THE ORIGINALIST CASE AGAINST THE *INSULAR CASES*

Michael D. Ramsey[*]

Abstract

Concurring in *United States v. Vaello Madero*, Justice Neil Gorsuch argued that the *Insular Cases* are contrary to the Constitution's original meaning and should be overruled. The Supreme Court's decisions in the *Insular Cases*, which created a second-class constitutional status for U.S. overseas territories, have also been criticized by leading originalist scholars such as Professors Gary Lawson and Michael Paulsen. However, there is no fully developed scholarly assessment of the *Insular Cases* from an originalist perspective; their inconsistency with an originalist approach is more assumed than proven. This Article fills that gap. Using the methodology of original public meaning, it considers the constitutional status of U.S. territories from the founding era through the early nineteenth century to the constitutionalization of U.S. citizenship in the Fourteenth Amendment.

Although the matter is somewhat more complicated than Justice Gorsuch's concurrence may suggest, this Article finds no foundation in traditional originalist sources for the *Insular Cases*' differential treatment of overseas territories. To the contrary, it concludes that U.S. territories were widely understood to be broadly encompassed by the Constitution without differentiation until an academic and judicial reassessment at the beginning of the twentieth century, impelled by U.S. acquisition of territories with substantial non-white populations, set the stage for the Court's newly invented doctrine. This Article thus concludes that Justice Gorsuch's assessment is correct and should carry weight with the Court's originalist-oriented majority. Finally, this Article examines the implications for territorial government of overruling the *Insular Cases*, which it concludes would be significant but not substantially destabilizing.

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* Warren Distinguished Professor of Law, University of San Diego School of Law. For helpful comments and conversations, thanks to William Baude, Andrew Kent, Vasan Kesavan, Thomas H. Lee, Christina Ponsa-Kraus, Saikrishna Prakash, Michael Rappaport, John Vlahoplus, Neil Weare, and the participants in the 2023 Law and Society Annual Meeting panel in San Juan, Puerto Rico, at which an earlier draft of this Article was presented. Thanks to Alec Towse for outstanding research assistance.

INTRODUCTION

Under current law, the U.S. Constitution does not apply fully in the five U.S. overseas territories[1] in the same way it does in U.S. states and the District of Columbia (nor in the same way it did in U.S. continental territories before they became states). That constitutional anomaly is the product of the *Insular Cases*, a series of Supreme Court decisions in the early twentieth century in the aftermath of the Spanish–American War.[2] The *Insular Cases* have been widely criticized in modern academic commentary as products of a racist and imperialist time, adopted to justify and facilitate extension of U.S. rule over non-white populations.[3]

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1. Currently American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands, plus minor islands without material permanent populations. *Insular Areas of the United States and Freely Associated State*s, U.S. DEP'T OF THE INTERIOR, https://www.doi.gov/library/internet/insular [https://perma.cc/2JUU-HSSK].

2. *E.g.*, Downes v. Bidwell, 182 U.S. 244, 287 (1901) (Brown, J., announcing the conclusion and judgment of the Court); Dorr v. United States, 195 U.S. 138, 149 (1904).

3. *See, e.g.*, Christina Duffy Ponsa-Kraus, *The* Insular Cases *Run Amok: Against Constitutional Exceptionalism in the Territories*, 131 YALE L.J. 2449, 2454 (2022); Adriel I. Cepeda Derieux & Neil C. Weare, *After* Aurelius*: What Future for the* Insular Cases*?*, 130 YALE L.J. F. 284, 306 (2020); SAM ERMAN, ALMOST CITIZENS: PUERTO RICO, THE U.S. CONSTITUTION, AND EMPIRE 47–55 (2019); KAL RAUSTIALA, DOES THE CONSTITUTION FOLLOW THE FLAG?: THE EVOLUTION OF TERRITORIALITY IN AMERICAN LAW 79–87 (2009); GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW 83–89 (1996). *See generally* FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION, AND THE CONSTITUTION (Christina Duffy Burnett & Burke Marshall eds., 2001) [hereinafter FOREIGN IN A DOMESTIC SENSE] (collecting essays on the *Insular Cases* and the colonial status of Puerto Rico). For a more nuanced view, see Andrew Kent, *The Jury and Empire: The Insular Cases and the Anti-Jury Movement in the Gilded Age and Progressive Era*, 91 S. CAL. L. REV. 375 (2018) (emphasizing the limited scope of the *Insular Cases* and their relationship to broader skepticism about the jury system).

Some recent scholarship seeks to rehabilitate the *Insular Cases* by emphasizing their possible modern use in defense of cultural practices in some territories that, while desirable to the native populations, might be in tension with U.S. constitutional provisions. *See, e.g.*, Stanley K. Laughlin, Jr., *Cultural Preservation in Pacific Islands: Still a Good Idea – and Constitutional*, 27 U. HAW. L. REV. 331 (2005); Russell Rennie, Note, *A Qualified Defense of the* Insular Cases, 92 N.Y.U. L. REV. 1683 (2017). *But see* Ponsa-Kraus, *supra*, at 2455–58 (describing and criticizing this "repurposing" of the *Insular Cases*).

Concurring in *United States v. Vaello Madero*,[4] Justice Neil Gorsuch argued that the *Insular Cases* are contrary to the Constitution's original meaning and should be overruled.[5] Several leading originalist scholars have also briefly criticized the *Insular Cases* as part of wider projects.[6] However, there is no fully developed scholarly assessment of the *Insular Cases* from an originalist perspective; their inconsistency with an originalist approach is more assumed than proven.

This Article fills that gap. Using the methodology of original public meaning, it considers the constitutional status of U.S. territories from the founding era through the early nineteenth century to the constitutionalization of U.S. citizenship in the Fourteenth Amendment. Although the matter is somewhat more complicated than Justice Gorsuch's concurrence suggests, this Article finds no foundation in traditional originalist sources for the *Insular Cases*' differential treatment of overseas territories. To the contrary, it concludes that the Constitution was widely (though not universally) understood to encompass U.S. territories without differentiation until a political and academic reassessment at the beginning of the twentieth century—impelled by U.S. acquisition of overseas territories to which application of the Constitution would have been inconvenient—set the stage for the Court's new direction. This Article thus concludes that Justice Gorsuch's originalist assessment is substantially correct. Finally, this Article examines the implications for territorial government of overruling the *Insular Cases*, which it concludes would be significant but not unduly destabilizing.

This Article proceeds as follows. Part I provides background on the *Insular Cases* and their subsequent application and criticism. Part II examines the Constitution's text and original meaning to assess the original constitutional status of U.S. territories. Parts III and IV consider the constitutional treatment of territories in post-ratification legislation, judicial

4. 596 U.S. 159 (2022).

5. *Id.* at 185–89 (Gorsuch, J., concurring).

6. *See* GARY LAWSON & GUY SEIDMAN, THE CONSTITUTION OF EMPIRE: TERRITORIAL EXPANSION AND AMERICAN LEGAL HISTORY 194–97 (2004); MICHAEL STOKES PAULSEN & LUKE PAULSEN, THE CONSTITUTION: AN INTRODUCTION 201–02 (2015); *see also* Cesar A. Lopez-Morales, *Making the Constitutional Case for Decolonization: Reclaiming the Original Meaning of the Territory Clause*, 53 COLUM. HUM. RTS. L. REV. 772, 781–85 (2022) (criticizing the *Insular Cases* on originalist grounds); Michael D. Ramsey, *Originalism and Birthright Citizenship*, 109 GEO. L.J. 405, 432–35 (2020) (discussing the *Insular Cases* briefly in connection with the Fourteenth Amendment's Citizenship Clause).

practice, and commentary. Part V reviews the originalist evidence assembled in the previous Parts to make the case that the doctrine of the *Insular Cases* is contrary to the Constitution's original meaning. Part VI addresses likely consequences of overruling the *Insular Cases* and providing equal constitutional treatment to U.S. territories.

I. BACKGROUND

This Part introduces the *Insular Cases*, outlining their doctrine of unincorporated territories and the resulting limitations on constitutional protections. It then recounts the doctrine's subsequent development and modern criticisms, including those from originalist perspectives.

A. *The* Insular Cases

The term "*Insular Cases*" may refer to twenty or more cases decided in the early twentieth century regarding the legal status of the United States' recently acquired overseas territories.[7] The present inquiry is principally concerned only with two of them: *Downes v. Bidwell*[8] and *Dorr v. United States*.[9] Together, these two cases established the doctrine of "unincorporated" territories, in which the Constitution applies with lesser force and scope to overseas territories than it does in states and "incorporated" territories.[10] Other decisions grouped within the broader category addressed distinct issues[11]

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7. *See* BARTHOLOMEW H. SPARROW, THE *INSULAR CASES* AND THE EMERGENCE OF AMERICAN EMPIRE 4, 257 (2006). With the Treaty of Paris, signed December 8, 1898, to end the Spanish–American War, Spain ceded Guam and Puerto Rico to the United States and agreed that the United States would purchase the Philippines for $20 million. Spain also granted independence to Cuba, subject to initial U.S. military occupation. *See* IVAN MUSICANT, EMPIRE BY DEFAULT: THE SPANISH-AMERICAN WAR AND THE DAWN OF THE AMERICAN CENTURY 626–29 (1998). The United States also annexed Hawaii in 1898 and, early in the twentieth century, acquired American Samoa and the U.S. Virgin Islands. *Acquisition Process of Insular Areas*, U.S. DEP'T INTERIOR, https://www.doi.gov/oia/islands/acquisitionprocess [https://perma.cc/W43V-ZYYA].

8. 182 U.S. 244 (1901).

9. 195 U.S. 138 (1904).

10. *Id.* at 149; Downes, 182 U.S. at 287.

11. *See, e.g.*, Neely v. Henkel, 180 U.S. 109, 119 (1901) (addressing the constitutional status of Cuba while independent but under U.S. military occupation). Many cases arising from island territories in this period involved only statutory questions. *E.g.*, De Lima v. Bidwell, 182 U.S. 1, 200 (1901) (holding that Puerto Rico was not a "foreign country" under U.S. tariff laws); Fourteen Diamond Rings v. United States, 183 U.S. 176, 177 (1901) (holding that the Philippines was not a

or were applications of the basic doctrine established in *Downes* and *Dorr* without material further development.[12]

The two principal cases have been widely discussed elsewhere;[13] for present purposes, they can be summarized briefly. *Downes* involved a constitutional challenge to the Foraker Act, which imposed duties on products shipped from Puerto Rico to the U.S. mainland.[14] That seemed to violate the plain language of Article I, requiring that "all Duties, Imposts and Excises shall be uniform throughout the United States."[15] On this basis, Downes, the exporter, sought reimbursement of duties paid upon landing his goods in New York.[16]

Although *Downes* only involved tariffs, it was understood at the time as a test case for the broader debate over the Constitution's application to the new territories. That debate had been running prominently since at least the end of the Spanish–American War in 1898.[17] Among other fora, it had featured in contending essays in the *Harvard Law Review*, written by Harvard Law School Dean Christopher Langdell (developer of the case method), Professor Simeon Baldwin, and political scientist Abbott Lowell (later president of Harvard University).[18] In particular, at issue was the citizenship of the

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"foreign country" under U.S. tariff laws, applying *De Lima*); Huus v. N.Y. & Porto Rico S.S. Co., 182 U.S. 392, 396–97 (1901) (holding trade with Puerto Rico to be domestic for purposes of state and federal regulations); Kepner v. United States, 195 U.S. 100, 133–34 (1904) (addressing double jeopardy under a congressional act governing the Philippines); Trono v. United States, 199 U.S. 521, 528 (1905) (same); Gavieres v. United States, 220 U.S. 338, 345 (1911) (same).

12. *E.g.*, Dooley v. United States, 183 U.S. 151, 157 (1901) (finding a tax on exports to Puerto Rico constitutional under *Downes*); Hawaii v. Mankichi, 190 U.S. 197, 211–16 (1903) (addressing the right to jury trial in the Hawaii territory as an unincorporated and incorporated territory); Dowdell v. United States, 221 U.S. 325, 332 (1911) (finding no right to grand or petit jury in the Philippines under *Dorr*); Balzac v. Porto Rico, 258 U.S. 298, 312–13 (1922) (applying *Downes* and *Dorr* to find no right to jury in misdemeanor cases in Puerto Rico).

13. *See, e.g.*, SPARROW, *supra* note 7, at 79–110 (discussing *Downes*); *id.* at 176–86 (discussing *Dorr*); *see also* ERMAN, *supra* note 3, at 49–55; NEUMAN, *supra* note 3, at 85–86; RAUSTIALA, *supra* note 3, at 80–81.

14. *Downes*, 182 U.S. at 247–48.

15. U.S. CONST. art. I, § 8, cl. 1.

16. *Downes*, 182 U.S. at 247.

17. *See* Andrew Kent, Boumediene, Munaf, *and the Supreme Court's Misreading of the* Insular Cases, 97 IOWA L. REV. 101, 122–31 (2011).

18. *See* Simeon E. Baldwin, *The Constitutional Questions Incident to the Acquisition and Government by the United States of Island Territory*, 12 HARV. L. REV. 393, 399 (1899); C.C. Langdell, *The Status of Our New Territories*, 12 HARV. L. REV. 365, 368–69 (1899); Abbott Lawrence Lowell, *The Status of Our New*

native populations of the new territories—with the first sentence of the Fourteenth Amendment declaring that "[a]ll persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States."[19] And, although early cases such as *Downes* involved Puerto Rico, the more worrisome question was the Philippines (also acquired from Spain after the war), which was much more distant geographically and culturally and had a much larger population.

The *Downes* Court ruled against the exporter by a 5–4 vote without a majority opinion. Justice Henry Brown (author of *Plessy v. Ferguson*) wrote the lead opinion, but no other Justices joined him.[20] Following Professor Langdell's suggestion, Justice Brown argued that the Constitution did not apply in any territories: the Constitution was adopted by and for the people in the states.[21] As discussed below, this view required aggressive moves to evade prior precedents. Although it had roots in nineteenth-century commentary,[22] it proved unpersuasive to anyone else on the Court.

Justice Edward White wrote for himself and two others (a fourth Justice concurred separately on narrower grounds).[23] In what would today be called a plurality opinion, Justice White expressed the idea of "incorporated" and "unincorporated" territories. Incorporated territories had full constitutional protection, while unincorporated territories did not.[24] White added, though, that even in unincorporated territories, certain restrictions on government action remained, based on "inherent, although unexpressed, principles which are the basis of all free government . . . restrictions of so fundamental a nature that they cannot be transgressed."[25]

Possessions—A Third View, 13 HARV. L. REV. 155, 156 (1899). An array of other law review articles also tackled the problem. *See* NEUMAN, *supra* note 3, at 244 nn.90–97 (collecting citations).

19. U.S. CONST. amend. XIV, § 1.

20. *Downes*, 182 U.S. at 247, 287, 344, 347, 375.

21. *Id.* at 285.

22. *See infra* Section III.B.

23. *Downes*, 182 U.S. at 287 (White, J., concurring, joined by Shiras & McKenna, JJ.); *id.* at 346 (Gray, J., concurring) ("If Congress is not ready to construct a complete government for the conquered territory, it may establish a temporary government, which is not subject to all the restrictions of the Constitution.").

24. *See id.* at 299 (White, J., concurring).

25. *Id.* at 291. White's opinion sharply disagreed with Brown's absolutist view that the Constitution did not apply in any U.S. territories. *See id.* at 289–92; *see also id.* at 295 (calling it an "erroneous principle").

Crucially for Justice White, a territory's status as incorporated or unincorporated depended on the U.S. government.[26] Congress, he said, had incorporated the continental territories, so they enjoyed full constitutional protections.[27] But because the United States had not taken steps to incorporate Puerto Rico, that territory remained unincorporated; because uniformity in tariffs was obviously not a principle "of so fundamental a nature that [it] cannot be transgressed," the exporter's challenge failed.[28] Conveniently, White's formulation allowed him to elide the nineteenth-century precedents with which Justice Brown struggled. More importantly, it opened the way for the United States to rule the new territories without unacceptable constraints—including, White heavily implied, without granting U.S. citizenship to their inhabitants.

Justices White and Brown were direct in expressing the racist and imperialist underpinnings of their positions. "[T]he consequences [of extending the Constitution to insular territories] will be extremely serious," Brown wrote.[29] "Indeed, it is doubtful if Congress would ever assent to the annexation of territory upon the condition that its inhabitants, however foreign they may be to our habits, traditions, and modes of life, shall become at once citizens of the United States."[30] White added that the power of annexation "could not be practically exercised if the result would be to endow the [territory's] inhabitants with citizenship of the United States"; he objected to the "immediate bestowal of citizenship on those absolutely unfit to receive it" as members of "an uncivilized race."[31]

Chief Justice Melville Fuller and Justice John Marshall Harlan each wrote opinions for the four dissenters. Fuller trained most of his fire on Brown's opinion, citing multiple nineteenth-century cases declaring or assuming that the Constitution applied in the United States' contiguous territories.[32] Justice Harlan ridiculed White's incorporated/unincorporated distinction as historically and logically unfounded: "I am constrained to say that this idea of 'incorporation' has some occult meaning which my mind does

26. *Id.* at 321.
27. *Id.* at 290.
28. *Id.* at 291.
29. *Id.* at 279 (Brown, J., announcing the conclusion and judgment of the Court).
30. *Id.* at 279–80.
31. *Id.* at 306 (White, J., concurring).
32. *Id.* at 352 (Fuller, C.J., dissenting).

not apprehend. It is enveloped in some mystery which I am unable to unravel."[33]

The Court held to its view that the Constitution did not fully apply in overseas territories without reaching consensus on the reasoning for several years.[34] Ultimately, newly appointed Justice William Day (formerly head of the commission that negotiated the treaty ending the war) assembled five votes for Justice White's theory of unincorporated territories in *Dorr v. United States*.[35] *Dorr* addressed the issue of the right to criminal jury trial in the Philippines, which Day resolved in accordance with White's opinion in *Downes*. First, he adopted the incorporated/unincorporated distinction:

> The [constitutional] limitations which are to be applied in any given case involving territorial government must depend upon the relation of the particular territory to the United States, concerning which Congress is exercising the power conferred by the Constitution. That the United States may have territory which is not incorporated into the United States as a body politic, we think was recognized by the framers of the Constitution in enacting the article [Article IV] already considered, giving power over the territories, and is sanctioned by the opinions of the justices concurring in the judgment in *Downes v. Bidwell*. Until Congress shall see fit to incorporate territory ceded by treaty into the United States, we regard it as settled by that decision that the territory is to be governed under the power existing in Congress to make laws for such territories, and subject to such constitutional

33. *Id.* at 391 (Harlan, J., dissenting).

34. *E.g.*, Hawaii v. Mankichi, 190 U.S. 197, 211, 218 (1903) (finding no right to jury trial in the unincorporated Hawaii territory). In *Gonzales v. Williams*, 192 U.S. 1, 13 (1904), the Court considered—but ultimately avoided—the question of whether persons born in Puerto Rico were U.S. citizens under the Fourteenth Amendment's Citizenship Clause; the Court instead unanimously held only that they were not "aliens" within the meaning of U.S. immigration laws. Although the Court avoided the citizenship issue directly, the political branches took *Gonzales* as implicit approval to treat Puerto Ricans (and other inhabitants of overseas territories, especially Filipinos) as noncitizens. Congress extended U.S. citizenship to persons born in Puerto Rico by statute in 1917. Organic Act of Porto Rico of March 2, 1917, ch. 145, § 5, 39 Stat. 951, 953. On the *Insular Cases* and Puerto Rican citizenship, *see* ERMAN, *supra* note 3, at 47–66.

35. 195 U.S. 138 (1904); *see also* Rasmussen v. United States, 197 U.S. 516, 519–21 (1905) (relying on the incorporated/unincorporated distinction in *Dorr* to find a constitutional right to jury trial in Alaska, an incorporated territory).

