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# ESSAY

# Needful Rules and Regulations: Originalist Reflections on the Territorial Clause

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## INTRODUCTION

> *The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.*
>
> —U.S. Constitution, Article IV, Section 3, Clause 2

There are few areas where the current state of the law is as inconsistent, incoherent, and intellectually bankrupt as the law of U.S. territories. The seminal cases in the field are the infamous *Insular Case*s, where the Supreme Court of the United States held that the "half-civilized," "savage," "ignorant and lawless" "alien races" that inhabited the United States' overseas territories were not entitled to the same constitutional rights and protections afforded to Americans residing in the mainland United States—holdings that were based on the white man's burden and similar then-prevalent theories of white supremacy.[1]

Despite being firmly entrenched within the constitutional anticanon and having "long been reviled"[2] by all corners of the legal community, the Supreme Court has never expressly overruled the *Insular Cases*; rather, it has repeatedly implored that they "should not

1. The *Insular Cases* typically refers to a series of six opinions issued by the Supreme Court during its 1901 term, including 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. New York & Porto Rico Steamship Co., 182 U.S. 392 (1901). Some jurists and scholars, however, include additional cases within the *Insular Cases*, such as The Diamond Rings, 183 U.S. 176 (1901); Kepner v. United States, 195 U.S. 100 (1904); Dorr v. United States, 195 U.S. 138 (1904); and Balzac v. Porto Rico, 258 U.S. 298 (1922). For purposes of this Essay, the term *Insular Cases* encompasses all cases decided by the Supreme Court prior to the transition of the insular territories from direct federal control to democratically elected local governments.

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

be further extended."[3] Yet notwithstanding this instruction, the lower federal courts continue—sometimes begrudgingly, but at other times enthusiastically—to apply them as binding precedent, typically because of the principle that only the Supreme Court may overrule its own precedents.[4]

Many believed that the situation would finally change in 2022. In his surprising concurrence in *United States v. Vaello Madero*,[5] Justice Gorsuch chastised the majority for resolving the case—involving Congress's decision to exclude residents of Puerto Rico from Supplemental Security Income program benefits—without reconsidering the *Insular Cases*. He expressly called for their overruling:

> The flaws in the *Insular Cases* are as fundamental as they are shameful. Nothing in the Constitution speaks of "incorporated" and "unincorporated" Territories. Nothing in it extends to the latter only certain supposedly "fundamental" constitutional guarantees. Nothing in it authorizes judges to engage in the sordid business of segregating Territories and the people who live in them on the basis of race, ethnicity, or religion.[6]

Justice Gorsuch went even further and expressly identified the recent decision of the U.S. Court of Appeals for the Tenth Circuit in *Fitisemanu v. United States*[7] as an example of a lower court improperly extending the *Insular Cases* to deny a fundamental right.[8]

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3. Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC, 140 S. Ct. 1649, 1665 (2020) (citing Reid v. Covert, 354 U.S. 1, 14 (1957) (plurality opinion)).

4. *See, e.g.*, Tuaua v. United States, 788 F.3d 300, 307 (D.C. Cir. 2015) ("Although some aspects of the *Insular Cases'* analysis may now be deemed politically incorrect, the framework remains both applicable and of pragmatic use in assessing the applicability of rights to unincorporated territories." (emphasis added)); Fitisemanu v. United States, 1 F.4th 862, 874 (10th Cir. 2021) (identifying the *Insular Cases* as "the most relevant precedents"); Ballentine v. United States, 486 F.3d 806, 813 (3d Cir. 2007) (explaining that although the Third Circuit "regrets the enduring 'vitality' of the *Insular Cases*" it is "bound by decisions of the Supreme Court"); Consejo de Salud Playa de Ponce v. Rullan, 586 F. Supp. 2d 22, 43 (D.P.R. 2008) ("Let it be clear. The court today is in no way attempting to overrule the *Insular Cases* as applied to the U.S. territories—only the Supreme Court can.").

5. 596 U.S. 159 (2022). The phrases "incorporated territories" and "unincorporated territories" refer, respectively, to territories destined to eventually become future states and those that will not, with the residents of the so-called "incorporated territories" possessing the full panoply of rights guaranteed by the U.S. Constitution, while those residing in the so-called "unincorporated territories" do not. *See* United States v. Lebrón-Caceres, 157 F. Supp. 3d 80, 88 (D.P.R. 2016). As Justice Gorsuch acknowledges, this distinction was invented entirely out of whole cloth by the Supreme Court in the *Insular Cases* and has no basis in the plain text of the Constitution. *Vaello Madero*, 596 U.S. at 184–85 (Gorsuch, J., concurring).

6. *Vaello Madero*, 596 U.S. at 184–85 (Gorsuch, J., concurring).

7. 1 F.4th at 862, 873.

8. *Vaello Madero*, 596 U.S. at 185–88 (Gorsuch, J., concurring).

That Justice Gorsuch—often perceived as one of the most conservative and originalist-oriented members of the Supreme Court[9]—called for the overruling of the *Insular Cases* raised hopes that the Court would shortly take up a case implicating the *Insular Cases*. While Justice Sotomayor had written separately in other cases to criticize the constitutional mistreatment of Puerto Rico and various congressional intrusions onto its self-government, even she did not mention the *Insular Cases* by name, let alone call for her colleagues to overrule them.[10] Not only that, but on April 27, 2022—less than one week after the Supreme Court issued its *Vaello Madero* opinion—a petition was filed with the Supreme Court requesting that it grant certiorari to review the Tenth Circuit's *Fitisemanu* decision.

During the months the *Fitisemanu* certiorari petition remained pending before the Supreme Court, there was unprecedented optimism that the Supreme Court would not only agree to hear the case but ultimately overrule the *Insular Cases* in a decision crossing ideological and philosophical lines.[11] After all, how could the Supreme Court *not* grant certiorari, especially with the *Fitisemanu* majority having relied exclusively on the *Insular Cases* to withhold birthright citizenship from those born in American Samoa and Justice Gorsuch even going so far as to reference the *Fitisemanu* decision by name in his *Vaello Madero* concurrence?

Those hopes were unceremoniously dashed on October 17, 2022. On that date, the Supreme Court summarily denied certiorari in *Fitisemanu*, with no recorded dissent and no statements concerning the denial.[12] The optimism many had felt that the Supreme Court would step in to correct its own century-old mistake was replaced not just with disappointment but a feeling of certain betrayal. Justice Gorsuch taunted readers with the tantalizing prospect of reconsidering the *Insular Cases* but, like Lucy promising not to pull away the football

9. *See* Donald A. Daugherty, Jr., *An Imagined Bloc and Other Figments*, 21 FEDERALIST SOC'Y REV. 76, 78 (2020) (calling Justice Gorsuch's "originalist/textualist approach . . . stricter than that of his conservative colleagues").

10. *See* Christina D. Ponsa-Kraus, *Political Wine in a Judicial Bottle: Justice Sotomayor's Surprising Concurrence in* Aurelius, 130 YALE L.J.F. 101, 128 (2020) (observing that Justice Sotomayor's concurrence in *Aurelius* "never mentions the *Insular Cases*").

11. *See, e.g.*, Matt Ford, *The Supreme Court Gets a Chance to Revisit America's Imperialist Past*, NEW REPUBLIC (Sept. 19, 2022), https://newrepublic.com/article/167761/american-samoa-citizenship-fitisemanu-gorsuch [https://perma.cc/8SGQ-RSAN] ("[I]t seems likely that [the Supreme Court] will inevitably be compelled to decide whether the *Insular Cases* should continue to apply in a postcolonial world." (emphasis added)); *Justices' Call to Overrule* Insular Cases *Taken Up in Supreme Court Petition*, SAIPAN TRIB. (Apr. 29, 2022), https://www.saipantribune.com/news/local/justices-call-to-overrule-insular-cases-is-taken-up-in-supreme-court-petition/article_ac622d16-861a-5743-86bf-1596fc4e0e0d.html [https://perma.cc/582Q-GMMQ].

12. Fitisemanu v. United States, 143 S. Ct. 362 (2022).

from Charlie Brown, failed to follow through, without even the courtesy of an opinion respecting the denial of certiorari.[13]

What, then, is the path forward for those who wish to right the wrongs in the constitutional treatment of the U.S. territories? Should litigants and their attorneys continue to bring territorial rights litigation in the federal courts, hoping for a different result yet risking still more unfavorable lower court decisions? Or should the people of the territories acquiesce to proponents of territorial paternalism and give up the struggle for equal rights, accepting a "different but equal" regime in exchange for so-called "workable" or "pragmatic" goals, like receiving greater federal social welfare appropriations from Congress?[14] Or is there currently no meaningful path forward with the federal government, with territorial rights remaining in their current state until a generational or ideological shift in Congress or the Supreme Court?

This Essay provides the roadmap for reforming the law of the territories—that is, replacing the ad hoc legal framework established by the *Insular Cases* and the patchwork of often-inconsistent lower court decisions with a new framework that both works in practice and remains faithful to the plain text of the U.S. Constitution and the intent of the Founders. Part I first addresses the threshold question of whether the *Insular Cases* even matter and need to be formally overruled, responding to recent claims that this would only represent a symbolic move with no practical effect, like the recent abrogation of *Korematsu v. United States*.[15] Part II considers why the Supreme Court has consistently avoided revisiting the *Insular Cases* despite having urged that they be given no further expansion, including what likely explains the surprising denial of certiorari in the *Fitisemanu* case despite Justice Gorsuch's call for action in his *Vaello Madero* concurrence. Part III then analyzes the Territorial Clause anew, based on the plain text of the Constitution and historical practice, to hopefully lay the theoretical foundation needed for the Supreme Court to not merely overrule the *Insular Cases* but to get the constitutional law of the territories right.

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13. *See* Tom Goldstein, *What You Can Learn From Opinions Regarding the Denial of Certiorari*, SCOTUSBLOG (Nov. 18, 2013, 2:10 PM), https://www.scotusblog.com/2013/11/what-you-can-learn-from-opinions-regarding-the-denial-of-certiorari/ [https://perma.cc/T7QH-RYUQ] (explaining that a Justice may issue an opinion regarding the denial of a certiorari petition to send "a warning shot" towards a practice, or to highlight that the issue is significant and cert-worthy but the instant case was not an appropriate vehicle).

14. *See* Anthony M. Ciolli, *Territorial Paternalism*, 40 MISS. COLL. L. REV. 103, 106–07 (2022) (summarizing these paternalist proposals recently urged by academics).

15. 323 U.S. 214 (1944), *abrogated by* Trump v. Hawaii, 585 U.S. 667, 710 (2018).

