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SOVEREIGNTY AND DEPENDENCE IN THE AMERICAN EMPIRE: NATIVE NATIONS, TERRITORIES, AND OVERSEAS COLONIES

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ABSTRACT

What justifies plenary powers over Native nations, U.S. territories, and overseas colonies? One answer is the text of the Constitution: the Indian Commerce Clause or the Territorial Clause. Another answer is sovereignty under international law. In this Article, I argue that these legalistic explanations overlook a third answer: that political and judicial actors justified plenary powers based on the colonial notion that these so-called dependent peoples were incapable of self-government.

Members of Congress, presidents, federal judges, and territorial governors reconciled republicanism and colonialism in the American empire by constituting Native nations, the territories, and the overseas colonies as dependent peoples. This Article unmasks how the legal framework of colonialism rested on their infantilization, the temporal character of colonial rule, and the pretense that it was for their benefit. Federal rule was justified because they were "wards of the nation," "in

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a state of infancy," or in "political childhood," waiting to learn how to govern themselves. The Article examines the judicial decisions, political speeches, and academic publications that infantilized these dependent peoples and how tribal and territorial sovereignty was contingent upon an expansive concept of dependency.

The Article is a cautionary tale about redemption through constitutionalism, either judicial constitutionalism (ending plenary powers) or legislative constitutionalism (repurposing plenary powers). Overruling any of the individual cases that legitimized these plenary powers—including United States v. Kagama *or the* Insular Cases*—will not undo colonial dependence or American imperialism. Instead, it will only conceal how the Constitution and the Supreme Court have long been complicit in empire. Constitutional redemption for the benefit of Indigenous peoples and colonized peoples ignores how central dependence and colonialism are to U.S. constitutionalism. Rather than ending or repurposing plenary powers, this Article concludes that only through democratic politics, social movements, and anticolonial solidarities can we undo the dependencies left by colonial rule. The emancipation of dependent peoples will only be possible if democratic decolonization takes precedence over constitutional interpretation.*

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INTRODUCTION

America did not become an empire when it conquered the overseas colonies of Puerto Rico, the Philippines, and Guam. It has always been, in the words of Chief Justice Marshall, "the American empire."[1] At the turn of the twentieth century, territorial expansion and colonialism were part of the constitutional memory of the nation.[2] For Theodore Roosevelt, there was no inconsistency between empire and self-government. Roosevelt recalled that Thomas Jefferson denied self-government to Louisianans because he believed "our new fellow-citizens are as yet as incapable of self-government as children."[3] Through this infantilization, Jefferson and Roosevelt constituted the

1. Loughborough v. Blake, 18 U.S. 317, 319 (1820) (using the term "American empire" as synonymous with the United States, the "name given to our great republic, which is composed of States and territories"). This was the first use of "American empire" in a Supreme Court opinion.

2. *See* Aziz Rana, *Colonialism and Constitutional Memory*, 5 U.C. IRVINE L. REV. 263, 267 (2015) [hereinafter Rana, *Colonialism*].

3. Stephen Wertheim, *Reluctant Liberator: Theodore Roosevelt's Philosophy of Self-Government and Preparation for Philippine Independence*, 39 PRESIDENTIAL STUD. Q. 494, 501 (2009) (citation omitted).

Native nations, the territories, and the overseas colonies as dependent peoples.

The idea of dependence legitimated plenary powers at the Supreme Court and reconciled republicanism and colonialism in constitutional thought. Even today, the legal discourse of dependence continues to bind together tribal and territorial sovereignty.[4] In the words of Justice Sotomayor, "[T]he tribes are just like Puerto Rico in that Congress controls their dependent sovereign nations."[5] These contradictions between sovereignty and dependence, republic and empire, are at the heart of colonial constitutionalism.[6]

Native nations, territories, and overseas colonies are part of a long history of colonial constitutionalism.[7] They were all considered dependent on the federal government and incapable of self-rule. Federal statutes governed them without their consent. While they had no voting representation in Congress, their local laws could not be inconsistent with the Constitution or the laws of the United States.[8] They were sovereign over internal affairs or local matters, but even that could be overridden by Congress.[9] Federal power, described as

4. *See generally* Fin. Oversight & Mgmt. Bd. v. Centro de Periodismo Investigativo, Inc., 598 U.S. 339 (2023) (citing several similar tribal cases when determining whether a statute that establishes a financial oversight board in Puerto Rico abrogates sovereign immunity); Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin, 599 U.S. 382 (2023) (including similar approaches with regards to sovereign immunity).

5. Transcript of Oral Argument at 15, Fin. Oversight & Mgmt. Bd. v. Centro de Periodismo Investigativo, Inc., 598 U.S. 339 (2023) (No. 22-96).

6. *See* Seth Davis, Eric Biber & Elena Kempf, *Persisting Sovereignties*, 170 U. PENN. L. REV. 549, 621–26 (2022) (discussing the "false dichotomy between dependency and sovereignty" in federal Indian law).

7. The similarities do not mean, of course, that the violence and the "intensities of exclusion" each suffered were comparable. Patrick Wolfe, *Corpus Nullius: The Exception of Indians and Other Aliens in US Constitutional Discourse*, 10 POSTCOLONIAL STUD. 127, 130 (2007). Moreover, the settlers of the territories decried when subordination was directed at them, but they were co-authors of Indian subordination and disappearance. *See* AZIZ RANA, THE TWO FACES OF AMERICAN FREEDOM 111 (2010) [hereinafter RANA, TWO FACES] (discussing how territorial expansion was premised on Native disappearance).

8. *See, e.g.*, United States v. Rogers, 45 U.S. 567, 573 (1846) ("[T]he United States will secure to the Cherokee nation the right . . . to make and carry into effect such laws as they may deem necessary . . . . [S]uch laws shall not be inconsistent with the Constitution of the United States . . . ."); Am. Ins. Co. v. 356 Bales of Cotton, 26 U.S. 511, 543 (1828) ("The powers of the territorial legislature extend to all rightful objects of legislation, subject to the restriction, that their laws shall not be 'inconsistent with the laws and Constitution of the United States.'").

9. *See, e.g.*, United States v. Lara, 541 U.S. 193, 200–01 (2004); Binns v. United States, 194 U.S. 486, 491 (1904); Nat'l Bank v. County of Yankton, 101 U.S. 129, 133 (1879). By sovereign over internal affairs, I mean that Native nations, territories, and overseas colonies could decide

plenary, was not subject to significant judicial review.[10] U.S. citizenship did not terminate dependent status.[11] The American empire did not derive its plenary powers over these peoples from the Constitution's enumerated powers.[12] Instead, the infantilization and the constitution of Louisianans, Cherokees, and Puerto Ricans as dependent provided ideological justification for colonial rule. And while the indeterminate text of the Indian Commerce Clause and the Territorial Clause did not constrain federal power,[13] it provided a post hoc legal basis for these plenary assertions of power over dependent peoples.[14]

This Article is about how the legal framework of colonialism rests on the infantilization and constitution of *dependent peoples*.[15] It explores how the infantilization of Native nations, United States territories, and overseas colonies justified colonialism through their

local matters for themselves, but subject to different degrees of congressional oversight. While the terms "sovereign" and "sovereignty" may be confusing and obsolete, I emphasize them because these were the concepts used by presidents, members of Congress, Supreme Court justices, territorial governors, and lawyers throughout the nineteenth and twentieth century. *See generally* DON HERZOG, SOVEREIGNTY, RIP (2020) (proposing the abandonment of the concept of sovereignty from scholarship and political debate).

10. Stephens v. Cherokee Nation, 174 U.S. 445, 478 (1899); Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212, 229–30 (1845).

11. *See* Winton v. Amos, 255 U.S. 373, 392 (1921) ("The guardianship arises from their condition of tutelage or dependency; and it rests with Congress to determine when the relationship shall cease; the mere grant of rights of citizenship not being sufficient to terminate it."); Balzac v. Porto Rico, 258 U.S. 298, 308 (1922) (finding U.S. citizenship for Puerto Ricans "entirely consistent with non-incorporation").

12. Professor Sarah H. Cleveland, in her seminal work on plenary powers, argues that the Supreme Court oscillated between the constitutional text—the Indian Commerce Clause or the Territorial Clause—and attributes inherent in sovereignty. During the Gilded Age, however, this inherent power over Native nations, immigrants, and territories was consolidated through the "plenary powers doctrine." Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 13, 25 (2002). While influenced by her scholarship, I argue that the source of this plenary power was a racialized concept of infantilization and dependence of the Native nations, territories, and overseas colonies. International law was fundamental for the initial development of the idea of sovereign dependent, Davis et al., *supra* note 6, at 559, but the ideas of infantilization and dependence, on their own, also justified denying self-government to dependent peoples.

13. U.S. CONST. art. I, § 8, cl. 3 (Indian Commerce Clause); *id.* art. IV, § 3, cl. 2 (Territorial Clause).

14. Cleveland, *supra* note 12, at 78, 241 ("The Court . . . also began to bring the doctrine within the folds of the Constitution and gradually relocated the power to the Constitution's enumerated clauses."); *see also* Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 192 (1989) ("[T]he central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs . . . ."); District of Columbia v. Carter, 409 U.S. 418, 430 (1973) ("Congress also possessed plenary power over the Territories.").

