

MAKING THE CONSTITUTIONAL CASE FOR DECOLONIZATION: RECLAIMING THE ORIGINAL MEANING OF THE TERRITORY CLAUSE

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ABSTRACT

The *Insular Cases*, a series of Supreme Court decisions in the early 1900s concerning the constitutional status of the colonies acquired from Spain at the conclusion of the Spanish-American War, have rightly played a central role in the discussion of Congress' relationship with the current U.S. territories. Overruling those decisions, which are racist in their rationale, is long overdue. Their repudiation, however, will not change the separate and unequal status of the territories as compared to the states under the Constitution. Because the Constitution distinguishes territories from states, formal decolonization—namely, ceasing to be a territory—is a necessary precondition to equal status under the Constitution (or, as Chief Justice John Marshall once wrote, “complete equality”). Stated in more precise terms, so long as the territories remain territories, their residents will not be equal to the residents of the states under the law. But that formal inequality was always meant to be temporary. The Constitution does not authorize colonial rule indefinitely because the territorial status, properly understood, is impermanent in character. Moreover, to cease to be a territory, the Constitution recognizes only

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two options: statehood or independence (which includes free association). As this Article demonstrates, the Constitution's text and related historical practice provide a fresh outlook on how to make the constitutional case for decolonization and bring much-needed equality to the residents of the territories—America's long-forgotten citizens.

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*“A prime part of the history of our Constitution . . . is the story of the extension of constitutional rights and protections to people once ignored or excluded.”*¹

INTRODUCTION

The United States has territories, and everyone knows that “U.S. territory” is constitutional law-speak for “U.S. colony.”² What the Constitution calls a U.S. territory is a distinct entity subject to Congress’ general authority, whose residents are “disenfranchised from the formal lawmaking processes [at the federal level] that shape its people’s daily lives.”³ And “no word other than ‘colonialism’ adequately describes th[at] relationship between a powerful metropolitan state and [a disenfranchised] . . . overseas dependency.”⁴ That is precisely the situation of the populated territories of the United States—namely, the Commonwealth of Puerto Rico, Guam, the U.S. Virgin Islands, the Commonwealth of the Northern Mariana Islands, and American Samoa.

For more than a century, millions of U.S. citizens and residents in these territories have been unable to vote in federal elections despite being subject to the laws, decisions, and actions of the federal government.⁵ To make matters worse, those federal laws and actions

1. *United States v. Virginia*, 518 U.S. 515, 557 (1996).

2. Christina D. Ponsa-Kraus, *Political Wine in a Judicial Bottle: Justice Sotomayor’s Surprising Concurrence in Aurelius*, 130 YALE L.J. F. 101, 106 (2020).

3. José A. Cabranes, *Puerto Rico: Out of the Colonial Closet*, 33 FOREIGN POL’Y 66, 68–69 (1979). I use the term “resident” throughout this Article solely for the purpose of including all U.S. citizens and non-citizen immigrants in the territories, as well as persons born in American Samoa who are considered U.S. nationals as opposed to citizens.

4. *Id.*

5. *See, e.g.*, *Igartúa v. United States*, 626 F.3d 592, 594–95 (1st Cir. 2010) (holding that residents of Puerto Rico have no constitutional right to vote for members of the U.S. House of Representatives); *Igartúa De La Rosa v. United States*, 417 F.3d 145, 148 (1st Cir. 2005) (en banc) (holding that residents of Puerto Rico have no constitutional right to vote for President or Vice President); *Att’y Gen. of Guam v. United States*, 738 F.2d 1017, 1019–20 (9th Cir. 1984) (holding that residents of Guam have no constitutional right to vote for President or Vice President); *see also* Ponsa-Kraus, *Political Wine in a Judicial Bottle*, *supra* note 2, at 130 (“[T]he U.S. citizens of Puerto Rico have not had the right to vote in U.S. presidential elections, or to elect U.S. Senators, or to elect voting Representatives in the U.S. House . . . [and] the island’s only representation consists of one single nonvoting ‘Resident Commissioner’”); Cesar A. Lopez-Morales, Note, *A Political Solution to Puerto Rico’s Disenfranchisement: Reconsidering Congress’s Role in*

sometimes treat the residents of the territories differently than the residents of the states.⁶ Put simply, these territorial residents have been unable to partake in the democratic promise upon which this Nation was founded: that ordinary citizens would consent to being governed under a set of rules of their own making.⁷

Too many people do not fully appreciate the constitutional implications and real-world consequences of residing in a U.S. territory. Few know, for example, that residents in the territories are subject to an emphatically broad power: Congress' authority under the Territory Clause "to dispose of and make all needful Rules and Regulations respecting the [United States] Territory . . ."⁸ Moreover, law schools rarely teach cases involving the Territory Clause, including but not limited to the infamous *Insular Cases*.⁹ But despite their inconspicuous place in the legal curricula, the cases are known to generations of residents in the U.S. territories. After all, even if they are unfamiliar with the decisions, these communities experience firsthand the "separate and unequal" treatment imposed on the territories.¹⁰

Bringing Equality to America's Long-Forgotten Citizens, 32 B.U. INT'L L.J. 152, 153–54, (2014) (same).

6. See, e.g., 42 U.S.C. §§ 1308, 1396d(b)(2), 1397dd, 1397gg(e)(1)(G) (limiting total amount of compensation provided to territories under Medicaid and the Children's Health Insurance Program ("CHIP"), as well as the portion of their Medicaid and CHIP expenditures reimbursed by the federal government); 42 U.S.C. § 1382c(e) (defining the term "United States" for purposes of the federal supplemental security income program as the 50 states and the District of Columbia). Many other examples abound.

7. See THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("That to secure these [unalienable] rights, Governments are instituted among Men, deriving their just powers from the consent of the governed . . .").

8. U.S. CONST. art. IV, § 3, cl. 2.

9. See Aziz Rana, *How We Study the Constitution: Rethinking the Insular Cases and Modern American Empire*, 130 YALE L.J. F. 312, 314 (2020) ("[T]oday, few American law classes actually teach the *Insular Cases*.").

10. The phrase "separate and unequal" is meant to evoke the groundbreaking book of the late Judge Juan Torruella of the U.S. Court of Appeals for the First Circuit, in which he discusses, among other things, the *Insular Cases*. JUAN R. TORRUELLA, *THE SUPREME COURT AND PUERTO RICO: THE DOCTRINE OF THE SEPARATE AND UNEQUAL* (1985). That phrase is, of course, a clever adaptation of the "separate but equal" doctrine of *Plessy v. Ferguson*, 163 U.S. 537, 540 (1896). And that adaptation is especially apt partly because, with the exception of two Justices, the same Court that decided *Plessy* in 1896 also decided the *Insular Cases* in 1901. See Juan R. Torruella, *The Insular Cases: The Establishment of a Regime of Political Apartheid*, 29 U. PA. J. INT'L. L. 283, 300–02 (2007).

Whenever the territories are discussed, the *Insular Cases* invariably come up—and rightly so, as these decisions constitute one of the darkest chapters in our Nation’s history and exert deep, ongoing harm to the people in the territories. The *Insular Cases* are a series of Supreme Court decisions handed down in the early 1900s that addressed the constitutional status of the former Spanish colonies (Puerto Rico, Philippines, and Guam) acquired in 1898 at the conclusion of the Spanish-American War.¹¹ Generally, these decisions, which are unabashedly racist towards the former Spanish colonies in their justification and rationale,¹² stand for the proposition that the Constitution applies in full to territories destined for statehood but only in part to territories that are not destined to be admitted into the Union.¹³ Inextricably, as a constitutional matter, “no current scholar, from any methodological perspective, defends the *Insular Cases*,” even though “they remain good law.”¹⁴

While the *Insular Cases* are central to the discussion of Congress’ relationship with the current territories, they do not fully explain the distinct constitutional status of the territories—particularly if the decisions are examined in a vacuum, as they sometimes are, and are divorced from the extensive and separate line of precedent involving the Territory Clause. Recent litigation in the Supreme Court demonstrates the problem with examining the *Insular Cases* in isolation. For example, in *Financial Oversight and*

11. See, e.g., *Balzac v. Porto Rico*, 258 U.S. 298 (1922); *Dorr v. United States*, 195 U.S. 138 (1904); *Downes v. Bidwell*, 182 U.S. 244 (1901) (comprising three of the *Insular Cases*).

12. See *infra* Part I.A. (discussing the *Insular Cases*); see, e.g., Adriel I. Cepeda Derieux & Neil C. Weare, *After Aurelius: What Future for the Insular Cases?*, 130 *YALE L.J. F.* 284, 287–92 (2020) (providing overview of the underlying racial context of the *Insular Cases*); Torruella, *supra* note 10, at 283, 286, 294 (explaining that racial biases and colonialist views greatly influenced the outcome of the *Insular Cases*, and describing the racism of the times towards the inhabitants of the new territories). For a thorough discussion of the racist context underlying the *Insular Cases*, see José A. Cabranes, *Citizenship and the American Empire: Notes on the Legislative History of the United States Citizenship of Puerto Ricans*, 127 *U. PA. L. REV.* 391, 432 (1978) (statement of Sen. Depew) (“[T]he United States would not and could not ‘incorporate the alien races, and . . . semi-civilized, barbarous, and savage peoples of these islands into our body politic as States of the Union’” (quoting 33 *CONG. REC.* 3622 (1900))); 33 *CONG. REC.* 2015, 3616 (1900) (“[Filipinos and Puerto Ricans are] mongrels . . . with breath of pestilence and touch of leprosy . . . [and] with their idolatry, polygamous creeds and harem habits.”).

13. *Boumediene v. Bush*, 553 U.S. 723, 757 (2008).

14. Gary Lawson & Robert D. Sloane, *The Constitutionality of Decolonization by Associated Statehood: Puerto Rico’s Legal Status Reconsidered*, 50 *B.C. L. REV.* 1123, 1146 (2009).

Management Board for Puerto Rico v. Aurelius Investment, LLC (“Aurelius”), the federal government did not invoke the *Insular Cases* when it successfully defended the constitutionality of the Puerto Rico Oversight, Management, and Economic Stability Act of 2016 (“PROMESA”)—a statute that, among other things, established a unique bankruptcy mechanism for Puerto Rico and restructured its territorial government to include a financial oversight board consisting of presidentially appointed members.¹⁵ Instead, the federal government relied upon a long and separate line of precedent defining the scope of Congress’ authority over *all* territories.¹⁶ In response, some parties challenging the constitutionality of the statute resorted to a place of familiarity, focusing instead on overruling the *Insular Cases* and (mis)labeling these decisions as the true source of Congress’ authority to treat the current territories differently from the states.¹⁷ The Supreme Court ultimately upheld the constitutionality of the statute, and rejected the applicability of the *Insular Cases* and the request to overrule them.¹⁸

Therein lies a disconnect in the discussion of Congress’ treatment of the territories: confusion about the true source of the principle that Congress has more latitude in governing the territories than it does when legislating for the states.¹⁹ To bridge that disconnect,

15. Puerto Rico Oversight, Management, and Economic Stability Act (“PROMESA”), Pub. L. No. 114-187, 130 Stat. 549 (2016) (codified at 48 U.S.C. § 2101). See generally Brief for the United States, Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC., 140 S. Ct. 1649 (2020) (Nos. 18-1334, 18-1496, and 18-1514) [hereinafter U.S. Brief in Aurelius] (arguing that “the *Insular Cases* are not relevant” to the case).

16. U.S. Brief in Aurelius, *supra* note 15, at 13–32.

17. Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC., 140 S. Ct. 1649, 1665 (2020) (acknowledging some of the parties asked the Court to overrule the *Insular Cases*); see Consolidated Opening Brief for Petitioner Unión de Trabajadores de la Industria Eléctrica y Riego, Inc. at 15–16, 56–66, Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC., 140 S. Ct. 1649 (2020) (Nos. 18–1334, 18–1496, and 18–1514) (arguing that the *Insular Cases* provide the basis for Congress’ enactment of PROMESA and Puerto Rico’s colonial status). As a law student, I too was guilty of examining the *Insular Cases* in isolation and adopting a view of America’s colonial problem that I have come to recognize as incomplete, if not legally inaccurate. See Lopez-Morales, *supra* note 5, at 160–61 (“Since the *Insular Cases* have never been overruled . . . U.S. citizens in Puerto Rico do not enjoy some of the constitutional rights and protections guaranteed to their fellow citizens in the states.”).