## I. WHY THE *INSULAR CASES* STILL MATTER

"Ultimately, any Supreme Court decision overturning the *Insular Cases* would almost certainly be nothing more than a symbolic *mea culpa*, issued a century after the damage has been done . . . ."[16] This is because

> [c]ontrary to popular belief, the questions raised in many of the decisions comprising the *Insular Cases* were not of a constitutional magnitude. Rather, they involved relatively mundane questions of statutory interpretation, such as whether Puerto Rico and the then-Territory of the Philippines were a "foreign country" for purposes of tariff laws; whether customs duties applied to imports from Puerto Rico; whether vessels traveling between Puerto Rico and New York were engaged in trade for purpose of federal maritime laws; and whether residents of Puerto Rico qualified as "aliens" under a federal immigration statute.[17]

Certainly, some of the *Insular Cases* withheld constitutional rights from the people of the territories. But it is often forgotten that under the prevailing interpretation of the Bill of Rights, those same constitutional protections were also denied to the residents of the states. This is because the Supreme Court had not yet endorsed the theory of incorporation of the Bill of Rights against the states through the Fourteenth Amendment.[18] Not only that, but since the *Insular Cases* were decided,

> [v]irtually all the meaningful provisions of the Bill of Rights of the United States Constitution have already been extended to all or most of the territories either through Congress or the courts. Moreover, the most prominent injustice—that the people of the territories cannot vote for the President of the United States or obtain representation in Congress—was not caused by the *Insular Cases* at all. Rather, the systematic disenfranchisement of the people of the territories comes directly from the plain and unambiguous text of the United States Constitution itself. This injustice will ultimately need to be addressed either through statehood or a constitutional amendment, both of which are essentially unattainable in today's political climate.[19]

Nevertheless, "this does not mean that the people of the territories and their allies should not pursue this goal" of overturning the *Insular Cases*.[20] The reason is simple: regardless of what the *Insular Cases* themselves did or did not do, the lower federal courts have distorted their meaning and extended them to such a great extent that the phrase "*Insular Cases*" or "Territorial Clause" can be invoked as magic words to justify pretty much anything done with respect to a U.S. territory. The lower federal courts, among other things, have used the *Insular Cases* as a talisman to do things such as withhold the right to

16. Ciolli, *supra* note 14, at 117.
17. Anthony M. Ciolli, *Territorial Constitutional Law*, 58 IDAHO L. REV. 206, 218 (2022).
18. *Id.* at 221–22.
19. Ciolli, *supra* note 14, at 117.
20. *Id.*

trial by jury in certain territories, permit systematic warrantless searches notwithstanding the Fourth Amendment, and even hold that individuals born in a territory of the United States are not U.S. citizens.[21]

The *Insular Cases* are thus a zombie precedent, a variant of what some courts and commentators have characterized as zombie laws—that is, statutes that have been declared unconstitutional or otherwise unenforceable but have never been repealed by a legislature and nevertheless technically remain "on the books" and thus capable of being "re-animated" at some future time.[22] And like a true zombie, engaging in mindless violence and aggression not tempered by empathy or self-control, the *Insular Cases* as applied by the lower federal courts bear the precedent's worst qualities.

While perhaps initially dismissed as an academic curiosity, the existence of zombie laws had a substantial real-world impact in the aftermath of *Dobbs v. Jackson Women's Health Organization*,[23] with courts struggling to ascertain the status of decades-old statutes prohibiting abortion.[24] But those familiar with the law of the territories had already known of the practical risks of such zombies for quite some time. It is today beyond reasonable debate that the legal rules established by the *Insular Cases*—including the distinction between so-called incorporated and unincorporated territories—were "a brand new constitutional doctrine" that had been "fabricated out of whole cloth" in order "to accommodate these territories populated by non-white, non-

21. *See, e.g.*, Northern Mariana Islands v. Atalig, 723 F.2d 682, 690 (9th Cir. 1984) (finding Northern Mariana Island statutory provisions that fail to ensure access to a jury trial for local criminal and civil offenses not to violate the Sixth or Fourteenth Amendments); United States v. Hyde, 37 F.3d 116, 121–22 (3d Cir. 1994) (holding that a person travelling to the United States from the U.S. Virgin Islands may be subjected to a routine customs search without any degree of suspicion); Fitisemanu v. United States, 1 F.4th 862, 881 (10th Cir. 2021) (holding that citizens of American Samoa are not birthright citizens of the United States).

22. *See, e.g.*, Pool v. City of Houston, 978 F.3d 307, 309 (5th Cir. 2020) (adjudicating the question of when the threat of continued enforcement is enough to reanimate a zombie law); Crowell v. Knowles, 483 F. Supp. 2d 925, 930–31 (D. Ariz. 2007) (describing the "zombie precedent" at issue in the case as "definitively extinguished by statutory amendment in 1989 [but] . . . repeatedly re-animated by mistaken citation and dicta"); Howard M. Wasserman, *Zombie Laws*, 25 LEWIS & CLARK L. REV. 1047, 1052, 1059–67 (2022) (identifying certain principles of constitutional litigation that produce "zombie laws" and describing the nature of those laws); Maureen E. Brady, *Zombie State Constitutional Provisions*, 2021 WIS. L. REV. 1063, 1065 ("Today's state constitutions remain full of sections that can be characterized as 'zombie provisions.' "); Maggie Gardner, *Dangerous Citations*, 95 N.Y.U. L. REV. 1619, 1646 (2020) (describing "zombie precedent" as arising when federal decisions quote outdated state case law).

23. 597 U.S. 215 (2022).

24. *See, e.g.*, Planned Parenthood Arizona, Inc. v. Brnovich, 524 P.3d 262, 264 (Ariz. Ct. App. 2022) (holding that a doctor who performs an abortion under modern statutes cannot be prosecuted under a state statute dating back to that state's territorial days).

Anglo-Saxon, non-European peoples."[25] Yet despite this universal acknowledgement, the *Insular Cases* remain an "ongoing specter" that "hover[ ] like a dark cloud" over cases pertaining to the territories.[26] And like true zombies, the *Insular Cases* stagger about aimlessly without rhyme or reason, violently infecting the areas of the law unfortunate enough to come into their path while sparing those that do not.

As the *Insular Cases* continue to persist in this undead state, they leave in their wake new lower court precedents that are often incoherent and possess more holes than a slice of swiss cheese. A jury trial in a criminal prosecution is a right in the U.S. Virgin Islands, but not in the Northern Mariana Islands.[27] The border between the mainland United States and Puerto Rico is a domestic border to which the full protections of the Fourth Amendment apply, but the border between the U.S. Virgin Islands and the rest of the United States is an international border subject to the border search exception.[28] The territorial government of Guam is an instrumentality of the federal government and thus is not precluded under the Dormant Commerce Clause from enacting tax laws that discriminate against nonresidents, but the territorial government of the U.S. Virgin Islands is treated as a state government for Dormant Commerce Clause purposes and is precluded from doing so.[29] The Northern Mariana Islands may enact laws that limit otherwise fundamental rights, such as the right to own land, which is limited to the indigenous Chamorro people, but Guam may not, even though it is located one hundred miles away and its indigenous population is also Chamorro.[30]

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25. Alex Tallchief Skibine, United States v. Lara*, Indian Tribes, and the Dialectic of Incorporation*, 40 TULSA L. REV. 47, 65 (2004) (quoting United States v. Pollard, 209 F. Supp. 2d 525, 539–40 (D.V.I. 2002)).

26. Adriel I. Cepeda Derieux & Neil C. Weare, *After* Aurelius*: What Future for the* Insular Cases*?*, 130 YALE L.J.F. 284, 285 (2020).

27. *Compare* Northern Mariana Islands v. Atalig, 723 F.2d 682, 690 (9th Cir. 1984) (preserving the constitutional validity of a Northern Mariana Islands statute that makes jury trials nonmandatory in criminal prosecutions), *with* Murrell v. People, 54 V.I. 338, 367–68 (V.I. 2010) (finding that the Virgin Islands Superior Court violated a DUI defendant's constitutional right to a jury trial when it invoked a local statute to order a bench trial on the charges).

28. *Compare* United States v. Acosta-Colon, 157 F.3d 9, 19–22 (1st Cir. 1998) (finding that a stop and detention at the San Juan airport exceeded the limits of a lawful *Terry* stop and violated the defendant's constitutional rights), *with* United States v. Hyde, 37 F.3d 116, 121–22 (3d Cir. 1994) (holding that a person travelling to the United States from the U.S. Virgin Islands may be searched for customs purposes without any degree of suspicion).

29. *Compare* Sakamoto v. Duty Free Shoppers, Ltd., 764 F.2d 1285, 1288 (9th Cir. 1985) (holding that the Commerce Clause does not apply to Guam because Guam is not a state), *with* Polychrome Int'l Corp. v. Krigger, 5 F.3d 1522, 1534 (3d. Cir. 1993) (stating that the Commerce Clause applies to the U.S. Virgin Islands).

30. *See* Wabol v. Villacrusis, 958 F.2d 1450, 1462 (9th Cir. 1990).

## II. THE RELUCTANCE TO REVISIT THE *INSULAR CASES*

The sheer number of inconsistent lower appellate court decisions—not to mention the serious constitutional questions implicated—cries out for resolution by the Supreme Court. Yet outside of occasional concurring or dissenting opinions by individual Justices,[31] the Supreme Court has refused to reexamine the *Insular Cases*, only going so far as to pronounce that they "should not be further extended"—whatever that may mean.[32] This is not for lack of opportunity: while litigants have sought certiorari in numerous cases directly presenting these issues, the Supreme Court has denied each and every one, without noted dissent.[33]

Why has the Supreme Court exercised its discretion to avoid granting certiorari petitions in cases directly challenging the *Insular Cases*? No one can definitively say in the absence of any formal opinions respecting the denials or any informal explanations from individual Justices. There is nevertheless some indication, however, as to the source of the Supreme Court's hesitancy. In his significant concurring opinion in *United States v. Vaello Madero*, Justice Gorsuch chastised the majority for resolving the case without reconsidering the *Insular Cases* and "settl[ing] this question right," yet openly acknowledged that "settling this question right would raise difficult new ones," in that "[d]isputes are sure to arise about exactly which of its individual provisions applies in the Territories and how," and that "[s]ome of these new questions may prove hard to resolve."[34]

Justice Gorsuch's point is well taken. Certainly, it is quite easy to advocate for the overruling of the *Insular Cases*. Like *Plessy v. Ferguson*, the racist reasoning and result of the *Insular Cases* is wholly untethered to the plain text of the Constitution, does not promote any legitimate functional or normative values, and is not consistent with any mainstream or even niche theory of constitutional interpretation.[35] But the legal rule that would replace the separate but equal regime authorized by *Plessy* if it were overruled was obvious: prohibit government-mandated racial segregation. And since government-mandated racial segregation was not the law in the entire United States

31. *See, e.g.*, United States v. Vaello Madero, 596 U.S. 159, 184–85 (2022) (Gorsuch, J., concurring).

32. Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC, 140 S. Ct. 1649, 1665 (2020) (quoting Reid v. Covert, 354 U.S. 1, 14 (1957) (plurality opinion)).

33. *See, e.g.*, Fitisemanu v. United States, 143 S. Ct. 362 (2022); Baxter v. United States, 141 S. Ct. 1269 (2021); Tuaua v. United States, 579 U.S. 902 (2016).

34. 596 U.S. at 187–88 (Gorsuch, J., concurring).

35. Gary Lawson & Robert D. Sloane, *The Constitutionality of Decolonization by Associated Statehood: Puerto Rico's Legal Status Reconsidered*, 50 B.C. L. REV. 1123, 1177 (2009).

but concentrated primarily in the South, it was not too difficult to predict the practical effect that overruling *Plessy* would have on government, business, and society once such segregation was found unconstitutional.

This is not the circumstance with the *Insular Cases*. It is certainly tempting to say that if the *Insular Cases* are overturned, the U.S. Constitution should just apply in full to all the territories. But what does that even mean? It is often overlooked that the word "Territory" only actually appears three times in the U.S. Constitution—the Territorial Clause, providing that "[t]he 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,"[36] and the Prohibition Era Eighteenth and Twenty-First Amendments. Other than these isolated uses of the word "Territory," the Constitution typically uses terms such as "State" or "Congress" when codifying or limiting the powers of the government.

The failure of the Constitution to expressly refer to territories outside of the Territorial Clause and the Twenty-First Amendment demonstrates how problematic it is to simply say that the Constitution should apply to the territories. For instance, the First Amendment expressly provides that "Congress shall make no law respecting an establishment of religion . . . or abridging the freedom of speech."[37] Today it is generally accepted that this prohibition, despite specifically referencing Congress, extends to the states by virtue of the Fourteenth Amendment. But if the plain text of the Constitution matters—as it should to originalists, textualists, strict constructionists, and adherents of similar philosophies—then how can the Fourteenth Amendment extend to the territories, given that it expressly states that

> [n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws[?][38]

And what of the cornucopia of powers expressly denied to the "States" set forth in Article I, Section 10, such as that "no State" shall pass a bill of attainder or ex post facto law, grant a title of nobility, impose duties on imports or exports, and so forth?