> restrictions upon the powers of that body as are applicable to the situation.[36]

Second, Justice Day acknowledged that fundamental rights would still apply in unincorporated territories but found the right to a jury trial not fundamental (largely for practical reasons):

> If the right to trial by jury were a fundamental right which goes wherever the jurisdiction of the United States extends, or if Congress, in framing laws for outlying territory belonging to the United States, was obliged to establish that system by affirmative legislation, it would follow that, no matter what the needs or capacities of the people, trial by jury, and in no other way, must be forthwith established, although the result may be to work injustice and provoke disturbance rather than to aid the orderly administration of justice. If the United States, impelled by its duty or advantage, shall acquire territory peopled by savages, and of which it may dispose or not hold for ultimate admission to statehood, if this doctrine is sound, it must establish there the trial by jury. To state such a proposition demonstrates the impossibility of carrying it into practice. Again, if the United States shall acquire by treaty the cession of territory having an established system of jurisprudence, where jury trials are unknown, but a method of fair and orderly trial prevails under an acceptable and long-established code, the preference of the people must be disregarded, their established customs ignored, and they themselves coerced to accept, in advance of incorporation into the United States, a system of trial unknown to them and unsuited to their needs. We do not think it was intended, in giving power to Congress to make regulations for the territories, to hamper its exercise with this condition.[37]

Or, as Day stated earlier in his opinion, the core holding was the Court's recognition of "the right of Congress to make laws for the government of territories, without being subject to all the restrictions which are imposed upon that body when

36. *Dorr*, 195 U.S. at 142–43 (citation omitted).
37. *Id.* at 148.

passing laws for the United States, considered as a political body of states in union."[38]

B. *Application and Commentary*

For the next fifty years, the Court carried forward the unincorporated territories doctrine without reservation. In the 1922 case *Balzac v. Porto Rico*,[39] the Court, in an opinion by Chief Justice William Howard Taft (formerly territorial governor of the Philippines),[40] reaffirmed the doctrine's application to Puerto Rico—even though, in the meantime, Congress had by statute made inhabitants of Puerto Rico U.S. citizens.[41] Congress's action, the Court found, failed to "incorporate" Puerto Rico, which remained subject to the diminished-rights status *Dorr* imposed on it.[42] As late as the 1950s, the Court continued to cite the doctrine with approval and without reflection.[43]

In the mid-1950s, though, the unincorporated territories doctrine collided with the Court's rethinking of a distinct but related matter: the Constitution's application in foreign countries.[44] In the late nineteenth century, *In re Ross*[45] held the

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38. *Id.* at 142. Justice Harlan again dissented. *Id.* at 154. Chief Justice Fuller and Justices Rufus Peckham and Joseph McKenna, who had dissented in *Downes*, concurred, accepting the authority of *Downes* and *Mankichi* as precedent but rejecting the doctrine of incorporation. *Id.* at 153–54.

Professor Ponsa-Kraus distinguishes between a "standard account" of the *Insular Cases*, holding that "*only* fundamental constitutional limitations, and nothing else in the Constitution . . . apply in the unincorporated territories" and a narrow reading (which she favors) that *at minimum* fundamental rights apply. *See* Ponsa-Kraus, *supra* note 3, at 2468–69; *see also* Christina Duffy Burnett, *Untied States: American Expansion and Territorial Deannexation*, 72 U. CHI. L. REV. 797, 814–69 (2005) (developing this distinction). This Article does not take a position on this matter, which is not directly relevant to its analysis.

39. 258 U.S. 298 (1922).

40. 1 HENRY F. PRINGLE, THE LIFE AND TIMES OF WILLIAM HOWARD TAFT: A BIOGRAPHY 199 (1939).

41. *Balzac*, 258 U.S. at 304–07. The Court confirmed that *Dorr* adopted Justice White's concurring opinion in *Downes* as the view of the Court. *Id.* at 305.

42. *Id.* at 313 (finding no constitutional right to jury trial in misdemeanor cases). At this point, Puerto Rico had a statutory right to jury trial for felonies. *Id.* at 300; *see* Kent, *supra* note 3, at 438–51 (discussing the development of jury trials in Puerto Rico).

43. *See, e.g.*, Granville-Smith v. Granville-Smith, 349 U.S. 1, 5 (1955); Johnson v. Eisentrager, 339 U.S. 763, 784–85 (1950).

44. *See* RAUSTIALA, *supra* note 3, at 127–55; Gerald L. Neuman, *Constitutionalism and Individual Rights in the Territories*, *in* FOREIGN IN A DOMESTIC SENSE, *supra* note 3, at 182, 189–90.

45. 140 U.S. 453 (1891).

Constitution to be strictly territorial, even as applied to U.S. citizens,[46] and the Court reaffirmed that proposition after World War II in *Madsen v. Kinsella*.[47] But in *Reid v. Covert*,[48] Justice Hugo Black abruptly changed direction, reconsidering *Madsen* and (on similar facts) requiring a civilian jury trial for a U.S. military spouse accused of murder in Britain.[49] In unqualified language, he declared (in considerable tension with the *Insular Cases*):

> At the beginning we reject the idea that when the United States acts against citizens abroad it can do so free of the Bill of Rights. The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution. When the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land.[50]

Justice Black distinguished the *Insular Cases* as "involv[ing] the power of Congress to provide rules and regulations to govern temporarily territories with wholly dissimilar traditions and institutions"[51] but left little doubt what he thought of them:

> [I]t is our judgment that neither the [*Insular Cases*] nor their reasoning should be given any further expansion. The concept that the Bill of Rights and other constitutional protections against arbitrary government are inoperative when they become inconvenient or when expediency dictates otherwise is a very dangerous doctrine and if allowed to flourish would destroy the benefit of a written Constitution and undermine the basis of our Government. If our foreign commitments become of such nature that the Government can no longer satisfactorily operate within the bounds laid down by the Constitution, that instrument can be

46. *Id.* at 464 (finding no right to jury trial for a U.S. citizen tried by a U.S. consular tribunal in Japan).

47. 343 U.S. 341, 361–62 (1952).

48. 354 U.S. 1 (1957).

49. *Id.* at 3, 5–6 (plurality opinion).

50. *Id.* at 5–6 (footnotes omitted).

51. *Id.* at 14.

> amended by the method which it prescribes. But we have no authority, or inclination, to read exceptions into it which are not there.[52]

Black managed only a plurality for his broad view of the Constitution's overseas application: Justice Felix Frankfurter and the second Justice John Marshall Harlan concurred in the result, limiting their conclusions to fundamental rights and generally endorsing the reasoning of the *Insular Cases*.[53] That limitation somewhat conformed the Constitution's status abroad to its status in unincorporated territories, although the concurring Justices thought a jury trial was required in *Reid*, while it was not constitutionally required in U.S. overseas territories. And in 1960, Justice Black got his fifth vote to make the Constitution applicable to U.S. citizens in foreign countries.[54] This outcome produced the peculiar situation that Puerto Ricans, for example, might have more rights under the U.S. Constitution in foreign countries than they did in their homeland.[55]

For a while, it seemed that this contradiction might spell the end of the *Insular Cases*' doctrine. Four members of the Court, led by Justices William Brennan and Thurgood Marshall, twice directly called for abandoning the doctrine.[56] Events, too, had somewhat overtaken it: the Philippines gained independence after World War II,[57] and with the post-war wave of decolonization, the United States seemed unlikely to acquire additional material overseas possessions. Further, as discussed below, substantial rights were extended to territorial

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52. *Id.* (footnote omitted).

53. *Id.* at 53, 64 (Frankfurter, J., concurring in the result); *id.* at 65, 74 (Harlan, J., concurring in the result). Harlan observed that "properly understood . . . [the *Insular Cases*] stand for . . . a wise and necessary gloss on our Constitution." *Id.* at 74. Chief Justice Earl Warren and Justices William Douglas and William Brennan joined Black's plurality. *Id.* at 1 (plurality opinion). Justice Thomas Clark, joined by Justice Harold Burton, dissented on the authority of *Madsen* and *Ross*. *Id.* at 78, 81–82 (Clark, J., dissenting).

54. Kinsella v. United States *ex rel.* Singleton, 361 U.S. 234, 249 (1960). Justice Clark, who dissented in *Reid*, joined the four Justices from the *Reid* plurality and wrote for a now five-Justice majority. *Reid*, 354 U.S. at 1, 78; *Kinsella*, 361 U.S. at 235.

55. *See* Neuman, *supra* note 44, at 190 ("Juxtaposing *Reid v. Covert* with the *Insular Cases* produces bizarre results.").

56. *See* Torres v. Puerto Rico, 442 U.S. 465, 475–76 (1979) (Brennan, J., concurring in the judgment); Harris v. Rosario, 446 U.S. 651, 653–56 (1980) (Marshall, J., dissenting).

57. Treaty of General Relations Between the United States of America and the Republic of the Philippines, Phil.-U.S., July 4, 1946, 11 U.S.T. 3.

inhabitants by statute or territorial constitutions.[58] The doctrine's underlying policy impulse thus seemed to have faded.

The Court instead took a different track, invigorating the doctrine's "fundamental rights" qualification.[59] In a series of cases in this period, the Court found multiple constitutional provisions to be "fundamental" for *Dorr*/*Downes* purposes and therefore applicable to overseas territories despite the unincorporated territories doctrine.[60] In other cases, the Court assumed claimed rights applied in overseas territories but found them not violated.[61] Taking the cue, lower courts further extended the list of rights applicable in territories.[62]

Then, in 1990, the doctrine received an unexpected boost from further developments regarding the Constitution's extraterritorial application. *United States v. Verdugo-Urquidez*[63] concerned the claimed application of the Fourth Amendment to the search of a Mexican citizen in Mexico.[64] In rejecting that claim and holding that the Constitution did not protect (at least in these circumstances) noncitizens abroad, the Court's majority cited *Dorr* and *Downes* as authority: "[C]ertainly, it is not open to us in light of the *Insular Cases* to endorse the view that every constitutional provision applies wherever the United States Government exercises its power."[65]

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58. *See infra* Section VI.F.

59. *See* Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 239–50 (2002) (discussing cases involving fundamental rights claims).

60. *E.g.*, Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 668–69 (1974) (discussing a Due Process Clause claim); Examining Bd. of Eng'rs, Architects & Surveyors v. Flores de Otero, 426 U.S. 572, 599–601 (1976) (discussing an Equal Protection Clause claim); *Torres*, 442 U.S. at 471 (discussing a Fourth Amendment claim). The Court had previously indicated in dicta that the Due Process Clause applied in unincorporated territories. *Balzac*, 258 U.S. at 12–13.

61. *E.g.*, *Harris*, 446 U.S. at 651–52 (per curiam); Califano v. Torres, 435 U.S. 1, 5 (1978) (per curiam).

62. Cleveland, *supra* note 59, at 243.

63. 494 U.S. 259 (1990).

64. *Id.* at 261–62.

65. *Id.* at 268–69. In a concurring opinion, Justice Kennedy relied more directly on the *Insular Cases* in developing a balancing test for the application of constitutional provisions to non-citizens abroad. *Id.* at 275, 277–78 (Kennedy, J., concurring). Subsequently, Kennedy, writing for a majority of the Court in *Boumediene v. Bush*, 553 U.S. 723, 755 (2008), relied on the *Insular Cases* (and in particular Justice Harlan's reading of the *Insular Cases* in *Reid*) among other factors in developing a test for the applicability of the writ of habeas corpus in Guantanamo, Cuba. *See* Kent, *supra* note 17, at 109–15 (criticizing this decision). As Professor Kent

Although the situations were not parallel—one could easily say the Constitution applied in U.S. territories but not abroad—the favorable citation appeared to undermine suggestions that the doctrine was on course for abandonment.

Verdugo was the product of a conservative-oriented Court arrayed against an expansive view of rights. But, after the turn of the century, scholarly developments began to threaten the *Insular Cases* from a different direction. Originalism in constitutional interpretation gained increasing purchase in academic scholarship and on the Court; *Verdugo* itself was somewhat of an originalist-oriented opinion, apart from its brief reliance on the *Insular Cases*.[66] The *Insular Cases* had long been criticized for their racist and imperialist foundations;[67] now, originalist scholars, with the potential to influence conservative-oriented Justices, turned a skeptical eye on them as well. In an extensive originalism-based assessment of the constitutional law of territories, Professors Gary Lawson and Guy Seidman sharply criticized the unincorporated territories doctrine as judicially invented.[68] Similarly, originalist scholar Michael Paulsen (writing with Luke Paulsen) dismissed the doctrine as manifestly inconsistent with the Constitution's original meaning.[69] These critiques were not comprehensive, however. Lawson and Seidman's assessment covered only a few pages within a wide-ranging account of territorial law, much of which focused on entirely distinct matters; the Paulsens' treatment was even shorter, appearing as part of a sweeping originalist overview of the Constitution as a whole. Justice Gorsuch embraced this criticism in making the modern Court's first direct appeal to overrule the *Insular Cases* on originalist grounds in *Vaello Madero*, although he also did not undertake a comprehensive originalist analysis.[70]

Thus, the *Insular Cases* have receded somewhat in significance compared to where they stood in the early and mid-

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explains, *Boumediene* is distinct from the *Insular Cases* addressed in this Article because it involved rights in a place outside U.S. *de jure* sovereign territory and under U.S. military control. *Id.*

66. *See Verdugo-Urquidez*, 494 U.S. at 265–67.

67. *E.g.*, Cepeda Derieux & Weare, *supra* note 3, at 296–98; Neuman, *supra* note 44, at 187–89; JUAN R. TORRUELLA, THE SUPREME COURT AND PUERTO RICO: THE DOCTRINE OF SEPARATE AND UNEQUAL 51–53 (1st ed. 1985).

68. LAWSON & SEIDMAN, *supra* note 6, at 194–97.

69. PAULSEN & PAULSEN, *supra* note 6, at 201–02.

70. United States v. Vaello Madero, 596 U.S. 159, 180–89 (2022) (Gorsuch, J., concurring). The concurrence's discussion of originalist materials covers only two paragraphs and two footnotes. *See id.* at 185–86.

twentieth century. They remain in effect, however, for U.S. overseas territories, and they retain (for now) the stamp of approval the modern Court placed on them in *Verdugo*. They are also under attack from a new direction: modern originalism. That attack has gained at least one originalist adherent on the Court, but with a potential majority of originalist-oriented Justices now sitting, the prospects of a new push to overrule the *Insular Cases*' doctrine may emerge. As a result, a close examination of the originalist case against the *Insular Cases* merits attention.

II. THE CONSTITUTION AS LAW IN TERRITORIES: TEXT AND CONTEXT

This Part considers the Constitution's text as it relates to the Constitution's effect in territories. It concludes, principally on the basis of Article IV, Article VI, and Article III, Section 2, that the Constitution applies to territories to the same extent as to states, except as to provisions specifically limited to states. It also considers and rejects textual arguments for restricting the Constitution's application in territories.

A. *The Territory Clause(s)*

A discussion of the original meaning of the constitutional law of territories necessarily begins with Article IV:

> 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.[71]

This Clause granted Congress regulatory authority over lands that were part of the United States but outside any state. In the 1780s, that description encompassed the area north of the Ohio River, east of the Mississippi River, south of the Great Lakes, and west of the western border of Pennsylvania.[72] Earlier, as part of the compromise that brought the Articles of Confederation into effect, states with claims to this area had

71. U.S. CONST. art. IV, § 3, cl. 2. The first Clause of Section 3 addresses admission of new states, discussed below.

72. PETER S. ONUF, STATEHOOD AND UNION: A HISTORY OF THE NORTHWEST ORDINANCE 22–23 (2019).

relinquished them, and the Confederation Congress had accepted ownership on behalf of the United States.[73]

These western lands were, in the years immediately prior to the Convention, routinely called the "territory" of the United States. Most notably, the Confederation Congress's 1787 ordinance concerning these lands, known as the Northwest Ordinance, used approximately the same phrase in its formal title—"territory of the United States"—as Article IV's "Territory . . . belonging to the United States"; officially, it was an "Ordinance for the government of the territory of the United States North West of the river Ohio."[74] Similarly, Congress's first ordinance relating to the Western lands, in 1784, was titled "a plan for a temporary government of the Western territory"; its first sentence declared: "That so much of the territory ceded or to be ceded by individual states to the United States . . . shall be divided into distinct states . . . ."[75] Congress followed up in 1785 with "An Ordinance for ascertaining the mode of disposing of Lands in the Western Territory."[76]

The Convention delegates likely added the Territory Clause to correct an omission in the Articles of Confederation. As James Madison later pointed out in *The Federalist*, the Articles did not give Congress power to regulate U.S. territories or create additional states within them:

> Congress [under the Articles] have assumed the administration of this stock [i.e., the Western Territory]. . . . [T]hey have proceeded to form new States, to erect temporary governments, to appoint officers for them, and to prescribe the conditions on which such States shall be admitted into the Confederacy. All this has [Congress] done; and done without the least color of constitutional authority. . . . I am sensible [Congress] could not

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73. *Id.* at 21.

74. 32 J. OF THE CONT'L CONG., 1774–1789, at 334–43 (July 13, 1787) (Roscoe R. Hill ed., U.S. Gov't Printing Off. 1936) [hereinafter NORTHWEST ORDINANCE]; ONUF, *supra* note 72, at 58–64. *See generally* JACK ERICSON EBLEN, THE FIRST AND SECOND UNITED STATES EMPIRES: GOVERNORS AND TERRITORIAL GOVERNMENT, 1784–1912, at 28–51 (1968) (describing the drafting history of the 1787 Northwest Ordinance).

75. 26 J. OF THE CONT'L CONG., 1774–1789, at 274–75 (Apr. 23, 1784) (Gaillard Hunt ed., U.S. Gov't Printing Off. 1936).

76. *See* 28 J. OF THE CONT'L CONG., 1774–1789, at 375–81 (May 20, 1785) (John C. Fitzpatrick ed., U.S. Gov't Printing Off. 1933); ONUF, *supra* note 72, at 21–22; *see also, e.g.*, THE FEDERALIST NO. 7, at 61 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("At present a large part of the vacant Western Territory is, by cession at least, if not by any anterior right, the common property of the Union.").

> have done otherwise. The public interest, the necessity of the case, imposed upon them the task of overleaping their constitutional limits. But is not the fact an alarming proof of the danger resulting from a government which does not possess regular powers commensurate to its objects?[77]

The Convention's initial list of Congress's powers under the Constitution also did not grant power in territories, although it referred to congressional power to admit new states.[78] Madison moved to add language granting Congress power to create new states and govern territory; this was agreed to with some revision but without recorded objection.[79] In a subsequent *Federalist* essay, Madison pointed to this language as an improvement on the Articles of Confederation, remedying the embarrassing situation of the Northwest Ordinance being, strictly speaking, ultra vires.[80] After ratification, Congress

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77. THE FEDERALIST NO. 38, at 239–40 (James Madison) (Clinton Rossiter ed., 1961).

78. 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 181–82 (Max Farrand ed., rev. ed. 1966) [hereinafter Farrand] (Committee of Detail report art. VII, § 1) (listing congressional powers); *id.* at 188 (art. XVII) (addressing admission of new states).

79. *Id.* at 324–25 (Madison) (recording Madison's initial proposal, which also included general legislative power over the seat of the national government); *id.* at 446 (Journal) (revising the provision on admitting new states); *id.* at 454–56 (Madison) (revising the process of admitting new states); *id.* at 458 (revising the provision on admitting new states into substantially its final form); *id.* at 458–59 (Journal) (recording adoption of language granting Congress power over "territory or other property belonging to the United States"); *id.* at 466 (Madison) (showing no recorded material debate and indicating that the motion carried with only Maryland opposing it). Maryland's opposition likely arose because the Convention voted down a proposal from Maryland delegate Luther Martin on an unrelated point. *See id.* (Madison). The final version of Article IV, Section 3 appeared in the Committee of Style report on September 12, approved by the Convention as part of its final approval of the Constitution on September 15, without recorded debate. *Id.* at 602 (Committee of Style Report art. IV, § 3); *id.* at 622 (Journal) (showing votes of final approval); *id.* at 606–09, 612–19, 622–33 (Madison) (recording final days of debate and showing no discussion of the territory power).

80. THE FEDERALIST NO. 43, at 273–74 (James Madison) (Clinton Rossiter ed., 1961). Madison first addressed Article IV's power to admit new states, noting that the Articles of Confederation lacked a provision on admitting new states and observing: "We have seen the inconvenience of this omission, and the assumption of power into which Congress have been led by it. With great propriety, therefore, has the new system supplied the defect." *Id.* at 274. He then turned to the Territory Clause and continued: "This is a power of very great importance, and required by considerations similar to those which show the propriety of the former [that is, of the

continued to refer to the Western lands as "territory," implicitly resting its regulatory authority on Article IV.[81]

Article IV's Territory Clause supplements what might be called the Constitution's other territory clause: Article I's direction that Congress shall have power:

> To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards and other needful Buildings . . . .[82]

One might think this Clause redundant of Article IV (apart from limiting the size of the capital district and requiring state consent for federal land purchases). The drafting history appears to explain the redundancy. Madison initially proposed to give Congress general legislative power over the capital district and a more limited power to "institute temporary Governments" in the Western Territory.[83] The Convention accepted his Clause regarding the capital district largely as proposed but broadened Congress's territory power to resemble Congress's power over the capital district; because the Clauses

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power to admit states]." *Id.* He also confirmed that he understood the Clause to refer to the western lands, using the phrase "Western territory." *Id*.