18. *Aurelius*, 140 S. Ct. at 1665.

19. I came across this disconnect during my time as a U.S. Department of Justice attorney representing the United States and its agencies in several cases

this Article explains that the source of Congress' authority over the territories is the Constitution itself, as interpreted in a long line of Territory Clause precedent of the Supreme Court, independent of the continued vitality of the *Insular Cases*.²⁰ Congress has exercised that power since the Founding, long before the *Insular Cases* were decided,²¹ and continues to do so today.²² And since the Constitution draws a distinction between territories and states, overruling the *Insular Cases* is not a sufficient step to guarantee the equal constitutional status of these two distinct entities.

Without the right diagnosis of America's colonial problem, we cannot agree on the solution. While there are many ways of discussing the colonial reality of the U.S. territories, including from a socioeconomic and political perspective, by and large, this Article examines the problem through a formalistic lens aimed at ascertaining the legal conditions of the territorial status under the Constitution. That examination is particularly important because, as this Article demonstrates, there can be no equality for the territories without formal decolonization—that is, without the territories ceasing to be territories under the Constitution. Equality is a mirage where Congress can delegate significant authority to a territorial government to resemble the autonomy of the states, while retaining the power to revise or revoke that delegation pursuant to the Territory Clause.²³

In ascertaining the legal conditions of the territorial status under the Constitution, including the meaning and scope of Congress' Territory Clause authority, this Article explores the relevant constitutional text and any related historical practice. Theoretically, a text-and-history approach is consistent with how the Supreme Court often ascertains the scope of the federal government's powers and its

involving Congress' exercise of the Territory Clause—including the constitutional challenge to PROMESA resolved in *Aurelius*.

20. See *infra* Part I.B. (analyzing the relationship between the *Insular Cases* and other precedents interpreting the Territory Clause).

21. “Congress had *always* exercised plenary power over territories” and the *Insular Cases* did not change that reality. Christina Duffy Burnett [Ponsa-Kraus], *Untied States: American Expansion and Territorial Deannexation*, 72 U. CHI. L. REV. 797, 875 (2005) (emphasis added).

22. See *Aurelius*, 140 S. Ct. at 1656 (“[Congress enacted PROMESA] pursuant to its power under Article IV of the Constitution.”); 42 U.S.C. § 2121(b)(2) (invoking Territory Clause authority to enact PROMESA).

23. See *infra* Part I.B. & Part III (discussing the legal conditions of territorial status under the Constitution and the viable options for formal decolonization).

interaction with the structural limitations of the Constitution.²⁴ And strategically, that approach is uniquely forceful in making the constitutional case for decolonization, as it draws a stark contrast with the deeply atextual and ahistorical framework of the *Insular Cases*.

This Article proceeds in three parts. Part I explains that overruling the *Insular Cases*, while long overdue, is unlikely to change the distinct constitutional status of the territories vis-à-vis the states. So long as the territories remain subject to Congress' authority under the Territory Clause, it will be exceedingly difficult, if not impossible, for territorial residents to enjoy the same rights as the states' residents. Territorial residents will remain disenfranchised at the federal level. They will also remain subjected to a congressional power that is not limited by subject matter, or by many of the Constitution's structural protections rooted in federalism and the separation of powers. Part II then explains that Congress' indefinite governance of the U.S. territories is contrary to the original public meaning of the Territory Clause. It was well established at the time of the Founding, and for a century thereafter, that Congress would govern the territories *only* as states-in-waiting, not as permanent possessions. Finally, Part III explains that putting an end to the separate and unequal treatment of territorial residents requires, at a minimum, the formal decolonization of the territories, which can only be accomplished through statehood or independence.

This Article demonstrates that reclaiming the original meaning of the Territory Clause is not just a resourceful tactic to have in our constitutional toolbox. It is a crucial element of any successful strategy to transform the real-world conditions of territorial residents and to make a persuasive case for decolonization—one that brings a new perspective to the classroom, the courtroom, and the halls of Congress.

24. See, e.g., *Aurelius*, 140 S. Ct. at 1656–61 (analyzing the text and history of Article IV's Territory Clause and Article II's Appointments Clause to hold that the Appointments Clause does not govern the appointment of territorial and D.C. officers vested with primarily local duties); *Nat'l Lab. Rels. Bd. v. Noel Canning*, 573 U.S. 513, 524–49 (2014) (analyzing text of the Recess Appointments Clause and related historical practice to hold that the clause covers vacancies that arise while the Senate is in session).

I. Understanding America's Colonial Problem

A. The *Insular Cases* as a Constitutional Anathema

Justice Neil Gorsuch recently asked at an oral argument: “If the *Insular Cases* are wrong[,] . . . why shouldn't we just say what everyone knows to be true?”²⁵ They are wrong, and the Supreme Court should say so. Scholars and commentators have analyzed the *Insular Cases* in excruciating detail, debating the meaning of their holdings and their effect on the constitutional status of the current territories.²⁶ By the Supreme Court's own later accounts, the *Insular Cases* reached the novel (and, one could add, legally unsupportable) conclusion that “the Constitution applies in full in incorporated Territories surely destined for statehood but only in part in unincorporated Territories”—a distinction concocted to treat differently the then-new territories acquired from Spain deemed to have been “unincorporated.”²⁷ Specifically, they held that the Constitution's “fundamental” provisions apply of their own force to the unincorporated territories, presumably leaving up to Congress the extension of nonfundamental constitutional rights to the people in these territories.²⁸ Notably, the *Insular Cases* did not provide any analytical framework—much less a principled one—on how to determine which constitutional provisions are “fundamental” enough to apply in unincorporated territories.²⁹ We know, however, that their “holdings indicate that the category of ‘fundamental’ provisions does not include the guarantees of jury trial in criminal cases or indictment by grand jury.”³⁰

This invented distinction between incorporated and unincorporated territories is known as “the doctrine of territorial incorporation.”³¹ Whatever the basis for the doctrine, it is not the Constitution. There is no distinction among the territories in the text

25. Transcript of Oral Argument at 9, *United States v. Vaello-Madero*, 141 S. Ct. 1462 (2021) (No. 20–303) [hereinafter Oral Argument in *Vaello-Madero*].

26. See, e.g., Ponsa-Kraus, *Political Wine in a Judicial Bottle*, *supra* note 2, at 103–04, 125–26, nn. 97–98 (collecting sources on academic debate); Cepeda Derieux & Weare, *supra* note 12, at 287–92 (same).

27. *Boumediene v. Bush*, 553 U.S. 723, 757 (2008).

28. *Id.* at 758; see Ponsa-Kraus, *Political Wine in a Judicial Bottle*, *supra* note 2, at 126 (“[A]ccording to the standard account, [the *Insular Cases*] held that the Constitution did not apply in the territories annexed by the United States in 1898—the ‘unincorporated’ territories—except for its ‘fundamental’ provisions.”).

29. GARY LAWSON & GUY SEIDMAN, *THE CONSTITUTION OF EMPIRE: TERRITORIAL EXPANSION & AMERICAN LEGAL HISTORY* 196 (2004).

30. *Id.*; accord *Balzac v. Porto Rico*, 258 U.S. 298, 310–12 (1922).

31. *Boumediene*, 553 U.S. at 757.

of the Territory Clause or of any other constitutional provision.³² Nor was there such a distinction in the preceding history of congressional practice of territorial governance, from the Founding through the end of the Spanish-American War. Similarly, nothing in the Constitution “marks out certain categories of rights or powers as more or less ‘fundamental’ than others—much less that rights to jury trial would fall on the ‘nonfundamental’ side of the ledger.”³³

The doctrine of territorial incorporation that emerged from the *Insular Cases* is an example of constitutional revisionism. It was well established early in our history that the territories were a part of the United States. In 1820, for example, in answering the question of whether the “term” “United States . . . designate[s] the whole, or any particular portion of the American empire,” Chief Justice John Marshall made it exceedingly clear that the “United States” is “the name given to our great republic, which is composed of States *and* territories.”³⁴ Writing for the Court, he further explained that “[t]he [D]istrict of Columbia, or the territory west of the Missouri, is not less within the United States, than [the original states of] Maryland or Pennsylvania.”³⁵ The *Insular Cases* changed that understanding. They did so because of racist assumptions concerning the acquired Spanish colonies—*islands* that Justice Henry Billings Brown, the author of *Plessy v. Ferguson*, deemed to be inhabited by “alien races, differing from us in religion, customs, laws, methods of taxation, and modes of thought.”³⁶ Given those differences, Justice Brown wrote in one of the *Insular Cases*, it was “obvious that the annexation of outlying and distant possessions” would create “grave questions . . . which may require action on the part of Congress that would be quite unnecessary in the annexation of contiguous territory inhabited only by people of the same race.”³⁷ Accordingly, the *Insular Cases* purported to justify these racist assumptions in the name of political expediency, claiming to help Congress avoid any “inherent practical difficulties” that might

32. See LAWSON & SEIDMAN, *supra* note 29, at 196 (“[T]here is nothing in the Constitution that even intimates that express constitutional limitations on national power apply differently to different territories once that territory is properly acquired.”).

33. *Id.* at 197.

34. *Loughborough v. Blake*, 18 U.S. (5 Wheat.) 317, 319 (1820) (Marshall, C.J.) (emphasis added).

35. *Id.*

36. *Downes v. Bidwell*, 182 U.S. 244, 287 (1901).

37. *Id.* at 282.

come with governing new colonies lacking “experience in . . . Anglo-American legal tradition[s].”³⁸

By adopting an atextual and ahistorical distinction among territories, the *Insular Cases* adopted the unprecedented and baseless view that so-called “unincorporated” territories “belong[] to the United States, but [are] not a part of the United States,”³⁹ and are “foreign to the United States in a domestic sense.”⁴⁰ Therefore, as a constitutional matter, the *Insular Cases* did not make sense then and do not make sense now. They are, as Professors Gary Lawson and Guy Seidman put it, “transparently an invention designed to facilitate the felt needs of a particular moment in American history.”⁴¹ Their repudiation is warranted and long overdue.

Admittedly, since *Balzac v. Porto Rico* in 1922, which is generally regarded as the last of the *Insular Cases*, the Supreme Court has not relied upon the territorial incorporation doctrine to conclude that a particular constitutional provision does not apply to the current territories.⁴² When faced with a particular individual-right guarantee or some other constitutional provision, the Court has either held or assumed that such right or provision applies in the territory.⁴³ Beyond

38. *Boumediene v. Bush*, 553 U.S. 723, 757 (2008); see *Downes*, 182 U.S. at 287 (using racist assumptions about “alien races” in the former Spanish colonies to justify the holding).

39. *Downes*, 182 U.S. at 287.

40. *Id.* at 341 (White, J., concurring).

41. LAWSON & SEIDMAN, *supra* note 29, at 197 (“Felt needs generally make bad law, and the *Insular Cases* are no exception.”).

42. Judges and commentators universally agree that the *Insular Cases* began with certain decisions handed down in 1901, and generally agree that the roster ends with *Balzac* in 1922. See Ponsa-Kraus, *Political Wine in a Judicial Bottle*, *supra* note 2, at 125 n.97 (collecting sources on the largely academic debate about which opinions can be included in the *Insular Cases* roster); Cepeda Derieux & Weare, *supra* note 12, at 287 n.20. *But see* Juan R. Torruella, *One Hundred Years of Solitude: Puerto Rico’s American Century*, in FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION, & THE CONSTITUTION 248 n.14 (Christina Duffy Burnett [Ponsa-Kraus] & Burke Marshall eds., 2001) (“The *Insular Cases*, strictly speaking, are the original six opinions issued [in 1901] involving the status of the territories acquired as a result of the Treaty of Paris.”).