15. Hawaii v. Mankichi, 190 U.S. 197, 240 (1903) (Harlan, J., dissenting).

lack of capacity for self-rule. The legal discourse of dependence (which this Article also calls guardianship, pupilage, tutelage, and trust) assumed the infantilization of the colonized, the temporary character of colonial rule, and that colonialism was for the colonized people's benefit. These notions were instrumental in shaping the relationship between the central government and its dependent subjects, through which the federal government simultaneously included and excluded these dependent political communities from the constitutional project,[16] promising them eventual sovereignty and inclusion while excluding them from democratic self-government. The idea of dependent peoples, then, provides an essential foundation for the structural relationship between race, empire, and law.

The concept of dependent peoples situates U.S. colonialism within the global structures of empire and white supremacy that were constituted during the European conquest of the Americas. In the subordination of all colonial peoples—first Indigenous peoples, then enslaved people from Africa—"'race' . . . came to signify the respective global statuses of superiority and inferiority, privilege and subordination."[17] The infantilization of Indigenous and other colonial peoples as dependent peoples was fundamental to their racialization and colonial exploitation.

The American empire did not emerge in a vacuum. It was built upon notions that the European powers espoused for centuries prior to the Declaration of Independence. The early justifications for Spanish conquest of the Americas, for example, relied on the idea that Indigenous peoples needed to be Christianized and civilized.[18] Francisco de Vitoria, one of the founders of international law, argued that the Spanish Empire could rule Indigenous peoples "as if they were simply children" because they had a diminished capacity for self-

16. *See generally* Antony Anghie, *Francisco de Vitoria and the Colonial Origins of International Law*, 5 SOC. & LEGAL STUD. 321, 331 (1996) (arguing that "the Indian is excluded from the sphere of sovereignty [and] it is the Indian who acts as the object against which the powers of sovereignty may be exercised"); JOHN REYNOLDS, EMPIRE, EMERGENCY AND INTERNATIONAL LAW 49 (2017) ("[D]econstruction typically points to the exclusion and (attempted) dehumanisation of the colonised population . . . ."); NTINA TZOUVALA, CAPITALISM AS CIVILISATION: A HISTORY OF INTERNATIONAL LAW 2 (2020) (discussing a similar inclusion-exclusion dynamic in international law).

17. CHARLES W. MILLS, THE RACIAL CONTRACT 21 (1997).

18. Anghie, *supra* note 16, at 332.

government.[19] Both American and European imperial projects were premised on the need to civilize dependent peoples who were "incapable of self-government."[20] The "rhetoric of paternalism" has deep roots in American colonial history since it "simply reproduced the British-American colonial relationship and reapplied it westward."[21] The American empire continued the civilization project of European imperialism, and the United States was, therefore, not postcolonial.

The infantilization of dependent peoples is not only central to international law but part of the social imaginary of modernity.[22] Social imaginaries have a "constitutive function"—they make "possible the practices that they make sense of and thus enable."[23] Analogizing Indigenous peoples and other colonial peoples to infants constitutes

19. Francisco de Vitoria, *On the American Indians (De Indis)*, *in* POLITICAL WRITINGS 290 (Anthony Pagden & Jeremy Lawrence eds., 1991).

20. Benjamin A. Coates, *The United States and International Law*, *1776-1939*, *in* A COMPANION TO U.S. FOREIGN RELATIONS: COLONIAL ERA TO THE PRESENT 400, 410 (Christopher R. W. Dietrich ed., 2020).

21. Bethany Harding, "Breaking Up, and Moving Westward": The Search for Identity in Post-Colonial America, 1787-1828, at 92 (May 2015) (Ph.D. dissertation, Marquette University), https://epublications.marquette.edu/dissertations_mu/502 [https://perma.cc/Q3H8-FVCF]. This paternalism also played a key role in subordinating the most numerous of dependent peoples—women. While both "women and children were understood to be dependents of husbands and fathers," in the case of women this dependency was "viewed to be natural and permanent." RANA, TWO FACES, *supra* note 7, at 163. In the era of western expansion and settler colonialism, the status of non-property-holding white male workers as stakeholders in society came at the subordination of women. They did this by stressing the value of their "skilled" labor, as opposed to the "unskilled" labor of women and children. *Id.* While before, independence was synonymous with owning property, in the nineteenth century, "supporting dependents was *evidence* of independence." Nancy F. Cott, *Marriage and Women's Citizenship in the United States, 1830-1934*, 103 AM. HIST. REV. 1440, 1452 (2011). This process elevated a group of white men by reinforcing women's dependency. It established an exclusionary notion of independence whereby being independent meant not being dependent or enslaved. Thus, independence was "inseparably linked to the differentiation between men's and women's roles." Joan R. Gundersen, *Independence, Citizenship, and the American Revolution*, 13 SIGNS 59, 77 (1987). This constitution of women as dependent also had a compounding effect for women who are part of more than one dependent group (that is, indigenous women and colonized women). *See* Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 140 (arguing that the "intersectional experience is greater than the sum of racism and sexism").

22. *See* Ashis Nandy, *Reconstructing Childhood: A Critique of the Ideology of Adulthood*, 10 ALTERNATIVES 359, 360 (1984) (analyzing the relationship between infantilization, colonialism, and modernity); CHARLES TAYLOR, MODERN SOCIAL IMAGINARIES 33 (2004). The idea of "social imaginary" describes "the way our contemporaries imagine the societies they inhabit and sustain." *Id.* at 6.

23. TAYLOR, *supra* note 22, at 183.

them as dependent peoples.[24] It makes imperial practices possible while justifying and enabling them. As a social imaginary, infantilization distorts the capacity for self-government of dependent peoples and provides ideological cover for colonialism.[25] By imagining Indigenous peoples as children with inferior capacity for self-government, European powers justified their role as "permanent guardians."[26] Since the metaphor of childhood legitimizes colonialism,[27] unmasking and deconstructing the ideological work of infantilization is a staple of postcolonial literature.[28]

The concept of dependent peoples can reconcile past and present imperialist projects.[29] It unmasks the ideological resources provided by infantilization, the so-called temporary character of colonial rule, and the pretense that it was all done for the benefit of colonized peoples. Judicial and political actors relied on these notions to justify colonial rule over Indigenous peoples, territories, and overseas colonies. By charting these legal justifications across dependent peoples and across generations, this Article contributes to an emerging scholarship on the continuities in the United States' imperial law and practice.[30]

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24. *See* China Mills & Brenda A. LeFrançois, *Child as Metaphor: Colonialism, Psy-Governance, and Epistemicide*, 74 WORLD FUTURES 503, 511 (2018) ("A key effect of constructing colonized peoples through the metaphor of childhood is to justify governance of the 'natives' . . . ." (citation omitted)).

25. TAYLOR, *supra* note 22, at 183 (describing how a social imaginary "distorts or covers over certain crucial realities").

26. CHERYL MCEWAN, POSTCOLONIALISM AND DEVELOPMENT 136 (2008). The child metaphor also conveyed a "transitional state," Nandy, *supra* note 22, at 360, and "the rhetorical banner of a duty of care," CLARE BARKER, POSTCOLONIAL FICTION AND DISABILITY 7 (2012).

27. Nandy, *supra* note 22, at 360; *see* BARKER, *supra* note 26, at 7 (discussing how the analogy to children is "foundational to the ideology of imperialism").

28. Mills & LeFrançois, *supra* note 24, at 508.

29. *See* Stefan Heumann, The Tutelary Empire: State- and Nation-Building in the 19th Century United States (2009) (Ph.D. dissertation, University of Pennsylvania) (ProQuest) (analyzing the U.S.'s imperial mission in the nineteenth and twentieth centuries); JULIAN GO, AMERICAN EMPIRE AND THE POLITICS OF MEANING 1 (2008) (describing colonial rule over the Philippines and Puerto Rico as "tutelary colonialism"); Alex Tallchief Skibine, *Redefining the Status of Indian Tribes Within Our Federalism: Beyond the Dependency Paradigm*, 38 CONN. L. REV. 667, 671 (2006) (discussing how the U.S.'s approach to Indian tribes closely resembled the protectorate model of European states); Charles R. Venator Santiago, Constitutional Interpretation and Nation Building: The Territorial Clause and the Foraker Act, 1787-1900, at 28 (Sept. 2002) (Ph.D. dissertation, University of Massachusetts Amherst) (ProQuest) (providing previous historical accounts of U.S. imperial history using a tutelary framework).

30. *See* Addie C. Rolnick, *Indigenous Subjects*, 131 YALE L.J. 2652, 2652 (2022); Gregory Ablavsky, *Sovereign Metaphors in Indian Law*, 80 MONT. L. REV. 11, 27–39 (2019); Cleveland, *supra* note 12, at 14; Lauren Benton, *Colonizing Hawai'i and Colonizing Elsewhere: Toward a*

The catchall doctrine of plenary power over territories and Native nations has many similarities—limited judicial review, exclusive power in the federal government, lack of consent, and congressional power over internal affairs even after relinquishment.[31] However, debates over the source of plenary power—whether the Constitution or sovereignty under the law of nations—overshadow the ideological work done by rhetorical appeals to infantilization.

