the Union's best interest, especially after it became a military defense territory during World War II.[360] Specifically, statehood embodied the "American legal philosophy" of self-government; it saved the federal government costs of supporting certain government functions; and it permitted and encouraged "a much more rapid growth in the economy of [Alaska] than would be possible under Territorial status."[361] Further, the Committee acknowledged that "the extreme degree of Federal domination of Alaskan affairs" significantly stifled its development.[362]

Hawaii's statehood was justified by the Committee on several grounds. First, Hawaii had strategic value for national defense.[363] The Japanese attack on Pearl Harbor during World War II revealed that Hawaii was "our western front," and such a vital function should not be relegated to "the inferior status of a Territory."[364] Second, continuing to deny "full political equality" to Hawaii's residents was inconsistent with the United States' effort to "promote the principle of self-determination and self-government among the peoples of the earth."[365] Third, Hawaii's racial heterogeneity gave the United States a "unique medium of communication and understanding with Asiatic peoples," thereby giving the country "intimate knowledge of Pacific affairs."[366] Finally, there was popular support among the American people to grant Hawaii statehood.[367]

D. The Upshot

The foregoing discussion reveals the sheer complexity of the practice of state admission. One takeaway is that Congress's decision

359 Andrew Glass, *Hawaii Enters Union as 50th State, Aug. 21, 1959*, POLITICO (Aug. 21, 2018, 12:01 AM), https://www.politico.com/story/2018/08/21/hawaii-enters-union-as-50th-state-aug-21–1959–789017/ [https://perma.cc/DEZ6-EZ4D].

360 H.R. REP. NO. 84-88, at 1, 37 (1955); JOHN S. WHITEHEAD, COMPLETING THE UNION: ALASKA, HAWAI'I, AND THE BATTLE FOR STATEHOOD 54 (2004).

361 H.R. REP. NO. 84-88, at 37.

362 *Id.*

363 *Id.* at 9.

364 *Id.*

365 *Id.*

366 *Id.* at 10.

367 *Id.*

to admit a state or deny a territory statehood, and the conditions under which this process took place, often reflect the political priorities, public perceptions, and national concerns of the time. These factors muddled the precise constitutional boundaries of power, sometimes redrawing and reinterpreting them to accommodate growth.[368] At other times, such powers were strictly construed or left unexercised altogether, particularly when admission of a new state would alter political or demographic characteristics.[369] In either case, the Constitution appears to be "a little more elastic, or a little more capable of contraction," than the political branches initially envisioned when new constitutional questions emerged.[370]

It also reinforces Justice Holmes's observation that logic is not the "only force at work in the development of the law."[371] And it invites a renewed opportunity to reconsider the worth of the foregoing practices.[372] To borrow an apt analogy from Professor Samuel Bray, Congress is "like a tailor who is working with a large bolt of fabric."[373] Starting from whole cloth, the tailor may rip, tear, trim, patch, and sew together pieces of the fabric to fit the task at hand.[374] Here, Congress's whole cloth is the Constitution, whose relevant provisions of acquiring territory and creating states were malleable due to their vagueness. The Constitution allowed for some degree of creativity on the hope that this power would be used in the nation's best interest.

The second takeaway is that the *Insular Cases* improperly deviated from the longstanding practice of admission and its related purpose. Between the bookends of Vermont and Hawaii, a common thread connecting the five lines of practice is that Congress has always (eventually) admitted territory that has a sufficiently significant relationship with the Union. As the Northwest Ordinance practice indicates, territories were meant to constitute a temporary status. The Founders acknowledged that territories were equivalent to colonies. Such status made the residents second-class members of the Union

368 *See supra* subsection II.C.3.

369 *See supra* subsection II.C.4.

370 13 REG. DEB. 1442 (1837); *see supra* subsection II.C.3.

371 O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 465 (1897).

372 *Cf. id.* at 468 ("We are only at the beginning of a philosophical reaction, and of a reconsideration of the worth of doctrines which for the most part still are taken for granted without any deliberate, conscious, and systematic questioning of their grounds.").