43. *Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC.*, 140 S. Ct. 1649, 1665 (2020) (“[T]hat the Constitution’s Appointments Clause applies to the appointment of officers of the United States with powers and duties in and in relation to Puerto Rico.”); *Puerto Rico v. Sanchez Valle*, 579 U.S. 59, 77 (2016) (“Double Jeopardy Clause bars both Puerto Rico and the United States from prosecuting a single person for the same conduct under equivalent criminal laws.”); *El Vocero de P.R. v. Puerto Rico*, 508 U.S. 147, 148 n.1 (1993) (holding that the Free Speech Clause of the First Amendment fully applies to Puerto Rico); *Rodriguez v.*

that, two four-Justice opinions have called into question the continued validity of the *Insular Cases* and the doctrine. One in 1957, a plurality opinion authored by Justice Hugo Black, declared that “neither the cases nor their reasoning should be given any further expansion,” as 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.”⁴⁴ The other in 1978, a concurrence in the judgment authored by Justice William Brennan, stated that “[w]hatever the validity of [these] old cases . . . in the particular historical context in which they were decided, those cases are clearly not authority for questioning the application . . . of the Bill of Rights.”⁴⁵

Citing these opinions in *Aurelius*, a 2020 decision upholding the constitutionality of the appointment of territorial officers under PROMESA, the Supreme Court declined to “extend the much-criticized ‘*Insular Cases*’ and their progeny,” “whatever their continued validity.”⁴⁶ Lastly, in a recent case concerning the denial of federal benefits to Puerto Rico residents, even the federal government took the view that “some of the reasoning and rhetoric” of these cases “is obviously anathema [and] has been for decades, if not from the outset.”⁴⁷

Popular Democratic Party, 457 U.S. 1, 8 (1982) (“[T]he voting rights of Puerto Rico citizens are constitutionally protected to the same extent as those of all other citizens of the United States.”); *Torres v. Puerto Rico*, 442 U.S. 465, 470 (1979) (holding that the Fourth Amendment requirements apply in Puerto Rico); *Califano v. Torres*, 435 U.S. 1, 4 n.6 (1978) (assuming, without deciding, that there is a right to interstate travel between Puerto Rico and the states); *Examining Bd. of Eng’rs, Architects & Surveyors v. Flores de Otero*, 426 U.S. 572, 600 (1976) (holding that due process and equal protection rights apply to residents of Puerto Rico).

44. *Reid v. Covert*, 354 U.S. 1, 14 (1957) (plurality opinion).

45. *Torres*, 442 U.S. at 475–76 (Brennan, J., concurring in the judgment).

46. *Aurelius*, 140 S. Ct. at 1665. There, the Court was presented with the question of whether the Appointments Clause, which provides the method of appointment of all “Officers of the United States,” U.S. CONST. art. II, § 2, cl. 2, applies in the territories and governs the selection of members of an entity that Congress created within Puerto Rico’s territorial government. *Aurelius*, 140 S. Ct. at 1654–55. While disclaiming the need to rely upon the *Insular Cases* or the doctrine of territorial incorporation, the Court held that the Appointments Clause applies in Puerto Rico and other nonstate entities but does not restrict the selection of *local* territorial officers such as the members of the Financial Oversight and Management Board for Puerto Rico. *Id.* at 1665.

47. Oral Argument in *Vaello-Madero*, *supra* note 25, at 10.

But just because the Supreme Court has moved away from relying upon this anachronistic doctrine does not mean that it should let the *Insular Cases* stand. On the contrary, I wholeheartedly agree with advocates who have noted that the “*Insular Cases* are still dangerous” because “lower courts reflexively rely on and often misapply” them.⁴⁸ Indeed, the territorial incorporation framework of the *Insular Cases* has served as a rare off-ramp to justify an otherwise nonsensical result. For example, a district judge invoked the territorial incorporation doctrine to decline extending the constitutional right of same-sex couples to marry to the residents of Puerto Rico.⁴⁹ It did so notwithstanding that: (1) the right to same-sex marriage recognized in *Obergefell v. Hodges* is grounded in the due process and equal protection clauses of the Fourteenth Amendment,⁵⁰ and the Supreme Court already had held that due process and equal protection rights apply in Puerto Rico⁵¹; and (2) there is no independent legal basis to deny that constitutional right to Puerto Rico residents. Unsurprisingly, the First Circuit did not hesitate to reverse.⁵² Concluding that the district judge’s “ruling err[ed] in so many respects that it is hard to know where to begin,” the First Circuit granted a “writ of mandamus requiring the district court to enter judgment . . . striking down” Puerto Rico’s ban on same-sex marriage as “unconstitutional.”⁵³

In short, the territorial incorporation doctrine has no textual or historical basis, the Supreme Court has largely abandoned the doctrine, and the mere “presence [of the *Insular Cases*] in the United States Reports is painful to citizens of both the territories and the states.”⁵⁴ The time has come to overrule these shameful decisions.

B. The Territorial Status Under the Constitution

With some arguable exceptions, overruling the *Insular Cases* to abolish the doctrine of territorial incorporation, while entirely

48. Cepeda Derieux & Weare, *supra* note 12, at 293–94.

49. *Conde Vidal v. Garcia-Padilla*, 167 F. Supp. 3d 279, 282, 286–87 (D.P.R. 2016).

50. *Obergefell v. Hodges*, 576 U.S. 644, 681 (2015).

51. *Examining Bd. of Eng’rs, Architects & Surveyors v. Flores de Otero*, 426 U.S. 572, 600 (1976).

52. *In re Conde Vidal*, 818 F.3d 765 (1st Cir. 2016).

53. *Id.* at 767.

54. Gerald L. Neuman, *Constitutionalism and Individual Rights in the Territories*, in *FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION, & THE CONSTITUTION 193–94* (Christina Duffy Burnett [Ponsa-Kraus] & Burke Marshall eds., 2001).

justified and necessary, would have little effect on the current constitutional status of the territories.⁵⁵ It is a basic fact that, regardless of the *Insular Cases*, the territories and the states are constitutionally distinct entities. The result: Territorial residents do not enjoy the same rights, privileges, and benefits that similarly situated residents of the states enjoy. For example, the residents of the territories cannot vote in federal elections because the Constitution grants that right only to the states of the Union and their people.⁵⁶

Also, territorial residents do not enjoy the same structural protections against abuse of power that the Framers of the Constitution deemed fundamental to our Nation's democratic experiment—namely, those rooted in federalism (such as the limited grants of legislative power to Congress in Article I, Section 8 vis-à-vis

55. One notable exception might be the extension of the Fourteenth Amendment's Citizenship Clause to the "U.S. nationals" of American Samoa, as well as the assurance to U.S. citizens born in other U.S. territories that their citizenship is grounded in the Constitution and not just in a federal statute that can be revoked at any time. *See* U.S. CONST. amend. XIV, § 1, cl. 1 ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States."); *Fitisemanu v. United States*, 1 F.4th 862, 865 (10th Cir. 2021) (holding that the Citizenship Clause does not apply to persons born in the unincorporated territory of American Samoa, and that Congress has the primary role in determining citizenship in unincorporated territories); *Tuaua v. United States*, 788 F.3d 300, 307–09 (D.C. Cir. 2015) (same); *Lawson & Sloane, supra* note 14, at 1193 n.281 (arguing that incorporation under the *Insular Cases* likely means that the residents of Puerto Rico qualify as U.S. citizens under Section 1 of the Fourteenth Amendment, even without any statutory grant of citizenship). Although the *Insular Cases* likely do not dispose of the question of whether persons born in the territories (including American Samoa) are entitled to birthright citizenship under the Constitution, the point is that, at a minimum, overruling the territorial incorporation doctrine would eliminate the legal basis upon which cases like *Fitisemanu* and *Tuaua* rely. *See, e.g.*, Brief for Scholars of Constitutional Law and Legal History as Amici Curiae Supporting Appellees' Petition for Rehearing en Banc at 2–8, *Fitisemanu v. United States*, 1 F.4th 862 (10th Cir. 2021) (Nos. 20-4017 & 20-4019).

56. U.S. CONST. art. I, § 2 (House of Representatives); *id.* art. I, § 3 (Senate); *id.* art. II, § 1 (President and Vice President); *see Lopez-Morales, supra* note 5, at 188 ("Federal courts . . . have continuously held that because the Constitution itself specifically grants the right to appoint electors to the states, the exclusion of U.S. citizens in the territories cannot be unconstitutional."); *see also Igartúa v. United States*, 626 F.3d 592, 596–97 (1st Cir. 2010) ("[T]he limitation on representation in the House [of Representatives] to the people of the states was quite deliberate and part of the Great Compromise," which "was explicitly predicated on the definition of statehood contained in the Constitution"); *Igartúa De La Rosa v. United States*, 417 F.3d 145, 148 (1st Cir. 2005) (explaining that Puerto Rico residents cannot vote in presidential elections because Puerto Rico is a territory and not a state).

the states) and in the separation of powers (such as the Vesting Clauses in Articles I–III).⁵⁷ When the Framers “split the atom of sovereignty” between the new national government and the states (i.e., federalism), and divided the national government into three coordinate branches (i.e., separation of powers), they did so with the understanding “that, in the long term, structural protections against abuse of power were critical to preserving liberty.”⁵⁸ The Framers’ objective was to protect liberty by preventing the “gradual concentration” of power in one government (state or federal), or in one branch of the federal government.⁵⁹ But, as explained below, those safeguards against the concentration of power do not apply in the same manner to the territories.⁶⁰ Almost definitionally, territorial residents experience what the Framers feared most: “the accumulation of all powers . . . in the same hands.”⁶¹ In describing that very fear, which arose from the colonial experience of the original states with England, James Madison’s writings in the Federalist Papers can be adapted slightly to describe perfectly the current experience of the U.S. territories: The “accumulation” of power in Congress to govern the territories *indefinitely* “may justly be pronounced the very definition of tyranny,” especially where, as here, the governed cannot elect the hands, or even consent to the rules, that govern them.⁶²

57. See U.S. CONST. art. I, § 1 (Legislative Vesting Clause); *id.* art. I, § 8 (enumerating Congress’ powers); *id.* art. II, § 1, cl. 1 (Executive Vesting Clause); *id.* art. III, § 1 (Judicial Vesting Clause). For a discussion of how constitutional limitations on governmental power rooted in federalism and the separation of powers do not constrain Congress’ power over the territories, see *infra* text accompanying notes 63–87.

58. *Seila L. LLC v. Cons. Fin. Prot. Bureau*, 140 S. Ct. 2183, 2202 (2020) (quoting *Bowsher v. Synar*, 478 U.S. 714, 730 (1986)).

59. *Id.* (quoting THE FEDERALIST NO. 51, at 349 (James Madison) (J. Cooke ed., 1961)).

60. The difference between the territories and the states is especially stark since the “constitutional strategy” that the Framers agreed upon was to “divide power everywhere except for the Presidency, and render the President directly accountable to the people through regular elections.” *Id.* at 2203. Indeed, territorial residents do not get either side of the bargain. On one side, they do not benefit from the structural divisions of power between the national government and the states, and within the national government. *Infra* Part I.B. And on the other side, they also cannot hold the President accountable through democratic elections because they cannot vote in such elections. *Supra* notes 5, 56.

61. THE FEDERALIST NO. 47, at 324 (James Madison) (J. Cooke ed., 1961); see also *Buckley v. Valeo*, 424 U.S. 1, 121 (1976) (“The men who met in Philadelphia in the summer of 1787 were practical statesmen, experienced in politics, who viewed the principle of separation of powers as a vital check against tyranny.”).

62. THE FEDERALIST NO. 47, at 324 (James Madison) (J. Cooke ed., 1961).

There are two categories of examples that aptly portray what it means to be a U.S. territory under the Constitution—one relating to the principles of federalism, and another to the separation of powers.

First, Congress' authority over the territories is not as limited as its authority over the states. With respect to the states, Congress cannot use its enumerated powers "to require the States to govern according to Congress' instructions."⁶³ Were it otherwise, a "general federal authority akin to the [states'] police power" over their own municipalities (i.e., the "general power of governing") would "undermine the status of the States as independent sovereigns in our federal system."⁶⁴ By contrast, in governing the territories, Congress has the very police power—what the Court has called a "general and plenary" authority⁶⁵—that the states have over their municipalities and subdivisions.⁶⁶ After all, the territories, unlike the states, are not independent sovereigns, and thus can be subject to Congress' "general power of governing" without constitutional difficulty.⁶⁷ So, whereas

63. *New York v. United States*, 505 U.S. 144, 162 (1992).

64. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 576 (2012) (plurality opinion).

65. *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1, 42 (1890); *see id.* at 44 (describing the power as "supreme"); *Sere v. Pitot*, 10 U.S. (6 Cranch) 332, 337 (1810) (Marshall, C.J.) (describing the power as "absolute and undisputed").