Because references to guardianship, pupilage, and tutelage preceded and justified plenary power, they can help us understand what is imperial about U.S. constitutionalism.[32] Historians have singled out the influence of the ward status of Native American tribes on debates concerning annexation of the Philippines and Puerto Rico.[33] This Article, instead, aims to provide a comprehensive overview of the duality between sovereignty and dependence in the imperial projects of Indigenous dispossession, territorial expansion through the admission of new states, and control of overseas colonies.[34]

History of U.S. Imperial Law, 38 L. & SOC'Y REV. 835, 836 (2004) (book review); Walter L. Williams, *United States Indian Policy and the Debate over Philippine Annexation: Implications for the Origins of American Imperialism*, 66 J. AM. HIST. 810, 810 (1980); Gregory Ablavsky, *The Savage Constitution*, 63 DUKE L.J. 999, 1083–84 (2014) [hereinafter Ablavsky, *Savage Constitution*]; T. ALEXANDER ALEINIKOFF, SEMBLANCES OF SOVEREIGNTY (2002); GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION (1996); Wolfe, *supra* note 7.

31. Cleveland, *supra* note 12, at 5.

32. *See* Oliver Charbonneau, Book Review, *in* H-DIPLO ROUNDTABLE XXI-17, at 4, 7 (2019) (reviewing DANIEL IMMERWAHR, HOW TO HIDE AN EMPIRE (2019)) (asking how "a closer look at the role of tutelary schemes and the intimate realm [might] texture our understanding of U.S. empire").

33. Williams, *supra* note 30; Veta Schlimgen, *The Invention of "Noncitizen American Nationality" and the Meanings of Colonial Subjecthood in the United States*, 89 PAC. HIST. REV. 317, 318 (2020); BLUE CLARK, LONE WOLF V. HITCHCOCK 101–06 (1994).

34. *See* James T. Campbell, Aurelius*'s Article III Revisionism: Reimagining Judicial Engagement with the* Insular Cases *and "The Law of the Territories"*, 131 YALE L.J. 2542, 2643 (2022) (discussing the need to "imagine this law of the territories as a concept adjacent and connected to Federal Indian law"); Rolnick, *supra* note 30, at 2744 ("Because scholars of territorial law tend to focus on one category (colonized status) at the expense of others (racialized or Indigenous), criticism of the *Insular Cases* insufficiently engages with the impact of embracing or rejecting the cases on racialized Indigenous peoples who live there."); Samuel Issacharoff, Alexandra Bursak, Russell Rennie & Alec Webley, *What Is Puerto Rico?*, 94 IND. L.J. 1, 39–44 (2019) (reconsidering the similarities between Puerto Rico and Native nations); Heumann, *supra* note 29 (analyzing the history of empire in the nineteenth century through the metaphor of tutelage but without directly addressing infantilization); José J. Álvarez González, *The Empire Strikes Out: Congressional Ruminations on the Citizenship Status of Puerto Ricans*, 27 HARV. J. ON LEGIS. 309, 313 n.14 (1990) (addressing the need for a "serious, detailed study" on the similarities between Native nations and overseas colonies); Gregory Ablavsky, *Too Much History: Castro-Huerta and the Problem of Change in Indian Law*, 2022 SUP. CT. REV. 293, 304–

Recent constitutional histories highlight the significance of slavery, native dispossession, territorial expansion, and overseas colonies in shaping constitutional law and constitutional politics.[35] This Article expands upon this scholarship by integrating the law of Native nations, territories, and overseas colonies into a unified law of dependent peoples. Individually, these polities exhibit inherent contradictions—being both sovereign and dependent, operating within constitutional and extraconstitutional contexts, and having unremarkable and anomalous characteristics.[36] However, by weaving them together, we can contextualize these tensions within the broader framework of liberal imperialism.[37] Tracing these continuities in empire-building can, therefore, further reveal the centrality of race and empire to U.S. constitutionalism.

Racism and imperialism were not mere "aberrations"[38] or "mistakes" corrected throughout U.S. history.[39] Instead, as Aziz Rana argues, the constitutional ideals of republicanism, equality, and liberty

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05 (2023) [hereinafter Ablavsky, *Too Much History*] (discussing how both the narrative of subordination and the narrative of tribal sovereignty are part of federal Indian law).

35. *See* Maggie Blackhawk, *Legislative Constitutionalism and Federal Indian Law*, 132 YALE L.J. 2205, 2205 (2023) [hereinafter Blackhawk, *Legislative Constitutionalism*]; K-Sue Park, *The History Wars and Property Law: Conquest and Slavery as Foundational to the Field*, 131 YALE L.J. 1062, 1062 (2022); Davis et al., *supra* note 6; Aziz Rana, *How We Study the Constitution: Rethinking the* Insular Cases *and Modern American Empire*, 130 YALE L.J.F. 312, 314 (2020) [hereinafter Rana, *How We Study*]; RANA, TWO FACES, *supra* note 7; Ablavsky, *Savage Constitution*, *supra* note 30, at 1003; Maggie Blackhawk, *Federal Indian Law as Paradigm Within Public Law*, 132 HARV. L. REV. 1787, 1789 (2019) [hereinafter Blackhawk, *Federal Indian Law*]; Dorothy E. Roberts, *The Supreme Court, 2018 Term—Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 51 (2019); Sam Erman, *Truer U.S. History: Race, Borders, and Status Manipulation*, 130 YALE L.J. 1188, 1188 (2021) [hereinafter Erman, *Truer U.S. History*]; WALTER JOHNSON, THE BROKEN HEART OF AMERICA 5 (2020).

36. *See* Davis et al., *supra* note 6, at 621 (analyzing the dichotomy between sovereignty and dependency); Christina D. Ponsa-Kraus, *The* Insular Cases *Run Amok: Against Constitutional Exceptionalism in the Territories*, 131 YALE L.J. 2449, 2455 (2022) [hereinafter Ponsa-Kraus, Insular Cases *Run Amok*] (discussing how the standard account of the *Insular Cases* mistakenly considers the unincorporated territories as an "extraconstitutional zone"); Angela Riley, *Native Nations and the Constitution: An Inquiry into "Extra-Constitutionality"*, 130 HARV. L. REV. F. 173, 199 (2017) (arguing that "it is perhaps time to reframe the narrative and to highlight the rather *unremarkable* aspects of Indian law" rather than the anomalous or extraconstitutional); Gerald L. Neuman, *Anomalous Zones*, 48 STAN. L. REV. 1197, 1201 (1996) (describing the idea of the "anomalous zones" within the United States).

37. *See* KARUNA MANTENA, ALIBIS OF EMPIRE 21 (2010) ("Liberal imperialism came to embody a coherent ideology marked by an intersecting set of justifications and governing strategies centered on the duty of liberal reform as the primary purpose of imperial rule.").

38. MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 184 (1999).

39. MAHMOOD MAMDANI, NEITHER SETTLER NOR NATIVE 37 (2020).

were premised on the exclusion and subordination of dependent peoples, including native people, enslaved people, women, and colonial subjects.[40] Against the narrative of American exceptionalism that "erases, almost entirely, the colonial structure of the American past,"[41] this Article provides a "new mirror" to make visible the legacy of colonialism in constitutional law and politics.[42]

This historical narrative will explore the mutually constitutive relationship of law, race, and empire through the political and judicial decisions that infantilized and constituted dependent peoples.[43] The main goal of this legal history is "imagining emancipatory alternatives."[44] It is a history of the past of empire in service of the future of Native nations and U.S. territories.[45] The history narrated here should lead us to deprioritize the United States Constitution, judicial review, and overruling cases as paths forward to decolonize and undo colonial dependence.[46] If the American empire was hidden through the concept of dependent peoples,[47] then unmasking

40. RANA, TWO FACES, *supra* note 7, at 12 ("[S]ettlers viewed republicanism as constitutively bound to empire and expansion."); *see also* Ablavsky, *Savage Constitution*, *supra* note 30, at 1087 (explaining that originalism needs to wrestle with the uncomfortable idea that "[s]lavery was not an island of oppression in a sea of liberty").

41. Rana, *Colonialism*, *supra* note 2, at 267. The liberal-democratic tradition makes invisible the coexisting illiberal, racist, and imperial traditions. ROGERS SMITH, CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY 3 (1999).

42. MAMDANI, *supra* note 39, at 39 ("Perhaps what is needed, then, is a new mirror: a new story of what America is, written through careful attention both to what happened and to the ways in which these events have been narrated and interpreted.").

43. This will be a top-down approach to colonial history, focusing on the discourses used by Justices of the Supreme Court, members of Congress, presidents, and the professional elite. The purpose is to find how these constitutional and political actors reconciled republicanism and colonialism by invoking the concept of dependent peoples' incapacity for self-government.

44. RANA, TWO FACES, *supra* note 7, at 17; *see also* Justin Desautels-Stein & Samuel Moyn, *On the Domestication of Critical Legal History*, 60 HIST. & THEORY 296, 310 (2021) ("[I]t seems worthwhile once again to wonder how legal history . . . can return to the service of human emancipation.").