Perhaps one should interpret the word "State" in the Constitution to really mean "State and Territory"? But if that is the case, what of the fact that Article I of the Constitution provides that

36. U.S. CONST. art. IV, § 3, cl. 2.
37. *Id.* amend. I.
38. *Id.* amend. XIV, § 1.

"[t]he House of Representatives shall be composed of members chosen every second year by the people of the several states"[39] and that "[t]he Senate of the United States shall be composed of two Senators from each state,"[40] while Article II provides that the President and Vice President be elected by the electoral college to which "[e]ach State shall appoint . . . a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress"?[41] If all references to "State" in the Fourteenth Amendment and similar provisions are construed to include a "Territory" as well, why would the same not be true of these provisions of Article I and Article II, thus entitling each territory to voting members in the House of Representatives, two senators, and presidential electors? And if each territory is entitled to such representation, then what purpose is served by admitting new states into the Union?

Even if we were to put aside those concerns for a moment, what of the Territorial Clause itself? As noted earlier, the plain text of the Territorial Clause grants Congress the power "to dispose of and make all needful Rules and Regulations respecting *the Territory* or other Property belonging to the United States."[42] What is the significance—if any—of the Founders' decision to use the singular "Territory" instead of the plural "Territories"? The only judicial decision to meaningfully examine this question is the infamous and odious *Dred Scott* case[43]—where the majority relied on the plain text of the Territorial Clause, as well as history, to conclude that the phrase "the Territory" in the Territorial Clause refers solely to the Northwest Territory and thus that the Founders did not intend to grant Congress the constitutional authority to prohibit slavery in future territories when slavery was permitted by the Constitution.[44]

Therefore, it may not be sufficient to simply say that if the *Insular Cases* were overruled, the Supreme Court could just reinstate the precedents that were in effect prior to the *Insular Cases*' issuance, or even prior to *Dred Scott*. For instance, in 1810—nearly a century before the *Insular Cases* were decided and almost fifty years before *Dred Scott*—the Supreme Court held in *Sere v. Pitot* that the Territorial Clause provides Congress with the "absolute and undisputed power" to govern the territories and that Congress could exercise that power to

39. *Id.* art. I, § 2, cl. 1.

40. *Id.* art. I, § 3, cl. 1.

41. *Id.* art. II, § 1, cl. 2.

42. *Id.* art. IV, § 3, cl. 2 (emphasis added).

43. Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

44. *See id.* at 436–38.

establish courts in the territories that were not Article III courts.[45] Does this precedent, too, need to be overturned? Perhaps not, if one agrees that such courts do not exercise the judicial power of the United States—as required by Article III—but rather some other power. But given that the U.S. District Courts of the Virgin Islands, Guam, and the Northern Mariana Islands today are virtually indistinguishable from the Article III federal district courts in terms of jurisdiction, can it *really* be said that these courts, as constituted now, do not exercise the judicial power of the United States?[46]

It is this prospect—that overruling the *Insular Cases* may not just create uncertainty but potentially tear governmental institutions asunder—that has almost certainly given the Supreme Court considerable pause. Certainly, Chief Justice Roberts has for many years "s[ought] incremental change in legal doctrine rather than supporting reversals of precedent that lead to sudden and dramatic redefinitions of the law and constitutional rights."[47] Yet while some commentators—including the conservative Justices' liberal colleagues—have characterized the other five originalism-oriented Justices as "aggressive" and willing "to upend bedrock legal doctrines" based on their decision in *Dobbs*,[48] the reality is far more nuanced. The *Dobbs* decision, while perhaps rightly characterized as a watershed moment for originalism and a shot across the bow of stare decisis, is wholly unremarkable with respect to its collateral impacts on federal judicial administration and government operations.[49]

But the *Dobbs* majority has shown far greater hesitation and restraint with respect to overruling other precedents in which there *would* still be a need for further federal court intervention. For instance, the same five Justices that constituted the *Dobbs* majority recently joined opinions in *Fulton v. City of Philadelphia*,[50] which recognized *Employment Division v. Smith*[51] as wrongly decided. Nevertheless, the Supreme Court did not actually overrule *Smith* in *Fulton*, for Justices

45. 10 U.S. (6 Cranch) 332, 337 (1810).

46. *See* James T. Campbell, *Island Judges*, 129 YALE L.J. 1888, 1895 (2020) (explaining that district judges in Guam, the U.S. Virgin Islands, the Panama Canal Zone, and Puerto Rico exercise federal jurisdiction).

47. Madhavi M. McCall, Michael A. McCall & Christopher E. Smith, *Criminal Justice and the 2013–2014 United States Supreme Court Term*, 38 HAMLINE L. REV. 361, 404 (2015).

48. *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 412–13 (2022) (Breyer, Sotomayor, Kagan, JJ., dissenting) ("Weakening *stare decisis* threatens to upend bedrock legal doctrines . . . [and] makes the Court appear not restrained but aggressive.").

49. *See* Clare Huntington, *Pragmatic Family Law*, 136 HARV. L. REV. 1501, 1562 (2023) (noting that abortion litigation has largely shifted to state courts).

50. 593 U.S. 522 (2021).

51. 494 U.S. 872 (1990).

Kavanaugh and Barrett refused to do so without first determining what legal rule should replace the one erroneously adopted in *Smith*.[52] In addition to characterizing the "historical record" as "more silent than supportive," Justice Barrett, joined by Justice Kavanaugh, asked,

> Yet what should replace *Smith*? The prevailing assumption seems to be that strict scrutiny would apply whenever a neutral and generally applicable law burdens religious exercise. But I am skeptical about swapping *Smith*'s categorical antidiscrimination approach for an equally categorical strict scrutiny regime, particularly when this Court's resolution of conflicts between generally applicable laws and other First Amendment rights—like speech and assembly—has been much more nuanced. There would be a number of issues to work through if *Smith* were overruled. To name a few: Should entities like Catholic Social Services—which is an arm of the Catholic Church—be treated differently than individuals? Should there be a distinction between indirect and direct burdens on religious exercise? What forms of scrutiny should apply? And if the answer is strict scrutiny, would pre-*Smith* cases rejecting free exercise challenges to garden-variety laws come out the same way?[53]

Such questions loom with even greater force with respect to overruling the *Insular Cases*. Are the federal courts in the territories established as Article IV courts illegally constituted and all judgments rendered by them over the past century void? Did Congress possess the authority to establish locally elected territorial governments yet retain plenary oversight—and if not, what is the practical effect: a reversion to military rule? Do each of the Bill of Rights' protections apply to the territories, and if so, are individuals who were wrongfully tried without a jury or had evidence obtained by virtue of a warrantless search at the territorial border entitled to new trials? If the land alienation laws of the Northern Mariana Islands or the matai system of American Samoa is unconstitutional, may those territories unilaterally secede from the United States, given that they voluntarily joined the United States through treaties that relinquished their sovereignty in exchange for preservation of those practices? What about federal income taxation or economic development laws providing the territories with favorable treatment—if such programs are unconstitutional, what replaces that revenue stream, if anything? And even with something as seemingly simple or benign as birthright citizenship, what of the individuals born in the Philippines when it had been a U.S. territory between 1898 and 1946 but, like those born in American Samoa, were only deemed U.S. nationals—would they, and their descendants, now receive the birthright citizenship that had been wrongfully denied to them?[54]

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52. *See Fulton*, 593 U.S. at 543–44 (Barrett, J., concurring).

53. *Id.* (citations omitted).

54. *See, e.g.*, Nolos v. Holder, 611 F.3d 279, 284 (5th Cir. 2010) (holding that persons born in the Philippines during the territorial period did not become U.S. citizens at birth); Valmonte v. INS, 136 F.3d 914, 920 (2d Cir. 1998) (same); Rabang v. INS, 35 F.3d 1449, 1454 (9th Cir. 1994) (same); Entines v. United States, 160 F. Supp. 3d 208, 213 (D.D.C. 2016) (same).

These are not simple questions, nor are they inconsequential ones. In fact, it is this very uncertainty that has led the government of American Samoa to obtain intervenor status in *Fitisemanu* and similar citizenship cases to oppose the extension of birthright citizenship to the territories. The American Samoan government is not opposed to citizenship per se; rather, the source of the opposition is a fear that a judicial ruling conferring citizenship would eventually cause a federal court to "find the foundational principles of American Samoa, the *matai* title system and communal land structure, unconstitutional under the Equal Protection Clause, and in one stroke of the pen destroy the *fa'a Samoa*."[55] And while one may rightly believe that a court should not permit any government—federal, state, or territorial—to wield veto power over whether a fundamental individual right codified in the U.S. Constitution should or should not apply within its borders, even Justice Gorsuch, in the January 11, 2023, oral argument in *Financial Oversight & Management Board for Puerto Rico v. Centro de Periodismo Investigativo*, expressed skepticism that "large and important constitutional question[s]" involving the territories should be resolved in cases where territorial governments are not parties.[56]

The absence of any clear and obvious alternatives to the *Insular Cases* framework that address these issues is particularly important when the Justices themselves may not view the territories from the same perspective. In his *Vaello Madero* concurrence, Justice Gorsuch emphasized the importance of adhering to the plain text of the Constitution and considering historical practices but, perhaps most importantly, appeared to treat the underlying issues as equally affecting all the territories, as evidenced by the express reference to the *Fitisemanu* ruling.[57]

Yet is the same true for Justice Sotomayor? Although Justice Sotomayor has certainly been perceived as an opponent of the *Insular Cases*, she has not actually called for them to be overturned,[58] only going so far as to share Justice Gorsuch's "hope [that] the Court will soon recognize that the Constitution's application should never depend on

55. Michael W. Weaver, *The Territory Federal Jurisdiction Forgot: The Question of Greater Federal Jurisdiction in American Samoa*, 17 PAC. RIM. L. & POL'Y J., 325, 357–58 (2008). The term "fa'a Samoa" refers to the traditional Samoan way of life, including but not limited to the "complex system of personal interrelationships" involving "extended family" and a "chieftal system," as well as a "land tenure system under which nearly all land is communally owned." King v. Andrus, 452 F. Supp. 11, 13 (D.D.C. 1977).

56. Damon Root, *The Supreme Court Weighs State Sovereignty and the Status of Puerto Rico*, REASON (Jan. 11, 2023, 4:56 PM), https://reason.com/2023/01/11/the-supreme-court-weighs-state-sovereignty-and-the-status-of-puerto-rico/ [https://perma.cc/6ZZ9-FDDF].