The omission in the Articles of Confederation resulted from disagreement, not oversight. When the Continental Congress drafted and debated the Articles in the 1770s, Congress did not control the western lands, which were subject to conflicting and sometimes extravagant claims by various states, particularly New York, Virginia, and North Carolina. States without western claims, led by Maryland, urged that the western lands be made common property of the United States as a whole, which the land-claiming states initially refused. No agreement could be reached before Congress finalized the Articles in 1778. Maryland then refused to ratify until the western land situation was resolved, holding out until 1781. At that point, New York and Virginia agreed to cede their land claims to Congress, with North Carolina eventually agreeing in principle as well. *See generally* MERRILL JENSEN, THE ARTICLES OF CONFEDERATION: AN INTERPRETATION OF THE SOCIAL-CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION, 1774–1781, at 150–60, 185–210 (reprt. 1976).

81. *E.g.*, Act of Aug. 7, 1789, ch. 8, 1 Stat. 50 (providing "for the Government of the Territory, North-west of the River Ohio"); Act of May 26, 1790, ch. 14, 1 Stat. 123 (providing "for the Government of the Territory of the United States, south of the river Ohio").

82. U.S. CONST. art. I, § 8, cl. 17.

83. 2 Farrand, *supra* note 78, at 324–25 (Madison).

had been drafted independently, the delegates likely found it easier to keep them separate rather than to redraft a combined clause.[84]

The Territory Clause strongly indicates that the Constitution's delegated power structure applies to Congress's power over territories. If the delegated power structure did not apply, the Clause would be superfluous. Madison obviously did not think it superfluous, and no one at the time was recorded suggesting it was. Further, inclusion of Congress's powers over the federal district and federal institutions in Article I indicates that the delegated power structure applies to them, and there is no reason to suppose that they would be understood differently from the Western Territory in this regard.

To be sure, under the Territory Clause, Congress's power over U.S. territory is very broad, essentially amounting to a general police power. The Clause (like the Federal District Clause) freed Congress from the subject matter limitations applicable to Congress's legislative authority within states, as enumerated in Article I. However, the grant to Congress of general police power in territories does not suggest that Congress is thereby freed of other specific limitations on Congress's power arising from the Constitution's structural and individual rights provisions. Rather, it indicates that Congress's power, as broad as it is, depends on the Constitution and is therefore limited by the Constitution.

B. *The Supremacy Clause*

Article VI's Supremacy Clause further confirms that Congress's power in territories is constitutionally constrained. It declares: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . ."[85] This phrasing bears on the territories question in two ways. First, the Constitution is the supreme law of the land, not the supreme law of the states (even though the Clause goes on to specify its binding authority over state judges). That suggests it covers all the land of the United

84. Why the Territory Clause ended up in Article IV instead of Article I remains mysterious, but its placement does not appear to have substantive implications for the present inquiry. It also seems unclear why the grants of authority are not parallel: "To exercise exclusive Legislation in all Cases whatsoever" for the District, U.S. CONST. art. I, § 8, cl. 17, and "to … make all needful Rules and Regulations" for territory, U.S. CONST. art. IV. The difference does not seem to suggest a lesser constitutional status for territory as compared to the District.

85. U.S. CONST. art. VI, cl. 2.

States, whether part of a state or not. Second, only congressional laws "made in Pursuance" of the Constitution are the supreme law of the land.[86] Thus, it appears Congress's enactments regarding territories must conform to the Constitution to be the supreme law.

Perhaps significantly, the initial version of the Supremacy Clause, in the New Jersey plan submitted on June 15, used the phrase "supreme law of the respective States" rather than supreme law of the land.[87] A version of this phrasing persisted in the Convention's draft through submission to the Committee of Style on September 10: "This Constitution and the Laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the several States, and of their citizens and inhabitants . . . ."[88] The Committee's redraft, reported a few days later, shifted to what became the final language.[89] Nothing in the records suggests a reason for the change, but one can infer it was intended to broaden the Clause's coverage beyond the states, particularly because the delegates had recently debated and approved the Territory Clause.[90]

C. *States-Specific Provisions and Article III, Section 2*

As discussed below, some early nineteenth-century commentary argued that the Constitution applied only within states. In support, commentators noted that several constitutional provisions, by their express terms, apply only within states. For example, Article IV's Guarantee Clause assures republican governments only in states, and its Privileges and Immunities Clause protects only citizens of states from discrimination in other states.[91] Article III's

86. *Id.*; *see* THE FEDERALIST NO. 33, at 205 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (noting that Article VI "*expressly* confines this supremacy to laws made *pursuant to the Constitution*"); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 180 (1803) ("[I]n declaring what shall be the supreme law of the land, the Constitution itself is first mentioned, and not the laws of the United States generally, but those only which shall be made in pursuance of the Constitution, have that rank.").

87. 1 Farrand, *supra* note 78, at 245 (Madison).

88. 2 Farrand, *supra* note 78, at 572 (Committee of Style report, Art. VIII).

89. *Id.* at 603 (Committee of Style report, Art. VI).

90. The Convention debated and approved the Territory Clause on August 30. *Id.* at 466 (Madison). Gouverneur Morris, who proposed the near-final version of the Clause, was a member of the Committee of Style. *See id.* How much weight to attribute to these developments may be contested among originalist-oriented scholars.

91. U.S. CONST. art. IV, §§ 2, 4.

diversity jurisdiction includes suits involving citizens of different states (not territories),[92] and perhaps most significantly, only states can elect representatives, choose Senators and presidential electors, and approve amendments to the Constitution.[93]

That some clauses are specific to states, however, does not necessarily imply that all clauses are; it could more readily indicate that when a clause is not expressly specific to states, it applies more broadly. And many state-specific clauses have apparent reasons for being state-specific. For example, the Framers presumably limited the Guarantee Clause to exclude territories because they knew that the Northwest Ordinance did not, as an initial matter, establish a republican form of government in the Northwest Territory.[94] By contrast, where there is no clear reason to limit constitutional provisions to operation within states, limits were not included.

Moreover, at least one specific clause strongly implies that the Constitution applies to territories except when expressly confined to states. The last paragraph of Article III, Section 2, provides:

> The Trial of all Crimes, except in Cases of Impeachment; shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.[95]

This Clause imposes two requirements: criminal trials must be by jury and take place in the state where the crime was committed. The Clause then relaxes the latter requirement if the crime was not committed within a state.[96] This indicates, though, that the jury trial requirement remains even for crimes committed outside a state. Further, Congress is obliged to direct in advance where trials for crimes committed outside states shall be held. One category of places not within any state,

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92. *Id.* art. III, § 2.

93. *Id.* art. I, §§ 2–3; *id.* art. II, § 1, cl. 2; *id.* art. V.

94. *See* NORTHWEST ORDINANCE, *supra* note 74, at 335–37.

95. U.S. CONST. art. III, § 2, cl. 3.

96. The Committee of Detail draft stated only that "The trial of all criminal offenses (except in cases of impeachments) shall be in the State where they shall be committed; and shall be by Jury"). 2 Farrand, *supra* note 78, at 187. Madison recorded that it was amended to its final form, and that "[t]he object of this amendment was to provide for trial by jury of offenses committed out of any State." *Id.* at 438.

and thus apparently covered by the Clause, is U.S. territories.[97] And if the Clause applies to crimes in territories, it is hard to see why other constitutional limitations would not also apply there. That, in turn, supports a broader understanding that places not within states are covered by the Constitution (both its granted powers and its limitations), except as to clauses specifically limited to states.

D. *We the People and Ratification*

The strongest argument for limiting the Constitution to states rests on its adoption process. The Preamble declares, "We the People of the United States . . . do ordain and establish this Constitution for the United States of America."[98] The only "People" actually involved in adopting the Constitution were the people of the states. Under Article VII, "The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same."[99] There was no provision for ratification or other approval by the people of the Northwest Territory (a small but nontrivial number),[100] either in the Constitution or in implementing statutes. People in the Northwest Territory could join as states, provided Congress approved,[101] but until that time, they were under U.S. authority whether they chose to be or not. Thus, the "People" who adopted the Constitution excluded people in the territory. Perhaps that meant the Constitution was adopted only for the people in the states. The Preamble declares it to be a Constitution "for the United States of America" adopted by the people "of the United States of America";[102] because the only people who adopted it were people of the states, one could read the language to equate "the United States" with only the states.

This argument is not without force, and as discussed below, it appeared at key points in the early nineteenth century and

97. There are others, of course, including foreign nations and the high seas, but it is hard to see why (or given the text, how) the Clause should (or could) be read to assure jury trials in those places but not in U.S. territories.

98. U.S. CONST. pmbl.

99. U.S. CONST. art. VII. By implication (confirmed by practice), the remaining original states could join after ratification in state conventions.

100. ONUF, *supra* note 72, at 67 (discussing the Northwest Territory's population in the 1780s).

101. U.S. CONST. art. IV, § 3, cl. 1.

102. U.S. CONST. pmbl.

later.[103] It has at least two substantial difficulties. First, it seems in tension with specific aspects of the Constitution's text discussed above, in particular Article III, Section 2, (which assumes that the jury trial requirement applies to crimes committed outside states),[104] as well as the Territory Clause and the Federal District Clause (which together grant Congress power over U.S. territories outside states, apparently bringing territories within the Constitution's delegated powers structure).[105] Second, as nineteenth-century critics pointed out,[106] it has troubling implications. If constitutional limits do not apply beyond states, presumably Congress could, for example, convey titles of nobility in territories, establish military tribunals to try all offenses, allow arbitrary detention and seizure of property, and impose torture and similar punishments.[107] Perhaps this is how founding-era Americans understood the Constitution's scope, but one may doubt it would have gone without objection.[108]

E. *Two Side Notes on Article IV*

In the nineteenth century, commentators advanced two restrictive readings of Article IV's application to territories worth considering here.[109] First, they claimed that Article IV applied only to territory of the United States at the time of ratification (namely, the Northwest Territory).[110] Second, they argued that Congress was obligated to prepare a territory for

103. *See infra* Section III.B; *see, e.g.*, Downes v. Bidwell, 182 U.S. 244, 250–51 (1901) (Brown, J., announcing the conclusion and judgment of the Court) ("[T]he Constitution deals with *States*, their people, and their representatives.").

104. *See supra* Section II.C.

105. *See supra* Section II.A.

106. *See infra* Section III.B.5.

107. U.S. CONST. art. I, § 9, cl. 8; *id.* amends. IV, VIII.

108. There appears to be no record of anyone in the drafting or ratification debates directly arguing that the Constitution applied only within states and not in territories. The Northwest Ordinance contained a list of rights guaranteed in the Northwest Territory, *see* NORTHWEST ORDINANCE, *supra* note 74, at 335, so it is possible that drafters and ratifiers saw this as a substitute for constitutional protections.

109. *See infra* Part III.

110. *E.g.*, Dred Scott v. Sandford, 60 U.S. 393, 448–49 (1857) (enslaved party) (opinion of Taney, C.J.). *But see* DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789–1888, at 268–69 (1985) (describing this argument as "singularly unpersuasive").

statehood and could not simply hold territory as territory.[111] Neither view has support in Article IV's text or context.

As to the first, Article IV's text standing alone renders it implausible. One would need to imply the word "existing" before "territory" in the phrase "make all needful Rules and Regulations respecting the Territory,"[112] which in itself does not seem an obvious implication. Further, the sentence continues "the Territory or other Property belonging to the United States."[113] Thus, Congress's power over territory and its power over property were granted in parallel. It would be absurd to think Congress had power over only the then-existing property of the United States and not later-acquired property. And it would be extraordinarily odd and ungrammatical to read the same phrase to have a temporal limit with respect to territory but not property.

Further, the drafters surely anticipated some future acquisition of territory by the United States. During the Confederation period, states with western land claims agreed in principle to cede their claims to Congress, but by 1787, Congress had accepted cessions for only the territory north of the Ohio River.[114] North Carolina, which claimed and administered the area now comprising the state of Tennessee, offered to cede that territory, but Congress by 1787 had not agreed to its terms.[115] It was widely anticipated, however, that the cession would be completed—as it eventually was after the Constitution was ratified.[116] Congress then organized the Southwest Territory, on the model of the Northwest Territory, in 1790.[117] Unsurprisingly, there is no record of anyone suggesting that Congress lacked constitutional power to do so.[118] More broadly, the United States contemplated acquiring neighboring territories, including Canada and Florida, during

111. *See* Micah Allred, *An Originalist Approach to Puerto Rico: Arguments Against the Status Quo*, 99 NOTRE DAME L. REV. REFLECTION 151, 157–65 (2024).

112. U.S. CONST. art. IV, § 3, cl. 2.

113. *Id.*

114. *See* JENSEN, *supra* note 80, at 150.

115. *See* ALLAN NEVINS, THE AMERICAN STATES DURING AND AFTER THE REVOLUTION, 1775–1789, at 388, 671.

116. Act of Apr. 2, 1790, ch. 6, 1 Stat. 106, 109 (accepting North Carolina cession).

117. Act of May 26, 1790, ch. 14, § 1, 1 Stat. 123, 123 (establishing territorial government in the ceded territory, called the Southwest Territory).

118. *See* 1 ANNALS OF CONG. 952 (1790) (Joseph Gales ed., 1834) (recording Senate passage of the Act without debate); 2 ANNALS OF CONG. 1478 (1790) (recording House passage of the Act without debate as to Congress's power).

the Confederation period.[119] It seems unlikely that the Framers drafted the Clause to exclude congressional power over those acquisitions if they occurred, or that anyone read it that way.

The purported limit on holding territory other than in preparation for statehood has somewhat more foundation. The idea that lands within the Northwest Territory would become states was reflected in the Confederation Congress's ordinances, most notably the Northwest Ordinance, which expressly committed Congress to admit states once they reached a designated population.[120] At the Convention, Madison's original proposal for Congress's territory power seemed limited to preparations for statehood, including that territorial governments be "temporary."[121] But during the debates, Gouverneur Morris proposed a substantial rewrite, which the delegates accepted and which—with only minor changes—became the final version of Article IV, Section 3.[122]

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119. During the revolution, American forces led by Richard Montgomery invaded Canada but were defeated by British forces at Quebec. *See generally* HARRISON BIRD, ATTACK ON QUEBEC: THE AMERICAN INVASION OF CANADA, 1775 (1968). The Articles of Confederation specifically contemplated Canada joining the Union. ARTICLES OF CONFEDERATION of 1781, art. XI. Although the Constitution dropped the reference to Canada, that was not due to Americans abandoning the idea of northward expansion, which persisted through the War of 1812. *See* Richard W. Maass, *"Difficult to Relinquish Territory Which Had Been Conquered": Expansionism and the War of 1812*, 39 DIPLOMATIC HIST. 70, 83–87 (2015). The Confederation Congress also contemplated an expedition against Florida (then held by the British). *See* 13 J. OF THE CONT'L CONG., 1774–1789, at 68–69 (Jan. 15, 1779) (Worthington Chauncey Ford ed., U.S. Gov't Printing Off. 1909). The expedition never materialized but simple geography surely kept acquisition of Florida in mind.

A distinct but related constitutional issue was whether the United States had power to acquire new territory at all. This concern was raised, for example, regarding the Louisiana Purchase, which President Thomas Jefferson concluded despite constitutional reservations. DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE JEFFERSONIANS, 1801–1829, at 66–70 (2001). That question is distinct from Article IV, which does not purport to grant acquisition power but only grants power over whatever territory the United States can lawfully possess. U.S. CONST. art. IV, § 3, cl. 2. At minimum, the treaty power seems to encompass power to acquire new land by treaty (a common eighteenth-century practice). *See* Michael D. Ramsey, Missouri v. Holland *and Historical Textualism*, 73 MO. L. REV. 969, 978–80 (2008) (discussing the scope of the treatymaking power).

120. NORTHWEST ORDINANCE, *supra* note 74, at 342–43; *see* ONUF, *supra* note 72, at 51–52 (discussing assumptions about forming new states in the Western Territory).

121. 2 Farrand, *supra* note 78, at 324 (Madison) (proposing to give Congress power "[t]o dispose of the unappropriated lands of the U. States" and "[t]o institute temporary Governments for New States arising therein").

122. *Id.* at 466 (Madison).

Morris's rewrite contained no temporal limitation on territorial government and it decoupled the two powers: Congress had power to admit new states (without reference to any particular territory) and, in a subsequent separate paragraph, power to govern territory (without reference to that power being temporary or in anticipation of statehood).[123] Unlike Madison's proposal, nothing in the final text links Congress's territory power to the process of admitting new states; the drafting history strongly suggests this expansion of Congress's power was deliberate. Although many drafters and ratifiers likely assumed Congress would admit new states from the territories on terms indicated in the Northwest Ordinance (and perhaps thought Congress had a statutory or moral obligation to do so),[124] nothing in the text imposes a constitutional obligation on Congress, and (in an original meaning analysis)[125] that obligation does not arise from unenacted assumptions about what Congress would do.

F. *Summary and Implications*

In sum, the Constitution's text and context indicate that the Constitution extends to U.S. territories. Article IV, which grants Congress power over territories, shows that Congress's territory power is part of the Constitution's delegated powers structure. If the Constitution's structural design applies in territories, it follows that the Constitution's limitations on federal power (as to both structure and individual rights) also apply there. General extension of the Constitution to territories is confirmed by the Supremacy Clause, which directs that the Constitution and federal law made pursuant to it is "the supreme Law of the Land"[126]—not, as initially proposed, the supreme law of the states.

It is true that some specific constitutional provisions—such as the Guarantee Clause and the Privileges and Immunities Clause—by their terms apply only to states. But that does not suggest that all constitutional provisions apply only to states.

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123. U.S. CONST. art IV, § 3, cl. 1–2.

124. *See* ONUF, *supra* note 72, at 67–87 (discussing subsequent debates over Congress's obligations under the Northwest Ordinance).

125. An interpretive approach based on original intent might find the argument requiring admission of states to be stronger. Professors Lawson and Seidman make an original meaning argument against power to acquire territory other than to form new states, but that is separate from Article IV and depends on their idiosyncratic view of the treatymaking power. *See* LAWSON & SEIDMAN, *supra* note 6, at 17–85.

126. U.S. CONST. art. VI, cl. 2.

Rather, it suggests that provisions not so limited apply outside states as well—as reflected in Article III, Section 2's provisions on jury trial.

A counterargument is possible based on a combination of the Preamble and the ratification process, which may suggest that the Constitution was made only by the people of the states and only for the people of the states. This position, however, has substantial drawbacks. First, it creates tension with the textual and contextual points summarized above. Second, it would implausibly give Congress unlimited power in territories (including the federal capital district) to take actions incompatible with constitutional government, such as establishing monarchical or aristocratic regimes and adopting tyrannical laws and processes.

Most importantly for the present inquiry, whatever one thinks of the reading excluding the Constitution from territories, that reading does not support extension of the Constitution to some territories and not others. In terms of the Constitution's eighteenth-century text and context, the only plausible response to the claim that the Constitution applies to all territories is that it applies to no territories. Nothing in the text refers to different types of territories, nor does any recorded commentary from the drafting and ratifying period.

III. IMPLEMENTING CONGRESS'S RULE OVER THE TERRITORIES, 1789–1860

This Part considers leading events, judicial decisions, and commentary in the post-ratification period up to the Civil War. The relevance of post-ratification materials in assessing the Constitution's original meaning is debated among originalist scholars, and these materials are assessed here to provide a complete account without intending to take definite positions in the debate over their potential relevance. As set forth below, the materials tend to confirm the textual and contextual conclusions discussed above, although they are not without ambiguities and puzzles.

A. *Initial Organization of the Territories, 1789–1800*

Soon after the Constitution's adoption, Congress enacted two organizational statutes relating to territories: a 1789 statute modifying the Northwest Ordinance and a 1790 statute governing territory ceded to the United States by North

Carolina (modern Tennessee).[127] These Acts indicate that Congress understood the Constitution to constrain its power over territories, although they raise some initial questions about how Congress understood the constraint it imposed.

As discussed, while the Convention was meeting in Philadelphia, Congress adopted what became known as the Northwest Ordinance, providing a governmental structure for U.S. territory north of the Ohio River and west of the western border of Pennsylvania.[128] Among other things, the Ordinance created the office of governor as the territory's superior executive officer, along with a subordinate secretary and three judges.[129] Under the Ordinance, Congress appointed the executive officers and judges; the executive officers held office for fixed terms unless earlier removed by Congress, while the judges had tenure during good behavior.[130]

In 1789, the new Congress passed an Act specifically directed to conforming the Ordinance to the newly ratified Constitution.[131] The Act recited: "In order that the ordinance of the United States in Congress assembled, for the government of the territory north-west of the river Ohio may continue to have full effect, it is requisite that certain provisions should be made, so as to adapt the same to the present Constitution of the United States."[132] The timing and text of the Act overwhelmingly indicate that the new Congress understood the Constitution to constrain its actions regarding governance of the Northwest Territory, for otherwise it would not have been "requisite" to make the changes.[133]

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127. Act of Aug. 7, 1789, ch. 8, 1 Stat. 50; Act of May 26, 1790, ch. 14, 1 Stat. 123.