373 Samuel L. Bray, *The Supreme Court and the New Equity*, 68 VAND. L. REV. 997, 1022 (2015).

374 *Id.* at 1022–23.

who stood on unequal footing with their fellow citizens residing in the states.[375]

Further, the United States was never supposed to retain colonies.[376] To do so would be repugnant to the principles espoused in the Declaration of Independence[377] and the Constitution. Statehood proponents repeatedly emphasized this contradiction during the Northwest Ordinance and Louisiana Purchase lines of practice. The Founders understood, and congressional practice reinforced, that a territory was a necessary step toward statehood under an apprenticeship theory to liberty.[378] The purpose of establishing a territory was to prepare it for statehood. This entailed attracting a sufficiently large population, learning and implementing democratic laws and institutions, and demonstrating economic viability. Indeed, maintaining territories for an extended period of time causes tangible harm: it undermines the American legal philosophy of self-government, stifles economic development, and weakens the administration of justice.[379]

From this perspective, the *Insular Cases* represent an improper deviation from well-settled, constitutionally sound practice. Excepting the Territories, Congress has never denied statehood to a territory that petitioned for it.[380] While the five lines of practice contained politically fraught decisions over admission, in each case, Congress eventually discharged its constitutional obligation of granting statehood. This result even applied to territories that were not originally contemplated to be viable candidates for statehood, such as Hawaii, Alaska, New Mexico, Arizona, and Oklahoma.[381] Congress has regularly, consistently, and

375 *Supra* subsections II.C.1–3.

376 *Id.*

377 THE DECLARATION OF INDEPENDENCE paras. 2, 29 (U.S. 1776) (describing the "long train of abuses and usurpations" by a tyrannical government "unfit to . . . [rule] a free people").

378 *Supra* notes 255–58 and accompanying text.

379 *Supra* notes 279, 361–62 and accompanying text.

380 Dávila-Colón, *supra* note 142, at 317.

381 For example, Oklahoma's statehood was viable only after tribal leaders' efforts to establish the State of Sequoyah was defeated in Congress. Stacy L. Leeds, *Defeat or Mixed Blessing? Tribal Sovereignty and the State of Sequoyah*, 43 TULSA L. REV. 5, 6–9 (2007). Oklahoma's admission in 1907 encompassed Indian Territory despite valid treaties with Congress promising no such result would occur. Dylan R. Hedden-Nicely & Stacy L. Leeds, *A Familiar Crossroads:* McGirt v. Oklahoma *and the Future of the Federal Indian Law Canon*, 51 N.M. L. REV. 300, 315 (2021). Some legislators eventually justified Oklahoma's statehood by emphasizing its "predominantly 'white' citizenry, and the genius of its 'race energy.'" Jesse de la Cruz, *Rejection Because of Race: Albert J. Beveridge and Nuevo México's Struggle for Statehood 1902–1903*, 7 AZTLAN 79, 87 (1977) (quoting 36 CONG. REC. 1412 (1903)). This

intentionally interpreted Article IV of the Constitution in such a manner that eventually grants statehood. The *Insular Cases* are contradistinguished from the foregoing practice insofar as it is a product of sheer political will based on inoperative facts and prejudiced motivations.[382]

Moreover, the *Insular Cases* doctrine is far from settled. The Court has retained the doctrine with great skepticism of its constitutional foundation and with an uncomfortable concession of the dubious motivations underpinning it:

> The concept that the Bill of Rights and other constitutional protections against arbitrary government are inoperative when they become inconvenient or when expediency dictates otherwise is a very dangerous doctrine and if allowed to flourish would destroy the benefit of a written Constitution and undermine the basis of our Government.[383]

Justice Gorsuch explained that even contemporaneous scholars who supported the doctrine acknowledged it was a "thoroughly modern invention" that contradicted judicial precedent and the original understanding of the constitutional text.[384] The *Insular Cases*, like *Dred Scott*,[385] *Plessy*,[386] and *Korematsu*[387] are deeply "rooted in racism and a national self-conception that we would not tolerate today."[388] And in recent years, commentators and the American public have increasingly voiced their opposition to the *Insular Cases* and the unjustifiable differential treatment of the citizens and nationals residing in the

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factor was used to delay New Mexico's admission because of its predominantly Mexican population. *Id.*; *supra* note 326.

382 *Supra* Part I.

383 Reid v. Covert, 354 U.S. 1, 14 (1957).

384 United States v. Vaello Madero, 142 S. Ct. 1539, 1555 (2022) (Gorsuch, J., concurring).

385 60 U.S. (19 How.) 393 (1856).

386 163 U.S. 537 (1896).

387 323 U.S. 214 (1944).