57. United States v. Vaello Madero, 596 U.S. 159, 183–87 (2022) (Gorsuch, J., concurring).

58. *See* Ponsa-Kraus, *supra* note 10, at 128.

the government's concession or the misguided framework of the *Insular Cases*."[59] While Justice Sotomayor has written or joined separate opinions in several cases that seem to endorse more "pro-territory" positions than the majority, are these positions actually "pro-territory," or simply "pro-Puerto Rico"? For instance, in *Puerto Rico v. Sanchez Valle*,[60] Justice Sotomayor joined the dissent written by Justice Breyer, which relied on international law and would have held that Puerto Rico is a separate sovereign from the federal government because the Puerto Rican Federal Relations Act[61] established a "compact" between the United States and Puerto Rico in which "the 'source' of Puerto Rico's criminal law ceased to be the U.S. Congress and became Puerto Rico itself, its people, and its constitution."[62] And in her concurring opinion in *Financial Oversight & Management Board for Puerto Rico v. Aurelius Investment, LLC*,[63] Justice Sotomayor again endorsed this compact theory—that is, that Puerto Rico is not a mere territory but a unique political entity "in union with the United States of America," in which Congress irrevocably relinquished sovereignty over Puerto Rico.[64] In other words, Justice Sotomayor appears to have "embraced what may be best described as a theory of Puerto Rico exceptionalism" that elevates Puerto Rico to a higher status than its fellow territories by effectively treating Puerto Rico as something other than a territory.[65]

Had Justice Sotomayor's view carried the day in those cases, it certainly would have elevated the legal, constitutional, and political status of Puerto Rico relative to the federal government. But it would do nothing for the territories that lack the equivalent of such a "compact," such as Guam and the U.S. Virgin Islands; they would remain mere territories, without any degree of sovereignty and subject to the plenary control of Congress. If Puerto Rico has become some new entity that is "in union" with the United States without being a state or a territory and over which Congress lacks sovereignty, how—if at all—is that entity constrained by the U.S. Constitution? And what of the Northern Mariana Islands and American Samoa, both of which voluntarily became part of the United States through negotiated treaties between their leaders and the United States—are they still mere territories, or do they share the higher status that would be afforded Puerto Rico? Would Justice Sotomayor hold that the

59. *Vaello Madero*, 596 U.S. at 194 n.4 (Sotomayor, J., dissenting).
60. 579 U.S. 59 (2016).
61. Puerto Rican Federal Relations Act, 48 U.S.C. § 731.
62. *Sanchez Valle*, 579 U.S. at 92 (Breyer, J., dissenting).
63. 140 S. Ct. 1649 (2020).
64. *Id.* at 1672–75 (Sotomayor, J., concurring in the judgment).
65. Ciolli, *supra* note 17, at 246–47.

government of America Samoa or the Northern Mariana Islands can veto application of the Citizenship Clause or the Equal Protection Clause within the metes and bounds of their territories, given the terms of their treaties with the United States as well as customary international law? And if so, could Puerto Rico choose to do the same with respect to other constitutional provisions that its government may disagree with?

Thus, it is very possible that the post–*Insular Cases* United States envisioned by Justice Sotomayor may be very different than the one contemplated by Justice Gorsuch. If this were the case, there is a strong possibility that if the Supreme Court were to revisit the *Insular Cases*, the result may closely resemble what is now known as the infamous "*Tidewater* Problem" of civil procedure.[66] For nearly 150 years, the Supreme Court had consistently held that the word "state" in Article III does not encompass territories and the District of Columbia, and thus that Congress lacks the constitutional authority to expand the jurisdiction of the federal courts beyond Article III limits to permit the exercise of diversity jurisdiction in cases where one party is a citizen of a state and the opposing party is a citizen of a territory or the District of Columbia.[67] When faced with this question again in *National Mutual Insurance Co. v. Tidewater Transfer Co.*,[68] a seven-Justice majority—consisting of Chief Justice Vinson and Justices Jackson, Black, Burton, Frankfurter, Reed, and Douglas—expressly held that the District of Columbia is not a "state," reaffirming those past precedents in full. And a six-Justice majority—composed of Chief Justice Vinson and Justices Frankfurter, Reed, Douglas, Rutledge, and Murphy—expressly rejected an alternative argument that the Seat of Government Clause, which gives Congress exclusive jurisdiction to legislate for the District of Columbia, allowed Congress to expand the jurisdiction of the federal courts beyond Article III limits.[69]

Yet despite these supermajorities voting to (1) not overturn prior precedents; (2) hold that the District of Columbia is not a "state" under Article III; and (3) hold that Congress cannot expand the jurisdiction of the federal courts beyond Article III, the ultimate holding was the complete opposite: Congress *can* expand the jurisdiction of the Article III courts by treating the District of Columbia as a state for

66. *See* James E. Pfander, *The* Tidewater *Problem: Article III and Constitutional Change*, 79 NOTRE DAME L. REV. 1925 (2004).

67. *See, e.g.*, O'Donoghue v. United States, 289 U.S. 516, 543 (1933); Corp. of New Orleans v. Winter, 14 U.S. (1 Wheat.) 91, 94 (1816); Hepburn v. Ellzey, 6 U.S. (2 Cranch) 445, 445 (1805).

68. 337 U.S. 582, 588 (1949).

69. *Id.* at 607, 626 (Rutledge, J., concurring); *id.* at 626–27 (Vinson, C.J., dissenting); *id.* at 655 (Frankfurter, J., dissenting).

purposes of diversity jurisdiction.[70] Why? While Justices Rutledge and Murphy agreed that Article III represented the maximum constitutional jurisdiction of the federal courts, they also believed that the District of Columbia was a "state" for purposes of Article III and that prior precedents holding the opposite had been incorrectly decided.[71] And while Justices Jackson, Black, and Burton believed the District of Columbia was not a "state" under Article III, they believed Congress could expand the jurisdiction of the federal courts beyond the limits of Article III.[72] The result of these fractured majorities was the affirmance of the diversity jurisdiction statute for reasons expressly rejected by supermajorities of the Court, and the overturning of 150 years of precedent despite a supermajority of the Court believing those precedents should not be overturned.

It is easy to envision how the Supreme Court, were it to grant certiorari in *Fitisemanu* or another case directly challenging the *Insular Cases* framework, could arrive at a similar impasse as the Court in *Tidewater*. Justices Gorsuch and Sotomayor may well agree that the *Insular Cases* were rooted in racism, that the territorial incorporation doctrine they established has no basis in the law under any theory of constitutional interpretation, and that they should persuade their fellow Justices to so hold. But if overruling the *Insular Cases* is the *only* thing a majority of the Court agrees on, the end result may be chaos and perhaps a rule that is not endorsed by any majority and is even more constitutionally bankrupt than the doctrine of territorial incorporation.

## III. GETTING THE TERRITORIAL CLAUSE RIGHT

The many reasons that caution against the Supreme Court revisiting the *Insular Cases* may leave supporters of the territories with a sense of hopelessness. Can it be that the Supreme Court views the *Insular Cases* simply as the least of several evils, to be marginalized to the greatest extent possible without ever actually being formally overruled? If so, the prospects of the Supreme Court granting certiorari in a case such as *Fitisemanu* may be slim to none, with gestures such as Justice Gorsuch's concurrence in *Vaello Madero* perhaps being the best acknowledgment one could hope for.

Yet despite these obstacles, there remains much reason for optimism. The law of the territories is, perhaps for the first time since

70. *See id.* at 600, 603–04 (plurality opinion).

71. *Id.* at 605–26 (Rutledge, J., concurring).

72. *Id.* at 601–04 (plurality opinion).

the *Insular Cases* were decided, something more than "a marginal debate about marginal places"[73] or "a footnote within a footnote of an already niche field."[74] And notwithstanding the denial of certiorari in *Fitisemanu* and other disappointments, the currently constituted Supreme Court certainly at least appears amenable to overruling the *Insular Cases*.

But as Justice Gorsuch emphasized, it is not enough to overrule the *Insular Cases*—rather, the Court needs to "settle this question right" through "employ[ing] legally justified tools . . . including not just the Constitution's text and its original understanding but the Nation's historical practice (or at least those uninfected by the *Insular Cases*)."[75] Certainly, this is not an easy task; if it was, the Supreme Court would likely have already overruled the *Insular Cases* long ago. The tools identified by Justice Gorsuch, however, certainly provide a workable path to establishing a model of federal-territorial relations that is not only faithful to the plain text and original understanding of the Constitution but has the added benefit of promoting territorial self-determination and safeguarding individual rights and liberties of territorial residents with few—if any—structural disruptions.

### *A. The Plain Text of the Constitution and Historical Practice*

It is axiomatic that to determine the meaning of the text of the U.S. Constitution, one must examine that text unadulterated by prior case law, which may have placed a judicial gloss on the original text and understanding.[76] The word "Territory" only appears three times in the entire Constitution: the Territorial Clause; the Eighteenth Amendment, enacting a nationwide prohibition on alcohol; and the Twenty-First Amendment, repealing the Eighteenth Amendment and returning regulation of alcohol to local authorities.[77] Because the Eighteenth and Twenty-First Amendments embrace solely the subject of prohibition, and in any event were ratified well after the Supreme Court decided the *Insular Cases*, the Territorial Clause represents the most natural starting point in any textual analysis.

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73. Burnett, *supra* note 2, at 1040–41.

74. Ciolli, *supra* note 17, at 248.

75. United States v. Vaello Madero, 596 U.S. 159, 187–88 (2022) (Gorsuch, J., concurring) (emphasis added).

76. *See* Magnolia Marine Transp. Co. v. Oklahoma, 366 F.3d 1153, 1156 (10th Cir. 2004); United States v. Colt, 126 F.3d 981, 984 (7th Cir. 1997) (citing Printz v. United States, 521 U.S. 898 (1997)); *see also* ANTONIN SCALIA, *Common-Law Courts in a Civil-Law System*, *in* A MATTER OF INTERPRETATION 39 (1997); Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 592 U.S. 351, 379 n.2 (2021) (Gorsuch, J., concurring in the judgment).

77. U.S. CONST. art. IV, § 3, cl. 2; *id.* amends. XVIII, XXI.

### 1. The Territorial Clause

The Territorial Clause reads, in its entirety, as follows:

> The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.[78]

There are several critical aspects of this text that warrant deeper analysis. While the Territorial Clause vests this power with Congress, the Territorial Clause is found in Article IV of the Constitution—titled "Relationships Between the States"—and not in Article I of the Constitution. Article I, Section 1 vests "[a]ll legislative Powers herein granted . . . in a Congress of the United States,"[79] and Sections 8 and 9 expressly enumerate the powers given to Congress[80] and those denied to Congress.[81] The use of the phrase "herein granted" in Article I, Section 1 necessarily implies that the legislative powers referenced in Section 1 are limited only to those enumerated in Article I.[82]

It must necessarily follow, then, that the power vested to Congress through the Territorial Clause in Article IV is not a "legislative power" conferred by Article I but a different power, one that is not legislative in nature. And what, exactly, makes a power "legislative"? Samuel Johnson's dictionary of the English language, considered one of "the most useful and authoritative" Founding Era dictionaries,[83] defines "legislative" as "[g]iving laws; law-giving."[84] In turn, it defines "lawgiving" as "legislative" and "lawgiver" as "Legislator; one that makes laws."[85]

This, then, leads to the second notable characteristic of the Territorial Clause: it vests Congress with the power to make "Rules and Regulations." This is a marked departure from the powers of Congress

78. *Id.* art. IV, § 3, cl. 2.

79. *Id.* art. I, § 1.

80. *Id.* art. I, § 8.

81. *Id.* art. I, § 9.

82. *See, e.g.*, Patrick A. Vickery, *Trumping Congress*, 97 TEX. L. REV. 1309, 1315 (2019); LAWRENCE LESSIG, FIDELITY & CONSTRAINT: HOW THE SUPREME COURT HAS READ THE AMERICAN CONSTITUTION 75 (2019); 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 789 (3d ed. 2000); Randy E. Barnett, *The Continuing Relevance of the Original Meaning of the Thirteenth Amendment*, 15 GEO. J.L. & PUB. POL'Y 1, 4 (2017); Victoria Nourse, *Reclaiming the Constitutional Text from Originalism: The Case of Executive Power*, 106 CALIF. L. REV. 1, 19 (2018); Nicholas Quinn Rosenkranz, *Executing the Treaty Power*, 118 HARV. L. REV. 1867, 1894 (2005).

83. Antonin Scalia & Bryan A. Garner, *A Note on the Use of Dictionaries*, 16 GREEN BAG 2d 419, 423–25 (2013).

84. SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (1st ed. 1755) [hereinafter JOHNSON'S DICTIONARY]; *id. Legislative*.