128. NORTHWEST ORDINANCE, *supra* note 74, at 334; *see* ONUF, *supra* note 72, at 60–64; EBLEN, *supra* note 74, at 33–41.

129. NORTHWEST ORDINANCE, *supra* note 74, at 335–37.

130. *Id.* Specifically, the Ordinance provided "there shall be appointed from time to time by Congress a governor, whose commission shall continue in force for the term of three years, unless sooner revoked by Congress," and "[t]here shall be appointed from time to time by Congress a secretary, whose commission shall continue in force for four years, unless sooner revoked." *Id.* at 335–36. The Ordinance further gave the governor authority to appoint other subordinate magistrates and stated that judges' commissions "shall continue in force during good behaviour." *Id.* at 336.

131. Act of Aug. 7, 1789, ch. 8, 1 Stat. 50.

132. *Id.*

133. Of course, one cannot say all members of Congress felt this way, but no doubts were recorded as being expressed. *See* 1 ANNALS OF CONG. 51, 55–56, 642, 659–60 (1789) (Joseph Gales ed., 1834) (recording reading and passage of the Act without debate). Moreover, the new Congress had no evident policy motivation (apart

Despite its broad title, the 1789 Act made only a few specific changes,[134] but they are instructive: it gave the new President, with the Senate's advice and consent, authority to appoint the territorial officers, and it made the executive officers (the governor and the secretary) removable by the President without limitation.[135] The first of these changes, shifting appointment from Congress to the President-plus-Senate, obviously conformed the Ordinance to the Constitution's Appointments Clause.[136] The second change, shifting removal power from Congress to the President, would be constitutionally required if members of Congress thought the President had removal authority over executive officers as part of the Article II "executive Power" vested in the President.[137] Again, it seems

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from constitutional concerns) to reduce its control over territorial officers, which had been established only two years earlier.

134. It has sometimes been said (including by the present author) that the Congress's Act regarding the Northwest Territory "reenacted" the Northwest Ordinance. More precisely, the Act demonstrated Congress's assumption that the Ordinance would continue in force, with changes made by the Act. It is unclear why Congress thought the Ordinance did not need to be reenacted: unlike treaties, the Constitution's Article VI did not make ordinances of the Confederation Congress part of the Constitution's supreme law of the land. Congress may have thought it covered by Article VI's first clause: "All 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." In any event, no one doubted that the Ordinance, as modified by the Act, remained in effect. *See* ONUF, *supra* note 72, at xxiv (discussing nineteenth-century application of the Ordinance).

135. Act of Aug. 7, 1789, ch. 8, § 1, 1 Stat. 50, 53. The Act also directed the governor to communicate with and provide information to the President in situations where the Ordinance had previously directed that such communications and information go to Congress. *Id.*

136. *See* U.S. CONST. art. II, § 2, cl. 2. For inferior officers, the Constitution allows Congress to place appointment power in "Heads of Departments." *Id.* Thus, if Congress considered the territorial governor a head of department (not an unreasonable view), the Ordinance's vesting of appointment authority over lesser territorial officers in the governor was already consistent with the Appointments Clause.

137. U.S. CONST. art. II, § 1. Whether this is the correct view of the Executive Power Clause is sharply debated. *See, e.g.*, Ilan Wurman, *In Search of Prerogative*, 70 DUKE L.J. 93, 140–45 (2020) (arguing that executive power includes removal power); Aditya Bamzai & Saikrishna Bangalore Prakash, *The Executive Power of Removal*, 136 HARV. L. REV. 1756, 1763–82 (2023) (same); Andrea Scoseria Katz & Noah A. Rosenblum, *Removal Rehashed*, 136 HARV. L. REV. F. 404, 406–15 (2023) (arguing that executive power does not include removal power); Jed H. Shugerman, *The Indecisions of 1789: Inconstant Originalism and Strategic Ambiguity*, 171 U. PA. L. REV. 753, 755–65 (2023) (arguing that the debates of the First Congress show ambiguity regarding the 1789 understanding of executive removal power). The 1789

clear that members of Congress thought the Constitution required these changes, which would be true only if the Constitution limited Congress's authority over territories. And neither the Act's text nor anything recorded as being said about it suggests that the Constitution applied only to these particular separation-of-powers matters and not to other limitations.[138]

The 1790 Act created a territorial government for the territory ceded to the United States by North Carolina.[139] The Act substantially incorporated by reference the provisions of the Northwest Ordinance (other than the prohibition of slavery),[140] as modified by the 1789 Act.[141] Thus, members of Congress again followed their apparent conviction that the Constitution required the President, rather than Congress, to appoint and remove territorial officers. More broadly, the 1789 and 1790 Acts (and similar ones that followed in 1798 and 1800)[142] indicate that members understood Congress's power

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Act suggests that Congress thought removal power needed to be placed with the President as a constitutional matter. *See* Michael D. Ramsey, *Presidential Power and What the First Congress Did Not Do*, 99 NOTRE DAME L. REV. REFLECTION 47, 57–58, 62–65 (2023).

138. Except as discussed below, the Ordinance otherwise appears to conform to the Constitution. For example, the Ordinance gave judges good behavior tenure. *See* U.S. CONST. art. III, § 1.

139. Act of May 26, 1790, ch. 14, 1 Stat. 123. The territory became the state of Tennessee in 1796. *See* Act of June 1, 1796, ch. 47, 1 Stat. 491.

140. North Carolina's cession of the territory, which Congress accepted, specifically stipulated that slavery would be permitted. Act of Apr. 2, 1790, ch. 6, 1 Stat. 106, 108.

141. Act of May 26, 1790, ch. 14, § 1, 1 Stat. 123, 123 ("[T]he government of the said territory south of the Ohio, shall be similar to that which is now exercised in the territory northwest of the Ohio; except [for the prohibition of slavery].").

142. In 1798, Congress provided for establishment of a territorial government in the Mississippi Territory (the area south of Tennessee between Georgia and the Mississippi River). Act of Apr. 7, 1798, ch. 28, 1 Stat. 549. The Act authorized the President "to establish [in the Mississippi Territory] a government in all respects similar to that now exercised in the territory northwest of the river Ohio" except for the prohibition of slavery, and "by and with the advice and consent of the Senate to appoint all the necessary officers therein." *Id.* § 3, 1 Stat. at 550. As to appointments, the Act added, closely following Article II's Appointments Clause, that "if the President of the United States should find it most expedient to establish this government in the recess of Congress, he shall nevertheless have full power to appoint and commission all officers herein authorized; and their commissions shall continue in force until the end of the session of Congress next ensuing . . . ." *Id.* In 1800, Congress divided the Northwest Territory in two, creating a new Indiana Territory approximately corresponding to the part of the Northwest Territory not within the modern state of Ohio. Act of May 7, 1800, ch. 41, § 1, 2 Stat. 58, 58–59.

over territories to be constrained by the Constitution. The Acts do, however, raise a puzzle regarding legislative power.

The Northwest Ordinance created a peculiar structure for the initial lawmaking process in the Northwest Territory. Initially, a majority of the governor and the three territorial judges could adopt laws of any state they thought appropriate for the territory, subject to Congress's disapproval.[143] Once the territory had 5,000 "free male inhabitants of full age," those inhabitants could form a territorial legislature consisting of an elected house of representatives, a 5-member legislative council appointed by Congress, and the governor.[144] The legislature could enact laws with a majority of the house and the council, subject to the governor's veto.[145] Under either structure, the Ordinance contained a broad delegation of legislative power from Congress to the territorial government.

The new Congress did not change any of this legislative structure in its 1789 Act, and Congress carried it over to the Southwest Territory in the 1790 Act.[146] Apparently, members of Congress thought the Ordinance's legislative structure complied with the Constitution, though it is unclear why. Perhaps they thought the Constitution did not apply to the exercise of legislative power in territories, but that seems unlikely as they apparently did think, as discussed above, that the Constitution applied to territorial appointments and executive supervision. They may have thought that, generally, Congress could delegate legislative power to other entities,[147]

This Act largely carried over the Northwest Territory's organizational structure to the new Indiana Territory, except that it allowed formation of a territorial legislature without a threshold of 5,000 inhabitants. *Id.* §§ 2–4, 2 Stat. at 59.

143. NORTHWEST ORDINANCE, *supra* note 74, at 336 ("The governor, and judges or a majority of them shall adopt and publish in the district such laws of the original states criminal and civil as may be necessary and best suited to the circumstances of the district . . . ."); *id.* (providing that laws so adopted should be reported to Congress and "shall be in force in the district . . . unless disapproved by Congress").

144. *Id.* at 337–38.

145. *Id.* at 336.

146. *See* Act of Aug. 7, 1789, ch. 8, 1 Stat. 50 (making no reference to legislative procedures for the Northwest Territory); Act of May 26, 1790, ch. 14, § 1, 1 Stat. 123, 123 (providing a structure of government in the Southwest Territory "similar to" the Northwest without further elaboration); *see also* Act of Apr. 7, 1798, ch. 28, § 3, 1 Stat. 549 (same as to Mississippi Territory).

147. *See* Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277, 303–04, 334–36 (2021) (discussing the Northwest Ordinance and the 1789 Act regarding the Northwest Territory as evidence of Congress's broad power to delegate legislative authority).

although that proposition has been sharply debated.[148] They may have thought that Congress's Article IV power to make rules and regulations for territories allowed Congress special latitude in creating local lawmaking bodies.[149] And, at least as to the initial structure, members of Congress might have thought that the process of adopting existing state laws for the territories was not really lawmaking.[150]

No recorded discussion sheds material light on why members of Congress thought the Northwest Territory's legislative structure complied with the Constitution.[151] But it seems most likely that they thought it did. If they thought the Constitution did not apply to the Territory, they would not have needed to conform other aspects of the Northwest Ordinance to the Constitution, as they expressly did in the 1789 Act.

The issue of exercising legislative power in territories illustrates a shortcoming of the Territory Clause (and, once it became relevant, the Federal District Clause). In these Clauses, the Constitution gave Congress general legislative authority over the western territory and the federal capital district, in contrast to the limited legislative authority Congress could exercise elsewhere.[152] Further, because territories were outside any state, they had no other source of legislative authority apart from what Congress authorized. But Congress lacked resources, knowledge, and institutional capacity to act as, in

148. *See* Ilan Wurman, *Nondelegation at the Founding*, 130 YALE L.J. 1490, 1494 (2021) (arguing that the Constitution contains a general nondelegation principle). Consideration of this debate is beyond the scope of this Article.

149. *See* Eli Nachmany, *The Irrelevance of the Northwest Ordinance Example to the Debate about Originalism and the Nondelegation Doctrine*, 2022 U. ILL L. REV. ONLINE 17, 20–24 (arguing that a constitutional restriction on delegating Article I legislative power should not be understood to constrain delegation of Article IV power). Alternatively, Congress might have thought ordinary nondelegation principles did not apply to the creation and empowerment of territorial governments. *See* Wurman, *supra* note 148, at 1543–44 (making this argument); Chad Squitieri, *Towards Nondelegtion Doctrines*, 86 MO. L. REV. 1239, 1272–73 (2021) (same).

150. As noted, under the initial structure, territorial judges (along with the governor) had power only to adopt existing laws of one or more states, not discretion to adopt whatever rules they thought appropriate. This limitation, combined with the involvement of judges rather than a legislative body, might suggest that Congress saw the power as something other than legislative. However, a later Act described the territorial governor and judges as having power to "enact" laws. *See* Act of May 8, 1792, ch. 42, § 1, 1 Stat. 285 (referring to laws "that have been . . . enacted by the governor and judges").

151. *See supra* note 133 and accompanying text.

152. *Compare* U.S. CONST. art. IV, § 3, cl. 2 ("The Congress shall have Power to . . . make all needful Rules and Regulations respecting the Territory"), *with* U.S. CONST. art. I, § 8 (enumerating specific powers).

effect, local government for territories.[153] Moreover, it made enormous practical sense for Congress to establish representative local governments in western territories to prepare them for statehood. Thus, there was considerable pressure on Congress to delegate lawmaking authority to local governments, whether the Constitution allowed it or not.

As explored in the next Section, there was a similar latent problem relating to judicial power in territories. The judges envisioned by the Constitution's Article III had only limited jurisdiction, with the understanding that local matters would be handled by state courts.[154] But in territories, there would be no state courts, so all courts had to be created by Congress. As described above, this did not pose an immediate problem: the Northwest Ordinance created a single three-judge court for the whole territory, with tenure and (after 1789) appointment conforming to the Constitution. But as territories gained population and the need for local courts grew, Congress found it increasingly inconvenient to follow Article III's dictates for territorial courts. This set the stage for the most significant judicial engagement with the constitutional law of territories in the early nineteenth century.[155]

These practical difficulties do not suggest that the Constitution did not apply to territories (nor, even less so, that it applied to only some territories). But they led to some uncertainty in the constitutional law of territories in the nineteenth century, to which the next Section turns. These puzzles aside, the core point remains that Congress's immediate post-ratification enactments show that Congress understood its powers in territories to be limited by the Constitution.

B. *The Constitution and Territories, 1800–1860*

This Section assesses the constitutional law of territories in the early to mid-nineteenth century. After the Spanish–American War, courts and academics sought support in events and decisions of this period for the proposition that the Constitution did not apply, or applied with lesser force, to some

153. *See* Arnold H. Leibowitz, *United States Federalism: The States and The Territories*, 28 AM. U. L. REV. 449, 451–52 (1979).

154. *See* Diego A. Zambrano, *Federal Expansion and the Decay of State Courts*, 86 U. CHI. L. REV. 2101, 2113 (2019).

155. *See infra* Section III.B.1.

or all territories.[156] Although territories' status raised some constitutional puzzles, as described below, this period provides little support for the later conclusions in the *Insular Cases* and related academic commentary, and to the contrary points in the opposite direction.

1. Court Decisions

No Supreme Court decision in the early to mid-nineteenth century suggested that the Constitution did not apply to territories, nor (especially) that it might apply to different territories in different ways. Rather, the Court consistently held or assumed that the Constitution did apply, although at times with some special considerations.

The Court's first direct encounter with the constitutional law of territories came in *Loughborough v. Blake*[157] in 1820. *Loughborough* challenged Congress's power to lay taxes in the District of Columbia,[158] a challenge the Court might have rejected easily if the Constitution did not limit Congress's power within territories. Instead, a unanimous Court, per Chief Justice John Marshall, made clear its understanding that the Constitution applied to Congress's power in the District (and in territories more broadly) but that the challenged tax complied with the Constitution.[159]

Writing for the Court, Marshall began with the proposition that the Constitution gave Congress general power to lay and collect taxes, with the condition that "all Duties, Imposts and Excises shall be uniform throughout the United States."[160] The "United States," Chief Justice Marshall continued, meant

156. *See supra* Part I. *See generally* ALISON L. LACROIX, THE INTERBELLUM CONSTITUTION: UNION, COMMERCE, AND SLAVERY IN THE AGE OF FEDERALISMS (2024) (examining constitutional thought in the pre–Civil War nineteenth century).

157. 18 U.S. (5 Wheat.) 317 (1820); *see* LAWSON & SEIDMAN, *supra* note 6, at 145 (discussing *Loughborough* as indicating a general understanding that the Constitution applied to territories). However one views the relevance of nineteenth-century materials to the Constitution's original meaning, the decision in *Loughborough* has a plausible claim to qualify as a product of the framing generation. Although decided more than thirty years after ratification, a majority of the Justices had been adult practicing lawyers at the time of ratification, and the Court was led by Chief Justice Marshall, who played an important role in the ratification debates and held key positions in the national government in its early years. THE SUPREME COURT JUSTICES: ILLUSTRATED BIOGRAPHIES, 1789–2012, at 53–57 (Clare Cushman ed., 3d ed., 2012).

158. *Loughborough*, 18 U.S. at 318.

159. *Id.* at 325.

160. *Id.* at 318–19 (quoting U.S. CONST. art. I, § 8, cl. 1).

states and territories together, so the uniformity requirement applied to both:

> It [the term "the United States"] is the name given to our great republic, which is composed of States and territories. The district of Columbia, or the territory west of the Missouri, is not less within the United States, than Maryland or Pennsylvania; and it is not less necessary, on the principles of our constitution, that uniformity in the imposition of imposts, duties, and excises, should be observed in the one, than in the other.[161]

Next, Marshall noted that, by Article I, Section 9, direct taxes had to be imposed "in Proportion to the Census or Enumeration herein before directed to be taken" (referring to the enumeration required by Article I, Section 2 for purposes of apportioning the House of Representatives).[162] He took this to mean that Congress was not required to impose a direct tax in the District (or presumably other territories), but that if it did, it had to proportion that tax to the census, as in states.[163] His conclusion here seems not a necessary or obvious one. But for present purposes, the key point is that, as with the uniformity requirement, Marshall thought the proportioning requirement applied to taxes Congress imposed in territories.

Loughborough thus represents a clear conclusion that constitutional limitations apply to Congress's powers in territories—which, as addressed above, conforms with the Constitution's text and early post-ratification practice. To be sure, the decision is somewhat remote from the Constitution's adoption and might be discounted on that ground, but it seems strong evidence that the early nineteenth century did not reflect a contrary understanding.

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161. *Id.* at 319.

162. Article I, Section 2 provides, "Representatives and direct Taxes shall be apportioned among the several States which may be included in this Union, according to their respective Numbers" and directs that an "Enumeration" of the population be taken every ten years. U.S. CONST. art. I, § 2, cl. 3. Article I, Section 9 then reiterates, "No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken." U.S. CONST. art. I, § 9, cl. 4.

163. *Loughborough*, 18 U.S. at 321–23 ("[The Constitution's text] may, without violence, be understood to give a rule when the territories shall be taxed, without imposing the necessity of taxing them."). Although Marshall's reading seems plausible, it might be as plausible to conclude that the apportionment requirement applied only to taxes within states.

Loughborough provides key background for the Court's subsequent decision in *American Insurance Co. v. 365 Bales of Cotton*[164] (also called *American Insurance Co. v. Canter*),[165] which has been read to complicate the Constitution's application to territories.[166] *Canter* involved a challenge to a ruling of a territorial court in Florida (recently acquired from Spain and not yet a state).[167] As described more fully below, after 1800, Congress shifted to a practice of creating local territorial courts that did not comply with Article III as to tenure of judges and, at least arguably, as to jurisdiction.[168] Defending the territorial court's ruling, Canter's attorney, Daniel Webster, argued (among other things) that the Constitution did not apply to territories. As Webster put it:

> What is Florida? It is no part of the United States. How can it be?—how is it represented? do the laws of the United States reach Florida? Not unless by particular provisions.
>
> The territory and all within it, are to be governed by the acquiring power, except where there are reservations by treaty.
>
> By the law of England, when possession is taken of territories, the king, *Jure Coronae*, has the power of legislation until parliament shall interfere. Congress have the *Jus Coronae* in this case, and Florida was to be governed by Congress as she thought proper.

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164. 26 U.S. (1 Pet.) 511 (1828).

165. *See* LAWSON & SEIDMAN, *supra* note 6, at 239 n.31 (discussing different names of the case). For simplicity, this Article adopts the general (and according to Lawson and Seidman, erroneous) practice of citing it as *Canter*. *See, e.g.*, William Baude, *Adjudication Outside Article III*, 133 HARV. L REV. 1511, 1526 (2020) (referring to the case as *Canter*).

166. *See, e.g.*, Langdell, *supra* note 18, at 378–87 (invoking *Canter* in arguing against applying the Constitution in territories); Downes v. Bidwell 182 U.S. 244, 263–67 (1901) (Brown, J., announcing the conclusion and judgment of the Court) (same).

167. *Canter,* 26 U.S. at 515.

168. *See infra* Section III.B.2. The Florida court in *Canter* was created by the territorial legislature with authorization from Congress; its judges served fixed terms. Apparently, the challengers in *Canter* did not directly claim the court was unconstitutional but objected to the judge exercising Article III jurisdiction in an admiralty case. *See* LAWSON & SEIDMAN, *supra* note 6, at 146–48 (discussing the arguments).