388 Blocher & Gulati, *supra* note 19, at 245 & n.110.

Territories.[389] Courts have increasingly criticized the doctrine, describing it as "discredited" and "an ultra vires act."[390]

Absent the *Insular Cases*, Congress has no defensible constitutional reason to deny statehood in perpetuity. The Territories have proven themselves a permanent fixture of the American polity, committed to perpetuating democracy and its ideals.[391] They each have a sufficiently large population pursuant to the Northwest Ordinance. Even if they did not, Congress has repeatedly waived such a requirement.

Considerations of local autonomy and cultural preservation can be maintained while granting statehood. It is absurd to claim that a territory should be denied statehood—that is, to be kept in a subservient colonial condition—on the grounds that it respects the Territories' "unique histories, economic conditions, social circumstances . . . and relative autonomy."[392] Continuing to deny equal treatment with regard to federal benefits is equally untenable:

> If Congress can exclude citizens from safety-net programs on the ground that they reside in jurisdictions that do not pay sufficient taxes, Congress could exclude needy residents of Vermont, Wyoming, South Dakota, North Dakota, Montana, and Alaska from benefits programs on the basis that residents of those States pay less into the Federal Treasury than residents of other States.[393]

Congress is obligated to grant the Territories statehood so as to formally acknowledge their equal political status with the states. By Congress's own admission, anything less than statehood is a denial of that equality; it perpetuates a paradox in what the United States purports to uphold as fundamental principles of democracy.[394]

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389 *See, e.g.*, *supra* notes 12–27 and accompanying text; Yarimar Bonilla, *For Puerto Ricans, Another Reminder that We Are Second-Class Citizens*, N.Y. TIMES (May 19, 2022), https://www.nytimes.com/2022/05/19/opinion/puerto-rico-supreme-court-social-security.html [https://perma.cc/8K5W-GR5R]; Paul Blumenthal, *Supreme Court Asked to Reject Racist Rulings that Denied Rights to 3.6 Million Americans*, HUFFPOST (Apr. 27, 2022, 9:30 PM), https://www.huffpost.com/entry/supreme-court-insular-cases_n_6269a5f8e4b029505deda44f/ [https://perma.cc/5B3U-UPZ6]; Stacey Plaskett, *The Second-Class Treatment of U.S. Territories Is Un-American*, THE ATLANTIC (Mar. 11, 2021), https://www.theatlantic.com/ideas/archive/2021/03/give-voting-rights-us-territories/618246/ [https://perma.cc/F5ZX-V2ZV].

390 *See, e.g.*, Aurelius Inv., LLC v. Puerto Rico, 915 F.3d 838, 854–55 (1st Cir. 2019), *rev'd on other grounds*, Fin. Oversight & Mgmt. Bd. v. Aurelius Inv., LLC, 140 S. Ct. 1649 (2020).

391 *See supra* subsection III.C.3.

392 United States v. Vaello Madero, 142 S. Ct. 1539, 1541 (2022).

393 *Id.* at 1562 (Sotomayor, J., dissenting).

394 H.R. REP. NO. 84-88, at 9 (1955).

Congress has gone to great lengths to manipulate political status: it preserved the institution of slavery through its practice of admitting companion states; it violated valid treaties with Native American tribes; it overthrew the sovereign kingdom of Hawaii; and it used statehood as a tool to entrench political power. These acts, and the arbitrary denial of statehood to the Territories, represent concrete threats to democracy. The Supreme Court has repeatedly acknowledged the import of a healthy federalist system: it is "a check on abuses of government power,"[395] it "secures to citizens the liberties that derive from the diffusion of sovereign power,"[396] and it enables states to respond, through the enactment of "positive law[,] . . . to the initiative of those who seek a voice in shaping the destiny of their own times."[397] Manipulating political status to maintain territories upsets the balance of power, undermines the purpose of a federalist system, and increases the risk of tyranny by the federal government.

In short, the *Insular Cases* doctrine fails to liquidate the meaning of the Constitution as it pertains to admission. The Supreme Court recently acknowledged that "the magnitude of a legal wrong is no reason to perpetuate it."[398] If the doctrine is overturned, the status quo will be disrupted. But that alone is insufficient to avoid returning to the proper and original understanding of the Constitution, especially when the doctrine so blatantly deviated from longstanding and settled practice. Indeed, "[u]nlawful acts, performed long enough and with sufficient vigor, are never enough to amend the law. To hold otherwise would be to elevate the most brazen and longstanding injustices over the law, both rewarding wrong and failing those in the right."[399] In short, Congress has not exactly been a benevolent tailor. But it can still redeem itself.