85. *Id. Lawgiving*, *Lawgiver*.

set forth in Article I, which repeatedly states that Congress may "make all Laws" or "exercise exclusive Legislation." It thus also necessarily follows that the phrase "Rules and Regulations" cannot be synonymous with the word "Laws" or "Legislation." This is perhaps best illustrated within Article I itself, where Section 8, Clause 4 vests Congress with the power "[t]o establish a uniform *Rule* of Naturalization, and uniform *Laws* on the subject of Bankruptcies throughout the United States."[86] Were "Rule" and "Laws" synonymous, there would have been no need for the Drafters of the Constitution to use the word "Rule" with respect to naturalization and the word "Laws" with respect to bankruptcies. And once again, Founding Era dictionaries provide some insight, with "Rule" being defined as "Government; empire; sway; supreme command" and "Regulation" as "[t]he act of regulating," with "[t]o Regulate" defined as "[t]o adjust by rule or method."[87]

The natural implication, then, is that the power of Congress to make "Rules and Regulations" under the Territorial Clause involves more than just the exercise of legislative power (i.e., the making of laws) but also establishing, and making adjustments to, a government. But what is the extent of that power? That is answered by the third notable characteristic of the text of the Territorial Clause—that Congress possesses the power to make all "needful" rules and regulations.

Under traditional rules of English grammar, the use of the adverb "needful" to modify the phrase "Rules and Regulations" necessarily limits or qualifies the universe of "Rules and Regulations" that Congress may enact pursuant to the Territorial Clause. But what does it mean for a rule or regulation to be "needful"? Again, Founding Era sources provide some helpful guidance, with "needful" being defined as "[n]ecessary; indispensably requisite."[88]

At this point, it is worth comparing the text of the Territorial Clause to other provisions of the U.S. Constitution. The Seat of Government Clause, which is included as one of the enumerated legislative powers conferred on Congress in Article I, Section 8, provides that Congress possesses the authority

> [t]o exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings . . . .[89]

86. U.S. CONST. art. I, § 8, cl. 4 (emphasis added).

87. JOHNSON'S DICTIONARY, *supra* note 84, *Rule*, *Regulation*, *To Regulate*.

88. *Id. Needful*.

89. U.S. CONST. art. I, § 8, cl. 17.

Several scholars have attempted to draw a parallel between the Seat of Government Clause and the Territorial Clause, asserting that "both provisions reveal[ ] clear parallels in language and in the breadth of congressional power recognized."[90]

Certainly, the Seat of Government Clause appears to provide Congress with plenary power over the District of Columbia and federally owned military bases or other buildings, in that it expressly vests Congress with the authority "[t]o exercise exclusive Legislation in all Cases whatsoever" with respect to the District and federal buildings.[91] But how can one—looking at the plain text of the Constitution alone—conclude that the Territorial Clause confers Congress with identical power over the territories? The Territorial Clause does not provide Congress with the power "[t]o exercise exclusive Legislation in all Cases whatsoever"; rather, it vests Congress with the power to "make all *needful* Rules and Regulations respecting the Territory or other Property belonging to the United States."[92] By its own terms, the Territorial Clause limits the authority of Congress to the adoption of "Rules and Regulations," and even then only "needful Rules and Regulations." Thus, the power afforded under the Territorial Clause must be different than that conferred under the Seat of Government Clause—after all, were it not, the Drafters of the Constitution could have done away with the Territorial Clause and simply referenced the territories in the Seat of Government Clause in the same manner as the District of Columbia and federal buildings.

But how may this power be different? An extraordinarily understudied provision of the U.S. Constitution—the Engagements Clause—provides some guidance. The Engagements Clause reads, in its entirety, that "[a]ll Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation."[93] Scholars have dismissed the Engagement Clause as one of the so-called "lapsed" or "vestigial" clauses of the Constitution—that is, provisions "which had legal force, but do not any longer" yet "were never amended or repealed."[94] The Engagements Clause is often considered a lapsed clause because "the United States paid off its obligations under the

90. *See, e.g.*, José R. Coleman Tió, Comment, *Six Puerto Rican Congressmen Go to Washington*, 116 YALE L.J. 1389, 1391–92 (2007); AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 264 (2005).

91. U.S. CONST. art. I, § 8, cl. 17.

92. *Id.* art. IV, § 3, cl. 2 (emphasis added).

93. *Id.* art. VI, cl. 1.

94. Peter Beck, *The Parts We Skip: A Taxonomy of Constitutional Irrelevancy*, 34 CONST. COMMENT. 223, 236 (2019).

Articles of Confederation" and the Clause, therefore, purportedly "refers to a condition—outstanding Confederation debt—that no longer exists, and never will again."[95]

Yet while it is certainly true that all debts incurred under the Articles of Confederation have since been paid off, the Engagements Clause does not only refer to debts—it expressly provides for the continued validity of "[a]ll Debts contracted *and Engagements entered into*, before the Adoption of this Constitution."[96] At the time of the drafting of the Constitution, an "engagement" was generally known as an "[o]bligation by contract," with an "obligation" meaning "[t]he binding power of any oath, vow, duty; contract" or "[a]n act which binds any man to some performance."[97] As such, by its own terms, the Engagements Clause did not only constitutionally mandate that the new federal government pay the debts incurred by the former Confederation government but that the federal government perform all contracts the Confederation government had entered into, including those pertaining to matters other than debt.

Perhaps the most famous obligation entered into by the government under the Articles of Confederation was the "Ordinance for the Government of the Territory of the United States, North-West of the River Ohio," more commonly known as the Northwest Ordinance. As its official name implies, the stated purpose of the Northwest Ordinance was to establish a "temporary government" for the Northwest Territory.[98] This temporary government initially consisted of a governor, secretary, and judges—all appointed by Congress—who would establish laws that "shall be in force in the district until the organization of the General Assembly therein, unless disapproved of by Congress; but afterwards the Legislature shall have authority to alter them as they shall think fit."[99] Such "general assembly or legislature" would be established "[s]o soon as there shall be five hundred free male inhabitants of full age in the district," and would consist of an elected house of representatives and an appointed legislative council with the "authority to make laws in all cases, for the good government of the district, not repugnant to the principles and articles in this ordinance established and declared."[100]

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95. *Id.* at 237.

96. U.S. CONST. art. VI, cl. 1 (emphasis added).

97. JOHNSON'S DICTIONARY, *supra* note 84, *Engagement*, *Obligation*.

98. Ordinance for the Government of the Territory of the United States North-West of the River Ohio § 1 (1787) [hereinafter Northwest Ordinance].

99. *Id.* § 5.

100. *Id.* §§ 9, 10.

But the Northwest Ordinance was not simply a mere piece of legislation or organic act. In addition to establishing the temporary government, it further provided, "It is hereby ordained and declared by the authority aforesaid, That the following articles shall be considered as *articles of compact* between the original States and the people and States in the said territory and *forever remain unalterable*, *unless by common consent* . . . ."[101] Among these articles of compact was a decree that "not less than three nor more than five States" be formed from the Northwest Territory, and that

> whenever any of the said States shall have sixty thousand free inhabitants therein, such State shall be admitted, by its delegates, into the Congress of the United States, on an equal footing with the original States in all respects whatever, and shall be at liberty to form a permanent constitution and State government.[102]

The Northwest Ordinance, then, by its own terms, constituted an engagement entered into by the Confederation government and the people of the Northwest Territory. And by virtue of the Engagements Clause, the terms of that engagement would remain binding against the United States after the adoption of the Constitution. In effect, the Engagements Clause incorporated by reference the Northwest Ordinance as part of the U.S. Constitution, in that the new federal government was constitutionally mandated to abide by this engagement, whose provisions were to "forever remain unalterable."[103]

The incorporation of the Northwest Ordinance through the Engagements Clause thus provides very powerful evidence as to what the Drafters of the Constitution likely meant by vesting Congress with the power to make "needful Rules and Regulations" under the Territorial Clause. As noted earlier, Founding Era dictionaries reflect that "needful" meant "[n]ecessary; indispensably requisite"; that "Rule" meant "Government; empire; sway; supreme command"; and that "Regulation" referred to "[t]he act of regulating," with "[t]o Regulate" defined as "[t]o adjust by rule or method."[104] The natural reading, then, is that the power to make "needful Rules and Regulations" under the Territorial Clause simply grants Congress the power to establish a temporary government for a territory and to make any necessary adjustments to that temporary government, with a view toward potential future admission to statehood. The temporary nature of such territorial government is supported by both the Admissions Clause, providing for the admission of new states into the Union, as well as the

101. *Id.* § 14 (emphases added).
102. *Id.* § 5.
103. *Id.* § 14.
104. JOHNSON'S DICTIONARY, *supra* note 84, *Needful*, *Rule*, *Regulation*, *To Regulate*.

Northwest Ordinance, which guaranteed eventual statehood and provided for changes to the structure of the territorial government based on achieving certain population thresholds that effectively transferred power to locally elected officials.

This is a very far cry from vesting Congress with plenary or absolute authority over the territories. While such authority may well be plenary with respect to establishing an initial temporary government for a territory, such authority should greatly lessen—or even disappear—once the temporary government begins operations and later transitions to a more permanent government. This is reflected in the Northwest Ordinance itself—which provides that Congress could disapprove the legislation adopted by the temporary government consisting of an unelected governor and judges, but that the general assembly or legislature once established would have the power to "make laws in all cases," without any mention whatsoever of Congress retaining the power to disapprove such laws as it could with respect to the unelected temporary government.[105] And perhaps most significantly, the Northwest Ordinance provided for a guarantee of statehood, stating that a "State shall be admitted" once it achieved a population of "sixty thousand free inhabitants."[106]

This interpretation of the Territorial Clause derives significant support from the actions of both Congress and the Supreme Court that most closely followed the drafting and ratification of the Constitution. One of the initial acts of the First Congress was to enact the Judiciary Act of 1789 to establish the lower federal courts.[107] The Judiciary Act created thirteen judicial districts for the eleven states that had ratified the Constitution at that time, and then Congress created two additional districts shortly thereafter once North Carolina and Rhode Island eventually ratified the Constitution.[108] Each state had one judicial district coterminous with the entire state, except for Massachusetts and Virginia, which each had two.[109] Each judicial district had both a federal district court and a federal circuit court, which consisted of a district judge and two Supreme Court Justices "riding circuit" to hear appeals from the district courts as well as possessing original jurisdiction over serious matters.[110] Decisions of the circuit court would then be appealable to the U.S. Supreme Court.[111]

105. Northwest Ordinance, *supra* note 98, §§ 5, 9–10.

106. *Id.* art. 5.

107. Judiciary Act of 1789, ch. 20, 1 Stat. 73.

108. Jon O. Newman, *A Statutory Oddity*, 105 JUDICATURE 46, 47–48 (2021).

109. *Id.* at 47.

110. *Id.* at 47–48.

111. *Id.*

Yet Congress elected to *not* establish any separate federal courts in the Northwest Territory, with the local courts of the territory constituting the only judicial fora.[112] Not only that, but Congress did not expressly provide for the Supreme Court to review the decisions of the courts of the Northwest Territory.[113]

Just three weeks before it issued its decision in *Marbury v. Madison*,[114] the Supreme Court decided another case on the question of jurisdiction. That case, *Clarke v. Bazadone*,[115] arose from the Northwest Territory. The territorial court had issued a judgment against Clarke and in favor of Bazadone for a total of $12,200 in damages as well as $95.30 in costs.[116] Clarke wanted the judgment reversed and sought review with the Supreme Court.[117] But since Congress never passed a law explicitly providing for such jurisdiction, how could the Supreme Court review the territorial court's judgment against Clarke?

Clarke proposed a creative argument. Article III, Section 1 of the U.S. Constitution provides that "[t]he judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish."[118] Article III, Section 2 then provides that "[t]he judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority," and that in such cases "[t]he Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make."[119]

Clarke noted that Congress had established the courts of the Northwest Territory through an act of Congress—the Northwest Ordinance.[120] According to Clarke, this made the courts of the Northwest Territories "inferior courts as the Congress may from time to time ordain and establish" pursuant to Article III, Section 1.[121] Because the Northwest Territory court exercised jurisdiction over the lawsuit pursuant to jurisdiction granted by Congress through the Northwest Ordinance—again, an act of Congress—Clarke argued that

112. Campbell, *supra* note 46, at 1903–04 (discussing how Congress did not establish federal courts in the Northwest Territory).