66. *See, e.g., Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC.*, 140 S. Ct. 1649, 1658–59 (2020) (explaining that Congress can legislate for the territories not only as the federal government but as the local territorial government); *Simms v. Simms*, 175 U.S. 162, 168 (1899) ("[Under the Territory Clause,] Congress has the entire dominion and sovereignty, national and local, Federal and state, and has full legislative power over all subjects upon which the legislature of a state might legislate within the state."); *Am. Ins. Co. v. 356 Bales of Cotton*, 26 U.S. (1 Pet.) 511, 546 (1828) (Marshall, C.J.) ("In legislating for [the territories], Congress [has] the combined powers of the general, and of a state government."); *see also Cincinnati Soap Co. v. United States*, 301 U.S. 308, 317 (1937) ("The national government may do for one of its dependencies whatever a state might do for itself or one of its political subdivisions . . ."); *United States v. McMillan*, 165 U.S. 504, 510–11 (1897) ("[I]t is equally indubitable that congress[] ha[s] the entire dominion and sovereignty, national and municipal, federal and state, over the territories of the United States, so long as they remain in the territorial condition . . ."); *First Nat'l Bank v. Yankton Cnty.*, 101 U.S. 129, 133 (1879) ("The Territories are but political subdivisions of the outlying dominion of the United States. Their relation to the general government is much the same as that which counties bear to the respective States, and Congress may legislate for them as a State does for its municipal organizations.");

67. *Domenech v. Nat'l City Bank of N.Y.*, 294 U.S. 199, 204 (1935) ("[A territory has] no independent sovereignty comparable to that of a state."); *Snow v. United States*, 85 U.S. (18 Wall.) 317, 321 (1873) ("[T]here is no sovereignty in a

Congress violates the Constitution when it “commandeers a State’s legislative or administrative apparatus for federal purposes” and “force[s] the States to implement a federal program,”⁶⁸ the Constitution allows such commandeering of the territories.⁶⁹ Any anti-commandeering principle protecting the territories from the federal government would be at odds with Congress’ general authority under the Territory Clause.

By the same token, whereas the Constitution requires the United States “to guarantee to every State in this Union a Republican Form of Government”⁷⁰ and provides that any “powers not delegated” to the national government “are reserved to the States,”⁷¹ the Constitution does not say anything about the form of local government that must exist in the territories or about any independent territorial powers that Congress could not encroach. Instead, the Constitution commits the decision of whether and how to create and structure territorial governments to Congress’ legislative discretion.⁷²

Second, Congress enjoys “broad latitude to develop innovative approaches to territorial governance,”⁷³ and “is not subject to the same

Territory of the United States but that of the United States itself.”); *see* *Puerto Rico v. Sanchez Valle*, 579 U.S. 59, 75–77 (2016) (holding that the Double Jeopardy Clause bars the Puerto Rico authorities and the federal government from successively prosecuting a person for the same offense because Puerto Rico is not an independent sovereign and Congress is the ultimate source of Puerto Rico’s prosecutorial power).

68. *Nat’l Fed’n of Indep. Bus.*, 567 U.S. at 577–78 (plurality opinion).

69. *Aurelius*, 140 S. Ct. at 1658 (holding that the District Clause and the Territory Clause give Congress the power to legislate for those localities in ways that would be impossible or unusual in other contexts) (citing *Palmore v. United States*, 411 U.S. 389, 398 (1973); *accord* *Rieser v. District of Columbia*, 580 F.2d 647, 656 n.14 (D.C. Cir. 1978) (en banc) (“[W]ith respect to legislating for the District of Columbia [with respect to the District clause] the Constitution does not even shackle Congress with the loose restrictions that govern its use of such powers as are contained in the . . . spending clause[.]”).

70. U.S. CONST. art. IV, § 4 (Guarantee Clause).

71. U.S. CONST. amend. X.

72. *Cf.* *Freytag v. Commissioner*, 501 U.S. 868, 914 (1991) (Scalia, J., concurring in part and in the judgment) (“Congress may endow territorial governments with a plural executive; it may allow the executive to legislate; [or] it may dispense with the legislature or judiciary altogether.”); 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1319, at 195 (“What shall be the form of government established in the territories depends exclusively upon the discretion of Congress. Having a right to erect a territorial government, [Congress] may confer on it such powers, legislative, judicial, and executive, as they may deem best.”).

73. *Puerto Rico v. Sanchez Valle*, 579 U.S. 59, 77 (2016).

restrictions which are imposed in respect of laws” enacted for the states.⁷⁴ In governing the territories, Congress can “dispense protections deemed inherent in a separation of governmental powers.”⁷⁵ That is because the government subject to the Constitution’s separation of powers is the one “created by the instrument”—namely, “a government for the United States,” and not for one of its subdivisions like a state or territory.⁷⁶ Accordingly, “Congress’ power to govern the Territories and the District [of Columbia] is *sui generis* in one very specific respect: When exercising it, Congress is not bound by the Vesting Clauses of Articles I, II, and III.”⁷⁷

The Supreme Court has repeatedly applied this logic with respect to *all* kinds of territories, regardless of their incorporation status. For instance, the Court has found that, whereas the Constitution prohibits Congress from delegating its national legislative power away,⁷⁸ Congress can delegate its power over the territories to territorial legislatures or even the President.⁷⁹ Whereas the Constitution requires all executive authority of the national

74. *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 323 (1937).

75. *Glidden Co. v. Zdanok*, 370 U.S. 530, 546 (1962) (plurality opinion).

76. *Barron v. Mayor & City Council of Balt.*, 32 U.S. (7 Pet.) 243, 247 (1833) (Marshall, C.J.); *accord* *Benner v. Porter*, 50 U.S. (9 How.) 235, 242 (1850) (“[Territorial governments] are not organized under the Constitution, nor subject to its complex distribution of the powers of government . . . but are the creations, exclusively, of the legislative department, and subject to its supervision and control.”).

77. *Ortiz v. United States*, 138 S. Ct. 2165, 2196 (2018) (Alito, J., dissenting) (“Unlike any of its other powers, Congress’s power over the Territories allows it to create governments in miniature, and to vest those governments with the legislative, executive, and judicial powers, not of the United States, but of the Territory itself.”).

78. U.S. CONST. art. I, § 1 (Legislative Vesting Clause); *Gundy v. United States*, 139 S. Ct. 2116, 2131–48 (2019) (Gorsuch, J., dissenting) (calling for the revival of the nondelegation doctrine). *But see* Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277, 278–367 (2021) (refuting the idea that the original understanding of the Constitution included a nondelegation doctrine).

79. *See, e.g., Cincinnati Soap*, 301 U.S. at 323 (recognizing Congress’ power to create a territorial legislature in the Philippines and upholding the delegation of legislative power over the territory to that local body); *United States v. Heinszen & Co.*, 206 U.S. 370, 384–85 (1907) (same); *Binns v. United States*, 194 U.S. 486, 491 (1904) (“[Congress] may legislate directly in respect to the local affairs of a territory, or transfer the power of such legislation to a legislature elected by the citizens of the territory.”); Act of Oct. 31, 1803, ch. 1, § 2, 2 Stat. 245, 245 (Nov. 10, 1803) (granting control to President Jefferson over the new Louisiana Territory, including the power to vest “all the military, civil, and judicial powers” in territorial officers as he deemed appropriate).

government to be vested in the President,⁸⁰ Congress may vest territorial executive functions in persons who are not accountable to the President.⁸¹ Whereas the Constitution prescribes specific requirements for the appointment of all officers of the United States,⁸² Congress can provide unique mechanisms for the selection of territorial officers.⁸³ Whereas the Constitution requires the judicial power of the United States to be vested in Article III courts,⁸⁴ Congress may empower Article IV territorial courts to decide local matters arising under the Constitution and laws of the United States.⁸⁵ Whereas the Constitution requires Article III judges to have life tenure during good behavior and irreducible salaries,⁸⁶ Congress can establish territorial courts without either assurance of judicial independence.⁸⁷ The list goes on.

80. U.S. CONST. art. II, § 1, cl. 1 (Executive Vesting Clause); *see* *Bowsher v. Synar*, 478 U.S. 714, 732–33 (1986) (“[B]ecause Congress [as opposed to the President] has retained removal authority over the Comptroller General, he may not be entrusted with executive powers.”).

81. *Snow v. United States*, 85 U.S. (18 Wall.) 317, 321–22 (1873) (upholding the prosecutorial authority of the Utah Territory’s attorney general, who was elected by the territorial legislature pursuant to Utah’s organic act).

82. U.S. CONST. art. II, § 2, cl. 2 (Appointments Clause); *see* *Lucia v. SEC*, 138 S. Ct. 2044 (2018) (holding that administrative law judges of the Securities and Exchange Commission are inferior officers subject to the strictures of the Appointments Clause).

83. *Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC.*, 140 S. Ct. 1649, 1661 (2020) (upholding the constitutionality of a uniquely complex mechanism for the presidential appointment of local officers comprising the Financial Oversight and Management Board for Puerto Rico).

84. U.S. CONST. art. III, § 1 (Judicial Vesting Clause); *see, e.g.*, *Stern v. Marshall*, 564 U.S. 462 (2011) (holding that bankruptcy courts lack the constitutional authority to resolve certain claims and disputes because they are not Article III bodies); *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 67–68, 73 (1982) (plurality opinion) (same).

85. *McAllister v. United States*, 141 U.S. 174, 184 (1891) (involving a non-Article-III district judge of Alaska Territory); *The City of Panama*, 101 U.S. 453, 460 (1879) (holding that district court of the Washington Territory had jurisdiction in admiralty cases and all cases arising under the Constitution and laws of the United States); *Am. Ins. Co. v. 356 Bales of Cotton*, 26 U.S. (1 Pet.) 511, 512 (1828) (Marshall, C.J.) (upholding the constitutionality of a decree passed by territorial court consisting of a notary and five jurors in the Florida Territory); *see* *Freytag v. Commissioner*, 501 U.S. 868, 913 (1991) (Scalia, J., concurring) (explaining that territorial courts are not Article III bodies).

86. U.S. CONST. art. III, § 1 (Tenure and Compensation Clauses).

87. *McAllister*, 141 U.S. at 186–87 (upholding tenure for a fixed term of years and removal of a territorial judge upon term’s expiration).

Because the distinction between the territories and the states under the Constitution does not turn on the doctrine of territorial incorporation that emerged from the *Insular Cases*, none of the Supreme Court's holdings regarding Congress' general authority over the territories would change if that infamous doctrine were abandoned. Make no mistake: The *Insular Cases* were wrongly decided and must be overruled. However, their repudiation will not change the territories' current situation unless it comes with the realization, discussed below in Part II, that the Territory Clause does not authorize indefinite colonial rule.

Consider Puerto Rico. In 1984, "Congress amended the definition of 'State' to exclude Puerto Rico 'for the purpose of defining who may be a debtor under chapter 9'" of the U.S. Bankruptcy Code, which provides a mechanism for financially distressed municipalities to file for bankruptcy.⁸⁸ Thirty years later, Puerto Rico faced its impending financial collapse but was unable to pass its own local debt-restructuring law without running up against preemption by the Bankruptcy Code.⁸⁹ Congress, however, proved unwilling to amend chapter 9 to reinclude Puerto Rico in the definition of "State," and instead enacted PROMESA.⁹⁰ In so doing, while admittedly saving Puerto Rico from its impending collapse, Congress unilaterally modified the territorial government of the Commonwealth of Puerto Rico to create a new entity that, among other things, would: (1) "file for bankruptcy on behalf of Puerto Rico or its instrumentalities"; (2) "supervise and modify Puerto Rico's laws (and budget) to 'achieve fiscal responsibility and access to the capital markets'"; and (3) "gather evidence and conduct investigations in support of these efforts."⁹¹ Congress also empowered the new entity with vast authority, some of which was transferred from the democratically elected branches of the Puerto Rico government.⁹² That new territorial entity consists of presidentially appointed territorial officers who are funded by, but are

88. *Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 579 U.S. 115, 118 (2016) (quoting Bankruptcy Amendments and Federal Judgeship Act, Pub. L. No. 98-353, § 421(j)(6), 98 Stat. 333, 368 (1984) (codified at 11 U.S.C. § 101(52))).