45. *See* RANA, TWO FACES, *supra* note 7, at 17 ("[H]istory is presented in the service of today's problems as well as tomorrow's latent possibilities."); HANS-GEORG GADAMER, PHILOSOPHICAL HERMENEUTICS 9 (David E. Linge ed., David E. Linge trans., Univ. of Cal. Press 2008) ("History is only present to us in light of our futurity.").

46. *See* ADOM GETACHEW, WORLDMAKING AFTER EMPIRE 17 (2019) (conceptualizing decolonization as "undoing the dependencies that colonial domination left behind"); *infra* Part IV.

47. *See* Erman, *Truer U.S. History*, *supra* note 35, at 1207 ("[L]aw concealed empire within doctrinal ambiguity."); Sam Erman, *Status Manipulation and Spectral Sovereigns*, 53 COLUM. HUM. RTS. L. REV. 813, 817–18 (2022) [hereinafter Erman, *Status Manipulation*] (describing how,

dependence will be necessary to imagine new paths of emancipation for Native nations, Indigenous peoples, and for Puerto Rico, Guam, American Samoa, the U.S. Virgin Islands, and the Northern Mariana Islands.[48]

This Article proceeds in four parts. The concept of dependent peoples provides a conceptual link between Native nations (Part I), territories that became states (Part II), and the overseas colonies (Part III). Part I considers how constituting Native nations as dependent structured their relationship with the federal government.[49] The *Marshall Trilogy* described Indians as "domestic dependent nations" and "ward[s]" of the national government.[50] Although dependent, sovereignty over internal affairs was vaguely reserved to the Native nations.[51] Their infantilization, however, also laid the seeds for comprehensive assertions of federal authority.[52] In cases like *United States v. Kagama*[53] and *Lone Wolf v. Hitchcock*,[54] the infantilization analogy became an independent source of plenary power.[55] The federal government retained power to interfere in internal affairs and to abrogate previous renunciations of sovereignty. Since the mid-twentieth century, the Supreme Court has retracted from asserting inherent powers, but it still reiterates the ward status of and plenary authority over Native nations.[56]

Part II discusses the U.S. territories that were also analogized to infants in a state of pupilage. It begins with the Northwest Ordinance

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through legal doctrines and "status manipulation," federal courts obfuscate the American empire).

48. While I am focusing here on what they have in common through the concept of dependent peoples, there are also important differences between Native nations, U.S. territories, and overseas colonies. *See* Rolnick, *supra* note 30, at 2667 (discussing the differences between indigeneity, Indian, and colonized peoples). One notable distinction is that overseas colonies are not susceptible to state encroachment to the same extent as Native nations, an issue that persists to this day. *See* Oklahoma v. Castro-Huerta, 142 S. Ct. 2486 (2022).

49. *See infra* Part I.A.

50. Cherokee Nation v. Georgia (*Cherokee Nation*), 30 U.S. (5 Pet.) 1, 17 (1831).

51. The extent of tribal sovereignty over internal affairs is still debated today. *See* Haaland v. Brackeen, 599 U.S. 255, 307 (2023) (Gorsuch, J., concurring) ("Indian Tribes remain independent sovereigns with the exclusive power to manage their internal matters.").

52. *See infra* Part I.B.

53. United States v. Kagama, 118 U.S. 375 (1886).

54. Lone Wolf v. Hitchcock (*Lone Wolf*), 187 U.S. 553 (1903).

55. *See id.* at 567; *Kagama*, 118 U.S. at 384.

56. *See infra* Part I.C.

and its model of temporary territorial government prior to statehood.[57] Territorial government and the admission of new states went together in the constitutional text,[58] but the indeterminacy of the Territorial Clause left open questions regarding the scope of federal power and the status of future territories. Though it did not fully answer these questions, the Supreme Court stated that territories were in a "state of infancy advancing to manhood."[59]

While federal power over the territories was initially uncontroversial, the extension of slavery placed the status of the territories at the forefront of constitutional debates. Proslavery sympathizers defended territorial sovereignty and rejected federal interference with slavery, now conceptualized as an internal affair. In *Dred Scott v. Sandford*,[60] Chief Justice Taney limited the scope of the Territorial Clause, restricted federal power over slavery in the territories, and banned keeping territories in a permanent state of dependence.[61] This was a model of territorial sovereignty for slave owners at the expense of enslaved and Indigenous peoples. During the Gilded Age, the Supreme Court and Congress abandoned territorial sovereignty in territories that were not sufficiently settled by Anglo-Saxon populations. Because of the lack of racial homogeneity and cultural assimilation, Congress prolonged the territories' state of infancy and the Supreme Court justified plenary power over the territories.[62]

Part III starts by exploring the intellectual and political debate concerning the annexation of the Philippines and Puerto Rico.[63] The Spanish-American War eroded *Dred Scott*'s prohibition on permanent dependencies and the promise of statehood for U.S. territories. Whether colonial rule could be temporary or permanent was influenced on one side by the ward status of Native nations and on the other by the notion of temporary territorial rule prior to statehood. A close reading of *Downes v. Bidwell*,[64] the most important of the *Insular*

57. *See infra* Part II.A.

58. *See* U.S. CONST. art. IV, § 3, cl. 1 (New States Clause); *id.* cl. 2 (Territorial Clause).

59. Loughborough v. Blake, 18 U.S. 317, 324 (1820).

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

61. *See id.* at 432, 501; *infra* Part II.C.

62. *See infra* Part II.D.

63. *See infra* Part III.A.

64. Downes v. Bidwell, 182 U.S. 244 (1901).

Cases, shows that the Supreme Court did not fully address whether the federal government could *permanently* rule territories.[65] Instead, it continued the rhetoric of temporality while deferring all colonial governance decisions to the political branches. These overseas colonies, then, did not constitute a radical break with previous territorial thought, but a continuation of the central ideas of colonial governance.[66]

In the twentieth century, federal courts read plenary power over the territories into the Territorial Clause without narrowing congressional power over the territories or their internal affairs, just like federal rule over Native nations.[67] And the most recent Supreme Court cases show that plenary power over the territories, once premised on their temporary infant situation, is still exerted over territories that can no longer be deemed temporary.[68] The Supreme Court now disowns the *Insular Cases*, but it continues to legitimize these plenary powers by comparing Puerto Rico to the pupilage of Native nations and the temporary U.S. territories.[69]

Part IV explores the interconnectedness of the paths of emancipation for Native nations and overseas colonies and the limitations of recent judicial engagement. It discusses three paths forward: ending plenary powers through judicial constitutionalism, repurposing plenary powers through legislative constitutionalism, and deconstitutionalizing colonialism through democratic decolonization. Part IV concludes that only through democratic politics, social

65. *See id.* at 299; *infra* Part III.B. These cases were initially referred to as the "Insular Tariff Cases" because they explored whether Congress could impose distinct tariffs on the states and the insular territories. De Lima v. Bidwell, 182 U.S. 1, 1–2 (1901); *see also* Goetze v. United States, 182 U.S. 221, 221 (1901); Dooley v. United States, 182 U.S. 222, 222 (1901); Armstrong v. United States, 182 U.S. 243, 244 (1901); Downes v. Bidwell, 182 U.S. 244 (1901); Huus v. N.Y. & Porto Rico S.S. Co., 182 U.S. 392, 392, 397 (1901) (reviewing whether tariff laws applied). On the *Insular Cases*, see *infra* note 388.

66. *See* Christina Duffy Burnett [Ponsa-Kraus], Untied *States: American Expansion and Territorial Deannexation*, 72 U. CHI. L. REV. 797, 814–15 (2005) [hereinafter Burnett, Untied *States*] (arguing that there is continuation between previous territories and the new overseas colonies); Christina Duffy Burnett & Burke Marshall, *Between the Foreign and the Domestic: The Doctrine of Territorial Incorporation, Invented and Reinvented*, *in* FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION, AND THE CONSTITUTION 1, 10–11 (Christina Duffy Burnett & Burke Marshall eds., 2001) (providing an overview of the *Insular Cases*); *infra* Part III.C.

67. *See* District of Columbia v. Carter, 409 U.S. 418, 430 (1973).

68. *See* United States v. Vaello Madero, 596 U.S. 159, 187 (2022) (Gorsuch, J., concurring).

69. *See* Fin. Oversight & Mgmt. Bd. v. Aurelius Inv., LLC, 140 S. Ct. 1649, 1665 (2020).

movements, and anticolonial solidarities can we imagine new forms of sovereignty and democratic self-governance that challenge colonial dependence.[70]

I. "WARDS OF THE NATION": INFANTILIZATION OF NATIVE NATIONS

This Part is divided into three sections: first, the founding period and the *Marshall Trilogy* (I.A); second, the antecedents to and consolidation of the plenary power doctrine (I.B); and finally, the concealment of colonialism from the doctrine of plenary power (I.C). These sections trace how the rhetorical appeal to infantilization—the constitution of Native peoples as *wards of the nation*—was a recurring theme in the colonization of Indigenous peoples. Through this periodization, we can understand how Native dependency was not a constant or a natural state but constituted, challenged, reconstituted, and hidden.