III. LEGISLATIVE PROPOSAL FOR ADMITTING THE TERRITORIES

President Lincoln observed that "[j]udicial decisions are of greater or less authority as precedents, according to circumstances."[400] Where a Supreme Court's decision is tainted by bias, deviates from

395 Gregory v. Ashcroft, 501 U.S. 452, 458 (1991).

396 New York v. United States, 505 U.S. 144, 181 (1992) (quoting Coleman v. Thompson, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting)).

397 Bond v. United States, 564 U.S. 211, 221 (2011).

398 McGirt v. Oklahoma, 140 S. Ct. 2452, 2480 (2020).

399 *Id.* at 2482.

400 Abraham Lincoln, Speech at Springfield Illinois (June 26, 1857), *in* 2 THE COLLECTED WORKS OF ABRAHAM LINCOLN 398, 401 (Roy P. Basler ed., 1953).

public expectation, lacks steady practice, or is erroneous, it is appropriate "to treat it as not having yet quite established a settled doctrine for the country."[401]

For its part, the Supreme Court has acknowledged that "when governing decisions are unworkable or are badly reasoned, '[it] has never felt constrained to follow precedent.'"[402] The *Insular Cases* are both. Further, they are not moored to an immutable constitutional rule. In fact, the doctrine flies in the face of the democratic principles upon which this Union was built. Given its repugnant history, the doctrine should be retired as the latest member of the anticanon.

Moreover, the purpose of the *Insular Cases* was to allow the United States to discharge territory it did not wish to retain. While the United States exercised this power with Cuba and the Philippines, it has not done so with the remaining Territories. In fact, the United States has moved in the opposite direction, incorporating more rights and protections to the Territories. Indeed, in many ways, the Territories are recognized as the functional equivalent of states. Consequently, the Territories are no longer temporary entanglements—possessions of a democratic empire—but rather, a core feature of the American polity.

Given the extensive analysis of congressional practice of state admissions, this Note proposes that the unwritten rule governing admission is: territories which have a sufficiently significant relationship with the Union are to be eventually admitted as states. Such a rule not only maintains the burden of proof that a territory can meet the responsibilities of statehood, but it also ensures that Congress unequivocally upholds its duty of granting political equality to entitled territories. To that end, this Note advances a legislative proposal inspired by the War Powers Resolution of 1973 to facilitate that discussion, ensure political accountability, and promote a reasonable timeline for statehood.

Ratified during the height of the Vietnam War, the War Powers Resolution aimed to "fulfill the intent of the framers of the Constitution" by ensuring that both Congress and the President were involved in the decision to introduce "Armed Forces into hostilities . . . and to the continued use of such forces in hostilities or in such situations."[403] When the President uses armed forces absent a formal declaration of

401 *Id.*

402 Payne v. Tennessee, 501 U.S. 808, 827 (1991) (quoting Smith v. Allwright, 321 U.S. 649, 665 (1944)).

403 War Powers Resolution, 50 U.S.C. § 1541(a) (2018).

war, the War Powers Resolution requires the President to submit a written report to Congress within 48 hours explaining: "(A) the circumstances necessitating the introduction of United States Armed Forces; (B) the constitutional and legislative authority under which such introduction took place; and (C) the estimated scope and duration of the hostilities or involvement."[404] Within sixty days of sending the report, the President must terminate the use of armed forces unless Congress provides otherwise.[405]

The legislative proposal may be called the "Resolution to Prepare the Remaining Permanently Inhabited Territories for Statehood." This Resolution defines qualifying territories as those lands which have a permanent United States citizen population.[406] The Resolution may include both incorporated and unincorporated territories. However, the current Territories must be incorporated as an initial matter. Unincorporated territories may only be added in event of cession, secession and subsequent reclamation as in the Civil War, or other means of acquiring new territory. In these cases, Congress must act expeditiously to incorporate the territory on the presumption it will be a permanent fixture of the American polity.

Operatively, the Resolution will exist in perpetuity until all qualifying territories have been incorporated and admitted as states. It will list said territories, which currently include American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands. At the start of each term, both Chambers must discuss and vote on the Resolution as it pertains to each listed territory. There would be four voting options. In exercising these options, Congress should account for the residents' preference of enfranchisement. For an unincorporated territory, the Chamber may vote in the affirmative to incorporate it, or in the negative to maintain the unincorporated status. In the former, Congress must provide the requisite steps the territory will take to formalize the transition to incorporation. This may include traditional provisions like ensuring a republican form of government, suffrage, and so on. In the case of the latter, Congress must specify the reasons for its negative vote and provide the necessary criteria that the territory must satisfy in order to receive an affirmative vote in the subsequent term. If one Chamber votes in the affirmative

404 *Id.* §§ 1543(a)(3)(A)–(C).