> What has Congress done? she might have done any thing—she might have refused the trial by jury, and refused a legislature.[169]

Marshall, again writing for the Court, upheld the territorial court's ruling without embracing Webster's argument. There was no constitutional difficulty, Marshall concluded, because territorial courts did not exercise the judicial power of the United States:

> These Courts, then, are not constitutional Courts, in which the judicial power conferred by the Constitution on the general government, can be deposited. . . . They are legislative Courts, created in virtue of the general right of sovereignty which exists in the government, or in virtue of that clause which enables Congress to make all needful rules and regulations, respecting the territory belonging to the United States. The jurisdiction with which they are invested, is not a part of that judicial power which is defined in the 3d article of the Constitution, but is conferred by Congress, in the execution of those general powers which that body possesses over the territories of the United States.[170]

Marshall's discussion is somewhat cryptic and might be read to imply relaxation of constitutional rules in territories. But particularly in light of *Loughborough*, it seems clear that this was not his meaning. Rather, as in *Loughborough*, the Constitution applied to territories, but (according to Marshall) there was no violation.[171]

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169. *Canter*, 26 U.S. at 538 (recording the argument of counsel); *see also id.* at 533 (recording Webster's co-counsel making a similar argument that a "ceded or conquered country" has no "right to participate in the privileges of the Constitution of the parent country"). Webster and his co-counsel also argued that the Florida court's jurisdiction was consistent with the Constitution. *Id.* at 532–33, 539.

170. *Id.* at 546.

171. Baude, *supra* note 165, at 1526–30. Although *Canter* only challenged the territorial court's jurisdiction, Marshall's reasoning appeared to validate other aspects of territorial courts inconsistent with Article III: if they did not exercise the judicial power described in Article III, they would not need to comply with Article III's rules regarding tenure and compensation. *See id.* (describing *Canter*'s implications for territorial courts). Marshall's conclusion has been sharply criticized. *See* LAWSON & SEIDMAN, *supra* note 6, at 146–50 (finding *Canter* inconsistent with the Constitution's original meaning); *id.* at 146 (observing that "from the perspective of original meaning, the decision's reasoning ranges from obscure to absurd"). *But see* Baude, *supra* note 165, at 1526–35 (providing a partial defense). Professor Baude

The Court did not subsequently understand *Canter* to exempt territories from the Constitution, as is apparent from later decisions. Its next major territorial case, *Cross v. Harrison*,[172] involved a challenge to the constitutionality of California's territorial government after the United States acquired California from Mexico and before California became a state.[173] Unlike other territories, Congress did not create a territorial government for California, so the President directed the military government established during the Mexican War to continue after the war's end.[174] Cross objected to paying duties on goods imported into California on the ground that territorial officials had no authority from Congress to collect them.[175]

One could easily reject Cross's argument (like the insurers' argument in *Canter*) if the Constitution had no application to territories and the U.S. government was (as Webster argued in *Canter*) free to govern as it pleased. The Court in *Cross*, however, did not adopt this approach and seemed to go out of its way to insist that the Constitution was in force in California after the cession.[176] In reciting the facts of the case, Justice James Wayne, writing for a unanimous Court, quoted with apparent approval a letter from the U.S. Secretary of State, including the following:

> This government *de facto* [that is, the carryover territorial government of California after the cession] will, of course, exercise no power inconsistent with the provisions of the Constitution of the United States, which is the supreme law of the land. For this reason no import duties can be levied in California on articles the growth, produce, or manufacture of the United States, as no such duties can be imposed in any other part of our Union on the productions of California. Nor can new duties be charged in California upon such foreign productions as have already paid duties in any of our ports of

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reads Marshall as arguing that territorial courts resemble state courts in that they adjudicate federal law without exercising the judicial power of the United States, and thus (like state courts), they need not follow the organizational rules of Article III. *Id.* Resolution of this debate is beyond the scope of this Article and irrelevant to its conclusion.

172. 57 U.S. (16 How.) 164 (1853).

173. *Id.* at 181, 186–87.

174. *Id.* at 182.

175. *Id.* at 186–87.

176. *Id.* at 195.

> entry, for the obvious reason that California is within the territory of the United States.[177]

Justice Wayne went on to reject Cross's claim and uphold the constitutionality of California's territorial government.[178] Among other arguments, he echoed Marshall's conclusion in *Loughborough* that the Uniformity Clause applied to territories:

> The right claimed [by Cross] to land foreign goods within the United States at any place out of a collection district, if allowed, would be a violation of that provision in the Constitution which enjoins that all duties, imposts, and excises, shall be uniform throughout the United States. Indeed, it must be very clear that no such right exists, and that there was nothing in the condition of California to exempt importers of foreign goods into it from the payment of the same duties which were chargeable in the other ports of the United States.[179]

Thus, *Cross* continued the pattern of *Loughborough* and *Canter* in recognizing the Constitution's application to territories but finding (perhaps dubiously)[180] no constitutional violation.

The last in this line of pre–Civil War decisions is *Dred Scott v. Sandford*,[181] which (among many other things) involved the Constitution's role in territories. *Scott* is an enormously complicated case that would take an entire book to explore fully;[182] this Article will examine only a small part. *Scott* is also doubtful material for originalist analysis due to its remoteness

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177. *Id.* at 185 (quoting Letter from James Buchanan, U.S. Sec'y of State, to William Voorhees (Oct. 7, 1848)). The Court also quoted a letter from Treasury Secretary R.J. Walker specifically noting the Department's view that "the Constitution of the United States extends to California." *Id.*

178. *Id.* at 198.

179. *Id.*

180. Lawson and Seidman sharply criticize the Court's conclusion that the President had independent constitutional power to organize a de facto peacetime government in California. *See* LAWSON & SEIDMAN, *supra* note 6, at 152–87. As with the Court's decision in *Canter*, the correctness of *Cross*'s constitutional holding is beyond the scope of this Article and irrelevant to its conclusion. For present purposes, the key point is that the Court thought the Constitution constrained the government's actions in California.

181. 60 U.S. (19 How.) 393 (1857).

182. *See generally* DON E. FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS (1978). For an insightful shorter summary and analysis, *see* CURRIE, *supra* note 110, at 263–73.

from the founding era and the shockingly poor use of textualist and originalist reasoning in Chief Justice Roger Taney's lead opinion.[183] For present purposes, the more relevant parts of the Court's output are the dissents by Justices John McLean and Benjamin Curtis.

Taney's opinion, among many dubious assertions, found unconstitutional Congress's prohibition (in what was known as the Missouri Compromise) of slavery in territory north of 36 degrees 30 minutes north latitude.[184] His conclusion rested on the proposition that the Constitution applied to territories, which Taney presented more as an assumption than a contested point.[185] Justices McLean and Curtis sharply dissented on Congress's power to prohibit slavery in territories.[186] But both dissenters expressly agreed that the Constitution applied there. McLean observed: "In organizing the Government of a Territory, Congress is limited to means appropriate to the attainment of the constitutional object. No powers can be exercised which are prohibited by the Constitution, or which are contrary to its spirit."[187] Curtis added:

> If, then, this clause [Article IV] does contain a power to legislate respecting the territory, what are the limits of that power? To this I answer, that, in common with all the other legislative powers of Congress, it finds limits in the express prohibitions on Congress not to do certain things; that, in the exercise of the legislative power, Congress cannot pass an ex post facto law or bill of attainder; and so in respect to each of the other prohibitions contained in the Constitution.[188]

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183. *See* FEHRENBACHER, *supra* note 182, at 335–88 (describing and sharply criticizing Taney's reasoning); CURRIE, *supra* note 110, at 263–73 (same); LAWSON & SEIDMAN, *supra* note 6, at 197–201 (same, specifically as to the prohibition on slavery).

184. *Scott*, 60 U.S. at 451–52. In 1820, Congress agreed after extensive debate to admit Missouri as a slave state and Maine as a free state, along with prohibiting slavery in territories north of the designated line. FEHERNBACHER, *supra* note 182, at 106–09. The issue was relevant in the *Scott* case because Scott claimed to have gained his freedom by residing in territory north of the Missouri Compromise line.

185. *Scott*, 60 U.S. at 446–50; *see* FEHRENBACHER, *supra* note 182, at 378–79.

186. *Scott*, 60 U.S. at 529–64 (McLean, J., dissenting); *id.* at 564–633 (Curtis, J., dissenting).

187. *Id.* at 542 (McLean, J., dissenting).

188. *Id.* at 614 (Curtis, J., dissenting).

Rather, the dissenters found no constitutional violation, largely on originalist grounds—pointing, for example, to the prohibition of slavery in the Northwest Ordinance, which no one at the founding had thought unconstitutional.[189]

The *Scott* dissenters' failure to contest the Constitution's application to territories was not inevitable. The Missouri Compromise had been under constitutional attack by pro-slavery advocates for some time,[190] and one response developed by anti-slavery forces was that the Constitution applied only within admitted states.[191] Most prominently, in debates over Congress's failed efforts to establish a territorial government in California, leading to the *Cross* case discussed above,[192] then-Senator Daniel Webster—reprising his argument from the *Canter* case twenty years earlier[193]—made that claim directly.[194] But neither McLean nor Curtis took it up, despite strong disagreement with Taney's conclusions.

Standing alone, the *Scott* Court's agreement on this point would count for little in an originalist assessment. Taken with the nineteenth-century Court's other treatments of territories, *Scott* at least indicates considerable judicial consensus on the Constitution's reach in the early to mid-nineteenth century. While some commentators (notably Webster) pressed opposing views, they were outliers: they could not tempt even the strongly anti-slavery dissenters in *Scott*. That, in turn, indicates that nineteenth-century legal arguments should not

189. *Id.* at 609–33 (Curtis, J., dissenting); *id.* at 540–47 (McLean, J., dissenting); *see* FEHRENBACHER, *supra* note 182, at 409–11 (discussing the dissenting arguments on the territory issue).

190. *See* FEHRENBACHER, *supra* note 182, at 154–55 (discussing arguments by John Calhoun in the 1840s).

191. *Id.* at 155–57.

192. Disagreement over slavery in California doomed legislative efforts to establish a territorial government, leading to the de facto government maintained by the President, which the Court upheld in *Cross*. *See* Cross v. Harrison, 57 U.S. (16 How.) 164, 190 (1853); *supra* notes 172–180 and accompanying text.

193. *See* Am. Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511, 538 (1828); *supra* notes 164–171 and accompanying text.

194. CONG. GLOBE, 30th Cong., 2d Sess. app. 272–74 (1849) (statement of Sen. Webster). Other anti-slavery senators made similar arguments. *E.g.*, *id.* at 256, 268 (statement of Sen. Dayton); *id.* at 269–70 (statement of Sen. Hale); *see* FEHRENBACHER, *supra* note 182, at 155–56 & n.11 (describing the debate). For further discussion, see *infra* Section III.B.3; *see also* CURRIE, *supra* note 110, at 272 n.265 (noting Thomas Hart Benton's contemporaneous criticism of *Scott* on the ground that the Constitution did not apply in territories, which included examples of "numerous congressional actions respecting territories that allegedly would have offended the Constitution had it applied").

be used to undercut the text and early post-ratification practice extending the Constitution to territories.

2. Congressional Actions

This Subsection turns to congressional enactments in the early to mid-nineteenth century regarding territories. Some of these acts raise questions about how to apply the Constitution in territories. They do not, however, go very far toward establishing that the Constitution did not apply to territories or (especially) that it might apply to some territories but not others.

Territorial Courts. As noted, the initial post-ratification legislation regarding territorial courts complied with the Constitution's directions regarding appointment and tenure.[195] That began to change in the early nineteenth century. First, Congress established courts for the District of Columbia in 1801.[196] The relevant legislation created a circuit court whose organization followed constitutional requirements.[197] But it also created the offices of "Justices of the Peace" for the District, who had the same powers as justices of the peace under Virginia and Maryland law.[198] These justices were appointed by the President alone for a term of five years.[199] Assuming justices of the peace were understood as judicial officers,[200] their tenure did not comply with Article III's good behavior tenure (and their appointment did not comply with the Appointments Clause unless they were inferior officers).[201] Second, three years later, organizing the Orleans Territory from the Louisiana Purchase, Congress established superior courts and authorized such inferior courts and justices of the peace as the territorial legislature chose to create, with four-

195. *Supra* Section III.A.

196. Act of Feb. 27, 1801, ch. 15, § 3, 2 Stat. 103.

197. *Id.*

198. *Id.* § 11.

199. *Id.* William Marbury, the subject of *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 138 (1803), was appointed under this provision.

200. Justices of the peace traditionally combined judicial functions with some law enforcement functions. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 338–43 (1765). Subsequent lower court cases treated the District's justices of the peace as judicial officers, although there was some disagreement over whether they were governed by Article III. *See* LAWSON & SEIDMAN, *supra* note 6, at 140–44 (discussing this litigation).

201. U.S. CONST. art. III, § 1; *id.* art. II, § 2, cl. 2.

year terms.[202] Third, in 1823, Congress roughly followed this approach in organizing the Florida territory (leading to the *Canter* litigation described above).[203]

The impetus for the shift is easy to see. Eighteenth-century territories were lightly populated, and a few judges with a status equivalent to U.S. federal judges in the states could manage these territories' judicial affairs. But as territorial populations increased and territories with existing substantial populations were acquired, territories needed multiple local courts to manage routine local judicial matters, akin to state courts within the states. Presumably, Congress found it inconvenient for such local, low-level courts to meet appointment and tenure requirements of Article III federal judges.

The question is whether the organizational shift regarding territorial courts suggests a broader view that the Constitution did not apply in territories. As discussed above, Congress's treatment of territorial courts does not require that conclusion. Congress may have supposed that Article III and the Appointments Clause did not govern territorial courts because those courts did not exercise the judicial power of the United States and were not officers of the United States; rather, one might say, territorial court judges were officers of the territory and exercised the judicial power of the territory. As described above, this appears to have been Chief Justice Marshall's later conclusion in *Canter* in 1828 concerning Florida's territorial courts.[204] This is not a conclusion that the Constitution does not apply to territories; it is a conclusion that courts organized under the Territory Clause and the Federal District Clause have different constitutional limits than those organized under Congress's power to create inferior Article III courts. As discussed below, congressional debates on the matter, which were not extensive, seem inconclusive.[205]

Territorial Legislatures. The Northwest Ordinance provided that once a territory reached a specified population, it could elect a territorial legislature.[206] The 1789 Act conforming the

202. Act of Mar. 26, 1804, ch. 38, § 5, 2 Stat. 283, 284. The Orleans Territory roughly constituted modern Louisiana. The inferior courts and justices of the peace did not comply with either the Appointments Clause or good behavior tenure and arguably did not comply with Article III's jurisdictional limits.

203. Act of Mar. 30, 1822, ch. 13, § 6, 3 Stat. 654, 656 (organizing Florida Territory).

204. *See supra* Section III.B.1.

205. *See infra* Section III.B.3.

206. *See* NORTHWEST ORDINANCE, *supra* note 74, at 337.

Ordinance to the Constitution did not address this provision, and later eighteenth-century territorial legislation, by incorporating the provisions of the Northwest Ordinance, extended it to the Southwest and Mississippi territories. Initially, the provision remained without practical effect because the territory lacked the requisite population. In the early nineteenth century, however, territories began to reach the population threshold, and Congress eliminated the threshold for some other territories.[207] Thus, elected territorial legislatures began to form and operate, and Congress separately established an elected local legislature (called the city council) in the District of Columbia.[208] These acts raise two constitutional issues.

The first is delegation—namely, whether Congress could delegate legislative power over territories to elected territorial legislatures. As discussed, however, Congress already implicitly addressed the delegation issue because Congress approved appointed territorial officials' exercise of delegated legislative power in the immediate post-ratification period.[209] Delegation to elected legislatures seems no more (though no less) problematic than delegation to appointed bodies, and, as discussed, members of Congress apparently thought the latter was constitutional without relying on any broader theory about the Constitution's inapplicability to territories.

Unlike the appointed lawmakers, the elected legislatures were additionally problematic under the Appointments Clause because their offices did not arise from any appointment. One might argue that the creation of the legislatures indicated that territories were understood as entirely outside the Constitution. But again, a narrower interpretation is available. The Appointments Clause applies only to "Officers of the United States" without further defining who is such an officer. Members of Congress may have understood territorial legislators as officers of the territory, not officers of the United States, due to their purely local authority. That would not mean the Constitution did not govern territorial legislators' offices; it would only mean the Appointments Clause did not govern their

207. *E.g.*, Act of May 7, 1800, ch. 41, § 4, 2 Stat. 58, 59 (allowing Indiana to form a territorial legislature before reaching the threshold of 5,000 inhabitants); Act of May 10, 1800, ch. 50, § 1, 2 Stat. 69, 69 (same as to Mississippi Territory). The Orleans territory had a legislature appointed by the President with the Senate's advice and consent. Act of Mar. 26, 1804, ch. 38, § 4, 2 Stat. 283, 284.

208. Act of May 3, 1802, ch. 53, §§ 1–2, 2 Stat. 195, 195–96.

209. *Supra* Section II.A.

offices. This approach to territorial legislators is consistent with Marshall's apparent approach to territorial courts in *Canter*.[210]

Territorial executives. In contrast to legislatures and courts, Congress in the early nineteenth century generally imposed constitutionally specified procedures for the appointment of territorial executives: appointment by the President with the Senate's advice and consent, appointment by the President alone during congressional recess, and appointment by the territorial governor for inferior offices.[211] It is unclear why Congress followed these procedures for executives and not for legislatures and courts. Later, Congress began to rethink this approach as well, shifting to executive officers appointed by territorial legislatures or by the President alone, or (in the twentieth century) to elected governors and other executive offices.[212] These structures seem defensible on a similar theory as territorial legislatures and courts: territorial executives exercise the executive power of the territory, not the executive power of the United States. In *Financial Oversight and Management Board for Puerto Rico v. Aurelius Investment, LLC,*[213] Justice Clarence Thomas expressly adopted this view of the Constitution's original meaning:

> Territorial officials performing duties created under Article IV of the Constitution are not federal officers within the original meaning of the phrase "Officers of the United States." . . . The founding generation understood the phrase "Officers of the United States" to refer to officers exercising the powers of the National Government, not officers solely exercising Article IV territorial power.
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> . . .

210. *See supra* note 170 and accompanying text.

211. *E,g.*, Act of May 7, 1800, ch. 41, §§ 1–3, 2 Stat. 58, 58–59 (Indiana Territory); Act of Mar. 26, 1804, ch. 38, §§ 1–3, 2 Stat. 283, 283–84 (Orleans Territory); Act of Jan. 11, 1805, ch. 5, §§ 1–3, 2 Stat. 309, 309 (1804) (Michigan Territory). For the District of Columbia, however, Congress provided only appointment by the President, without the Senate, for the chief executive officer. Act of May 3, 1802, ch. 53, § 5, 2 Stat. 195, 196 (Mayor); Act of May 1, 1802, ch. 41, § 2, 2 Stat. 175, 175–76 (Superintendent). As to removals, typically the nineteenth-century statutes named the territorial executives to a term of years "unless sooner removed by the President of the United States." *E.g.*, Act of Mar. 26, 1804, ch. 38, § 2, 2 Stat. 283, 283 (Orleans Territory).

212. *See* LAWSON & SEIDMAN, *supra* note 6, at 129–38 (describing and criticizing this shift). Currently, all U.S. territories have elected governors. *Id.*

213. 590 U.S. 448 (2020).

> The powers vested in territorial governments are distinct from the powers of the National Government. Territorial legislatures exercise the legislative power of the Territory, not Article I legislative power. Territorial officials exercise the executive power of the Territory, not Article II executive power. And territorial courts exercise the judicial power of the Territory, not the "judicial power of the United States" under Article III [citing *Canter*].[214]

Again, whether or not this view of original meaning is correct,[215] it provides an explanation for Congress's action that does not depend on the Constitution being entirely inapplicable to territories.

Other Statutory Provisions. Nineteenth-century Congresses sometimes included other provisions in territorial legislation that have been thought to bear on territories' constitutional status but, on closer examination, seem inconclusive. For example, Congress sometimes specified that territorial legislatures could take no action contrary to the Constitution and laws of the United States.[216] Perhaps this indicated that Congress thought the Constitution constrained territorial legislatures and Congress wanted to be sure that its delegation of general legislative power to territorial governments stayed within constitutional bounds. Alternatively, Congress (or some members) might have thought the constitutional limits would not apply absent statutory directives stating that they did.

Congress also routinely required that territorial officers take an oath to uphold the Constitution;[217] the insurers' counsel in *Canter* pointed to this practice in arguing for the Constitution's

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214. *Id.* at 474–76 (Thomas, J., concurring). *Aurelius* involved a challenge to an administrative board in Puerto Rico appointed by the President without Senate advice and consent.

215. *See* LAWSON & SEIDMAN, *supra* note 6, at 129–50 (arguing that, as a matter of original meaning, all territorial officers must comply with the Appointments Clause and, for courts, with Article III).