A. The Origins of "Wardship"

1. *Friendship and Protection Between Native Nations and the United States.* Infantilization makes us see Indigenous peoples as dependent on the federal government rather than how they were progressively characterized as dependent. Prior to European conquest, however, their sophisticated agricultural system was capable of sustaining a human population of millions.[71] Native nations organized politically through a federal structure known as the Iroquois League.[72] In the years prior to the American Revolution, the British crown increasingly recognized Native sovereignty through treaties.[73] For instance, the Royal Proclamation of 1763 acknowledged "preexisting rights to self-government" for Native tribes and treated them as subjects who could ask the British crown for protection.[74]

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70. *See* Amna A. Akbar, Sameer M. Ashar & Jocelyn Simonson, *Movement Law*, 73 STAN. L. REV. 821, 881 (2021).

71. PEKKA HÄMÄLÄINEN, INDIGENOUS CONTINENT: THE EPIC CONTEST FOR NORTH AMERICA 62 (2022).

72. *See id.* at 124.

73. *See* Mary Sarah Bilder, *Without Doors: Native Nations and the Convention*, 89 FORDHAM L. REV. 1707, 1711 (2021).

74. *Id.* (quoting COLIN G. CALLOWAY, THE SCRATCH OF A PEN 96–97 (2007)).

This recognition of British subjecthood angered the colonists, who denounced their equalization with the "merciless Indian Savages."[75] After independence, however, the Confederation Congress followed British precedent and formalized relationships with Native nations to neutralize the threat of other European empires.[76] Since the Six Nations refused "to be treated as Dependents," George Washington recommended negotiating with them, culminating with the Treaty of Fort Stanwix of 1784.[77] In 1785, in three treaties with the Cherokee, Choctaw, and Chickasaw peoples—collectively known as the Treaty of Hopewell—the United States declared its commitment to the "protection" of the Indians, especially against white settlers in their lands.[78] All treaties ended by asserting that, with "friendship re-established," the parties must preserve peace and friendship.[79]

While the language of *friendship* implied an equal relationship between sovereigns, the term *protection* proclaimed sovereignty over Indian peoples and anticipated their eventual dependent status.[80] In practice, however, both friendship and protection were unfulfilled promises. New York, Georgia, and North Carolina asserted sovereign rights to interfere with the Indians.[81] Questions of who should manage Indian affairs, the source and scope of that power, and the related topic of territorial expansion and statehood were at the forefront of the Philadelphia Convention and the eventual ratification of the

75. THE DECLARATION OF INDEPENDENCE para. 29 (U.S. 1776); RANA, TWO FACES, *supra* note 7, at 96.

76. Bilder, *supra* note 73, at 1713–14.

77. Ablavsky, *Savage Constitution*, *supra* note 30, at 1020 (quoting James Duane's Views on Indian Negotiations (July/Aug. 1784), *in* 18 EARLY AMERICAN INDIAN DOCUMENTS: TREATIES AND LAWS, 1607-1789: REVOLUTION AND CONFEDERATION 299 (Alden T. Vaughan gen. ed., Colin G. Calloway ed., 1994)).

78. *See id.* at 1029. The Cherokee treaty even recognized their right to send a deputy to Congress. Treaty of Hopewell, Cherokees-U.S., art. XII, Nov. 28, 1785, 7 Stat. 18 ("[T]hey shall have the right to send a deputy of their choice, whenever they think fit, to Congress."); *see also* Bilder, *supra* note 73, at 1714.

79. Bilder, *supra* note 73, at 1714.

80. Lauren Benton, *Shadows of Sovereignty: Legal Encounters and the Politics of Protection in the Atlantic World*, *in* ENCOUNTERS OLD AND NEW IN WORLD HISTORY 136, 144 (Alan Karras & Laura J. Mitchell eds., 2015) ("Americans referred to protection as a way of announcing claims to sovereignty."); PATRICK WOLFE, TRACES OF HISTORY 150 (2016) (arguing that the paternalistic language of the Treaty of Greenville of 1795 anticipated the rhetoric of guardianship of the *Marshall Trilogy*).

81. Ablavsky, *Savage Constitution*, *supra* note 30, at 1042.

Constitution.[82] The delegates at the Constitutional Convention carefully designed the Territorial Clause (also known as the Property Clause[83]), the Compact Clause, the Treaty Clause, and the Supremacy Clause to "protect and restrain Indians and states alike."[84] Meanwhile, the Indian Commerce Clause, which recognizes congressional power to "regulate Commerce . . . with the Indian Tribes," was added to the Commerce Clause near the end of the convention, then neglected during debates over ratification and the first decades after.[85] But even though the Indian Commerce Clause was not the focus, Indian dispossession and territorial expansion were animating reasons for ratifying the new Constitution.[86]

Despite the centrality of these issues in the Constitution, early U.S. policy towards the Indians was more concerned with the law of nations, the rules governing the relations between nations, than the four corners of the constitutional text.[87] Thomas Jefferson—who claimed a right of preemption for the United States through purchase or other just means—argued that, although Native nations retained their natural rights, "no other white nation can become their patrons, protectors or Mediators."[88] Protection and preemption were, then, interwoven and gradually became a crucial instrument in Indian dispossession, despite their lack of consent.[89]

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82. *Id.* at 1050–51; John Hayden Dossett, *Indian Country and the Territory Clause: Washington's Promise at the Framing*, 68 AM. U. L. REV. 205, 216 (2018).

83. Following *Downes v. Bidwell*, 182 U.S. 244, 250 (1901), I will call it the Territorial Clause instead of the Property Clause or the Territory Clause.

84. Ablavsky, *Savage Constitution*, *supra* note 30, at 1007; *see also* Dossett, *supra* note 82, at 216 ("[C]ontending that the Territory Clause is a primary source of authority in Indian affairs.").

85. Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 YALE L.J. 1012, 1022 (2015) [hereinafter Ablavsky, *Beyond the Indian Commerce Clause*]; *see* Robert N. Clinton, *The Dormant Indian Commerce Clause*, 27 CONN. L. REV. 1055, 1157–58 (1995); Bilder, *supra* note 73, at 1717–18 (describing the Indian Commerce Clause as a "fail-safe").

86. Ablavsky, *Savage Constitution*, *supra* note 30, at 1002.

87. Henry Knox, Secretary of War, stated that "Indians possess the natural rights of man." Ablavsky, *Savage Constitution*, *supra* note 30, at 1061–62.

88. *Id.* at 1064 (quoting Notes for a Conversation with George Hammond (ca. Dec. 10, 1792), *in* 24 THE PAPERS OF THOMAS JEFFERSON 717, 717 (John Catanzariti ed., 1990)).

89. ALAN TAYLOR, THE DIVIDED GROUND 404 (2006) ("[A]nything more than a partisan fiction asserted to dispossess native people."); Ablavsky, *Beyond the Indian Commerce Clause*, *supra* note 85, at 1074 ("The Natives quickly pointed out the flaw in the officials' international law argument: the absence of Native consent.").

2. *Tribal Sovereignty at the Supreme Court: The* Marshall Trilogy. The Supreme Court constitutionalized these ideas of protection and preemption in three cases penned by Chief Justice Marshall, collectively known as the *Marshall Trilogy*.[90] In these cases, the Supreme Court infantilized and characterized the Native nations as dependent peoples. *Johnson v. M'Intosh*,[91] the first of these cases, voided the sale of land by tribal chiefs to Thomas Johnson, a private U.S. citizen.[92] According to the Court, when the European powers discovered the Americas, they had to sort out who among the Europeans had title to the land. The doctrine of discovery, a creation of the law of nations, asserted that the discovering nation had "the sole right of acquiring the soil from the natives."[93] Once the European nation and the Native people established relations, no other power could interfere. While the right of occupation or possession laid with the Native tribes, discovery gave "exclusive title" and "ultimate dominion" to the European power, who could also "extinguish the Indian title of occupancy, either by purchase or by conquest."[94] Once title by conquest was declared, courts could not interfere.[95] Marshall found "some excuse" for this arrangement "in the character and habits of the people whose rights have been wrested from them."[96] And although "deemed incapable of transferring the absolute title to others," Indians were to be "protected" in their possession.[97] Because they were considered not only "a dependent" but also "a distinct people," treaties were made with them to preserve peace and restrain white settlers.[98] Following early U.S. policy, protection and the right of preemption supported each other.

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90. *See generally* Worcester v. Georgia, 31 U.S. 515 (1832) (holding that a Georgia statute that forbade white persons from residing in Cherokee Nation without a license from Georgia was unconstitutional); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831) (holding that the Cherokees were not a foreign state in the constitutional sense and instead were domestic dependent nations); Johnson v. M'Intosh, 21 U.S. 543 (1823) (holding that the doctrine of discovery gave European powers that discovered land exclusive title and gave Indians right of possession or occupation).

91. Johnson v. M'Intosh, 21 U.S. 543 (1823).

92. *Id.* at 604–05.

93. *Id.* at 573.