405 *Id.* §§ 1544(a)–(b).

406 Permanent is defined as "continuing or enduring without fundamental or marked change." *Permanent*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/permanent/ [https://perma.cc/9VMZ-VB2L].

and the other in the negative, or if there is a variance in the conditions for incorporation in the Chambers' affirmative vote, Congress shall call a joint session to resolve the difference.

A similar process would exist for incorporated territories. Congress may vote in the affirmative to grant an incorporated territory statehood. Such a vote indicates that a Chamber believes the territory has met the minimum requirements for statehood. If Congress so votes, it must promptly pass a separate enabling act that empowers the territory to form a state government and ratify a state constitution (if one does not already exist) and provides any reasonable conditions for admission. If Congress votes to deny statehood for a territory in that particular term, for each territory, Congress must provide a detailed report as to the reasons for its decision. Such a requirement promotes accountability and transparency on the part of Congress, and it gives the territories an opportunity to remedy the perceived deficiencies. If Congress fails to take a timely vote on the matter, the Resolution automatically grants each listed territory statehood and prescribes a path to statehood consistent with established practice. This final provision takes effect, unless the residents of that territory vote to refuse statehood. If a Territory expresses hesitation or adversity to statehood, Congress may consider such condition as a reason to temporarily, but not indefinitely, postpone statehood (i.e., until the next term). Congress should ensure that reasonable efforts and special attention are made to preserve the Territories' local heritage, which may alleviate such adversity.[407]

CONCLUSION

This Note advocated for the Territories' statehood. The main jurisprudential impediment to this prospect of democratic equality for

407 Preserving the Territories' local heritage is essential for this enfranchisement project. For example, Guam's native language, Chamorro, is considered vulnerable, meaning that "[m]ost, but not all, children or families . . . speak their parental language as their first language, but this may be restricted to specific social domains" like the home. UNESCO, ATLAS OF THE WORLD'S LANGUAGES IN DANGER 11–12, 78 (Christopher Moseley ed., 3d ed. 2010). Relatedly, Congress must take proper steps to accurately gauge the residents' desired political status and ensure that nonresidents do not improperly influence the result. Federal courts thus far have failed to do so. *See* Petition for Writ of Certiorari at 26, 140 S. Ct. 2739 (2020) (No. 19-827) (asserting that the Ninth Circuit's invalidation of Guam's political-status plebiscite put the "inhabitants in an impossible position. On one hand, these inhabitants lack fundamental political rights and protections because of their tenuous relationship with the United States. . . . But on the other, they cannot join together as a political body to express their opinions on the status quo or the territory's future political relationship with the United States.").

nearly four million American citizens and nationals are the *Insular Cases*. This doctrine has no defensible precedential value: it is constitutionally erroneous and poorly reasoned;[408] it is inconsistent with longstanding and settled legislative practice that extended statehood to territories that have a sufficiently significant relationship with the Union; it is motivated by political and racial conceptions we should no longer tolerate; it has proven unworkable by creating the undesirable "byproducts of uncertainty, cost, and opacity;"[409] and its underpinnings have since been "'eroded' by subsequent developments of constitutional law."[410] The Territories are a permanent fixture of the American polity, and their political, social, and legal statuses must be improved so as to be equal with their fellow citizens.

This Note challenges the *Insular Cases* by analyzing over two centuries of legislative practice, and it offers a legislative proposal to ensure permanently inhabited territories are granted statehood in a timely manner. What remains is whether the three branches of government will discharge their respective constitutional obligations in a manner that meaningfully enfranchises the Territories. If the government fails this basic duty, we will require nothing less than a "constitutional moment," whereby the American public, "confronting issues of great import, make[s] a conscious decision to strike out on transformative constitutional paths."[411]

408 *See* Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2479 (2018) (noting that "[a]n important factor in determining whether a precedent should be overruled is the quality of its reasoning").

409 Randy J. Kozel, *Stare Decisis in the Second-Best World*, 103 CALIF. L. REV. 1139, 1162 (2015).

410 *See* Hurst v. Florida, 577 U.S. 92, 102 (2016) (quoting Alleyne v. United States, 570 U.S. 99, 119 (2013) (Sotomayor, J., concurring)).

411 Levinson, *supra* note 17, at 264.