89. *Id.* at 117–18, 130.

90. PROMESA, *supra* note 15.

91. Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC., 140 S. Ct. 1649, 1655 (2020) (quoting PROMESA); *see also* 48 U.S.C. § 2121(c)(1) (defining the newly created Financial Oversight and Management Board for Puerto Rico as *within* the territory's government).

92. *See, e.g.*, 48 U.S.C. § 2121(d)(1)(B) (requiring Puerto Rico's governor to present certain budgets and reports to the Board); *id.* § 2124 (authorizing the Oversight Board to manage the Commonwealth's debt).

not accountable to, the residents of Puerto Rico.⁹³ Needless to say, Congress could never pass this kind of law in any of the states, as it would violate nearly every provision and structural limitation of the Constitution.⁹⁴

Congress did not need the *Insular Cases* to accomplish any of these actions.⁹⁵ Overruling the territorial incorporation doctrine would not have prevented Congress from enacting PROMESA or federal economic legislation that treats Puerto Rico and other territories differently than the states.⁹⁶ After all, the territorial incorporation doctrine's conclusion—that certain provisions of the Constitution do not apply to Puerto Rico—is irrelevant where, as here, the Court already has found that the relevant constitutional provisions apply to the territory.⁹⁷ Ultimately, the separate and unequal treatment of Puerto Rico and other territories is possible largely, if not only, because of their continued territorial status under the Constitution.

In sum, territorial incorporation will *not* guarantee the residents of the territories the same rights that the residents of the states already enjoy. The Constitution itself draws that distinction, even if it does not distinguish among territories. Without the above-mentioned structural protections rooted in federalism and the separation of powers, liberty suffers. Just ask the millions of residents of Puerto Rico who, while entitled to most, if not all, of the guarantees of the Bill of Rights, have witnessed how a President and a Congress that they cannot elect modified their elected territorial government through the creation of an unelected entity to superintend Puerto Rico's finances. Suffice to say, as James Madison once wrote, that “no

93. *Id.* § 2121(e) (prescribing a procedure for the appointment of Board members); *id.* § 2127(b) (providing that the Board's funding must come entirely from Puerto Rico).

94. See GUSTAVO A. GELPÍ, THE CONSTITUTIONAL EVOLUTION OF PUERTO RICO AND OTHER U.S. TERRITORIES (1898-PRESENT) 220 (2017) (“[T]he statute allows for the restructuring of all of Puerto Rico's public debt . . . which would not have been possible under other alternatives considered [available to the states], such as full extension of Chapter 9 of the U.S. Bankruptcy Code to the Commonwealth.”).

95. *Aurelius*, 140 S. Ct. at 1665.

96. See *supra* note 6 and accompanying text.

97. See, e.g., *Aurelius*, 140 S. Ct. at 1665 (concluding that the *Insular Cases* were not implicated because the Appointments Clause applies in the territories); Oral Argument in *Vaello-Madero*, *supra* note 25, at 10–11 (showing that the government argued that the *Insular Cases* were not relevant to the case because the Equal Protection Clause applies in the territories); see also *supra* note 43 and accompanying text.

further arguments would be necessary to inspire a universal reprobation of th[is colonial] system.”⁹⁸

II. The Original Public Meaning of the Territory Clause

As discussed, Congress has greater latitude in governing the territories than in legislating for the states because the territories and the states are distinct constitutional entities. But the Constitution’s text, historical practice, and Supreme Court precedents demonstrate that the Constitution permits the unequal treatment of the territories *only* because such inequality was meant to be temporary. The Constitution does not give Congress a blank check to govern the territories indefinitely as it deems appropriate.⁹⁹

Congress’ power under the Territory Clause is limited in important respects. There is, of course, the modest textual limitation that Congress has the “[p]ower to dispose of and make all *needful* Rules and Regulations respecting the [United States] Territory.”¹⁰⁰ Also, as the Supreme Court has made clear, that power is the equivalent of the states’ general police power over their municipalities and residents.¹⁰¹ Properly understood, then, the Bill of Rights limits Congress’ governance of the territories in the same way that it limits the states’ governance of their own political subdivisions.¹⁰² For example, Congress cannot ban interracial marriage in the territories,¹⁰³

98. THE FEDERALIST NO. 47, at 324 (James Madison) (J. Cooke ed., 1961).

99. The Constitution “does not permit full-fledged colonialism in which territorial inhabitants are treated as subjects beyond the range of the Constitution” and its Bill of Rights. LAWSON & SEIDMAN, *supra* note 29. In *Aurelius*, the “opinion for the Court offers a pellucid account of what is known as Congress’ ‘plenary power’ over U.S. territories,” while “[e]schewing the common but mistaken understanding that, somehow, ‘plenary power’ means most of the Constitution does not ‘apply.’” Ponsa-Kraus, *Political Wine in a Judicial Bottle*, *supra* note 2, at 128 n.104.

100. U.S. CONST. art. IV, § 3, cl. 2 (emphasis added); *see* LAWSON & SEIDMAN, *supra* note 29, at 128 (describing this clause “as a self-contained grant[] of legislative power” over the territories that effectively nullifies the need for a “necessary and proper” requirement akin to that in the Sweeping Clause).

101. *Supra* text accompanying notes 63–72.

102. *See* Ponsa-Kraus, *Political Wine in a Judicial Bottle*, *supra* note 2, at 128 n.104 (“Congress’s plenary power allows it to legislate for the territories both as the federal government and as the territorial government, but does not exempt it from the constitutional limitations that would ordinarily constrain the relevant exercise of power.”).

103. U.S. CONST. amend. XIV, § 1 (Equal Protection Clause and Due Process Clause); *cf.* *Loving v. Virginia*, 388 U.S. 1, 2, 11–12 (1967) (holding that state ban on interracial marriage violated the Equal Protection and Due Process Clauses of the Fourteenth Amendment).

reintroduce racial segregation,¹⁰⁴ authorize warrantless searches of peoples' homes,¹⁰⁵ or suppress religious worship.¹⁰⁶ More precisely, federal legislation concerning the territories that neither burdens a fundamental right nor discriminates against a suspect class is constitutional so long as it is rationally related to a legitimate interest.¹⁰⁷ Otherwise, such legislation is constitutional only if it survives heightened scrutiny.¹⁰⁸ Stated differently, the level of constitutional scrutiny that applies to a federal law concerning the residents of the territories must be the same as the level that would apply to a federal law concerning the residents of the states or to a state law concerning its own residents.¹⁰⁹

Such limitations from the Bill of Rights notwithstanding, Congress has a lot more leeway when governing the territories only because, as Part I.B. explains, its territorial power is not limited by: (1) subject matter; and (2) the whole plethora of structural protections rooted in federalism and the separation of powers. And, again, the

104. U.S. CONST. amend. XIV, § 1; *cf.* *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483, 495 (1954) (holding that racial segregation in public schools violated the Equal Protection Clause of the Fourteenth Amendment); *Bolling v. Sharpe*, 347 U.S. 497, 498–500 (1954) (holding that racial segregation in District of Columbia public schools violated the equal-protection guarantee of the Due Process Clause of the Fifth Amendment).

105. U.S. CONST. amend. IV; *cf.* *Mapp v. Ohio*, 367 U.S. 643, 659–60 (1961) (adopting exclusionary rule in criminal prosecutions under the Fourth Amendment's prohibition against unreasonable searches and seizures, as applied to the states through the Fourteenth Amendment's Due Process Clause).

106. U.S. CONST. amend. I, § 1 (Free Exercise Clause); *cf.* *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 524, 531, 547 (1993) (holding that city ordinance suppressing ritual slaughter of animals of Santeria religion violated the Free Exercise Clause of the First Amendment, as applied to the state through the Fourteenth Amendment's Due Process Clause).

107. The government admitted as much during the oral argument in *Vaello-Madero*. Testing the boundaries of the government's position, Justice Gorsuch asked whether "rational basis [always] applies to distinctions based on territorial status" or whether a "statute discriminating against territories" on the basis of "invidious racial discrimination" would be subject "to strict scrutiny." Oral Argument in *Vaello-Madero*, *supra* note 25, at 35. The government (correctly) conceded that rational basis review would apply to a law that only involves the extension of a "particular social welfare benefit" without infringing on a fundamental right, and that heightened scrutiny would apply to a racially discriminatory law. *Id.* at 35–36.

108. *Id.* at 36.

109. *Cf.* *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985) (discussing the tiers of constitutional scrutiny in the equal protection context); *Williamson v. Lee Optical of Okla. Inc.*, 348 U.S. 483, 488–89 (1955) (discussing the tiers of constitutional scrutiny in the due process context).

absence of these limitations is especially troubling given that Congress is largely electorally unaccountable to the disenfranchised residents of the territories.¹¹⁰

That distinct constitutional reality, however, was never meant to be a permanent condition. The relevant constitutional text and related historical practice demonstrate that the territorial status under the Constitution was supposed to be transitory.

Let's start with the text of Article IV, Section 3 of the Constitution. The first clause in the section is the Admissions Clause, which authorizes Congress to admit new states into the Union from territory acquired after the Constitution's ratification.¹¹¹ Specifically, it provides in relevant part that "[n]ew States may be admitted by the Congress into this Union."¹¹² The Territory Clause immediately follows in the next clause, authorizing Congress to "dispose of and make all needful Rules and Regulations respecting the [United States] Territory." That structural decision of combining both clauses into one section is powerful textual evidence that statehood was the end goal for the territories or that, at a minimum, the territorial status was meant to be temporary. The Supreme Court acknowledged this very point in *O'Donoghue v. United States*, a case decided in 1933 that highlighted the distinction between federal courts established under Article III and territorial courts established under Article IV of the Constitution.¹¹³ It explained, "[s]ince the Constitution provides for the admission by Congress of new states, it properly may be said that the outlying continental public domain, of which the United States was the proprietor, was, from the beginning, destined for admission as a state or states into the Union."¹¹⁴

Scholars and commentators agree that this textual integration of the Admissions Clause and the Territory Clause is a powerful

110. Cf. *Reynolds v. Sims*, 377 U.S. 533, 555 (1964) ("[H]istory has seen a continuing expansion of the scope of the right of suffrage in this country. The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government."); *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964) ("No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.")

111. U.S. CONST. art. IV, § 3, cl. 1.

112. *Id.*

113. 289 U.S. 516, 535 (1933) ("[T]he territorial courts are 'legislative' courts, created in virtue of the national sovereignty . . . and . . . they are not invested with any part of the judicial power defined in the third article of the Constitution.")

114. *Id.* at 537–38 (citations omitted).

indicator of the original meaning of Congress' power to govern the territories—specifically, that Congress would govern the populated territories as states-in-waiting, not as permanent possessions.¹¹⁵ As constitutional law Professor Akhil Amar has explained:

[T]he Constitution never promised in so many words that all federal territory would at some point ripen into statehood. Nevertheless, the fact that Article IV addressed both federal territory and new states in a single integrated section both reflected and reinforced a general expectation that territories would indeed mature into new states that in due course would be admitted on equal terms.¹¹⁶

Professors Lawson and Seidman have also said that such combination is proof that the Constitution is “well suited to the addition of new states” from the acquired territories but not as well suited to the perpetuation of an “empire’ on a colonial model.”¹¹⁷

115. See Duffy Burnett [Ponsa-Kraus], *Untied States*, *supra* note 21, at 799 (“Throughout the nineteenth century, the United States annexed territories with a view toward expanding the boundaries of a constitutional republic through the admission of new states into the Union.”); José R. Coleman Tió, Comment, *Six Puerto Rican Congressmen Go to Washington*, 116 *YALE L.J.* 1389, 1394 (2007) (“The evidence . . . suggests that territorial disenfranchisement was meant to be temporary; territories would be held as states-in waiting.”). The Constitution “provides ample authorization for the acquisition of new territory *for the purpose of creating new states*” and that, while “there is no constitutional problem with” that kind of “acquisition,” “there are serious questions about the ability of the United States to add territories that are not slated for statehood.” LAWSON & SEIDMAN, *supra* note 29, at 4 (emphasis added).

116. AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 274 (2005).

117. LAWSON & SEIDMAN, *supra* note 29, at 4. Professors Lawson and Seidman ultimately conclude that the Constitution does not forbid Congress from deciding “to hold legitimately acquired territory as a permanent colony (though, the next Congress, or the next, can always switch sides again).” *Id.* at 203. They believe that a territory can be acquired with an eye toward statehood—which would make the acquisition legitimate as a constitutional matter—but that Congress can then permanently deny that territory the option of statehood and hold it indefinitely. *Id.* at 202–03. It is unclear how much of Professors Lawson and Seidman’s conclusion that indefinite colonial rule is constitutional turns on their view that the Vesting Clauses and other separation-of-powers provisions constrain the governance of the territories. See *id.* at 129–50 (arguing that the Appointments Clause and Article III requirements extend to territorial officials and entities). If it does, the conclusion runs contrary to the Supreme Court’s Territory Clause precedents and well-established congressional practice concerning the governance of the territories. See *supra* text accompanying notes 73–87 (collecting Supreme Court

Of course, it is not just the textual integration of the two clauses in a single section that tells the whole story. Historical government practice informs the meaning of the relevant constitutional provision¹¹⁸—here, the nature and scope of Congress’ authority over the territories. Moreover, Founding-era history and “early congressional practice” is particularly compelling because it “provides ‘contemporaneous and weighty evidence of the Constitution’s meaning.’”¹¹⁹ In this context, that early practice is even more compelling since it remained constant, without exception, for more than a century.

The Founding generation, “[h]aving themselves been treated as colonists,” had a different conception of territorial governance than the modern Congress.¹²⁰ The Framers “vowed not to mistreat their own new colonies”: “The older states would help their younger siblings grow up and would thereafter regard them as equals, rather than as permanent adolescents—the status to which Mother England had wrongly relegated her own New World wards” (and the status to which Congress has subjected the current territories).¹²¹ Given that conception, Congress governed the territories as states-in-waiting between the Founding and the end of the Spanish-American War in 1898. Without exception, Congress acquired and governed every single territory during that period as an impermanent entity destined for statehood.¹²² The territories’ admission into the Union often was expressly tied to objective metrics such as reaching certain population

precedents and historical examples relating to the applicability of the Constitution’s separation-of-powers provisions to territorial governments).

118. *McCulloch v. Maryland* explains that questions involving the scope of the federal government’s constitutional powers, “if not put at rest by the practice of the government, ought to receive a considerable impression from that practice,” and notes that such interpretations of the Constitution, “deliberately established by legislative acts, on the faith of which an immense property has been advanced, ought not to be lightly disregarded.” 17 U.S. (4 Wheat.) 316, 401 (1819) (Marshall, C.J.); see Letter from James Madison to Spencer Roane (Sept. 2, 1819), in 8 THE WRITINGS OF JAMES MADISON 447, 450 (Gaillard Hunt ed., 1908) (“[It] was foreseen at the birth of the Constitution, that difficulties and differences of opinion might occasionally arise in expounding terms & phrases necessarily used in such a charter . . . and that it might require a regular course of practice to liquidate & settle the meaning of some of them.”) (omission in original).

119. *Alden v. Maine*, 527 U.S. 706, 743–44 (1999) (quoting *Printz v. United States*, 521 U.S. 898, 905 (1997)).

120. AMAR, *supra* note 116, at 273.

121. *Id.*

122. See *supra* note 115 and accompanying text.

levels.¹²³ The Northwest Ordinance of 1787, which the Continental Congress enacted and the First U.S. Congress re-enacted in 1789, did exactly that.¹²⁴ It guaranteed the inhabitants of the Northwest Territory their eventual admission into the Union, providing for the subdivision of the Territory into smaller soon-to-be states that would be admitted “on an equal footing with the original States, in all respects”¹²⁵ More generally, Congress and the public understood the “Western territory” to be “more than a buffer zone; it would also be the nursery of new states.”¹²⁶

Notably, this practice of treating the territories as temporary entities was not considered to be a matter of legislative prudence. On the contrary, when presented with the alternative possibility of subjecting existing territories to indefinite colonial rule, Congress did not hesitate to reject it. Indeed, in the mid-nineteenth century, Congress rejected the proposal to delay indefinitely the admission of the Florida Territory as a state on the basis that “territorial organization” was “*never* designed for other than a temporary purpose.”¹²⁷ The option of having a permanent territory did not seem constitutionally permissible.

Nineteenth-century Supreme Court precedents confirm that congressional understanding of the territories as impermanent entities. As early as 1820, Chief Justice Marshall described the territorial status as one “of infancy advancing to manhood, looking forward to complete equality [as a state] so soon as that stat[us] of manhood shall be attained.”¹²⁸ In 1894, just before the Spanish-

123. Cession of territory by the states of Virginia and Georgia to the United States made clear that “the territory so ceded should be formed into states, to be admitted, on attaining a certain population, into the Union.” *Shively v. Bowlby*, 152 U.S. 1, 26 (1894) (citing Acts Cong. April 7, 1798, ch. 28, (1 Stat. 549), May 10, 1800, ch. 50, and March 3, 1803, ch. 27, (2 Stat. 69, 229)). Article V of the 1787 Northwest Ordinance provided that “whenever any of the said States shall have sixty thousand free Inhabitants therein, such State shall be admitted by its Delegates into the Congress of the United States, on an equal footing with the original States, in all respects” or even “at an earlier period, and where may be a less number” so long as the admission is “consistent with the general interest of the Confederacy.” Act of Aug. 7, 1789, ch. 8, 1 Stat. 50, 51–53 n.(a).

124. See Act of Aug. 7, 1789, ch. 8, 1 Stat. 50, 51–53 n.(a) (incorporating 1787 Northwest Ordinance art. V).

125. *Id.*; see also AMAR, *supra* note 116, at 273 (describing conditions for admission of new states in the 1787 Northwest Ordinance).

126. AMAR, *supra* note 116, at 273.

127. H.R. REP. NO. 28–577, at 1 (1844) (emphasis added).

128. *Loughborough v. Blake*, 18 U.S. (5 Wheat.) 317, 324 (1820) (Marshall, C.J.).

American War, the Supreme Court stated in unmistakable terms that “territories acquired by Congress, whether by deed of cession from the original states, or by treaty with a foreign country, are held with the object, as soon as their population and condition justify it, of being admitted into the Union as states.”¹²⁹ And even the infamous *Dred Scott v. Sandford*, decades earlier, in 1857, had observed that “no power [is] given by the Constitution to the Federal Government to establish or maintain colonies . . . to be ruled and governed at its own pleasure.”¹³⁰ There was nothing groundbreaking or controversial about these statements. On the contrary, they aptly described Congress’ governance of the territories in accordance with the example that the First Congress set forth when it re-enacted the Northwest Ordinance.

As discussed in Part I.A., by drawing an atextual and novel distinction between territories that were destined for statehood and those that were not, the *Insular Cases* abandoned the original and well-settled understanding of the territorial status as a transient step towards statehood.¹³¹ But even a decade after the decision in *Balzac* in 1922, the Supreme Court continued to highlight the temporary nature of the territorial status. In 1933, in *O’Donoghue*, the Court explained “that as a preliminary step toward that foreordained end [of statehood]—to tide over the period of ineligibility—Congress, from time to time, created territorial governments, the existence of which was necessarily limited to the period of pupilage.”¹³² The Court did not stop there. In addition to “pupilage,”¹³³ the decision also used the words

129. *Shively v. Bowlby*, 152 U.S. 1, 49 (1894).

130. 60 U.S. (19 How.) 393, 446 (1857).

131. *Cabranes*, *supra* note 12, at 411 (“For the first time in American history, ‘in a treaty acquiring territory for the United States, there was no promise of citizenship . . . [nor any] promise, actual or implied, of statehood.’” (alteration in original) (quoting J. PRATT, *AMERICA’S COLONIAL EXPERIMENT* 68 (1950))); *Coleman Tió*, *supra* note 115, at 1394 (“[T]he territorial incorporation doctrine devised by the *Insular Cases* permitted a sharp deviation from prior practice.”); *Boumediene v. Bush*, 553 U.S. 723, 756 (2008) (“[W]hen the Nation acquired noncontiguous Territories . . . at the conclusion of the Spanish-American War . . . Congress chose to discontinue its previous practice of extending constitutional rights to the territories by statute.”).

132. *O’Donoghue v. United States*, 289 U.S. 516, 537 (1933).

133. *Id.* (quoting *Snow v. United States*, 85 U.S. (18 Wall.) 317, 320 (1873); *Nelson v. United States*, 30 F. 112, 115 (C.C.D. Or. 1887)).

“purely provisional,”¹³⁴ “impermanent,”¹³⁵ “inchoate,”¹³⁶ and “temporary”¹³⁷ to describe a territory’s status under the Constitution.

The intended ephemeral condition of the territorial status was highly important to the question presented in *O’Donoghue*. There, the Supreme Court held that the then-existing District of Columbia courts were Article III courts whose judges necessarily must enjoy life tenure during good behavior and irreducible compensation during their continuance in office.¹³⁸ In so holding, the Court explained that the District of Columbia and its courts are “permanent establishments” of the Union that could be vested with Article III judicial power, unlike the territories and their non-Article III courts which are impermanent and not vested with the same power.¹³⁹ In other words, to reach its holding, the Court distinguished the permanency of the District of Columbia as the seat of the federal government from the impermanency of the territories as states-in-waiting.

The distinction between the permanent District of Columbia and the impermanent territories was highly relevant to the holding in *O’Donoghue* because, as discussed, territorial judges do not enjoy the same structural assurances of judicial independence as Article III judges do—namely, life tenure and irreducible compensation. It was precisely because of the temporary status of the territories, the Court explained, that the Constitution’s structural limitations did not constrain territorial governments.¹⁴⁰ More specifically, the Court said it is reasonable to conclude that the makers of the Constitution never intended “to give permanent tenure of office or irreducible compensation to a judge who was to serve during this *limited and*

134. *O’Donoghue*, 289 U.S. at 538.

135. *Id.*

136. *Id.* (quoting *Ex parte Morgan*, 20 F. 298, 305 (W.D. Ark. 1883)).

137. *Id.* (quoting *Pollard v. Hagan*, 44 U.S. (3 How.) 212, 223 (1845)).

138. *Id.* at 551. *But see* *Palmore v. United States*, 411 U.S. 389, 406–07 (1973) (upholding the constitutionality of a District of Columbia Superior Court judge lacking life tenure protection because the judge presided over local matters under Article I’s District Clause and did not exercise the judicial power of the United States under Article III). For a helpful discussion reconciling the seemingly contradictory decisions in *O’Donoghue* and *Palmore*, see Justice Stephen Breyer’s opinion for the Court in *Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC.*, 140 S. Ct. 1649, 1664–65 (2020) (explaining the structural change that Congress had made to the District of Columbia courts between *O’Donoghue* and *Palmore*).

139. *O’Donoghue*, 289 U.S. at 534–45.

140. *Id.* at 537–38; *cf.* ARNOLD H. LIEBOWITZ, *DEFINING STATUS: A COMPREHENSIVE ANALYSIS OF U.S. TERRITORIAL POLICY* 6–10 (1989) (explaining that the consistent evolution from territory to state under Article IV served as a check to Congress’ exercise of its broad territorial powers).

sometimes very brief period under a purely provisional government which, in all cases probably and in some cases certainly, would cease to exist during his incumbency of the office."¹⁴¹

By the same token, there is no evidence that the makers of the Constitution, or anyone in the Founding generation, would have thought that these structural limitations could be excluded *permanently* or even *indefinitely* from the territories. More precisely, there is no indication whatsoever that the Constitution would permit the current situation in which non-Article III courts lacking fundamental assurances of judicial independence can continue to adjudicate cases or controversies arising under the U.S. Constitution and federal law with no end in sight.¹⁴² On the contrary, four decades before *O'Donoghue* and a decade before the first of the *Insular Cases*, the Supreme Court upheld the limited tenure of a non-Article III judge in the Alaska Territory in *McAllister v. United States*, confidently observing: "The absence from the Constitution of such guarantees for territorial judges was no doubt due to the fact that the organization of governments for the territories was but temporary, and would be superseded when the territories became states of the union."¹⁴³

To recapitulate, for more than a century, territorial residents have experienced the indefinite absence of numerous structural protections. That reality flies in the face of the original meaning of the Territory Clause as a source of substantial power over a transient entity. Put simply: The Constitution does not authorize the current colonial reality of the territories—namely, the indefinite exercise of substantial power over a permanent possession.