94. *Id.* at 574, 587.

95. *See id.* at 589 ("It is not for the Courts of this country to question the validity of this title, or to sustain one which is incompatible with it.").

96. *Id.*

97. *Id.* at 591.

98. *Id.* at 596.

In *Johnson*, dependency granted the Indians a limited right of possession but not dominion. In *Cherokee Nation v. Georgia*,[99] however, dependency meant their exclusion from federal courts.[100] The Supreme Court decided that the Cherokees were not a foreign state in the constitutional sense and could not file an injunction against Georgia to protect their lands.[101] Instead, the Indians residing within U.S. territory were "domestic dependent nations"[102] in a "state of pupilage," and "[t]heir relation to the United States resemble[d] that of a ward to his guardian."[103] Marshall asserted that the Cherokees acknowledged in the Treaty of Hopewell that they were "under the protection of the United States," and that they "address the president as their great father."[104] Marshall found additional support in the Indian Commerce Clause, which distinguishes foreign nations from Indian tribes, impairing Indian tribes from being deemed foreign nations.[105] The main force of the argument, however, was not the constitutional text but their domestic dependent status.[106]

Finally, in *Worcester v. Georgia*,[107] the Supreme Court declared unconstitutional a Georgia statute that forbade white persons from residing in Cherokee Nation without a license from Georgia.[108] While neither the Cherokee Nation nor any other Native nation was a party in the litigation, Marshall still reassessed the relationship between

99. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831).

100. *See id.* at 20.

101. *Id.* at 19–20.

102. *Id.* at 17.

103. *Id.*

104. *Id. See* MICHAEL PAUL ROGIN, FATHERS AND CHILDREN: ANDREW JACKSON AND THE SUBJUGATION OF THE AMERICAN INDIAN 209 (2009) ("To break the strength tribes derived from their historic territory, and to demonstrate the subordinate Indian position, white authorities had insisted since colonial days that Indians address them as 'father.'").

105. *Cherokee Nation*, 30 U.S. at 18.

106. *See id.* at 53 (Thompson, J., dissenting). For Justice Thompson, dissenting with Justice Story, to be a "sovereign" means to "govern itself by its own authority and laws." *Id.* Citing extensively from Emer de Vattel's *The Law of Nations*, Thompson argued that a state or nation does not "cease to be sovereign and independent states, so long as self government, and sovereign and independent authority is left in the administration of the state." *See id.* at 53–54. Through the Hopewell Treaties, Cherokee Nation sought the protection of the United States, but it remained a foreign nation. *Id.* at 66. Chief Justice Marshall encouraged Thompson to write this dissent, and some of its arguments were eventually adopted by Marshall in *Worcester v. Georgia*, 31 U.S. 515, 561 (1832). FRANCIS N. STITES, JOHN MARSHALL: DEFENDER OF THE CONSTITUTION 162–63 (1981).

107. Worcester v. Georgia, 31 U.S. 515 (1832).

108. *Id.* at 595–96.

Native tribes and the state and national governments. The decision clarified that the right to acquire Native lands comes only from purchase, if "the natives were willing to sell," or "*defensive* war."[109] Native nations, which Marshall once again analogized to children,[110] declared dependence to the European power but only "so long as their actual independence was untouched, and their right to self government acknowledged."[111] Great Britain, in fact, "considered them as nations capable . . . of governing themselves, under her protection."[112] The ninth article of the Hopewell Treaty with the Cherokee Nation, which conferred the "exclusive right of regulating the trade with the Indians, and *managing all their affairs*" to the United States "for the benefit and comfort of the Indians," did not surrender this self-governance.[113] According to Marshall, the United States could regulate trade but not "the management of all their affairs."[114]

Marshall cited Emer de Vattel, known to the founding generation for his work *The Law of Nations*, on the law of protectorate, which recognized that states did not cease to be sovereign "so long as self government and sovereign and independent authority are left in the administration of the state."[115] The Native tribes, then, were a distinct political community, capable of self-government over "internal affairs."[116] Since no state could interfere with the Cherokee Nation—only the federal government—Georgia's statute was declared unconstitutional.[117]

In these three cases, Marshall invoked the doctrine of discovery of the law of nations to legitimize federal control. However, most international lawyers rejected the doctrine of discovery.[118] Among

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109. *Id.* at 545.

110. *Id.* at 547 (describing that, for Indians, it was immaterial "whether they were called the subjects, or the children of their father in Europe").

111. *Id.*

112. *Id.* at 548.

113. *Id.* at 553.

114. *Id.* at 554.

115. *Id.* at 561; Skibine, *supra* note 29, at 671 (discussing the influence of the law of protectorate on Marshall).

116. *Worcester*, 31 U.S. at 547.

117. *Id.* at 562.

118. Douglas Lind, *Doctrines of Discovery*, 13 WASH. U. JURIS. REV. 1, 62 (2020) (To most of the natural lawyers, Marshall's "account of discovery would have seemed presumptuous and unlawful."); Andrew Fitzmaurice, *Discovery, Conquest, and Occupation of Territory*, *in* THE OXFORD HANDBOOK OF THE HISTORY OF INTERNATIONAL LAW 840, 841 (Bardo Fassbender &

discovery scholars, only Vattel argued that European powers could take Indigenous lands since they were not being used productively by European standards.[119]

The long-term influence of the *Marshall Trilogy*, however, did not depend exclusively upon its incorporation of international law.[120] Instead, infantilization—Native nations' so-called dependence on the federal government—became its own argument for federal protection and federal power.[121] First, the Supreme Court established the right of preemption; then it disclaimed that Native tribes were foreign states; and, finally, it stopped states from interfering with Native tribes. Native dependence was elastic enough to encompass all three decisions while recognizing the exclusive province of the federal government and tribal sovereignty over internal affairs. In *Worcester*, tribal sovereignty and federal dependence went together to protect the Indians from state encroachment.[122] Nothing, however, could now stop Congress—with the support of federal courts—from twisting dependency to an inherent source of plenary power over internal affairs.[123]

B. Dependency as Independent Justification for Plenary Power

The *Marshall Trilogy* left the place of Native tribes within the U.S. constitutional system ambiguous. Questions remained about the source and scope of tribal sovereignty, the source and scope of congressional power over Native internal affairs, whether Congress could abrogate treaties without Native consent, whether Congress could relinquish its powers over Native nations, and the relationship between citizenship and guardianship. Of the *Marshall Trilogy*,

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Anne Peters eds., 2012) ("[T]he history of the law of nations . . . has largely been opposed to the principle of discovery." (citation omitted)).

119. Lind, *supra* note 118, at 62.

120. *See* Davis et al., *supra* note 6, at 559 (discussing how the *Marshall Trilogy* is consistent with the idea of "dependent sovereignty in international law"); *see also* Ablavsky, *supra* note 30, at 1079 (describing the similarities between the *Marshall Trilogy* and "earlier thinking about Native sovereignty").

121. MAMDANI, *supra* note 39, at 46 ("[T]he infantilization of Indians became an argument for federal 'protection' . . . ."); WOLFE, *supra* note 80, at 159 ("[D]ependency, like wardship, connotes both a condition that warrants protection and a state of subordination.").

122. Worcester v. Georgia, 31 U.S. 515, 556 (1832).

123. Philip P. Frickey, *Domesticating Federal Indian Law*, 81 MINN. L. REV. 31, 58 (1996) ("[T]he entire plenary power era lends itself to the interpretation, consistent with the Marshall decisions, that federal authority as well as tribal sovereignty is inherent under international law . . . ."); Ablavsky, *Savage Constitution*, *supra* note 30, at 1080 (recognizing the similarities and differences between the *Marshall Trilogy* and the plenary power cases).

Worcester, the one not directly involving any Native tribe—since tribes were excluded from federal courts—provided the most enthusiastic support for tribal sovereignty. It is fitting, then, that fourteen years later, another case without any Native parties undermined self-government by using the same rhetoric of the *Marshall Trilogy*.

In *United States v. Rogers*,[124] the federal government indicted William S. Rogers, a white man, for murdering another white man.[125] Both, however, had moved to the Cherokee Nation, and Rogers claimed they were Cherokee.[126] At the time, a federal statute enacted in 1834 punished crimes committed in Native territory while excepting crimes between tribe members.[127] In addition, the Treaty of New Echota of 1835 recognized the Cherokee's right to enact laws to protect persons associated with them, provided such laws are not inconsistent with the Constitution and statutes regulating Native affairs.[128] Rogers argued that the treaty extended the exception to adopted members of the tribe.[129]

In an opinion by Chief Justice Taney, the Supreme Court held that the statutory exception did not apply to Rogers. But in so doing, Taney reasserted some elements of the doctrine of discovery first formulated by Marshall—Native tribes occupied, but did not own, their lands; they were an inferior race to be civilized; and federal power over this territory was a political question.[130] The opinion, however, contradicted *Worcester*'s language on tribal sovereignty over internal affairs. Native tribes occupied their territory only by "the assent of the United States, and under their authority."[131] In fact, according to Taney, they had never been recognized as independent nations nor as owners of their lands.[132] In dictum, the Court added that Congress could punish any crime committed in Native territory "no matter whether the offender be a white man or an Indian."[133] But since Rogers and his victim were considered white men, they were outside the

124. United States v. Rogers, 45 U.S. 567 (1846).
125. *Id.* at 571.
126. *Id.*
127. *Id.* at 572.
128. *Id.* at 573.
129. *Id.* at 567–68.
130. *Id.* at 572.
131. *Id.*
132. *Id.*
133. *Id.*

exemption enacted by Congress for crimes committed by tribe members against each other.