113. *Id.*

114. 5 U.S. (1 Cranch) 137 (1803).

115. 5 U.S. (1 Cranch) 212 (1803).

116. *Id.*

117. *Id.*

118. U.S. CONST. art. III, § 1.

119. *Id.* art. III, § 2.

120. *Clarke*, 5 U.S. at 212.

121. *Id.* at 213; U.S. CONST. art. III, § 1.

the case arose under "the laws of the United States" under Article III, Section 2.[122] He then argued that Section 2 gave the Supreme Court appellate jurisdiction over the territorial court unless Congress proactively created an exception.[123] In other words, Clarke maintained that the Supreme Court automatically retained appellate jurisdiction to review judgments from a territorial court unless Congress expressly divested the Supreme Court of such jurisdiction, which Congress had not done in the Northwest Ordinance.[124] In other words, according to Clarke, mere silence was not enough to defeat jurisdiction.

The Supreme Court rejected Clarke's argument and dismissed his petition for lack of jurisdiction.[125] The Court did not, however, issue a lengthy explanation of its decision as it did in *Marbury*. Rather, the opinion rejected Clarke's argument in a single sentence:

> The court quashed the writ of error, On the ground that the act of congress had not authorized an appeal or writ of error, from the general court of the North-western Territory, and therefore, although from the manifest errors on the face of the record, they felt every disposition to support the writ of error, they were of opinion they could not take cognizance of the case.[126]

While short on reasoning, the Supreme Court did not believe that the Northwest Ordinance constituted a "law of the United States" over which the Supreme Court was constitutionally required to exercise appellate jurisdiction.[127] And while Congress considered legislation to statutorily overrule the *Clarke* decision and vest the Supreme Court with jurisdiction to review decisions of the courts of the Northwest Territory, the Court ultimately rejected that proposal on the basis that acts of Congress concerning the Northwest Territory were not matters of federal law that warranted review by the Supreme Court or any other federal court to establish uniformity.[128]

This idea that Congress is not exercising its legislative powers under Article I when it adopts an organic act or similar law establishing a territorial government would soon be expressly endorsed by the Supreme Court. In *American Insurance Co. v. Canter*, decided in 1828, the Supreme Court considered a claim that the court system of the Florida Territory was unconstitutional, in that the judges appointed to the territorial courts established by Congress did not possess life

122. *See Clarke*, 5 U.S. at 212–13.

123. *See id.* at 213.

124. *See id.*

125. *See id.* at 214.

126. *Id.*

127. *See id.*

128. *See* Anthony M. Ciolli, *United States Territories at the Founding*, 35 REGENT U. L. REV. 73, 86 (2022) (citing James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 HARV. L. REV. 643, 709–11 (2004)).

tenure—as required by Article III for courts of the United States—but rather only served four-year terms.[129] The Supreme Court rejected this argument, expressly articulating the principle that had been implicit in *Clarke*: Congress only enacts "laws of the United States" when exercising its national legislative powers under Article I and adopts a different sort of power under the Territorial Clause.[130] The Supreme Court analogized Congress's powers under the Territorial Clause to the power of a state to structure its own state government: because Article III extends only to courts exercising the judicial power of the United States, state judges sitting on state courts exercising the judicial power of a state are not required to have life tenure, and thus territorial judges sitting on territorial courts exercising the judicial power of a territory also need not possess life tenure.[131] Notably, the Supreme Court in *Canter* never characterized the power of Congress under the Territorial Clause as being "plenary" or "absolute"—not surprising, given that state governments also have never been able to exercise unlimited authority over their state.

There is one more characteristic of the Territorial Clause that warrants comment: it vests Congress with the power to "make all needful Rules and Regulations respecting *the Territory*."[132] It has on occasion been argued—most famously in the majority opinion in *Dred Scott v. Sandford*—that the use of the singular "the Territory," as opposed to the plural "the Territories," means that the Drafters of the Constitution intended for the Territorial Clause to *only* apply to the Northwest Territory, the only territory in existence when the Constitution was drafted and ratified.[133] It is this interpretation of the Territorial Clause that the *Dred Scott* majority used to justify its results-oriented holding that Congress lacked the constitutional authority to outlaw slavery in the territories, despite the fact that it had done so for the Northwest Territory through the Northwest Ordinance.[134]

Despite its odious origins, the argument that there may be constitutional significance to the Drafters' choice to use the singular "the Territory" in the Territorial Clause warrants at least some consideration. Nevertheless, the proposition that the Drafters used the phrase "the Territory" merely as shorthand for "the Northwest Territory" is without meaningful support. Under traditional rules of

129. 26 U.S. (1 Pet.) 511 (1828); *see Clarke*, 5 U.S. at 214.

130. *Canter*, 26 U.S. at 544–46.

131. *Id.*

132. U.S. CONST. art. IV, § 3, cl. 2 (emphasis added).

133. 60 U.S. (19 How.) 393, 436–38 (1857) (enslaved party).

134. *Id.* at 449–52.

English grammar, the word "the" need not only refer to a single object but could refer to an entire class of objects. For instance, a speaker may say "I enjoy the ballet" or use the metaphor "[t]he pen is mightier than the sword," yet it is clear that the person is not referring to a particular ballet performance or a specific pen or sword.[135] That the Drafters intended to refer to a class of territories rather than to only the Northwest Territory is further bolstered by the fact that the Northwest Ordinance itself permitted Congress to, at some future date, divide the Northwest Territory into multiple districts with their own legislatures and governors.[136] And less than fifteen years after the Constitution was ratified, Congress would approve the Louisiana Purchase and divide it into the Territory of Orleans and the Territory of Louisiana, expressly rejecting the contention that the Constitution did not permit the acquisition of foreign territory.[137]

But perhaps the strongest evidence that the Drafters of the Constitution were not referring exclusively to the Northwest Territory is in the last provision of the Territorial Clause: "[N]othing in this Constitution shall be so construed as to Prejudice any Claims of the United States, *or of any particular State*."[138] By the time the Confederation Congress first enacted the Northwest Ordinance in 1787—let alone by the time sufficient states ratified the U.S. Constitution—every state had *already* ceded all its claims to the land that constituted the Northwest Territory.[139] The inclusion of this language in the Territorial Clause, then, serves no purpose whatsoever unless it contemplates the establishment of future territories consisting of land to which a particular state possesses a claim.

### 2. Other Relevant Provisions of the U.S. Constitution

At the very heart of originalism is the idea that the words of the U.S. Constitution matter, and in construing its provisions, "the starting

135. While the word "the" is typically treated as a definite article, and the word "a" is an indefinite article, there are certain instances where use of these articles is flipped, with "the" serving as an indefinite article and "a" serving as a definite article. *See, e.g.*, Martine Johnston, *Special Cases in the Use of the Definite Article*, UNIV. OF TORONTO, https://advice.writing.utoronto.ca/english-language/definite-article/ (last visited Apr. 22, 2024) [https://perma.cc/EJH5-QM25].

136. Northwest Ordinance, *supra* note 98, § 1.

137. *See* David P. Currie, *The Constitution in Congress: Jefferson and the West, 1801-1809*, 39 WM. & MARY L. REV. 1441, 1457–59, 1461 (1998) ("The southern portion, which contained the city of New Orleans, was christened the Territory of Orleans and the remainder the District (later territory) of Louisiana.").

138. U.S. CONST. art. IV, § 3, cl. 2 (emphasis added).

139. *See* Clay Tallman, *The Public Domain*, 20 TEX. L. REV. 55, 56–59 (1941) (summarizing state cessions of land to the federal government during this period).

point, and usually the ending point, are the four corners of its language."[140] But the U.S. Constitution is not simply a series of clauses to interpret in isolation from each other; rather, the language of the Constitution must necessarily be interpreted in a way that ensures the internal consistency and coherence of the *entire* document.[141]

Thus, it is not enough to determine the meaning of the Territorial Clause and to simply stop there. Instead, one must go further and consider the interplay between the Territorial Clause and other provisions of the Constitution, which may be relevant to defining the relationship among the United States, the territories, and the people of the territories.

As noted earlier, the word "Territory" only appears three times in the text of the Constitution: the Territorial Clause and fleeting references in the two Prohibition Era amendments.[142] The word "State" and the plural "States," however, appear passim throughout the entire Constitution. Yet despite its repeated use by the Founders, the Constitution does not expressly define the word "State" just as it does not expressly define a "Territory."

Nevertheless, to many of us the meaning of "State" appears obvious. It likely was obvious to the Drafters of the Constitution as well. While the Constitution does not define the word "State," the official name of the Articles of Confederation—the frame of government in place at the time of the drafting of the Constitution—was the "Articles of Confederation and Perpetual Union Between the States of New Hampshire, Massachusetts Bay, Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina and Georgia."[143] As such, a "State" for purposes of the U.S. Constitution certainly constituted one of the original thirteen states that made up the United States under the Articles of Confederation, as well as any new states subsequently created pursuant to the Admissions Clause of the U.S. Constitution.[144]

Interpreting the word "State" in the U.S. Constitution to mean a state—and *only* a state—has longstanding support in some of the earliest Supreme Court precedents. In 1805, in an opinion written by

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140. Stephen Markman, *The Debate Over the Judiciary*, 35 SUFFOLK U. L. REV. 443, 449–50 (2001).

141. *See* H. Jefferson Powell, *Grand Visions in an Age of Conflict*, 115 YALE L.J. 2067, 2074 (2006) (describing Professor Akhil Amar's "practice of constitutional textualism [as] an enquiry into the meaning of the Constitution—including all of its amendments—as an integrated and coherent whole.").

142. *See supra* note 77 and accompanying text.

143. ARTICLES OF CONFEDERATION of 1781, pmbl.

144. U.S. CONST. art. IV, § 3, cl. 1.

Chief Justice Marshall, a unanimous Supreme Court in *Hepburn & Dundas v. Ellzey* held that the District of Columbia is not a "state" as that word is used in the Constitution, holding that "state" simply means "state" and not any type of "distinct political society" operating within the United States.[145] A decade later, in another opinion by Chief Justice Marshall, the Supreme Court applied this same reasoning to hold that a territory is not a "State" as that term is used in the Constitution.[146] The bright-line interpretative rule established by the Founding Era Supreme Court is thus very straightforward: If a governmental entity is not a state, then it is not a "State" for purposes of the Constitution, regardless of how distinct of a political entity it has become or how much autonomy it possesses in practice.[147]

### *B. Envisioning a Post–*Insular Cases *Territorial Clause*

Ultimately, the plain text and original understanding of the pertinent provisions of the U.S. Constitution establish a rather simple and straightforward framework of federal-territorial relations. Under the Territorial Clause, Congress may not exercise plenary authority over the territories, as it may with the District of Columbia and federal property; its authority to enact "needful Rules and Regulations" is limited to establishing a temporary territorial government, including its structure and initial set of laws.[148] The purpose of this is to ensure a peaceful and orderly transition to U.S. sovereignty from whatever may have come before.[149] As U.S. sovereignty becomes established and the territory can transition to peaceful self-government, the power of Congress to act in loco parentis by directly legislating for the territory under the Territorial Clause is correspondingly reduced and perhaps eventually eliminated.

In exercising this power under the Territorial Clause, Congress does not act in its capacity as a national legislature but exercises the same power and authority that a state could lawfully exercise when performing these functions. Thus, if the powers of a state government are *limited* by a constitutional provision, the authority of Congress under the Territorial Clause is similarly limited. Nevertheless, if—and only if—Congress could exercise its national legislative powers to take a certain action against a state, it may of course still exercise the same power against a territory.