216. *E.g.*, Act of Mar. 26, 1804, ch. 38, § 4, 2 Stat. 283, 284 (Orleans Territory); Act of Mar. 30, 1822, ch. 13, § 5, 3 Stat. 654, 655 (Florida Territory); *see* Downes v. Bidwell, 182 U.S. 244, 257 (1901) (Brown, J., announcing the conclusion and judgment of the Court) (arguing that this practice indicated Congress's conclusion that the Constitution did not apply to territories of its own force); *cf. id.* at 362 (Fuller, C.J., dissenting) (responding that "Congress and all legislative bodies have often made enactments that in effect merely declared existing law").

217. *E.g.*, Act of Mar. 26, 1804, ch. 38, § 6, 2 Stat. 283, 284–85 (Orleans Territory).

applicability to territories.[218] The practice (to which no objections were recorded) seems to suggest that Congress assumed the Constitution applied to the conduct of territorial officers: otherwise someone might have pointed out that territorial officers did not have constitutional obligations.

Finally, Congress sometimes specified that territorial governments had to respect particular constitutional rights such as trial by jury.[219] That might suggest an assumption that—absent such specification—constitutional rights did not apply. Notably, Congress, in these provisions, did not list all constitutional rights by name, raising the possible implication that rights not specified did not apply.[220] But it may simply have been that Congress, or some of its members, were particularly concerned about some rights and included them for extra emphasis (for example, the specification of trial by jury in the Orleans Territory, which upon acquisition by the United States had an entrenched system of nonjury trials).

In sum, the statutory record of the early to mid-nineteenth century provides no clear indication that members of Congress generally thought the Constitution applied only to states. Some of Congress's enactments raise puzzling questions, but these seem insufficient to overcome the evidence of the text and founding-era context. And of particular significance to the *Insular Cases*, nothing in the statutory record of this period indicates that the Constitution might apply to some territories and not others. Congress's legislation organizing the various territories contains no suggestion that it was "incorporating" territories (or not incorporating territories) in a constitutionally significant sense.

3. Congressional Debates

Some arguments during congressional debates in the early and mid-nineteenth century claimed or suggested that the Constitution had limited or no application to territories. It is, however, important to examine the full context before drawing broad conclusions from these contentions. Three episodes, in particular, are worth brief consideration.

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218. Am. Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511, 527, 538 (1828) (argument of counsel).

219. *E.g.*, Act of Mar. 26, 1804, ch. 38, § 5, 2 Stat. 283, 284 (Orleans Territory); *see also* Act of Mar. 30, 1822, ch. 13, § 10, 3 Stat. 654, 658 (Florida Territory) (containing a longer list of specified rights).

220. *See* Act of Mar. 30, 1822, ch. 13, § 10, 3 Stat. 654, 658 (Florida Territory) (omitting, for example, freedom of speech).

The District of Columbia debates. Congress entertained proposals in 1803 and 1805 to return all or most of the District of Columbia to Maryland and Virginia.[221] Proponents offered a range of arguments in support, including democratic values: the national government's control over the District, they said, stood in tension with a commitment to self-government.[222] Other members countered, among many responses, that the Bill of Rights and other constitutional protections assured the rights of District residents, even without an elected District government.[223] And, in turn, some supporters of the proposals doubted that those protections extended to the District in light of the Constitution's broad grant of congressional power over the federal enclave.[224]

Conclusions based on this episode must necessarily be carefully circumscribed. The proposals failed by wide

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221. The House considered a proposal to return the entire District to Maryland and Virginia in February 1803. 12 ANNALS OF CONG. 486 (1803); *see* CURRIE, *supra* note 119, at 66–70 (discussing this proposal). An 1805 proposal would have returned the District, except the city of Washington, to Maryland and Virginia. 14 ANNALS OF CONG. 874 (1805).

222. *E.g.*, 12 ANNALS OF CONG. 487 (1803) (statement of Rep. Smilie); *id.* at 488 (statement of Rep. Bacon); *see* CURRIE, *supra* note 119, at 67 n.7.

223. *E.g.*, 14 ANNALS OF CONG. 927 (1805) (statement of Rep. Lucas) (stating that the Bill of Rights applied to all laws passed by Congress, including for the District); *id.* at 946 (statement of Rep. Goddard) ("[W]e can no more pass an act, to operate here [in the District], which is repugnant to the principles and provisions of the Constitution, than we can, to operate in any other part of the Union."); *id.* at 956 (statement of Rep. Lewis) (stating people of the District are "entitled to all the privileges of the Constitution, except that of being represented"); *id.* at 960 (statement of Rep. Williams) ("[T]here are certain rights and privileges secured to the people in this District, under our Constitution, which Congress have no more power to violate than they have [to violate] the rights which are secured to the several States."); *id.* at 973 (statement of Rep. Dennis) ("It has been again and again shown, that all the restrictions on the powers of the several departments [of the national government], both in the body of the Constitution and the amendments thereto, are equally applicable to the people here [in the District] as to any other people in the Union."); *see* CURRIE, *supra* note 119, at 67 n.7 (noting these statements).

224. *E.g.*, 14 ANNALS OF CONG. 893 (1805) (statement of Rep. Eppes) (stating that the term "exclusive legislation" in the Federal District Clause vests in Congress "absolute sovereignty over the District," which means that Congress can "pass laws without any limitation"); *id.* (asserting that inhabitants of the District lost their constitutional rights upon cession by Maryland and Virginia; "[i]t is not, therefore, in the Constitution of the United States we are to look for the limitation of the power of Congress, as it respects this District"); *id.* at 910 (statement of Rep. Elmer) (arguing that inhabitants of the District "have no rights as freemen secured to them by the Constitution" while "under the exclusive jurisdiction of Congress").

margins,[225] though it does not seem that the opponent's constitutional arguments were central to the outcome. Only a few speakers addressed the Constitution's application in the District, and although many of those who spoke on the issue thought the Constitution did apply,[226] that view had some dissenters. At most, one might say that there was no consensus—either by assumption or after argument—that the Constitution did *not* apply to the District. That limited conclusion, however, provides some context for the near-contemporaneous debate over Louisiana.

The Louisiana debates. The United States acquired the Louisiana Territory from France by treaty in 1803. In late 1803 and early 1804, Congress passed a series of bills implementing the treaty, authorizing the President to take possession on behalf of the United States and providing a territorial government.[227] Constitutional issues arose in much of the debate over these matters, although mostly not on the question of the Constitution's application to the new territory.[228] In scattered instances, however, debates addressed the matter directly, with some members stating that the Constitution did

225. *See* 12 ANNALS OF CONG. 506–07 (1803); 14 ANNALS OF CONG. 980–81 (1805). Congress later returned the part of the District south of the Potomac River to Virginia. *See* Retrocession Act of 1846, ch. 35, § 1, 9 Stat. 35, 35–36.

226. Professor David Currie's account concludes, perhaps with some overstatement, that sentiment ran generally in favor of finding the Constitution applicable to the District. *See* CURRIE, *supra* note 119, at 67 n.7 (commenting that "most members who spoke on the question during the debate on ceding the District back to the states insisted that the Bill of Rights applied there" and that those taking this view spoke "almost without contradiction"). A more cautious reading would be that both positions were advanced without evident consensus.

As discussed above, *supra* Section III.B.2, Congress, at around the same time, established a local government for the District that might seem to raise constitutional issues, but these provisions appear not to have been debated in those terms. *See* DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789–1801, at 286–88 (1997); 10 ANNALS OF CONG. 868–74, 991–1000 (1801).

227. Act of Oct. 31, 1803, ch. 1, § 1, 2 Stat. 245, 245; Act of Nov. 10, 1803, ch. 3, § 1, 2 Stat. 247, 247; Act of Mar. 26, 1804, ch. 38, § 1, 2 Stat. 283, 283.

228. *See* CURRIE, *supra* note 119, at 95–114. The principal issues were whether the United States had power to acquire territory by treaty (a point on which President Jefferson himself famously had reservations) and, more divisively, whether Congress could admit Louisiana as a state. *Id.* at 99–107.

not constrain Congress's governance of the new acquisition,[229] while other members contested that position.[230]

As with the debates over the District, it is hard to identify a consensus. The argument against the Constitution's territorial application was not well developed, being presented more as assertion than analysis. The Louisiana-related legislation, which passed by wide margins, did not depend on finding the Constitution inapplicable; generally, that argument was advanced in the alternative, along with claims (often developed at greater length) that the proposed acts complied with the Constitution.[231] Paired with the arguments over the Constitution's application in the District—which occurred in roughly the same period—the Louisiana debates do not offer anything more definite than that the matter was discussed without resolution.[232]

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229. *E.g.*, 13 ANNALS OF CONG. 471 (1803) (statement of Rep. Nicholson) ("[Louisiana] is in the nature of a colony whose commerce may be regulated without any reference to the Constitution."); *id.* at 511–12 (statement of Rep. Smilie) ("[T]he Constitution of the United States did not extend to this territory any farther than they were bound by the compact between the ceding power and the people."); *id.* at 514 (statement of Rep. Rodney) ("[T]he limitations of power, found in the Constitution, are applicable to States and not to Territories."). None of these speakers materially elaborated on the constitutional basis of their argument.

230. *E.g.*, *id.* at 510 (statement of Rep. Griswold) ("As to the idea of some gentlemen, that this territory, not being a part of the United States, but a colony, and that therefore we may do as we please with it, it is not correct."); *id.* at 1129 (statement of Rep. Campbell) ("[I]n legislating for the people of Louisiana, they [Congress] were bound by the Constitution of the United States.").

231. For example, one specific point of contention was whether Article VII of the treaty, which purported to bar tariffs on French and Spanish goods brought into New Orleans for twelve years, violated the Constitution's rule against giving "Preference . . . to the Ports of one State over those of another." U.S. CONST. art. I, § 9, cl. 6. Treaty defenders offered various arguments for why the treaty provision was constitutional in addition to the observation by some members that the Constitution did not apply. *See* CURRIE, *supra* note 119, at 109–10; 13 ANNALS OF CONG. 471 (1803) (statement of Rep. Nicholson); *id.* at 474–75 (statement of Rep. Rodney).

232. Professor Currie concludes that "[f]or practical purposes Congress appeared to think the only constitutional provisions that applied to the territories were those authorizing the United States to acquire and administer them." CURRIE, *supra* note 119, at 113. This seems to overstate (as Currie seems to overstate in the opposite direction regarding the Constitution's application to the District, see *supra* note 226).

One may speculate that Chief Justice Marshall was aware of the uncertainty reflected in these debates and sought to resolve it by reaching out in *Loughborough* in 1820 to say that the Constitution's limitations on Congress apply to both the District and other territories, including the "territory west of the Missouri." 18 U.S. (5 Wheat.) 317, 319 (1820); *see supra* Section III.B.1.

The slavery debates. As noted, in 1820, Congress prohibited slavery in the Louisiana Purchase north of 36 degrees 30 minutes north latitude, as part of the Missouri Compromise. Although the compromise package had broad (if perhaps grudging) support, some Southern voices began questioning whether Congress had constitutional power to enact such a prohibition.[233] This questioning grew and sharpened in the 1830s as Southern leaders such as John Calhoun advanced various constitutional theories in support; among other arguments, Calhoun maintained—anticipating Chief Justice Taney in *Dred Scott*—that the Fifth Amendment's Due Process Clause protected the property right in slavery.[234]

These arguments escalated in the 1840s with the acquisition of the Oregon Territory and the Mexican Cession. Anti-slavery responses at first stood on constitutional grounds, including Congress's broad Article IV power over territory and the precedents of the Northwest Ordinance and the Missouri Compromise.[235] But in an extended Senate debate over the organization of a territorial government in California, Senators Webster and William Dayton, as well as several other Northern senators, argued that the Constitution had no application other than in states.[236] If true, that proposition would defeat

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If this was Marshall's intent, it did not fully succeed, because the matter recurred in connection with the Florida Territory in 1822. *See*, *e.g.*, 39 ANNALS OF CONG. 1374-76 (1822) (recording debate over the Florida Territory). Representative Rhea appeared to argue that inhabitants of Florida would not have constitutional rights until Florida became a state, *id.* at 1375, but it is not recorded whether others agreed with him. The Florida territorial statute as enacted contained both a list of specific rights and a general direction that territorial laws comply with the Constitution. Act of Mar. 30, 1822, ch. 13, § 5, 10, 3 Stat. 654, 655, 658. Professor Currie finds from this an "apparently universal assumption . . . that the Bill of Rights did *not* apply to the territories," CURRIE, *supra* note 119, at 315 & n.213, which again seems a considerable overstatement.

233. FEHRENBACHER, *supra* note 182, at 107–09.

234. *Id.* at 122; *e.g.*, CONG. GLOBE, 24th Cong., 1st Sess. 82 (1836) (statement of Sen. Calhoun) (opposing proposal to ban slavery in the District of Columbia).

235. FEHRENBACHER, *supra* note 182, at 128–35.

236. CONG. GLOBE, 30th Cong., 2d Sess. app. at 272–74 (statement of Sen. Webster); *id.* at 255–57 (statement of Sen. Dayton) (arguing that the legislation organizing a territorial government in California "extend[s] the Constitution to a country over which the Constitution does not and cannot extend until you admit it as a State"); *id.* at 268 (statement of Sen. Dayton) (describing the Constitution as a contract among the states); *id.* at 269–70 (statement of Sen. Hale) (agreeing with Dayton); *see also id.* at 279–81 (statement of Sen. Berrien) (arguing that some parts of the Constitution apply to territories and some do not); FEHRENBACHER, *supra* note 182, at 155–56 & n.11 (describing the debate). *See generally* CONG. GLOBE, 30th Cong., 2d Sess. app. at 255–309 (1849) (recording debate).

Southern claims for constitutional protection of slavery in territories; unsurprisingly Southern senators, including Calhoun, responded forcefully to the contrary.[237] After inconclusive debate in the context of the California proposals (which ultimately failed), the debate recurred at various points in the early 1850s on similar terms.[238]

The question for present purposes is how much to make of these debates. The best answer seems to be that they should count for little in an originalist analysis, for at least three reasons.

First, the debates are far removed from the founding era and appear to have few antecedents in earlier commentary. It is true that, as recounted above, Webster and his co-counsel as advocates had advanced a similar argument to the Supreme Court in *Canter*.[239] But the Court did not adopt that argument, and it seemed to have faded from prominence until revived to counter Calhoun's constitutional defense of slavery.

Second, Webster and his allies seem to have gotten the worst of the debate in Congress and elsewhere. Several senators questioned how, if the Constitution did not apply in territories, Congress had any power in territories at all. Calhoun pointed out that if Webster was right, then Congress could act contrary to the express terms of the Constitution in territories, including creating titles of nobility and denying habeas corpus.[240] Webster (anticipating later moves in the *Insular Cases*) seemed to backtrack, conceding in response to a direct challenge that at least the religious test clause would apply in territories[241]—a concession that gravely undermined his theory of the Constitution as purely a compact for the governance of the states.

Third, perhaps because of these perceived weaknesses, the anti-slavery movement as a whole did not take up this

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237. *E.g.*, CONG. GLOBE, 30th Cong., 2d Sess. app. at 262 (1849) (statement of Sen. Foote) (invoking the Supremacy Clause to show that the Constitution applied in territories); *id.* at 268 (statement of Sen. Walker); *id.* at 270–72 (statement of Sen. Butler); *id.* at 273–74 (statement of Sen. Calhoun); *id.* at 276–77 (statement of Sen. Downs); *id.* at 281–83 (statement of Sen. Underwood) (arguing that territorial officers' oaths to support the Constitution showed the Constitution to be applicable); *id.* at 287–88 (statement of Sen. Westcott).

238. *E.g.*, FEHRENBACHER, *supra* note 182, at 193–97.

239. *See supra* note 169 and accompanying text.

240. CONG. GLOBE, 30th Cong., 2d Sess. app. at 273–74 (1849) (statement of Sen. Calhoun); *see* FEHRENBACHER, *supra* note 182, at 156.

241. CONG. GLOBE, 30th Cong., 2d Sess. app. at 282 (statement of Sen. Webster, responding to Sen. Underwood); *see* FEHRENBACHER, *supra* note 182, at 635 n.10.

argument. Although the argument persisted in Congress in the early 1850s, the 1856 Republican Party platform—in which prohibition of slavery in territories was a central feature—reverted to a constitutional defense of Congress's territorial powers, abandoning the idea that the Constitution was inapplicable.[242] And, as discussed, in the 1857 *Scott* case, the dissenters responded to Chief Justice Taney's constitutional claim not by denying that the Constitution applied in territories but by insisting that the Constitution gave Congress power to prohibit slavery in territories.[243]

In sum, although the arguments of Webster and his allies are interesting precursors of the *Insular Cases*, it is hard to see them as materially indicative of the Constitution's original meaning. They were largely confined in prominence to the late 1840s and early 1850s when they were advanced in support of one side of the bitter sectional conflict over slavery in territories; they suffered from internal contradictions and were not adopted broadly even by the anti-slavery side. And in any event, the arguments reflected the absolute position that the Constitution did not apply in territories, not the position ultimately adopted in the *Insular Cases* that the Constitution applied in some territories and not others.

4. Treaties

The term "incorporated" as applied to territories appears to come not from nineteenth-century statutes but from nineteenth-century treaties. The first U.S. treaty acquiring territory—the Louisiana Purchase—contained this article:

> The inhabitants of the ceded territory shall be incorporated in the Union of the United States and admitted as soon as possible according to the principles of the federal Constitution to the enjoyment of all the rights, advantages and immunities of citizens of the United States, and in the mean time they shall be maintained and

242. FEHRENBACHER, *supra* note 182, at 202 (noting that the platform asserted that the Constitution conveyed to Congress "sovereign powers over the Territories of the United States for their government," including the power to ban slavery). The platform went on to argue that slavery was, in any event, illegal in territories as a result of the Fifth Amendment's Due Process Clause (slavery being a denial of liberty), which obviously depended on constitutional limitations applying to territories. *Id.*

243. *See supra* notes 186–189 and accompanying text.

> protected in the free enjoyment of their liberty, property and the Religion which they profess.[244]

The treaty acquiring Florida had an almost identical provision.[245] The treaty ending the Mexican War preserved more express discretion to Congress:

> The Mexicans who, in the territories aforesaid, shall not preserve the character of citizens of the Mexican Republic, conformably with what is stipulated in the preceding article, shall be incorporated into the Union of the United States and be admitted at the proper time (to be judged of by the Congress of the United States) to the enjoyment of all the rights of citizens of the United States, according to the principles of the Constitution; and in the meantime, shall be maintained and protected in the free enjoyment of their liberty and property, and secured in the free exercise of their religion without restriction.[246]

Subsequent commentators took these provisions to indicate that the Constitution did not apply automatically in the acquired territories and that the Constitution's applicability instead depended on treaty provisions and congressional action.[247] That does not, however, seem the most natural reading of the language.

Each of these treaty articles referred to a specified group of people who were not U.S. citizens and envisioned extending

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244. Treaty of the Cession of Louisiana, Fr.-U.S., art. III, Apr. 30, 1803, 8 Stat. 200.

245. Treaty of Amity, Settlement, and Limits, Spain-U.S., art. 6, Feb. 22, 1819, 8 Stat. 252.

246. Treaty of Peace, Friendship, Limits and Settlement (Treaty of Guadalupe Hidalgo), Mex.-U.S., art. IX, Feb. 2, 1848, 9 Stat. 922 [hereinafter Treaty of Guadalupe Hidalgo]. The Gadsden Purchase Treaty adopted this article by reference to apply to territory Mexico sold to the United States in 1853. Treaty of Boundaries (Gadsden Treaty), Mex.-U.S., art. 5th, Dec. 30, 1853, 10 Stat. 1031. The treaty regarding the other major U.S. territorial acquisition of the period, the Oregon Territory, did not have any similar provision, although it had provisions relating to property and navigation rights of British subjects in the territory. Treaty of Boundaries (Oregon Treaty), U.K.-U.S., arts. II & III, June 15, 1846, 9 Stat. 869.

247. Notably, the treaty ending the Spanish-American War did not have a similar provision regarding territories acquired from Spain. *See* Treaty of Peace (Treaty of Paris), Spain-U.S., Dec. 10. 1898, 30 Stat. 1754. For the reasons discussed, that absence should not suggest anything about the Constitution's applicability, except that the U.S. negotiators likely anticipated reluctance to extend citizenship to inhabitants of the acquired territories.

citizenship to them as soon as possible or as soon as Congress thought proper. That is a different concern from whether the Constitution applied in a particular geographic area acquired by the United States. The pre–Civil War Constitution would not have required that people who were formerly noncitizens would become citizens upon U.S. acquisition of the territory (although international law might have required it). The treaty articles do not say or imply anything about the constitutional rights of people who were already U.S. citizens who might be residing in, or later come to, acquired territories or about people born in territories after acquisition.