Although nominally about federal prosecution of a U.S. citizen, the dicta about congressional power to punish Indigenous people foreshadowed broad congressional power over Native tribes' internal affairs. The priority of the 1834 statute over the 1835 treaty left Congress's power to unilaterally abrogate Indian treaties through statutes unclear. The Supreme Court finally settled the question in the case of *The Cherokee Tobacco*,[134] which limited tribal sovereignty over local affairs.[135]

An 1866 treaty with the Cherokee Nation recognized their "right to sell any products," paying taxes only on the products sold beyond the borders of their territory.[136] However, the United States seized tobacco manufactured in the Cherokee Nation because it understood an 1868 federal statute imposing taxes on tobacco to apply in any state or territory, including within the Cherokee Nation.[137] Relying on *Cherokee Nation v. Georgia* and *Rogers*, the Supreme Court decided that the Cherokee Nation was part of the territory of the United States.[138] Inconsistency with the treaty was not legally relevant since what mattered was which one was enacted last—later known as the last-in-time rule.[139] Treaties had "no higher sanctity" than statutes, and "considerations of humanity and good faith" should be addressed by the political departments, not the courts.[140] There was, therefore, no limitation to Congress's ability to supersede the terms of a treaty through statute without consent. A year later, the Indian Appropriations Act of 1871, which ended treaty-making and the recognition of new tribes as independent nations, continued the degradation of treaties.[141]

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134. The Cherokee Tobacco, 78 U.S. (11 Wall.) 616 (1870).

135. *See id.* at 621.

136. *Id.* at 618 (quoting Treaty with the Cherokee, art. 10, Cherokee Nation-U.S., July 19, 1866, 14 Stat. 799).

137. *Id.* at 617–18, 620.

138. *Id.* at 619 (citing Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 12 (1831); *Rogers*, 45 U.S. at 572).

139. *Id*. at 621 ("A treaty may supersede a prior act of Congress, and an act of Congress may supersede a prior treaty.").

140. *Id.*

141. Act of Mar. 3, 1871, ch. 120, 16 Stat. 544, 566 ("That hereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty.").

Ex parte Crow Dog[142] resumed the question previewed in *Rogers*: whether Congress could punish crime committed in Indian territory.[143] In *Crow Dog*, however, the Court found the defendant and the victim to be within the exception for crimes between tribe members in their territory.[144] Reiterating the language of *Cherokee Nation v. Georgia*, the Supreme Court described Native tribes as "a dependent community who were in a state of pupilage."[145] Only through labor and education could they hope to "become a self-supporting and self-governed society."[146] Since education on self-government and their dependence were mutually constitutive, it was up to their guardian, Congress, to decide whether to extend or to exempt Native tribes from federal laws and practices.

The Supreme Court implied that Congress could extend criminal laws within Native tribes' territory but that it needed to do so expressly.[147] Two years after *Crow Dog*, Congress finally changed the law to punish tribe members who committed crimes against each other within any territory of the United States and in Native reservations within state limits.[148] In *Kagama*, the Supreme Court decided that the Indian Commerce Clause could not be the source of that congressional power.[149] Instead, Native tribes occupied the same space as other organized bodies—such as territorial governments—that derived their authority from the only two true sovereigns: the United States and the individual states. In the case of the territories, congressional power to govern arose not from the Territorial Clause but from owning the land encompassing the territories and from "the right of exclusive

142. *Ex parte* Kan-gi-shun-ca (Crow Dog), 109 U.S. 556 (1883).

143. *Id.* at 557.

144. *Id.* at 571–72.

145. *Crow Dog*, 109 U.S. at 569; *see* Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831) ("[Tribes] may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupilage.").

146. *Crow Dog*, 109 U.S. at 569.

147. *See id.* at 572 (explaining that, in order to uphold the exercise of jurisdiction in this case, there needed to be "clear expression of the intention of Congress" to reverse the "general policy of the government towards the Indians").

148. *See* Major Crimes Act, 18 U.S.C. § 1153(a) (1885) (criminalizing certain offenses committed by "[a]ny Indian . . . against the person or property of another Indian").

149. United States v. Kagama, 118 U.S. 375, 378–79 (1886) (arguing that it would require a "very strained construction of this clause" to punish common-law crimes "without any reference to their relation to any kind of commerce").

sovereignty which must exist in the National Government."[150] The Supreme Court reasoned that "[t]he right to govern may be the inevitable consequence of the right to acquire Territory."[151] Since the Native tribes were not full sovereigns, they occupied a "semi-independent position" with the "power of regulating their internal and social relations."[152] Congressional power over both territories and Native nations did not derive from the constitutional text but from their lack of full sovereignty.[153]

Although the Indian Commerce Clause did not authorize congressional interference, the Native tribes' dependent status, through their infantilization, provided its own inherent source of power. According to the Supreme Court, the Major Crimes Act was "within the competency of Congress" because "[t]hese Indian tribes [were] the wards of the nation" and "*dependent* on the United States."[154] It is "[f]rom their very weakness and helplessness" that "there arises the duty of protection, and with it the power."[155] While self-government and dependence purportedly reinforced each other in *Worcester* and *Crow Dog*, dependence was uncoupled from sovereignty in *Kagama* to become its own independent source of plenary power at the expense of tribal sovereignty.[156]

In the following years, the Supreme Court continued infantilizing Indigenous peoples to legitimize broader assertions of congressional authority. Because it was up to Congress to end their condition of dependency, it could, for example, assign a right of way through Native territory to a railway company without Native consent.[157] Their

150. *Id.* at 380. The Supreme Court relied on *Murphy v. Ramsey*, 114 U.S. 15, 44 (1885), which is discussed in Part II.D.

151. *Kagama*, 118 U.S. at 380 (citing Am. Ins. Co. v. 356 Bales of Cotton, 26 U.S. 511, 543 (1828)).

152. *Id.* at 381–82.

153. *See id.* at 380 (citing *Murphy*, 114 U.S. at 44) (arguing that congressional power over the territories arises from "the right of exclusive sovereignty which must exist in the National Government, and can be found nowhere else").

154. *Id.* at 383–84.

155. *Id.* at 384.

156. *Cf.* Michael C. Blumm, *Retracing the Discovery Doctrine: Aboriginal Title, Tribal Sovereignty, and Their Significance to Treaty-Making and Modern Natural Resources Policy in Indian Country*, 28 VT. L. REV. 713, 759, 759–60 n.296 (2004) (arguing that *Kagama* "misinterpreted the Marshall Court's language and undermined the principles it laid down").

157. *See* Cherokee Nation v. S. Kan. Ry. Co., 135 U.S. 641, 654–57 (1890) ("It would be very strange if the national government . . . could not exercise [eminent domain] in a Territory

dependency even sanctioned Congress's power to determine tribal membership, which was crucial for the allotment policy that broke up the tribes.[158] Congress could also lease lands belonging to the Cherokee Nation to mining companies.[159] Finally, in *Lone Wolf v. Hitchcock*, dependency authorized Congress to unilaterally abrogate treaties that protected tribal property, leading to tribal dispossession.[160] Because Congress was the guardian of these wards of the nation, it could rule over them without judicial interference.[161] This power over tribal membership and property, which the Supreme Court baptized as "plenary power"[162] or "[p]lenary authority,"[163] was explicitly premised on their dependency and the pretext that it was all for their benefit.[164] In contrast to the *Marshall Trilogy*, *Lone Wolf* contained no reference to the law of nations and only subsidiary references to the

occupied by an Indian nation or tribe, the members of which were wards of the United States, and directly subject to its political control.").

158. *See* Stephens v. Cherokee Nation, 174 U.S. 445, 488 (1899) (deciding that because of the tribe's "condition of dependency," Congress could "empower the Dawes Commission to determine" tribal citizenship).

159. *See* Cherokee Nation v. Hitchcock (*Hitchcock*), 187 U.S. 294, 308 (1902) (explaining that the extent of congressional power over tribal property is an issue for the legislative branch, not the judicial branch, to determine).

160. Lone Wolf v. Hitchcock, 187 U.S. 553, 565 (1903) ("Congress possessed a paramount power over the property of the Indians, by reason of its exercise of guardianship over their interests, and that such authority might be implied, even though opposed to the strict letter of a treaty with the Indians."). The Supreme Court continued the discourse of dependence: "relation of dependency," "care and protection," "guardianship," and "ignorant and dependent race." *Id.* at 564–65; *see also* CLARK, *supra* note 33, at 97 (explaining how *Lone Wolf* led to Indian dispossession).

161. *See Lone Wolf*, 187 U.S. at 567–68 (denying the judiciary's ability to "question or inquire into the motives" behind the relevant legislation since Congress "possessed full power" in dealing with tribes).