Some may make the textual argument that the Constitution authorizes Congress to treat the populated territories as permanent possessions that it can dispose of as it deems appropriate. After all, the Territory Clause is in the same sentence as, and shares many of the

141. *O'Donoghue*, 289 U.S. at 537–38 (emphasis added).

142. As a matter of legislative discretion, Congress has established different adjudicative systems in the District of Columbia and the territories ranging from: (1) an ordinary federal district court with life-tenured judges, as it did eventually in Puerto Rico; and (2) courts without such judges, as it has done in territorial courts established under Article IV's Territory Clause and District of Columbia local courts established under Article I's District Clause. See *Examining Bd. of Eng'rs, Architects & Surveyors v. Flores de Otero*, 426 U.S. 572, 594–95 n.26 (1976); S. REP. NO. 89-1504, at 2 (2d Sess. 1966) (explaining that the existing U.S. District Court for the District Court of Puerto Rico would be "in its jurisdiction, powers, and responsibilities the same as the U.S. district courts in the (several) States"); *Palmore v. United States*, 411 U.S. 389, 402–08 (1973).

143. *McAllister v. United States*, 141 U.S. 174, 184, 187–88 (1891).

same words with, the Property Clause (both in Section 3, Clause 2 of Article IV of the Constitution), which provides that “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.*”¹⁴⁴ Given that textual overlap, some might argue that Congress’ power over the populated territories must be the same as its power to acquire, control, administer, and dispose of federal lands (such as national parks) or federal property (such as government buildings).

While there might be many similarities in these powers, centuries of Supreme Court precedent and historical practice demonstrate that their scope is different. Sure, “the word ‘territory,’ as there used, signifies property, since the language is not ‘territory or property,’ but ‘territory or other property.’”¹⁴⁵ But the Supreme Court has held for centuries now that the text of the clause also extends to “[t]he power of governing and of legislating for *a* territory.”¹⁴⁶ And there is “an evident difference between the words ‘the territory’ and ‘a territory’ of the United States.”¹⁴⁷ Whereas the former relates to “a particular part or parts of the earth’s surface—the imperially extensive real estate holdings of the nation,” the latter points to a “governmental subdivision which happened to be called a ‘territory,’ but which quite as well could have been called a ‘colony’ or a ‘province.’”¹⁴⁸ Stated otherwise, whereas the words “the territory” refer to an uninhabited parcel of land or property, the words “a territory” refer to an inhabited U.S. territory.

The Supreme Court has never doubted the constitutional reality that Congress’ authority over federal property is different from its power over the populated territories.¹⁴⁹ For example, separation-of-powers provisions constrain all exercises of federal (national) power—including the disposition and regulation of U.S. lands and property.¹⁵⁰

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

145. *O’Donoghue*, 289 U.S. at 537.

146. *Sere v. Pitot*, 10 U.S. (6 Cranch) 332, 336–37 (1810) (Marshall, C.J.) (emphasis added).

147. *O’Donoghue*, 289 U.S. at 537.

148. *Id.*

149. This constitutional distinction has the added benefit of also being desirable as a normative matter, as it would be repugnant to treat human beings residing in the territories as the functional equivalent of a parcel of land or property belonging to the United States, which would be the necessary consequence of treating the Territory and Property Clauses as wholly identical.

150. *Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 270–71, 275–77 (1991) (holding that law enacted pursuant

They do not constrain, however, Congress' exercise of its *sui generis* (primarily local) power over the U.S. territories.¹⁵¹ As noted above, only the first category is subject to the complex distribution of powers recognized in the Constitution.¹⁵² So, while the non-delegation doctrine arguably prohibits Congress from delegating its legislative power over the national parks to the National Park Service, that doctrine does not constrain Congress from delegating its power over a territory to a territorial legislature as it has done time and time again since 1789.¹⁵³ And, again, the reason why the power over a U.S. territory is less constrained than the power over U.S. property is because the former was meant to be temporary until the territory would join the Union as a state.

In conclusion, the original meaning of the Territory Clause is that Congress has significant authority for the temporary governance of the territories as transitory entities—not significant authority for the indefinite governance of the territories as permanent possessions. The current system in which Congress governs the territories indefinitely as colonies—in the case of Puerto Rico and Guam, for 124 years and counting—constitutes a stark departure from the original public meaning of the Territory Clause. Unsurprisingly, in his powerful dissent in *Downes v. Bidwell* (one of the *Insular Cases*), Justice John Marshall Harlan criticized the departure from that meaning as “wholly inconsistent with the spirit and genius, as well as with the words, of the Constitution.”¹⁵⁴ Indefinite colonial rule, just as the doctrine of territorial incorporation of the *Insular Cases*, is plain and simple: a constitutional anathema.¹⁵⁵

to the Property Clause that created a federal entity to regulate national airports violated the separation of powers).

151. See *Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC.*, 140 S. Ct. 1649, 1654–55, 1665 (2020) (holding that federal statute enacted pursuant to the Territory Clause that created territorial entity with primarily local powers and duties did not violate the Appointments Clause).

152. See *supra* text accompanying notes 73–87. *Aurelius* concluded that “structural constraints . . . apply to all exercises of *federal* power, including those related to Article IV entities,” but not to exercises of “primarily *local* powers” over a U.S. territory. 140 S. Ct. at 1657, 1661, 1664–65 (emphasis added).

153. See *supra* text accompanying notes 78–79. See *generally* Act of Aug. 7, 1789, ch. 8, 1 Stat. 50, 51–53 n.(a) (incorporating the 1787 Northwest Ordinance).

154. 182 U.S. 244, 380 (1901) (Harlan, J., dissenting).

155. See *Igartúa de La Rosa v. United States*, 229 F.3d 80, 89 (1st Cir. 2000) (Torruella, J., concurring) (“*Indefinite* colonial rule by the United States is not something that was contemplated by the Founding Fathers nor authorized *per secula seculorum* by the Constitution.”).

Reclaiming this original meaning of the Territory Clause is essential to making a constitutional case for decolonization—both inside and outside the courtroom. With respect to making the case inside the courtroom, I agree with Justice Brett Kavanaugh’s recent suggestion that, if the Territory Clause is meant to provide for the *temporary* governance of the territories pending their admission as states or their own independence as a sovereign country, the more difficult question is: “How do we figure out . . . when the time has run?”¹⁵⁶ In that regard, there are at least four things that will need to be identified before pressing a legal theory that revolves around the original meaning of the Territory Clause: (1) the legal claim and proper vehicle that would permit further development of this textual and historical case against Congress’ continued exercise of the Territory Clause; (2) a legally cognizable remedy; (3) ways to overcome any justiciability objections by the Government (such as the invocation of the political question doctrine); and (4) whether the Court would need to overrule prior Territory Clause precedents to reach this result and, if so, which ones. These are important and difficult questions worth exploring further.

That said, in determining the extent to which an injured party can judicially enforce the constitutional limits on Congress’ governance of the territories, we can safely assume that a court would not be able to order the admission of a territory as a state, or its independence.¹⁵⁷ These are decisions that the Constitution commits to Congress’ discretion.¹⁵⁸ But there are other ways in which courts could enforce the Constitution’s limits on Congress’ power over the territories. In fact, this Article lays the foundation for one such way. Courts could strike down a federal law or action that hinges on the absence of structural safeguards characteristic of the impermanent territorial condition. They could vacate, for example, decisions by non-Article III judges adjudicating a claim arising under the U.S. Constitution or federal law. The theory is straightforward: The Constitution authorizes the adjudication of federal cases by

156. Oral Argument in *Vaello-Madero*, *supra* note 25, at 57–58 (Justice Kavanaugh suggesting that the Territory Clause has a “time limit . . . of sorts”). *But see id.* at 48, 51 (Justice Kagan calling the argument that the territorial power is temporally limited to be a “big claim” and Justice Breyer characterizing the same as a “big bite in this case, where it isn’t fully argued”).

157. *See* *Igartúa De La Rosa v. United States*, 417 F.3d 145, 152 (1st Cir. 2005) (explaining that “the road to statehood,” or any other change to “the present status of Puerto Rico . . . runs through Congress”).

158. *See, e.g.*, U.S. CONST. art. IV, § 3, cl. 1 (“New States may be admitted by the Congress into this Union . . .”).

non-Article III judges in a territory only to the extent that the territorial government is provisional and impermanent in character.¹⁵⁹ Therefore, decisions by judges lacking life tenure and irreducible compensation in any territory held indefinitely as a possession—namely, an “unincorporated territory,” to use the term of the *Insular Cases*—are repugnant to the Constitution and must be vacated.

With respect to making the constitutional case for decolonization outside of the courtroom, the original meaning of the Territory Clause highlights the inevitable tension that exists between the Constitution and the current colonial reality of the territories. That tension should be compelling enough for the general public and the political branches to act definitively in providing for the formal decolonization of the territories through effective constitutional options.

III. Formal Decolonization of the Territories

In advocating for the territories in the courtroom, we cannot forget, much less become willfully blind to, the fact that there is an obvious step in beginning to tackle America’s colonial problem: the decolonization of the territories as a formal matter. And formal decolonization means that the territories should cease to be territories under the Constitution.

The United States has an obligation to decolonize its territories. Regardless of judicial enforceability, as Part II explains, indefinite colonial rule is constitutionally unauthorized. Moreover, as a member of the community of nations and a state party to the International Covenant on Civil and Political Rights, the United States has an international legal duty to vindicate the right to self-determination of the residents in the territories.¹⁶⁰ And aside from any legal duty to decolonize, there is a moral obligation to do so, since “the citizens of the states have a stake in how the territories are governed” and “how power is exercised in their name.”¹⁶¹ The first step

159. See *supra* text accompanying notes 132–143.

160. See, e.g., International Covenant on Civil and Political Rights, art. 1 ¶ 1, Dec. 16, 1966, 999 U.N.T.S. 171 (“All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”); G.A. Res. 1514 (XV), Declaration on the Granting of Independence to Colonial Countries and Peoples, ¶ 2 (Dec. 14, 1960) (same); Lopez-Morales, *supra* note 5, at 200–15 (discussing obligations of the United States with respect to Puerto Rico under customary international law and the International Covenant on Civil and Political Rights).

161. Neuman, *supra* note 54, at 200.

in the formal decolonization process is to agree on the available options that the Constitution permits.

The first option is for the territory to join the Union as a state. That option, unlike any other, guarantees “complete [formal] equality” under the Constitution.¹⁶² Under statehood, the new state becomes a “separate sovereign” among, and on “equal footing” with, the rest of the states.¹⁶³

The other option is for the territory to join the community of nations as an independent country, like the Philippines did in 1946.¹⁶⁴ The new country would have total control of its domestic and international affairs, including the ability to execute international agreements with other nations. It could even sign a treaty with the United States to become a free-associated state of the United States, as the Federated States of Micronesia, the Republic of the Marshall Islands, and the Republic of Palau have done.¹⁶⁵ But make no mistake, “free association” or any other similar arrangement is just a form of formal independence.¹⁶⁶ Free-associated states (also known as “compact states”) are independent sovereign countries that have entered into an international agreement with the United States.

There are those who think that there is a third option, one in which a territory and the United States enter an irrevocable compact of permanent association—or, at least, one that can only be dissolved by mutual consent. That compact would establish a new entity that is neither a territory nor a state, and guarantees U.S. citizenship to the residents of the new entity. As it relates to Puerto Rico, that largely

162. *Loughborough v. Blake*, 18 U.S. (5 Wheat.) 317, 324 (1820) (Marshall, C.J.).

163. *Puerto Rico v. Sanchez Valle*, 579 U.S. 59, 69 n.4 (2016); *accord* *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 579 (2012) (plurality opinion) (“The States are separate and independent sovereigns.”); *Coyle v. Smith*, 221 U.S. 559, 573 (1911) (“[W]hen a new State is admitted into the Union, it is so admitted with all the powers of sovereignty and jurisdiction which pertain to the original States.”); *Pollard v. Hagan*, 44 U.S. (3 How.) 212, 216 (1845) (“[States are] admitted . . . on an equal footing with the rest.”).

164. *See* Treaty of General Relations Between the United States of America and the Republic of the Philippines, July 4, 1946, U.S.-Phil., 61 Stat. 1174 (providing for and recognizing the independence of the Republic of the Philippines).