In particular, the "shall be incorporated" language does not refer to "incorporation" of a geographic area into the United States. It is specified persons, not specified territory, that the treaties require to be incorporated. The Mexican cession treaty, in particular, makes clear that incorporation does not refer to territory because it requires only that inhabitants who do not choose to remain Mexican citizens (as described earlier in the treaty) will be "incorporated."[248] The treaty did not require those who chose to remain Mexican citizens to be incorporated. And in this context, it is difficult to see what incorporation might mean, apart from being made citizens. It seems doubtful, therefore, that the treaties are (as later claimed) indicative of a theory of discretional application of constitutional rights in territories.

5. Early Nineteenth-Century Treatises

Several early nineteenth-century legal treatises, particularly those of Justice Joseph Story[249] and Chancellor James Kent,[250] address Congress's power over territories in ways one might read to place territorial government outside

248. *See* Treaty of Guadalupe Hidalgo, *supra* note 246.

249. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 1308–24, at 184–201 (1833).

250. 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 29 (1826). Two other major constitutional commentaries, by William Rawle and St. George Tucker, mention Congress's power over territories as arising from the Constitution's Article IV but do not comment on the existence or non-existence of constitutional limitations. *See* WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 226–27 (1825) (noting "a general jurisdiction [that] appertains to the United States over ceded territories or districts" without further elaboration); 1 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA, app. note D, at 278–86 (1803) (discussing Congress's Article IV powers without considering limitations).

constitutional constraints. The treatises, therefore, may be worth considering in assessing the Constitution's original meaning on this point.[251] On closer examination, however, they appear at best ambiguous.

Taking Story first, Chapter 31 of his *Commentaries on the Constitution* opened by locating Congress's power over territories in Article IV's Territory Clause,[252] which he added "was obviously proper, in order to escape from the constitutional objection already stated to the power of congress over the territory ceded to the United States under the confederation."[253] He then continued:

> No one has ever doubted the authority of congress to erect territorial governments within the territory of the United States, under the general language of the clause, "to make all needful rules and regulations." . . . Having a right to erect a territorial government, they [Congress] may confer on it such powers, legislative, judicial, and executive, as they may deem best. They may confer upon it general legislative powers, subject only to the laws and constitution of the United States.[254]

To this point, Story's account seems consistent with the view that the Constitution both empowered and limited Congress with respect to territories. Later in the chapter, however, he appeared to speak of Congress's power in more expansive terms:

> The power of congress over the public territory is clearly exclusive and universal; and their legislation is subject to no control; but is absolute, and

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251. As elsewhere in this Subsection, consideration of these authorities is not an endorsement of their value in determining original meaning. Story (born 1779) was not a member of the founding generation. Kent (born 1763) was a young practicing lawyer at the time of the Constitution's adoption, but it is not apparent that he gave attention to constitutional issues. *See James Kent*, HIST. SOC'Y OF THE N.Y. CTS., https://history.nycourts.gov/figure/james-kent/ [https://perma.cc/3CXK-RLL9] (recounting his early career).

252. STORY, *supra* note 249, § 1316, at 193.

253. *Id.* § 1317. The "objection" referenced here is that the Articles of Confederation did not give Congress power to govern territories. *See* THE FEDERALIST NO. 38, *supra* note 77, at 239–40 (James Madison) (highlighting this difficulty); *see also* STORY, *supra* note 249, § 1318, at 25–26 (adding that the power to govern territory "would seem to follow, as an inevitable consequence" from the government's power to acquire territory by treaty or conquest).

254. STORY, *supra* note 249, § 1319, at 195–96 (quoting U.S. CONST. art. IV, § 3, cl. 2).

> unlimited, unless so far as it is affected by stipulations in the cessions, or by the ordinance of 1787, under which any part of it has been settled.[255]

This passage, in tension with the one previously quoted, might appear to reject constitutional limitations (particularly as it mentioned cessions but not the Constitution containing limitations on Congress). But Story may have had something narrower in mind, as the immediately succeeding sentences indicate. The section continued:

> But the power of congress to regulate the other national property (unless it has acquired, by cession of the states, exclusive jurisdiction) is not necessarily exclusive in all cases. If the national government own a fort, arsenal, hospital, or lighthouse establishment, not so ceded, the general jurisdiction of the state is not excluded in regard to the site . . . .[256]

Perhaps then, this section actually addressed a different issue: the extent to which Congress's power over territory is subject to the states' control.[257] In any event, even if one values Story's observations as indicative of original meaning, these passages, taken as a whole, seem ambiguous on the critical point.

Kent's commentaries have a similar ambiguity. Like Story, Kent at one point appeared to speak of Congress's unlimited power over territories: "[C]ongress," he wrote, "have assumed to exercise over them [the territories] supreme powers of sovereignty."[258] He continued:

> It would seem, from these various congressional regulations of the territories belonging to the United States, that congress have supreme power in the government of them, depending on the exercise of their sound discretion.[259]

And on prospective settlement of the Oregon Territory, he added:

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255. *Id.* § 1322, at 198.

256. *Id.*

257. Story's citation here of William Rawle's treatise, in which Rawle discussed state authority over federal property, reinforces this interpretation. *See id.* § 1328 nn.2–3 (citing *inter alia* RAWLE, *supra* note 250, at 237, 240).

258. 1 KENT, *supra* note 250, at 359.

259. *Id.* at 360.

> It would be a long time before it would be populous enough to be created into one or more independent states; and, in the mean time, . . . the colonists would be in a state of the most complete subordination, and as dependent upon the will of congress as the people of this country would have been upon the king and parliament of Great Britain, if they could have sustained their claim to bind us in all cases whatsoever. Such a state of absolute sovereignty on the one hand, and of absolute dependence on the other, is not at all congenial with the free and independent spirit of our native institutions . . . .[260]

This discussion seems to reject constitutional limitations on Congress's power over territories. But also like Story, Kent has passages that make matters more ambiguous. In an earlier part of the *Commentaries*, he discussed *Loughborough v. Blake*, the 1820 case in which the Supreme Court addressed Congress's power to collect taxes in the District of Columbia.[261] As shown above,[262] *Loughborough* appears firmly to conclude that the Constitution limits Congress's territorial powers, and Kent described the case in those terms:

> [I]t [was] understood [by the Court] that congress [was] under no necessity of extending a tax to the unrepresented District of Columbia, and to the territories; though, if they be taxed, then the constitution gives the rule of assessment.[263]

This conclusion is obviously inconsistent with the proposition that the Constitution does not limit Congress's power over territories. Moreover, Kent's earlier-quoted observations may (like Story's) have addressed a narrower point. Before launching into his concerns over potential congressional oppression of territories, Kent noted that territorial residents lacked the access to federal courts enjoyed by residents of states,[264] and "[n]or will a writ of error or appeal lie from a territorial court to the Supreme Court, unless there

260. *Id.* at 360–61.

261. *Id.* at 241–42.

262. *See* discussion of *Loughborough supra* Section III.B.1.

263. 1 KENT, *supra* note 250, at 241.

264. *Id.* at 360 (referring to the Court's conclusion that territorial residents are not residents of "states" for federal jurisdiction).

be a special statute provision for the purpose."[265] Thus, Kent may have been concerned not about the Constitution's application to territories as a theoretical matter but by the lack of Article III judicial remedies for territorial inhabitants. Especially taken with his earlier acknowledgment of the *Loughborough* holding, it is hard to read Kent as making a definite statement that the Constitution did not apply to territories.

IV. THE FOURTEENTH AMENDMENT AND AFTERWARD

In 1868, the states ratified the Constitution's Fourteenth Amendment, whose first sentence declares: "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."[266] This Part briefly considers the implications of the Amendment and its aftermath for the constitutional law of territories.

A. *"Born . . . in the United States"*

Prior scholarship has addressed at length the original meaning of the phrase "born . . . in the United States" in the Fourteenth Amendment.[267] The argument needs to be recounted only briefly here. It rests on three central propositions. First, a series of Supreme Court cases in the early to mid-nineteenth century (some of them discussed above) made clear the Court's view that "the United States" included territories as well as states.[268] For example, as noted earlier, Chief Justice Marshall in *Loughborough v. Blake* observed that:

> It [the term "the United States"] is the name given to our great republic, which is composed of States

265. *Id.* On this point Kent cited *Clark v. Bazadone*, 5 U.S. (1 Cranch) 212 (1803) and *United States v. More*, 7 U.S. (3 Cranch) 159 (1805), holding that a territorial court's ruling on territorial law could not be appealed to the U.S. Supreme Court absent an authorizing statute. 1 KENT, *supra* note 250, at 360 n.b.

The above-quoted passages are substantially equivalent in later editions. *See, e.g.*, 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 256, 383–86 (3d ed. 1836); 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 279, 432–33 (10th ed. 1860). The third edition added, after commenting on Congress's "discretion" in governing territories: "That discretion has hitherto been exercised in wisdom and good faith, and with an anxious regard for the security of the rights and privileges of the inhabitants, as defined and declared in the ordinance of July, 1787, and in the constitution of the United States." 1 KENT, *supra,* at 385 (3d ed. 1836).

266. U.S. CONST. amend. XIV, § 1.

267. Ramsey, *supra* note 6, at 425–35.

268. *Id.* at 426, 430–32 (discussing *Loughborough*, *Cross*, and *Fleming v. Page*).

> and territories. The district of Columbia, or the territory west of the Missouri, is not less within the United States, than Maryland or Pennsylvania.[269]

Thus, the meaning of "in the United States" was well established at the time the Amendment was adopted as including U.S. territories.

Second, the Amendment's drafting history indicates that its drafters assumed (consistent with prior Supreme Court decisions) that the citizenship provisions would extend to territories.[270] In particular, there was debate over whether the proposed language would include Native Americans living in tribes; it was generally concluded that the phrase "subject to the jurisdiction thereof" would exclude them (as they were subject to the jurisdiction of the tribes, not of the United States).[271] In considering this matter, the drafters directly examined the language's effect on tribes in territories, such as the Navajo, without any suggestion that those tribes were not "in" the United States.[272]

Third, the Clause's central purpose was to overturn *Scott*'s ruling that persons of African descent could not be citizens and to make citizens of the former slaves and their descendants.[273] There is no reason to suppose the drafters would have wanted to exclude former slaves in territories (including the District of Columbia) from constitutional citizenship while confirming citizenship to former slaves in states. Relatedly, the pre-Amendment common law recognized U.S. citizenship for birth in U.S. territories and states.[274] The Amendment constitutionalized the common law (and confirmed its application to persons of African descent);[275] again, there is no reason to suppose the drafters would have wanted to depart from the prior common law as to territories.

The application of the Citizenship Clause in territories does not definitively resolve the applicability of other parts of the Constitution. It is possible that the original Constitution and early amendments did not apply in territories even though the Citizenship Clause did. In addition, under the fundamental

269. Loughborough v. Blake, 18 U.S. (5 Wheat.) 317, 319 (1820).
270. Ramsey, *supra* note 6, at 427–29.
271. *Id.*
272. *Id.* at 428 n.109, 449 (quoting Sen. Trumbull).
273. *Id.* at 429.
274. *See id.* at 415–16.
275. *See id.* at 410–17.

rights approach adopted in the *Insular Cases*,[276] citizenship could be a fundamental right that applied in unincorporated territories while other rights did not. Nonetheless, the Citizenship Clause seems most easily understood as part of a broader recognition of territories as fully encompassed within the constitutional system. At the least, adoption of a geographically broad Citizenship Clause in 1868 is consistent with the foregoing assessment of the Constitution's original geographic scope.

B. *Constitutional Rights in Territories After 1868*

Although of doubtful significance for the Constitution's original meaning, it may be worth noting that the Court in the late nineteenth century held or assumed that the Constitution applied in territories. For example, in 1890, *Cherokee Nation v. Southern Kansas Railway Co*.[277] addressed Congress's power to take land by eminent domain in what was then called Indian Territory (modern Oklahoma).[278] The Court upheld the taking but made clear that Congress had to proceed subject to constitutional limitations:

> The lands in the Cherokee territory, like the lands held by private owners everywhere within the geographical limits of the United States, are held subject to the authority of the general government to take them for such objects as are germane to the execution of the powers granted to it; provided only, that they are not taken without just compensation being made to the owner.[279]

The case has particular significance because the land in question was located in the then-unorganized eastern part of modern Oklahoma, which at that point was reserved for Native American tribes. It did not have a territorial government in the form of other territories, nor was it considered eligible for (or suitable for) future statehood. If there had been any idea that the Constitution did not apply in territories, or—especially—that the Constitution did not apply fully in some territories, one

276. *See supra* Section I.A.

277. 135 U.S. 641 (1890).

278. *Id.* at 649.

279. *Id.* at 657 (concluding that Congress's power over interstate commerce and commerce with Indian tribes authorized the taking and that the Fifth Amendment did not require compensation to be paid in advance (only that it be paid)).

might expect it to be considered; instead, the Court directly held the opposite, without discussion.[280]

V. SUMMARY: TERRITORIES AND ORIGINAL MEANING

This Part summarizes the evidence and conclusions outlined in prior Parts. The originalist case against the *Insular Cases* (specifically against the doctrine of *Downes* and *Dorr* recognizing fewer constitutional rights in overseas territories than elsewhere in the United States) begins with the Constitution's text.[281] Article IV recognizes that Congress's power over territories is delegated constitutional power; although that power is broad, its inclusion in the Constitution indicates that the constitutional system of powers and limits extends to territories. Article VI's Supremacy Clause confirms this extension by describing laws made "in pursuance of" the Constitution as the supreme law of the land (presumably including all of the "land" of the United States, both states and territories). Finally, Article III, Section 2's right to jury trial specifically indicates that it applies outside states (and, thus, presumably in territories) by providing for the method of trial of crimes "not committed within any State."

It is true that the Constitution's text makes some constitutional clause expressly applicable to states and, by implication, not to territories. But this does not imply that other clauses, which lack geographic limits, are limited. If anything, it implies the opposite: when the Framers wanted to limit constitutional clauses to states, they included the limit expressly, implying that absent an express limit, no limit was intended. Notably, all the provisions of the initial individual rights amendments, adopted in 1791, are categorical, and not limited only within states.

The strongest textual argument for excluding the Constitution from territories comes from the observation that the Constitution was adopted by the people of the states (not

280. For other cases holding or assuming the Constitution applied to territories during this period, see, e.g., Springville City v. Thomas, 166 U.S. 707, 708–09 (1897) (holding that the Seventh Amendment applied in Utah Territory and "the act of Congress could not impart the power to change the constitutional rule"); Thompson v. Utah, 170 U.S. 343, 346 (1898) (holding that the right to jury trial applied in Utah Territory); Callan v. Wilson, 127 U.S. 540, 549–50 (1888) (holding that the right to jury trial applied in the District of Columbia); Reynolds v. United States, 98 U.S. 145, 154–57 (1878) (holding that the Sixth Amendment applied to prosecutions in Utah Territory).

281. *Supra* Section II.A.

including the people of territories). The Preamble refers to the "people of the United States" as the adopters of the Constitution "for the United States." One could conclude that the Constitution was adopted by and for only the people within states, not by or for people in territories. Although this argument was made in the nineteenth century, it appears not to have been suggested at the time of adoption. And it does not seem sufficient to overcome the substantial textual evidence indicating the Constitution's application to territories. Finally, the Preamble-based argument provides no basis for distinguishing *among* territories. It indicates a categorical rule that the Constitution does not apply in any territories. As described above, this was the rule Justice Brown (and no other Justices) favored in the *Insular Cases*. The Court's ultimate resolution in the *Insular Cases*—that the Constitution applies fully in "incorporated" territories but not in "unincorporated" territories—is not supported by the Preamble (or anything else in the Constitution's text).

Practice immediately after ratification confirms the Constitution's application to territories.[282] As recounted above, in 1789, the First Congress amended the previously enacted Northwest Ordinance (the governing instrument of then-existing U.S. territory) expressly to conform it to the new Constitution.[283] There would be no need to do this, of course, if the Constitution did not apply to governance in territories, but no one was recorded as making that objection.

Thus, the Constitution's text and early history support application of constitutional limits in territories and provide no support for the doctrine of the *Insular Cases*. As discussed,[284] the nineteenth-century experience complicates the picture but does not materially alter the conclusion. Most notably, court decisions in the early nineteenth century allowed some departure from constitutional rules regarding territorial courts; congressional practice similarly departed to some extent from constitutional rules regarding territorial lawmaking. However, these developments were not justified on the ground that the Constitution did not apply to territories. Rather, they were justified on the ground that territorial courts (and, one supposes, territorial legislatures) were officers of the territory, not officers of the United States; as a result, territorial courts were not governed by the specific separation-of-powers clauses

282. *Supra* Section III.A.

283. Act of Aug. 7, 1789, ch. 8, 1 Stat. 50.

284. *Supra* Sections III.B, IV.

addressed to judges and other officers of the United States. While that theory may or may not be persuasive, it does not support (and indeed refutes) a broader claim that the Constitution does not apply to territories at all.

As also recounted,[285] a line of argument developed in the nineteenth century expressly asserting that the Constitution did not apply to territories. This began as a lawyerly defense of the separation-of-powers anomalies noted above (though the Court did not adopt it). Later, it was advanced by some anti-slavery advocates, hoping to deflect Southern arguments that the Constitution protected slavery in territories. But, as discussed, it was not widely adopted. Most notably, it was not adopted even by the dissenters in *Scott*, where application of the Constitution in territories was directly presented. And again, this claim was categorical as to all territories. It did not advance the proposition, later adopted in the *Insular Cases*, that some territories had a different constitutional status.

In sum, the text provides strong support for the application of the Constitution in territories, only weak support for the idea that the Constitution applies only within states, and no support at all for the *Insular Cases*' conclusion that the Constitution applies fully to some territories and not others. A similar assessment can be made for practice in the nineteenth century. The suggestion that the *Insular Cases* invented a doctrine to address the new circumstance of overseas non-white possessions seems borne out by text and history.

VI. IMPLICATIONS OF OVERRULING THE *INSULAR CASES*

This Part considers the implications of overruling the *Insular Cases* and returning the constitutional law of territories to something closer to the Constitution's original meaning. The assessment is important because if overruling would be too disruptive to settled patterns of territorial government, the Court might be reluctant to move in that direction even if it is satisfied that the *Insular Cases* were wrongly decided. This Part concludes, however, that the impact of overruling, while not negligible, would likely not be substantially disruptive.[286]

285. *Supra* Section III.B.3.

286. *See* Ponsa-Kraus, *supra* note 3, at 2482–512 (similarly arguing that the potential effect on territorial government of overruling the *Insular Cases* has been overstated).

A. *Structure of Territorial Governments*

Some originalist scholars have argued that the structure of territorial governments is inconsistent with the Constitution's original meaning.[287] Specifically, as described above, territorial judges are not appointed in compliance with the Appointments Clause and lack good behavior tenure required for federal judges by Article III; territorial governors are elected by the people of the territory rather than appointed in compliance with the Appointments Clause, and are not removable by the President; territorial legislatures likewise are elected rather than appointed and legislate pursuant to broad delegations from Congress that might not satisfy even the undemanding modern nondelegation doctrine, much less the more exacting nondelegation standard some originalists favor.[288] If territorial governments must conform to the Constitution's separation-of-powers provisions, territorial governments might need to be wholly reconfigured, largely to the detriment of territorial residents' democratic self-government. This prospect might lead courts to hesitate in undertaking fundamental changes to the constitutional law of territories.

However, with regard to reconsidering the *Insular Cases*, this concern is misplaced. Overruling the *Insular Cases* would not require this wholesale reconsideration of territorial governments' structures. It is true that territorial governments depart from the Constitution's design for the federal government in multiple ways. However, the constitutionality of this practice does not depend on the *Insular Cases*' unincorporated territories doctrine. The practice applies to all territories (including the District of Columbia), whether incorporated or not; it long predates the *Insular Cases* and does not arise from the proposition that territories are outside the Constitution.[289] Congress implemented some of these departures soon after the Constitution's ratification.[290] The Supreme Court approved the non-Article III design of territorial courts in *Canter* in 1828;[291] in *Aurelius*, the modern Court (with all originalist-oriented Justices in agreement) rejected an Appointments Clause challenge to territorial

287. *E.g.*, LAWSON & SEIDMAN, *supra* note 6, at 121–50.
288. *See, e.g.*, Wurman, *supra* note 148, at 1493–94.
289. *See supra* Part III.
290. *See supra* Section III.A.
291. 26 U.S. (1 Pet.) 511, 546 (1828); *see supra* Section III.B.1.

executive officers without reliance on the *Insular Cases*.[292] As discussed, Justice Thomas concurred in *Aurelius* specifically to explain why (in his view) the structure of territorial governments does not offend the Constitution's original meaning, again without reliance on any aspect of the *Insular Cases*.[293]

Thus, overruling the *Insular Cases* does not open a path to challenge the structure of territorial governments. Such a challenge would require overturning *Canter*, *Aurelius*, and over 200 years of practice, none of which depends on the *Insular Cases*.