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145. 6 U.S. (2 Cranch) 445, 452 (1805).

146. Corp. of New Orleans v. Winter, 14 U.S. (1 Wheat.) 91, 94 (1816).

147. *Id.*

148. U.S. CONST. art. IV, § 3, cl. 2; *see supra* notes 98–100 and accompanying text.

149. *See supra* Section III.A.

But how would this originalist interpretation of the Territorial Clause work in practice? Let us consider some scenarios.

### 1. Structure of Territorial Governments

Article IV, Section 4 of the U.S. Constitution provides that "[t]he United States shall guarantee to every State in this Union a Republican Form of Government."[150] As such, Congress cannot exercise its powers under the Territorial Clause to establish a monarchy, a dictatorship, permanent military rule, or other form of nonelected government for a territory. Nor does the Territorial Clause permit Congress to arbitrarily interfere with the structure of a territorial government that has achieved stable self-government, such as by unilaterally repealing the Constitution of Puerto Rico.

Nevertheless, there are certain instances where Congress could still constitutionally alter the structure of a territorial government—not under the Territorial Clause but through the exercise of its other powers. For instance, Congress possesses an obligation to protect against invasion and domestic violence[151] and may suspend the writ of habeas corpus "when in Cases of Rebellion or Invasion the public Safety may require it."[152] As such, Congress may exercise its national legislative powers to establish a *temporary* military or other nonelected government for a territory, just as it did with the Southern states in the immediate aftermath of the Civil War. In fact, the Supreme Court expressly acquiesced to Congress dissolving the state government of Georgia and placing it under temporary military rule during the Reconstruction Era pursuant to Congress's authority under the Guarantee Clause.[153]

### 2. Congressional Representation and Federal Voting Rights

Article I, Sections 2 and 3 of the Constitution expressly limit representatives and senators to the "States," with Article II, Section 1 similarly vesting only states with electoral college votes.[154] A state government lacks the authority to vest itself with greater federal representation than structurally provided for in the Constitution, and the Constitution does not permit Congress—acting in its capacity as a national legislature—to modify the composition of the House of

150. U.S. CONST. art. IV, § 4.
151. *Id.*
152. *Id.* art. I, § 9, cl. 2.
153. *See* Georgia v. Stanton, 73 U.S. (6 Wall.) 50 (1867).
154. U.S. CONST. art. I, §§ 2–3; *id.* art. II, § 1, cl. 3.

Representatives, the Senate, or the Electoral College. Consequently, territories may only achieve direct voting representation in both houses of Congress and the Electoral College upon passage of a constitutional amendment or their admission to statehood.

### 3. Applicability of the Federal Bill of Rights

The Supreme Court initially steadfastly refused to apply the guarantees of the Bill of Rights against the states. It ultimately overruled those precedents, however, in its seminal decision *Gitlow v. New York*, extending the rights of freedom of speech and freedom of the press, codified in the First Amendment, to state governments.[155] Over the next century, the Court would incorporate virtually every other provision of the Bill of Rights against the states.[156] Because Congress's authority to legislate for a territory under the Territorial Clause should be limited only to the same power and authority that a state may lawfully exercise, the Territorial Clause prohibits Congress—as well as territorial governments—from withholding the protections of any portion of the Bill of Rights that has been incorporated against the states.

### 4. Structure and Powers of Territorial Courts

As discussed above, in a decision issued one week[157] before *Marbury v. Madison*, the Supreme Court rejected—albeit without full legal analysis—a claim that the courts of the Northwest Territory established by Congress exercised the judicial power of the United States as provided for in Article III of the U.S. Constitution.[158] The

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155. 268 U.S. 652, 666 (1925).

156. *See, e.g.*, Timbs v. Indiana, 139 S. Ct. 682 (2019) (excessive fines); McDonald v. City of Chicago, 561 U.S. 742 (2010) (Second Amendment); Schilb v. Kuebel, 404 U.S. 357 (1971) (excessive bail); Aguilar v. Texas, 378 U.S. 108 (1964) (warrant requirement); Edwards v. South Carolina, 372 U.S. 229 (1963) (right to petition); Robinson v. California, 370 U.S. 660 (1962) (cruel and unusual punishment); Mapp v. Ohio, 367 U.S. 643 (1961) (unreasonable searches and seizures); Everson v. Bd. of Educ., 330 U.S. 1 (1947) (establishment of religion); Cantwell v. Connecticut, 310 U.S. 296 (1940) (free exercise of religion); De Jonge v. Oregon, 299 U.S. 353 (1937) (freedom of assembly); Klopfer v. North Carolina, 386 U.S. 213 (1967) (speedy trial); *In re* Oliver, 333 U.S. 257 (1948) (public trial); Duncan v. Louisiana, 391 U.S. 145 (1968) (impartial jury); Ramos v. Louisiana, 140 S. Ct. 1390 (2020) (unanimous jury); Pointer v. Texas, 380 U.S. 400 (1965) (right to confront witnesses); Washington v. Texas, 388 U.S. 14 (1967) (compulsory process); Gideon v. Wainwright, 372 U.S. 335 (1963) (assistance of counsel); Benton v. Maryland, 395 U.S. 784 (1969) (double jeopardy); Griffin v. California, 380 U.S. 609 (1965) (self-incrimination in court); Miranda v. Arizona, 384 U.S. 436 (1966) (self-incrimination out of court).

157. Anne Ashmore, *Dates of Supreme Court Decisions and Arguments*, SUP. CT. OF THE U.S. 4 (2006), https://www.supremecourt.gov/opinions/datesofdecisions.pdf [https://perma.cc/BP2X-NHR5].

158. Clarke v. Bazadone, 5 U.S. (1 Cranch) 212 (1803).

Supreme Court would offer that missing reasoning several years later in a case challenging the constitutionality of the territorial courts of the Florida Territory, whose judges only served terms of four years and were not guaranteed the lifetime appointments associated with good behavior provided for in Article III.[159] The Supreme Court arrived at this decision by expressly concluding that the courts of the Florida Territory—even though established by Congress—were not created as inferior federal courts exercising the judicial power of the United States pursuant to Article III, but were created to exercise the judicial power of the Florida Territory.[160] It did so by expressly holding that in legislating for the territories, "Congress exercises the combined powers of the general, and of a state government."[161] This is fully consistent with an originalist understanding of the Territorial Clause: because Congress exercises the power of a state government in establishing a civil government for a territory, and states are not bound by the limitations of Article III when creating their state courts, Congress likewise need not do so with territorial courts—at least when the courts exercise the judicial power of a territory rather than the judicial power of the United States.[162]

### 5. Congressional Veto of Territorial Laws

As described earlier, the power of Congress under the Territorial Clause to enact "needful Rules and Regulations" is not absolute or plenary but limited to the power to establish a temporary government for a territory and to make any necessary adjustments to that temporary government.[163] After this temporary government successfully transitions to a stable and democratically elected self-government, the authority of Congress to veto legislation enacted for the territory by that democratically elected territorial government should cease.[164] This does not mean that Congress lacks any authority whatsoever to preempt territorial laws—its authority to do so, however,

159. Am. Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511, 546 (1828).

160. *Id.*

161. *Id.*

162. Whether modern federal district courts in the territories—such as the District Court of the Virgin Islands, the District Court of Guam, and the District Court for the Northern Mariana Islands—can reasonably be characterized as exercising the judicial power of a territory as opposed to the United States is a subject of considerable debate in light of Congress repeatedly reducing the jurisdiction of those courts to hear local cases and conversely increasing the jurisdiction of the local courts to do so. *See* United States v. Ayala, 917 F.3d 752 (3d Cir. 2019) (rejecting claim that the District Court of the Virgin Islands now exercises the judicial power of the United States so as to be subject to Article III requirements and limitations).

163. *See* discussion *supra* Subsection III.A.1.

164. *See* discussion *supra* Section III.A.

would be constrained by its enumerated powers and other constitutional obligations. For instance, as explained below, Congress could permissibly preempt bankruptcy laws enacted by the territorial government of Puerto Rico as part of its exercise of the enumerated power to establish uniform laws on the subject of bankruptcy.[165]

### 6. Citizenship

The Citizenship Clause of the Fourteenth Amendment extends birthright citizenship to every person "born . . . in the United States."[166] It is well established—at both the time of the Founding and at the drafting of the Fourteenth Amendment—that the phrase "United States," standing alone without any modification, is intended to refer to the United States as a political entity, and thus includes not just the states but also territories, the District of Columbia, and any other place over which the United States exercises sovereignty.[167] Because neither Congress nor a state government may withhold the right to birthright citizenship as conferred by the Constitution, neither Congress nor territorial governments may withhold constitutional birthright citizenship from those born in any territory, including American Samoa.

### 7. Land Alienation

The territorial laws that are arguably most likely to violate the U.S. Constitution are the land alienation laws in place in the Northern Mariana Islands and American Samoa, which place severe restrictions on the ability of those who are not members of the local indigenous populations to purchase property.[168] After all, it should be so

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165. *See* discussion *infra* Subsection III.B.8.

166. U.S. CONST. amend. XIV, § 1, cl. 1.

167. *See* Loughborough v. Blake, 18 U.S. (5 Wheat.) 317, 319 (1820) ("Does th[e] term [United States] designate the whole, or any particular portion of the American empire? Certainly this question can admit of but one answer. It is the name given to our great republic, which is composed of the States and territories."); Cross v. Harrison, 57 U.S. (16 How.) 164, 181, 197 (1853) (finding collection of tonnage duties and imposts on goods arriving in San Francisco from outside of the United States proper after California was ceded to the United States by Mexico, but before California became a state); Crandall v. Nevada, 73 U.S. (6 Wall.) 35, 48–49 (1867) (referring to American citizens as "every citizen of the United States from the most remote States or territories"); United States v. Wong Kim Ark, 169 U.S. 649, 693 (1898) ("The fourteenth amendment affirms the ancient and fundamental rule of citizenship by birth within the territory . . . . The amendment, in clear words and in manifest intent, includes the children born within the territory of the United States . . . .").

168. Wabol v. Villacrusis, 958 F.2d 1450, 1452 (9th Cir. 1990) (explaining that the Northern Mariana Islands' Constitution and the Covenant to Establish a Commonwealth in Political Union with the United States of America provides that "acquisition of permanent and long-term interests in real property within the Commonwealth shall be restricted to persons of Northern Marianas

fundamental as to not require citation that a state such as Texas could not constitutionally enforce a law limiting land ownership only to individuals who could trace their ancestry to an individual who was a citizen of Texas when Texas first became a state, or who possessed fifty percent or more "Texan" ancestry. It is a commonly expressed fear, then, that overruling the *Insular Cases* would necessitate also overruling lower court precedents such as *Wabol v. Villacrusis*[169] and *Craddick v. Territorial Registrar*,[170] which respectively upheld the land alienation laws of the Northern Mariana Islands and American Samoa against challenges under the Equal Protection Clause. As the *Wabol* court put it, applying the Equal Protection Clause in such a manner would "operate as a genocide pact for diverse native cultures" and force "mainland attitudes toward property" on the indigenous populations of these territories.[171]

Whether the race- or ancestry-based land alienation laws in force in the Northern Mariana Islands and American Samoa constitute sound public policy is certainly a matter of reasonable debate. Race- and ancestry-based restrictions on the ownership or transfer of land owned by or held in trust for indigenous peoples, however, have a long history in the United States dating back to the cases known as the *Marshall Trilogy*, which laid the foundation for modern Federal Indian Law.[172] In fact, prior to 1887, Congress—through various statutes and treaties— expressly "prohibit[ed] conveyances, leases, or encumbrances of land from Indian tribes to non-Indians, unless conducted in the presence of a U.S. commissioner and ratified by treaty."[173] Such land alienation restrictions were constitutional due to the recognition of the

descent"); Craddick v. Territorial Registrar, 1 Am. Samoa 2d 10, 11–12 (1980) (stating that "27 ASC 204(b)" provided that "[i]t is prohibited to alienate any [non-freehold] lands . . . to any person who has less than one half native blood" and that "native lands" may not be alienated to people with "any nonnative blood whatsoever" unless they were "born in American Samoa, [are] a descendant of a Samoan, lived in American Samoa for more than five years, and ha[ve] officially declared" their intention to permanently settle in American Samoa).