165. 48 U.S.C. §§ 1901–1973 (setting forth compact of free association and related agreements with Micronesia, Marshall Islands, and Palau).

166. Letter from Dana J. Boente, Acting Deputy Att’y Gen., to Ricardo A. Roselló Nevares, Puerto Rico Governor, at 2–3 (Apr. 13, 2017) [hereinafter Boente Letter] (on file with the *Columbia Human Rights Law Review*) (“Free Association [is a form of] complete and unencumbered independence.”).

undefined option has sometimes been called an “improved” or “enhanced commonwealth.”¹⁶⁷

Some of the most prominent constitutional and legal scholars of our time have stated in clear and unmistakable terms that, under the Constitution, “[t]here are two, *and only two*, real self-determination options for Puerto Rico [and other territories]: statehood and independence.”¹⁶⁸ Indeed, the third nonstate, nonterritorial option raises serious, if not insurmountable, constitutional problems. As a threshold matter, the text of the Constitution recognizes four distinct categories of entities comprising the United States: the “States,” “the Territor[ies],” “Indian Tribes,” and the “District [of Columbia].”¹⁶⁹ Outside the United States, the Constitution also references “foreign Nations.”¹⁷⁰ All these categories are mutually exclusive, and nowhere does the text authorize Congress to concoct a new constitutional category out of whole cloth.

More generally, other than the Admissions Clause, there is no provision in the Constitution that authorizes one Congress to bind a later one with respect to the treatment of a nonstate entity. The longstanding consensus, for decades now, has been that “Congress does not have the power to create a permanent union between [the territories] and the United States except by admitting [them] into statehood.”¹⁷¹ That has been the position of the executive branch,

167. For a captivating discussion of the continued debate over irrevocable compacts in the context of Puerto Rico, see Ponsa-Kraus, *Political Wine in a Judicial Bottle*, *supra* note 2, at 102, 104–30.

168. Letter from Legal and Constitutional Scholars in Support of the Puerto Rico Admission Act, H.R.1522 & S.780, and in Opposition to the Puerto Rico Self-Determination Act, H.R.2070 & S.865, to Speaker Pelosi, Majority Leader Schumer, and Leaders McCarthy and McConnell (Apr. 12, 2021) [hereinafter Scholars’ Letter] (on file with the *Columbia Human Rights Law Review*).

169. *See, e.g.*, U.S. CONST. art. I, § 8, cl. 3 (Commerce Clause); *id.* art. I, § 8, cl. 17 (District Clause); *id.* art. IV, § 3 (Admissions Clause and Territory Clause); *cf.* *Igartúa v. United States*, 626 F.3d 592, 596 (1st Cir. 2010) (“The text of the Constitution defines the term ‘State’ and affords no flexibility as to its meaning. The term is unambiguous and refers to the thirteen original states . . . and those which have since joined the Union through the process set by the Constitution.”).

170. U.S. CONST. art. I, § 8, cl. 3 (Commerce Clause).

171. Scholars’ Letter, *supra* note 168; *see* *Dorsey v. United States*, 567 U.S. 260, 274 (2012) (“[S]tatutes enacted by one Congress cannot bind a later Congress, which remains free to repeal the earlier statute, to exempt the current statute from the earlier statute, to modify the earlier statute, or to apply the earlier statute but as modified.”) (citing *Reichelderfer v. Quinn*, 287 U.S. 315, 318 (1932)); *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 135 (1810)). The one thing under the Constitution that is permanently binding (and “indestructible”) is statehood. Henry Paul Monaghan, *We the People[s], Original Understanding, and Constitutional Amendment*, 96

including the Office of Legal Counsel at the U.S. Department of Justice, for nearly three decades—that, absent statehood or independence, Congress cannot relinquish its authority over any portion of the United States.¹⁷² Once a territory becomes a sovereign entity—either as a new U.S. state or as an independent country—Congress lacks the constitutional authority to change that status.¹⁷³ And in the context of Congress’ power over the District of Columbia under the District Clause, which is analogous in scope to the power over the territories under the Territory Clause,¹⁷⁴ the Supreme Court has held that Congress’ delegation of authority to a nonstate entity is always subject to the revision, alteration, or revocation of that delegation.¹⁷⁵

COLUM. L. REV. 121, 143 (1996) (“[I]n the new constitutional order, the [Great] Compromise ensured that the states would be part of an ‘indestructible Union, composed of indestructible States.’” (quoting *Texas v. White*, 74 U.S. (7 Wall.) 700, 725 (1868))).

172. Memorandum Opinion, Teresa Wynn Roseborough, Deputy Assistant Att’y Gen., Office of Legal Counsel, *Mutual Consent Provisions in the Guam Commonwealth Legislation* (July 28, 1994); see Letter from Jeffrey A. Rosen, Deputy Att’y Gen., to Juan Ernesto Dávila Rivera, Chairman of the Puerto Rico Elections Comm’n 2 (July 29, 2020) [hereinafter Rosen Letter] (identifying “Statehood” and “independence” as the only legally permissible nonterritorial options); Boente Letter, *supra* note 166, at 2–3 (noting that the Executive Branch has “rejected as unconstitutional previous ‘enhanced Commonwealth’ proposals that would have given Puerto Rico a status outside of the Territory Clause, but short of full independence, and would have further provided that the relationship between the United States and Puerto Rico could only be altered by mutual consent”); Brief for the United States as Amicus Curiae Supporting Respondents at 31–33, *Puerto Rico v. Sanchez Valle*, 579 U.S. 59 (2016) (No. 15-108) [hereinafter U.S. Amicus Brief in *Sanchez Valle*] (collecting sources rejecting mutual consent provisions); see also Lawson & Sloane, *supra* note 14, at 1181 (“[T]he predominant constitutional view . . . is that the Constitution knows only the mutually exclusive categories of ‘State’ and ‘Territory’” (quoting T. ALEXANDER ALEINIKOFF, *SEMBLANCES OF SOVEREIGNTY: THE CONSTITUTION, THE STATE, AND AMERICAN CITIZENSHIP* 89–90 (2002))).

173. See *supra* notes 162–163; Ponsa-Kraus, *Political Wine in a Judicial Bottle*, *supra* note 2, at 123 (“Philippine independence ‘binds’ Congress because the Philippines is a sovereign and independent nation-state, which the United States would have to (re)conquer in order for the grant of independence to be undone.”); *id.* (“And although it has not always been the case, these days international law prohibits conquest.”).

174. Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC., 140 S. Ct. 1649, 1658–59 (2020); *District of Columbia v. Thompson Co.*, 346 U.S. 100, 104–07 (1953).

175. *Thompson Co.*, 346 U.S. at 104–07, 109 (relying upon Territory Clause cases to reach conclusion with respect to revocability of delegations of authority to the District of Columbia).

Moreover, the proponents of the Commonwealth of Puerto Rico already tried to pursue an innovative nonterritorial option in 1952 and did not succeed.¹⁷⁶ While they achieved an unprecedented level of self-government for the island, comparable in many ways to that of the states, there is no question that Puerto Rico remains a territory of the United States. Whatever limited support might have existed for the constitutionality of an “irrevocable” nonstate, nonterritorial option, it was based on largely outdated modes of constitutional interpretation that, just like the *Insular Cases*, purport to elevate political expediency above all else.¹⁷⁷ Those arguments now have little, if any, traction in academic and legal circles. At a minimum, given that “the most telling indication of [a] severe constitutional problem . . . is [a] lack of historical precedent’ to support it,”¹⁷⁸ proponents of nonterritorial options besides the formal categories of statehood or independence bear a heavy burden to prove the options’ constitutionality. And they must do so with legal arguments, not empty rhetoric. That has yet to happen. Meanwhile, the territories’ decolonization is long overdue.

The last three presidential administrations (Obama, Trump, and Biden) have not missed a beat in arguing to the Supreme Court that Congress retains plenary authority over Puerto Rico and the territories.¹⁷⁹ Unfortunately, that zealous energy has not always transferred over to helping territorial residents exercise their right to self-determination. Instead, to use Puerto Rico again as an example, repeated calls for decolonization are often met with indifference, specious objections,¹⁸⁰ or legislative proposals that are clearly

176. See Ponsa-Kraus, *Political Wine in a Judicial Bottle*, *supra* note 2, at 104–07, 122–24.

177. Lawson and Sloane explained that scholars like T. Alexander Aleinikoff “have argued that the Constitution indeed allows the United States to enter into a binding compact with Puerto Rico.” Lawson & Sloane, *supra* note 14, at 1182–83. They note that, “during three previous administrations (Eisenhower, Kennedy, and Ford), U.S. officials in the Department of Justice and elsewhere concluded ‘that Congress had the power to enter into an irrevocable compact.’” *Id.*

178. *Seila Law LLC v. Cons. Fin. Prot. Bureau*, 140 S. Ct. 2183, 2201 (2020) (quoting *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 505 (2010)).

179. See generally Brief for the United States, *United States v. Vaello-Madero*, 141 S. Ct. 1462 (2021) (No. 20-303); U.S. Brief in *Aurelius*, *supra* note 15; U.S. Amicus Brief in *Sanchez Valle*, *supra* note 172.

180. See generally *Rosen Letter*, *supra* note 172, at 3–4 (complaining that recent decolonization plebiscites in Puerto Rico did not include, and thus could not reject, the Commonwealth’s current colonial status). For a straightforward discussion of the Department of Justice’s letter on Puerto Rico’s yes-or-no vote on statehood, and other objections to Puerto Rico’s recent decolonization efforts, see

unconstitutional.¹⁸¹ And, to be sure, partisan politics do not help the decolonization effort either. Ultimately, the swinging pendulum of indifference and obstructionism simply fosters uncertainty, further delaying the decolonization process and hindering the struggle for equality in the territories.

CONCLUSION

The United States has a colonies problem. Overruling the distinction among incorporated and unincorporated territories created in the *Insular Cases*, while necessary and important, will not remove many, if not most, of the obstacles that territorial residents face on a daily basis in their incessant pursuit for justice and equality. Nor would overruling the *Insular Cases* change the legal reality that the territories and the states are distinct entities under the Constitution. To remove those obstacles, and change that reality, formal decolonization must happen. In making the constitutional case for decolonization, this Article identifies two indispensable elements: (1) embracing the original meaning of the Territory Clause as a source of significant authority for the temporary governance of the territories as provisional entities, and (2) reaching a consensus on the viable options for the territories' formal decolonization. Through these elements, this Article lays the foundation for making the constitutional case for decolonization inside and outside of the courtroom, recognizing

Christina D. Ponsa-Kraus, *Make Puerto Rico a State Now*, N.Y. TIMES (Nov. 4, 2020), <https://www.nytimes.com/2020/11/04/opinion/puerto-rico-state.html> [<https://perma.cc/A4SE-596H>] (“Puerto Ricans reject being a territory. But even if they didn’t, the inclusion of a territorial status option would defeat the morally essential purpose of a vote on Puerto Rico’s future: to decolonize Puerto Rico. Continued colonial status does not belong on a decolonization ballot.”).

181. For example, the proposed Puerto Rico Self-Determination Act (H.R.2070 & S.865): (1) calls for a convention in which elected delegates will “debate and draft definitions on self-determination options for Puerto Rico”; (2) “provides for a referendum at the conclusion of the convention among the options it produces”; and (3) “requires Congress to enact a joint resolution ratifying the result of the referendum.” Christina D. Ponsa-Kraus, *The Battle over Puerto Rico’s Future*, BALKINIZATION BLOG (Apr. 21, 2021), <https://balkin.blogspot.com/2021/04/the-battle-over-puerto-ricos-future.html> [<https://perma.cc/ZR9D-H8W6>]. But, as explained above, no Congress can bind itself to ratify the results of a self-determination referendum, much less a later Congress—especially, if the resulting nonterritorial option is unconstitutional. Moreover, by calling for a Puerto Rican constitutional convention to debate and “define non-territorial options other than statehood or independence, the inaptly named Puerto Rico Self-Determination Act disserves its purported goal by perpetuating the pernicious myth that such options exist. They do not.” Scholars’ Letter, *supra* note 166, at 1.

that the time is now for the all of us to end this regrettable colonial experiment and take a giant step towards the endless path of striving “to form a more perfect Union.”¹⁸²

182. U.S. CONST. pmb1.