B. *Statehood and Independence*

Overruling the *Insular Cases* would not affect current debates regarding the possibility of statehood or independence for territories. As to independence, Congress has express textual authority to "dispose of . . . the Territory or other Property belonging to the United States."[294] While the Constitution's drafters likely thought of "dispos[ing]" of territory as principally referring to land sales, the text is not so limited; Congress appears to have textual authority to "dispose" of territory by granting independence, as it did with the Philippines.[295] In any event, the scope of this power does not appear to turn on the *Insular Cases* or the distinction between incorporated and unincorporated territories.[296] Because the Territory Clause applies to territory generally and because the

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292. Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC, 590 U.S. 448, 453 (2020); *see supra* Section III.B.2.

293. *See Aurelius*, 590 U.S. at 473–75 (Thomas, J., concurring in the judgment); *supra* Section III.B*; see also* Baude, *supra* note 165, at 1525–33 (defending territorial courts on originalist grounds). Whether that defense is correct is unaffected by acknowledging the unconstitutionality of the unincorporated territories doctrine.

On similar (but perhaps even stronger) grounds, overruling the *Insular Cases* would not seem to threaten Congress's approval of territorial legislatures that depart from equal representation. *See* Rayphand v. Sablan, 95 F. Supp. 2d 1133 (D.N. Mar. I. 1999) (upholding non-proportional representation in the Northern Marianas Islands against an equal protection challenge); Ponsa-Kraus, *supra* note 3, at 2504-06) (discussing *Rayphand* and concluding that "Congress has always had the power to create, modify, and dissolve territorial governments unconstrained by a requirement that they be republican in form").

294. U.S. CONST. art. IV, § 3, cl. 2.

295. Philippine Independence Act, Pub. L. No. 73-127, 48 Stat. 456 (1934) (providing procedures for granting independence).

296. *But see* Burnett, *supra* note 38, at 853–70 (suggesting that the *Insular Cases'* creation of the category of "unincorporated" territories facilitated the ability to relinquish those territories).

incorporated/unincorporated distinction lacks historical grounding in the founding era, there is no reason to suppose that a territory's "incorporated" status creates stronger constitutional obstacles to relinquishing it, should Congress choose to do so.

Regarding statehood, as discussed, arguments have been advanced that Congress, as an original matter, lacked power to hold territory indefinitely without offering a path to statehood.[297] These arguments seem misplaced, at least under an original meaning analysis, because Congress's textual power in territories is not linked to its power to admit new states, and its power to admit new states is expressly discretionary.[298] Thus, although the *Insular Cases* appear to assume a power of Congress to hold and govern territories indefinitely without a path to statehood, that power likely exists as a textual matter without reliance on the *Insular Cases*.

C. *Extraterritorial Application of the Constitution*

The Court has sometimes seen the *Insular Cases* as related to the question of the Constitution's extraterritorial application.[299] However, overruling the *Insular Cases* would not require rethinking extraterritorial application as it currently stands. Taken together, *Reid v. Covert*[300] and *United States v. Verdugo-Urquidez*[301] establish that the Constitution protects U.S. citizens in foreign territory but may not protect noncitizens in foreign territory.[302] That conclusion is consistent with full application of the Constitution within U.S. territories,

297. *See, e.g.*, Allred, *supra* note 111; LAWSON & SEIDMAN, *supra* note 6, at 78–81; *supra* Section II.E; *see also* Ponsa-Kraus, *supra* note 3, at 2483 (referring to the *Insular Cases* as "denying the implicit promise of statehood that territories have always enjoyed").

298. U.S. CONST. art. IV, § 3, cl. 2; *id.* at cl. 1 ("New States may be admitted by the Congress into this Union."). As discussed, *see supra* Part II.E, the final text broadened Madison's initial proposal, which seemed to link Congress's territorial power to preparations for statehood. It is no doubt true that the Constitution's drafters and ratifiers assumed that territories—at least territories held by the United States in 1787—would eventually become states, as reflected in the Northwest Ordinance and the 1789–1790 territorial legislation. It is much less clear that this assumption persisted with respect to territories acquired in the nineteenth century—particularly, for example, with respect to modern Oklahoma, which after acquisition was set aside for Native American tribes. In any event, even if there had been such an assumption, it does not seem to be adopted in the Constitution's text.

299. *See supra* Section I.B.

300. 354 U.S. 1, 6–8, 12–14 (1957).

301. 494 U.S. 259, 274–75 (1990).

302. *See supra* Section I.B.

including overseas territories. *Reid* relied heavily on U.S. citizens' right to invoke the Constitution wherever they might be—a proposition substantially in tension with the *Insular Cases* (as Justice Black noted) and consistent with abandoning the unincorporated territories doctrine.[303] Thus, overruling the *Insular Cases* would resolve what otherwise appears to be a material incoherence in the law of the Constitution's geographic application.

Verdugo did rely in part on the *Insular Cases* to conclude that the Fourth Amendment (and, by implication, other constitutional rights) did not apply to noncitizens abroad, but neither *Verdugo*'s result nor most of its reasoning depended upon them. *Verdugo* principally argued that, under the Constitution's original understanding, the Fourth Amendment protected a political community that did not include noncitizens without connections to the United States.[304] That conclusion is consistent with overruling the *Insular Cases*, which did not address or depend on the Constitution's relationship to noncitizens outside U.S. territory. A central proposition of the case against the *Insular Cases* is that territories are *within* the United States.[305]

D. *Citizenship*

As argued above and elsewhere, failure to recognize constitutional birthright citizenship for persons born in U.S. territories appears inconsistent with the Fourteenth Amendment's original meaning.[306] Lower courts have rejected challenges to this limitation on citizenship in part based on the *Insular Cases*.[307] Thus, overruling the *Insular Cases* might

303. *See supra* notes 48–53 and accompanying text (discussing *Reid*).

304. *Verdugo*, 494 U.S. at 265–68; *see* Andrew Kent, *A Textual and Historical Case Against a Global Constitution*, 95 GEO. L.J. 463, 509–13 (2007) (arguing that under the Constitution's original meaning, constitutional protections generally did not apply to noncitizens in foreign countries); *see also* Andrew Kent, *Citizenship and Protection*, 82 FORDHAM L. REV. 2115, 2120–21 (2014) (noting association of constitutional rights with geographic location).

305. Similarly, overruling the *Insular Cases* need not affect the scope of constitutional rights on military bases and similar facilities outside U.S. sovereign territory, as addressed in *Boumediene v. Bush*, 553 U.S. 723 (2008) and *Munaf v. Geren*, 553 U.S. 674 (2008). Although *Boumediene* relied in part on the *Insular Cases*, its central issue is distinct. *See* Kent, *supra* note 17, at 111, 164–73.

306. *See supra* Part IV; Ramsey, *supra* note 6, at 427–29.

307. Tuaua v. United States, 788 F.3d 300, 301–02 (D.C. Cir. 2015); Fitisemanu v. United States, 1 F.4th 862, 864–65 (10th Cir. 2021).

strengthen the claim to constitutional birthright citizenship in overseas territories.

Nonetheless, it is unlikely that such a change in constitutional doctrine would have unacceptably disruptive implications. Persons born in most U.S. territories already have U.S. citizenship by statute.[308] It is true that birthright citizenship currently is somewhat less secure in those territories than it is in U.S. states because it could be altered by statute. However, there is no prospect that such a statute would be enacted. Therefore, extending constitutional birthright citizenship to these territories would be largely symbolic (though symbolism may be important to some). The exception is American Samoa, whose residents do not have U.S. citizenship by statute; they instead have the lesser status of "U.S. nationals."[309] Recognizing constitutional citizenship in American Samoa would change the current citizenship status of people born there. However, it is doubtful that this would be a disruptive change. The population of American Samoa is quite small,[310] and the experience of other territories whose residents have citizenship by statute—including similarly distant ones such as the Northern Marianas Islands—indicates that recognizing U.S. citizenship even in distant island territories does not create unmanageable problems.[311]

In sum, abandoning the doctrine of the *Insular Cases* would lead to stronger claims to constitutional citizenship in overseas territories. But that change does not, as a practical matter, appear to be substantial in terms of the general government of

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308. *See* Act of Mar. 2, 1917, ch. 145, § 5, 39 Stat. 951, 953 (providing a civil government for Puerto Rico); Immigration and Nationality Act, Pub. L. No. 82-414, §§ 302–07, 66 Stat. 163, 237, 236–38 (1952); Act of Mar. 24, 1976, Pub. L. 94-241, art. III, § 303, 90 Stat. 263, 266 (establishing the Commonwealth of Northern Mariana Islands).

309. *See* Nationality Act of 1940, Pub. L. No. 76-853, ch. 2, § 204, 54 Stat. 1137, 1139 (designating American Samoans as noncitizen "nationals" of the United States).

310. *American Samoa Population 2024 (Live)*, WORLD POPULATION REV., https://worldpopulationreview.com/countries/american-samoa-population [https://perma.cc/6224-3C59] (showing a population less than 48,000 in 2023).

311. In rejecting constitutional citizenship for American Samoans, lower courts relied in part on concerns—expressed by American Samoan officials—that recognizing American Samoans as citizens would threaten aspects of Samoan culture. *E.g.*, *Tuaua*, 788 F.3d at 310. These concerns were not developed with specificity and seem misplaced as arguments specifically against citizenship. *See* Ponsa-Kraus, *supra* note 3, at 1512–19 (discussing and discounting this argument for its failure to identify practices that would be threatened). Rather, they seem to be part of concerns about application of particular constitutional rights, a matter discussed below.

the United States or of the territories (though it would no doubt be important to some territorial residents).

E. *Tariffs*

Overruling *Downes v. Bidwell* would most immediately change the direct holding of that case, which was that the Tariff Uniformity Clause[312] does not apply to tariffs on goods imported from unincorporated territories.[313] Currently, as allowed by *Downes*, the "customs territory of the United States," to which uniform tariff treatment applies, is defined to include Puerto Rico and the District of Columbia but not other territories.[314] Accordingly, under current law, at least as a threshold matter, imports from other U.S. territories are treated as imports from outside the "customs territory of the United States" and assessed duties under the same schedule applied to imports from foreign countries.[315] This was the exact practice (as then applied to goods imported from Puerto Rico) challenged in *Downes*, and the Court there acknowledged that if the Constitution applied fully to unincorporated territories, the tariff could not stand.[316] Thus, ending the constitutional designation of unincorporated territories would require the other territories (American Samoa, Guam, the U.S. Virgin Islands, and the Northern Marianas Islands) to be included within the "customs territory of the United States," eliminating tariffs on products shipped between them and other parts of the United States.

This would not, however, be a substantial change because the volume of trade between the United States and the territories is presumably small given the territories' small populations, and much of that trade is accorded duty-free status in any event. Specifically, products of U.S. territories outside the "customs territory of the United States" are imported free of tariffs.[317] Adopting tariff uniformity would not affect tariffs on these products (although it would constitutionalize their current duty-free status). As a practical matter, if "customs

312. U.S. CONST. art. I, § 8, cl. 1 ("[A]ll Duties, Imposts and Excises shall be uniform throughout the United States.").

313. Downes v. Bidwell, 182 U.S. 244, 262 (1901) (Brown, J., announcing the conclusion and judgment of the Court).

314. 19 C.F.R. § 101.1 (2024) (defining "Customs territory of the United States").

315. *Id.* § 7.2(a).

316. *See Downes*, 182 U.S. at 249 (Brown, J., announcing the conclusion and judgment of the Court). Congress later changed the tariff treatment of Puerto Rico.

317. 19 C.F.R. § 7.3(a)(1).

territory of the United States" included U.S. overseas territories, the only change would be that foreign products first imported into one of those territories and then brought to other parts of the United States would not be subject to duty when shipped from U.S. overseas territories—though they would become subject to U.S. tariff upon entering the U.S. overseas territory.[318] Thus, imposing tariff uniformity would not seem, as a practical matter, to entail substantial changes in U.S. tariff practice.[319]

F. *Individual Rights*

Potentially the most substantial change to arise from overruling the *Insular Cases* would be complete extension of the Bill of Rights and other individual constitutional rights to persons in U.S. territories. This would not be as large a shift as might initially appear because many individual constitutional rights already extend to territories under current doctrine. The ultimate doctrinal result of the *Insular Cases* was that "fundamental rights" extend even to unincorporated territories.[320] Subsequently, the Court recognized many constitutional rights as "fundamental" for this purpose (and it might well recognize others even if the *Insular Cases* remain in place).[321]

Moreover, territories generally have their own constitutions or governing statutes that guarantee individual rights in parallel with, or at least similar to, U.S. constitutional rights.[322]

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318. The latter change might be disadvantageous to territory residents, depending on relative U.S. tariff rates.

319. Somewhat related to tariffs, some lower courts have held, citing the *Insular Cases* and the so-called border-search exception, that the Fourth Amendment does not apply to searches of goods and persons entering the United States from outside U.S. customs territory. *E.g.*, United States v. Baxter, 951 F.3d 128, 131–32 (3d Cir. 2020); United States v. Hyde, 37 F.3d 116, 120–22 (3d Cir. 1994); *see* Cepeda Derieux & Weare, *supra* note 3, at 298–304 (discussing these cases). These decisions seem incorrect in any event, because the Supreme Court has held that the Fourth Amendment's search protection is a fundamental right applicable in overseas territories irrespective of the border-search exception. *Id.* at 303–04; Torres v. Puerto Rico, 442 U.S. 465, 470–71 (1979).

320. Dorr v. United States, 195 U.S. 138, 148–49 (1904); *see supra* Section I.A.

321. *See supra* Section I.B; Cleveland, *supra* note 59; *see also* Kent, *supra* note 3, at 382 (noting that apart from jury rights and tariff uniformity, "the Supreme Court never again held that a single other constitutional right was inapplicable" to territories).

322. *E.g.*, P.R. CONSTITUTION, art. II; AM. SAM. CONSTITUTION, art. I; N. MAR. I. CONSTITUTION, art. I; Organic Act of Guam, Pub. L. No. 81-630, § 5, 64 Stat. 384,

For example, the right to a criminal jury trial—a central concern in the early twentieth century when it was thought incompatible with governing new overseas territories—now generally exists at least as a matter of local law (although with some limitations and variations).[323]

Finally, finding that U.S. constitutional rights apply fully to territories might nonetheless allow consideration of a territory's distinct status in considering whether those provisions have been violated.[324]

Nonetheless, eliminating the *Insular Cases*' rule would extend rights to territories in ways that would change current practices to some material extent. For example, even where criminal jury trials are generally established, jury trials for criminal misdemeanors and civil cases are not always required,

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385–86 (1950) (listing rights similar to those in the U.S. Constitution); Revised Organic Act of the Virgin Islands, Pub. L. No. 83-517, § 3, 68 Stat. 497, 497–98 (1954) (same). Much of this protection originated in the early twentieth century. *See* Kent, *supra* note 3, at 382 (finding that Puerto Rico and the Philippines had by statute most of the rights in the U.S. Constitution apart from the Second and Third Amendments and some aspects of jury trials); *id*. at 417–36 (describing rights in the Philippines); *id*. at 436–48 (describing rights in Puerto Rico).

323. P.R. CONSTITUTION, art. II, § 11 (requiring felony jury trials); 8 GUAM CODE ANN. § 85 (2023) (same); V.I. Code tit. 5, § 3601 (2019) (same). Lower courts have divided on whether some jury rights in American Samoa and the Northern Marianas Islands are required by the U.S. Constitution. *See* King v. Andrus, 452 F. Supp. 11, 17 (D.D.C. 1977) (recognizing criminal jury right in American Samoa); United States v. Lee, 159 F. Supp. 2d 1241, 1245 (2001) (noting right to trial jury but not grand jury in criminal cases in American Samoa after *King*); Northern Marianas Islands v. Atalig, 723 F.2d 682, 690–91 (9th Cir. 1984) (no constitutional right to criminal jury in the Northern Marianas Islands).

324. *E.g.*, United States v. Vaello Madero, 596 U.S. 159, 162 (2022) (concluding that the Equal Protection Clause does not require Congress to extend Social Security benefits to Puerto Rico, without relying on the *Insular Cases*); *see also id.* at 189 (Gorsuch, J., concurring) (noting the irrelevance of the *Insular Cases* to this decision).

A particular concern raised by some commentators and natives of territories is that application of full constitutional rights to certain territories would undermine longstanding indigenous cultural practices, to the disadvantage of indigenous people in the territory. *See, e.g.*, Laughlin, *supra* note 3. In particular, laws in American Samoa and the Northern Marianas Islands restrict land ownership to persons who are at least partly of native descent—arguably a race-based restriction subject to challenge under the equal protection clause. *See* Wabol v. Villacrusis, 958 F.2d 1450, 1458–62 (9th Cir. 1992) (upholding ownership restrictions in the Northern Marianas Islands); Craddick v. Territorial Registrar of Am. Sam., 1 Am. Samoa 2d 10, 12 (1980) (same as to American Samoa). However, it is unclear that the *Insular Cases* are necessary or even relevant to preserving these laws against constitutional challenge. *See* Ponsa-Kraus, *supra* note 3, at 2497–504, 2507–09 (arguing that overruling the *Insular Cases* would not lead to a different result).

nor are unanimous verdicts.[325] Moreover, because these rights are secured by instruments other than the Constitution, those instruments may be interpreted differently from the Constitution (especially by territorial courts), and the scope of rights as actually implemented in particular territories may vary considerably.[326]

The full effect of applying U.S. constitutional rights to overseas territories is beyond the scope of this Article. Undoubtedly, it would require some changes in overseas territories' practices, as well as constitutionalizing some rights currently protected only by statute. But it is hard to say that these changes would be unmanageable or that the territories are (as the *Insular Cases* suggested) inherently unsuitable for applying those rights, most of which are protected already in at least some territories.

CONCLUSION

In sum, the originalist case against the *Insular Cases* arises directly from the original meaning of the Constitution's text. The text and its context make clear that Congress's substantial power over territory of the United States arises from the text itself and, correspondingly, is constrained by it. Although it is possible to develop a textual counternarrative that the original Constitution's protections applied only within states, there is little—if any—evidence that anyone in the founding era adopted this reading, and there is considerable evidence that they did not. Moreover, the doctrine of the *Insular Cases* is not that the Constitution does not apply to U.S. territories; it is that the Constitution only partly applies to some "unincorporated" territories, depending on the preferences of Congress. For this

325. *E.g.*, P.R. CONSTITUTION, art. II, § 11 (requiring jury trial only for criminal felonies and requiring a verdict by a vote of nine out of twelve jurors).

326. In Puerto Rico, the Northern Mariana Islands, and American Samoa, rights are implemented in territorial constitutions, see *supra* note 322, which territorial courts can presumably interpret differently from the U.S. Constitution even as to parallel provisions, as is often done for state constitutions. U.S. statutes governing Guam and the U.S. Virgin Islands apply U.S. constitutional provisions directly and would (at least in theory) not be subject to differential interpretation. The Guam Elective Governor Act, Pub. L. No. 90-497, 82 Stat. 842, 847 (1968), expressly provides that rights contained in the first nine amendments to the U.S. Constitution, plus the Thirteenth, the second sentence of Section One of the Fourteenth, Fifteenth, and Nineteenth Amendments "shall have the same force and effect there as in the United States or in any State of the United States." The Revised Organic Act of the Virgin Islands, Pub. L. No. 83-517, 68 Stat. 497, 497–98 (1954), defines rights with identical wording to the U.S. Constitution (with some exceptions).

proposition, the text's original meaning offers no support, and the Justices in the majority in the *Insular Cases* barely attempted to argue otherwise.

The nineteenth-century outlook is concededly more complex. As Congress faced practical challenges in administering territories and the question of rights in territories became enmeshed in the debates over slavery, various complications and competing positions arose. Thus, it is possible to piece together some support for incomplete application of the Constitution to territories (as the Justices in the majority in the *Insular Cases* purported to do). Attention to the full range of debate and practice in the nineteenth century shows, however, that the dominant view in courts and commentary remained that the Constitution applied fully in territories—up to the point that impending U.S. acquisition of non-white overseas territories prompted a reevaluation based not on text and history but on supposed practical incompatibilities between the Constitution and the new U.S. imperialism. Thus, the nineteenth-century evidence, while not entirely consistent, is insufficient to outweigh the evidence of the founding era and, on balance, supports it.

Finally, abandoning the *Insular Cases*' doctrine of unincorporated territories would not appear to have unmanageable effects on the administration of territories. It would require some changes in territorial government, in particular recognition of some further individual rights. But many constitutional rights are currently recognized (either directly or in territorial constitutions and statutes) in all territories, and most constitutional rights are recognized in at least some territories. Thus, transition to full application of the Constitution in all territories would likely not be unduly disruptive.