169. 958 F.2d at 1458–62.

170. 1 Am. Samoa 2d at 12–13.

171. 958 F.2d at 1462.

172. *See* Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823) (holding that Piankeshaw Indians had right of occupancy but not title to the land, thereby invalidating a sale of land by the Piankeshaw Indians to the plaintiff); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 2–3 (1831) (noting that the Cherokee nation "and their ancestors have been and are the sole and exclusive masters of this territory, governed by their own laws, usages, and customs," but identifying them as a "domestic dependent nation"); Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832) (rejecting an argument for state jurisdiction over non-Indians living within the Cherokee Nation).

173. TANA FITZPATRICK, CONG. RSCH. SERV., R46647, TRIBAL LAND AND OWNERSHIP STATUSES: OVERVIEW AND SELECTED ISSUES FOR CONGRESS 6 (2021), https://sgp.fas.org/crs/misc/R46647.pdf [https://perma.cc/6JWX-533Y].

Indian tribes as "domestic dependent nations" whom the United States possessed an obligation to protect.[174]

The Northern Mariana Islands and American Samoa are distinct from Indian land in one critical respect: these territories were not conquered or purchased by the United States from some other colonial power. Rather, both territories were functionally sovereign and independent at the time they joined the United States and relinquished that sovereignty through negotiated treaties with the federal government.[175] As a result of those treaties, the Northern Mariana Islands and American Samoa, though characterized as territories, appear to possess all the hallmarks of the "domestic dependent nations" recognized by the Supreme Court as early as 1831.[176] For instance, like treaties between the United States and many Indian tribes, the treaties negotiated and entered into among the United States and the local leaders of the Northern Mariana Islands and American Samoa expressly provide for the preservation of land pursuant to local custom.[177] In fact, both federal and territorial courts have expressly relied upon the treaty power of Congress to uphold the constitutionality of the land alienation provisions in these specific territories.[178]

### 8. Bankruptcy

The Bankruptcy Clause of the U.S. Constitution vests Congress with the enumerated power to enact "uniform Laws on the subject of

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174. *See Cherokee Nation*, 30 U.S. at 2, 17–18, 74:

> They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases—meanwhile they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian.

175. *See American Samoa*, U.S. DEP'T OF THE INTERIOR, https://www.doi.gov/oia/islands/american-samoa (last visited Apr. 22, 2024) [https://perma.cc/6YTW-CGLX]; Proclamation No. 5564, 51 Fed. Reg. 40399 (Nov. 3, 1986).

176. *See Cherokee Nation*, 30 U.S. at 2.

177. *See* Instrument of Cession Chiefs of Tutuila to United States Government, Sam.-U.S., Apr. 17, 1900, https://asbar.org/wp-content/uploads/attachments/cession1.pdf [https://perma.cc/4QXJ-HN4P]; Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America § 805, *reprinted as amended in* 48 U.S.C. § 1801 (allowing the restriction of acquisition of "permanent and long-term interests in real property . . . to persons of Northern Mariana Islands descent").

178. *See* Wabol v. Villacrusis, 958 F.2d 1450, 1459 n.17 (9th Cir. 1990) ("Under Article IV, section 3 of the United States Constitution, Congress may 'dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United State.' "); Craddick v. Territorial Registrar, 1 Am. Samoa 2d 10, 13 (1980) ("We merely point to the history of treaties and laws as evidencing recognition on the [part] of the United States Government from the very beginning of the compelling nature of the governmental interest in restricting alienation.").

Bankruptcies throughout the United States."[179] The Supreme Court has characterized this power not just as a plenary power but a "supreme power," to which the states are wholly subservient.[180] As such, Congress unquestionably possesses the power to preempt bankruptcy laws enacted by a territory—*not* due to its power under the Territorial Clause but pursuant to the "supreme power" conferred on it by the Bankruptcy Clause.[181]

For similar reasons, Congress likely acted within its constitutional powers when it established the so-called "PROMESA Board" to set the budget for the government of Puerto Rico without the consent of Puerto Rico's governor or legislature.[182] While certainly constituting an infringement on the self-government of Puerto Rico, which should be impermissible under an originalist understanding of the Territorial Clause,[183] it is highly likely that Congress also possesses an equivalent power to force a state government into involuntary bankruptcy and to establish a similar board with equivalent temporary power over the state budget.[184] Again, the power of Congress to take

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179. U.S. CONST. art. I, § 8, cl. 4.

180. *See* New York v. Irving Tr. Co., 288 U.S. 329, 333 (1933) ("The Federal government possesses supreme power in respect of bankruptcies."); *see also* Sacred Heart Hosp. of Norristown v. Dep't of Pub. Welfare (*In re* Sacred Heart Hosp.), 133 F.3d 237, 243 (3d Cir. 1998) ("There can be no doubt that Congress unequivocally expressed its intent to abrogate the states' Eleventh Amendment immunity under the Bankruptcy Code."); Hood v. Tenn. Student Assistance Corp. (*In re* Hood), 262 B.R. 412, 420 (B.A.P. 6th Cir. 2001) ("Thus, the Supreme Court recognized that an orderly and expeditious bankruptcy process necessarily requires subordination of state sovereignty.").

181. *Irving Tr. Co.*, 288 U.S. at 333; Puerto Rico v. Franklin Cal. Tax-Free Tr., 579 U.S. 115, 121 (2016). Significantly, the Supreme Court has itself implicitly recognized this to be the case by engaging in a Bankruptcy Clause preemption analysis with respect to the municipal bankruptcy laws enacted by Puerto Rico:

> If it were the case that the Territorial Clause confers Congress with the absolute and unrestricted plenary power to make any law whatsoever for the territories—whether organized or unorganized, incorporated or unincorporated—there would be no need to conduct any sort of preemption analysis under the Bankruptcy Clause. Under such a broad reading of the Territorial Clause, it would have been sufficient to simply note that Congress could exercise plenary authority under the Territorial Clause to legislate for Puerto Rico, without the need for any more extensive preemption analysis under the Bankruptcy Clause or otherwise.

Ciolli, *supra* note 17, at 230–31.

182. *See* 48 U.S.C. § 2121(d)(1)(B)-(C), (e)(3) (outlining that the Oversight Board in its sole discretion may set the budget for Puerto Rico and that, though the Governor of Puerto Rico "shall be an ex officio member of the Oversight Board," they will not have voting rights); *see also* Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC, 140 S. Ct. 1649, 1656 (2020) ("Congress created the Board pursuant to its power under Article IV of the Constitution to 'make all needful Rules and Regulations respecting the Territory . . . belonging to the United States.' ").

183. *See* discussion *supra* Subsection III.B.1.

184. *See* Adam Feibelman, *Involuntary Bankruptcy for American States*, 7 DUKE J. CONST. L. & PUB. POL'Y 81, 83, 105–13 (2012) (analyzing the constitutionality of involuntary bankruptcy for

such action would not stem from the Territorial Clause but from the Bankruptcy Clause.

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Perhaps the most striking aspect of the above interpretative scenarios is how little disruption would occur if the Supreme Court overruled the *Insular Cases* and instead applied an originalist interpretation of the Territorial Clause. Overruling the *Insular Cases* would not indirectly overrule or call into doubt the validity of more recent Supreme Court decisions involving the territories: ultimately, the Supreme Court got the result—and even much of the reasoning—of those cases *right*. It would not result in large-scale structural changes to the current U.S. government, in that it would not require that territories receive seats in Congress or obtain electoral votes in the absence of a constitutional amendment. Nor would it result in unintended consequences such as territorial governments being democratically elected, land alienation laws in American Samoa and the Northern Mariana Islands being found unconstitutional, or Congress possessing less authority to legislate for the District of Columbia. On the contrary, territorial autonomy would have even *greater* constitutional support under an originalist approach, in that the power of Congress to interfere with a territory's self-government or arbitrarily force cultural assimilation would be far more constricted than under the legal rules established by the *Insular Cases*. And because Congress or territorial governments already conferred virtually all the protections in the Bill of Rights to the territories by statute—with perhaps the most notable exception being birthright citizenship for those in American Samoa[185]—a holding that these rights extend to the people of the territories by virtue of the Constitution would be extraordinarily easy to implement.

states and arguing that "constitutional impediments to a state bankruptcy regime with an involuntary component are much less robust than courts, commentators, and scholars assume"). In fact, similar involuntary boards have been established in the context of the municipal bankruptcies in New York City, Detroit, and the District of Columbia. *See* David Skeel, *Reflections on Two Years of P.R.O.M.E.S.A.*, 87 REVISTA JURÍDICA U. P.R. 862, 864–66 (2018) (discussing the rise of oversight boards in "response to large-scale municipal crises").

185. *See, e.g.*, Tuaua v. United States, 788 F.3d 300, 302 (D.C. Cir. 2015) ("[T]he Citizenship Clause does not extend birthright citizenship to those born in American Samoa."); Fitisemanu v. United States, 1 F.4th 862, 864–65 (10th Cir. 2021) (reversing the district court's decision and holding that birthright citizenship does not apply to American Samoans).

## CONCLUSION

The United States has a colonies problem that began in the late nineteenth century. But while many other nineteenth-century colonial powers either dispensed with their colonies or integrated them into their national government, the United States' colonial footprint has remained largely unchanged for more than one hundred years.

Certainly, many factors contribute to the current situation. But the *Insular Cases* and the doctrine of territorial incorporation embraced by the early twentieth-century Supreme Court have played an outsized role in maintaining the colonial status quo. Through its reliance on theories of white supremacy espoused by the leading legal scholars of the day, a majority of the Supreme Court placed its constitutional seal of approval on differential treatment among the territories based on nothing more than naked racism. And while to its partial credit the Supreme Court has attempted to retreat from these disgraceful rulings, its failure to expressly overrule the *Insular Cases* has empowered both Congress and the lower federal courts to invoke the phrase "Territorial Clause" as a talisman to uphold nearly every practice that treats the territories and their people differently from their state counterparts or even each other—almost always to the territories' detriment.

Yet like other situations where the Supreme Court erred, it is not enough to simply say—without more—that the Supreme Court should overrule its precedent, no matter how misbegotten, racist, or irrational. The *Insular Cases* cannot take their rightful place in the dustbin of U.S. constitutional law with other anticanon precedents, such as *Plessy v. Ferguson*, without a clear alternative that is workable in practice, will not disrupt the "good" aspects of the federal-territorial relationship, and—perhaps most importantly—is rooted in the plain text of the U.S. Constitution and the original intent of the Founders. To echo Justice Gorsuch, it is not enough to overrule the *Insular Cases*, but instead the Court must "settle this question right" even if "settling this question right would raise difficult new ones."[186]

The humble purpose of this Essay has been to lay the groundwork for such an alternative to the *Insular Cases*. I am not so bold as to say that my conception of the original understanding of the Territorial Clause is the only correct interpretation. It has often been said that constitutional law develops as a dialogue, not just among courts adjudicating cases but among scholars, practitioners, and others with the time and desire to independently develop theories and

186. United States v. Vaello Madero, 596 U.S. 159, 189 (2022) (Gorsuch, J., concurring).

interpretations.[187] My sincere hope is that this Essay will kickstart such a dialogue and enable the Supreme Court to finally get it right.

187. *See generally* LOUIS FISHER, CONSTITUTIONAL DIALOGUES (1988).