162. *Stephens*, 174 U.S. at 478 ("Congress possesses plenary power of legislation in regard to [Indian tribes], subject only to the Constitution of the United States . . . ."); *Hitchcock*, 187 U.S. at 306 ("The plenary power of control by Congress over the Indian tribes and its undoubted power to legislate . . . directly for the protection of the tribal property, was in that case [*Stephens v. Cherokee Nation*] reaffirmed.").

163. *Lone Wolf*, 187 U.S. at 565 ("Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government.").

164. *See Stephens*, 174 U.S. at 488 (claiming that congressionally empowered determination of tribal citizenship was "in promotion of the best interests of the tribes"); *Hitchcock*, 187 U.S. at 307 ("Congress was vested with authority to adopt measures to make the tribal property productive, and secure therefrom an income for the benefit of the tribe."); *Lone Wolf*, 187 U.S. at 566 (recognizing Congress's ability to abrogate treaties regarding tribal property whenever doing so is "in the interest of the country and the Indians themselves").

constitutional text.[165] Instead, the Supreme Court legitimized plenary powers by contriving the "dependency" of Indigenous peoples.[166]

C. Concealing Colonialism from the Doctrine of Plenary Power

In the Gilded Age, dependency became an independent justification for plenary power over Native tribes. But this dependency had no timeframe, since plenary power remained even after tribe members became U.S. citizens. At first, individual allotment of land and U.S. citizenship terminated the guardianship relation, and Congress could not criminalize Native conduct except as consistent with enumerated powers.[167] Yet thereafter the Supreme Court decided that tribes remained "dependent," and citizenship was not inconsistent with guardianship.[168] Their constitution as dependent peoples was, therefore, the source of a plenary and everlasting power over Native peoples.

During the twentieth century, however, the Supreme Court attributed this plenary power to the Constitution itself, especially the Indian Commerce Clause. In *Morton v. Mancari*,[169] for example, plenary power over Indian tribes was premised on both "the assumption of a 'guardian-ward' status" and the Constitution—namely, the Indian Commerce Clause and the Treaty Clause.[170] It also

165. *See* United States v. Kagama, 118 U.S. 375, 378–80 (1886) (dismissing the Indian Commerce Clause as a basis for the application of criminal laws to acts committed by and against Indians within tribal territories); Cherokee Nation v. S. Kan. Ry. Co., 135 U.S. 641, 656–57 (1890) (focusing on eminent domain but also relying on the Indian Commerce Clause); *Stephens*, 174 U.S. at 491 (quoting Act of June 28, 1898, ch. 517, 30 Stat. 495, 512 (adopting the language of U.S. CONST. art. IV, § 3, cl. 2)).

166. Winton v. Amos, 255 U.S. 373, 391–92 (1921) ("Congress has plenary authority over the Indians and all their tribal relations, and full power to legislate concerning their tribal property. The guardianship arises from their condition of tutelage or dependency . . . ."); *see also* Cleveland, *supra* note 12, at 74 ("[U]nilateral power to legislate over every aspect of tribal life . . . was inherent, derived from the Indians' status as dependents and the United States' ultimate control over Indian lands.").

167. *See In re* Heff, 197 U.S. 488, 509 (1905) (noting that U.S. citizenship placed Indians "outside the reach of police regulations on the part of Congress" and that allotment of land did not justify federal control in all cases).

168. United States v. Celestine, 215 U.S. 278, 291 (1909); Tiger v. W. Inv. Co., 221 U.S. 286, 313 (1911); United States v. Sandoval, 231 U.S. 28, 48 (1913); United States v. Nice, 241 U.S. 591, 601 (1916) (overruling *In re Heff*); *see also Winton*, 255 U.S. at 392 ("The guardianship arises from [Indians'] . . . dependency; and it rests with Congress to determine when the relationship shall cease; the mere grant of rights of citizenship not being sufficient to terminate it.").

169. Morton v. Mancari, 417 U.S. 535 (1974).

170. *Id.* at 551–52.

started describing congressional plenary powers through the language of trust rather than guardianship.[171]

The Supreme Court eventually read plenary powers into the Indian Commerce Clause.[172] Although *Kagama* rejected reading broad powers into the Indian Commerce Clause, now, the Court ascribed the federal government's plenary power to that same clause.[173] But it is still unclear whether this was a substantive change or a cosmetic one meant merely to comply with the doctrine of enumerated powers.[174] Even today, the Supreme Court continues to cite *Kagama* and the ward status espoused therein despite concealing the role that colonialism played in the formation of plenary power.[175]

While no longer formally recognized as the source of plenary power, dependency is still a normative justification for diminished sovereignty. In *Oliphant v. Suquamish Indian Tribe*,[176] the Supreme Court found that Native tribes had no inherent criminal jurisdiction over non-Natives within their reservations.[177] Native tribes forfeited this sovereignty in return for protection during their "incorporation" into the United States.[178] Similar to *Kagama*, *Oliphant* appropriated the dependency language of the *Marshall Trilogy* and transformed it into

171. Seminole Nation v. United States, 316 U.S. 286, 296 (1942) ("[T]his Court has recognized the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people.").

172. Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 192 (1989) (citing *Morton*, 417 U.S. at 551–52) (deciding that "the central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs").

173. *See* United States v. Lara, 541 U.S. 193, 200 (2004) ("This Court has traditionally identified the Indian Commerce Clause . . . and the Treaty Clause . . . as sources of that [plenary] power."); Cleveland, *supra* note 12, at 80 ("[T]he Court has reinterpreted the plenary power doctrine to be a broad federal power deriving from the Constitution's textual provisions . . . ."); Ablavsky, *Savage Constitution*, *supra* note 30, at 1082 ("[T]he Court dragged in the Indian Commerce Clause post hoc to sanitize the [plenary power] doctrine.").

174. *See* Cleveland, *supra* note 12, at 80–81 (noting that "newly reaffirmed limitations on the Interstate Commerce Clause may also impose limits on federal power under the Indian Commerce Clause" such that the power is not, in fact, absolute).

175. *See, e.g.*, Oklahoma v. Castro-Huerta, 142 S. Ct. 2486, 2498 n.3 (2022) (citing Donnelly v. United States, 228 U.S. 243, 271–72 (1913) (citing United States v. Kagama, 118 U.S. 375 (1886))).

176. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).

177. *Id.* at 211.

178. *Id.* at 209; *see also* Robert N. Clinton, *There Is No Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L.J. 113, 215 (2002) (criticizing the ahistorical foundations of *Oliphant*).

an imagined social contract between Native tribes and the federal government that legitimizes the loss of tribal sovereignty.[179]

In *United States v. Lara*,[180] the Supreme Court nominally recognized inherent Native sovereignty to try nonmembers.[181] However, the Supreme Court relied on Congress's willingness to authorize this sovereignty, which it said Congress can deauthorize at any moment.[182] Plenary power can "both restrict[] and, in turn, relax[] those restrictions" on tribal sovereignty.[183] In his concurrence, Justice Thomas disagreed that this plenary power derived from the Indian Commerce Clause or the Treaty Clause and denounced its inconsistency with the recognition of inherent sovereignty.[184] Meanwhile, Justice Souter, joined by Justice Scalia, dissented and argued that, since dependent sovereignty was in fact "constitutional in nature," Congress could not reinvest inherent tribal sovereignty, as decided in *Oliphant*.[185] The only ways to restore sovereignty were independence, like the Philippines, or to repudiate the doctrine of dependent sovereignty.[186] But since the dissent emphasized dependence over sovereignty, it argued that Congress could not restore tribal sovereignty over nonmembers.[187] While seemingly contradicting *Oliphant*, *Lara* still subjects inherent tribal sovereignty to Congress's plenary powers. This plenary power, however, purports to be divorced from dependence and the goal of facilitating Native dispossession. Thus the Supreme Court now conceals colonialism in its formulation of the doctrine of plenary power.

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179. MILLS, *supra* note 17, at 25 (describing the "colonial contract" that legitimized European rule over Native peoples).

180. United States v. Lara, 541 U.S. 193 (2004).

181. *Id.* at 210.

182. *See id.* at 200–01 (identifying Congress's "broad general powers to legislate in respect to Indian tribes").

183. *Id.* at 202.

184. *See id.* at 214–15 (Thomas, J., concurring) (stressing how tribal sovereignty cases often rest on "two largely incompatible and doubtful assumptions"). Justice Thomas elaborated this thesis in *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 659 (2013) (Thomas, J., concurring) and in *Haaland v. Brackeen*, 599 U.S. 255, 335 (2023) (Thomas, J., dissenting).

185. *Lara*, 541 U.S. at 228 (Souter, J., dissenting).

186. *See id.* at 229 (noting that there exist "only two ways that a tribe's inherent sovereignty could be restored," either by granting independence to the tribes or "repudiat[ing] its existing doctrine of dependent sovereignty").

187. *See id.* at 231 ("I would therefore . . . hold that Congress cannot reinvest tribal courts with inherent criminal jurisdiction over nonmember Indians.").

II. "STATE OF INFANCY": TERRITORIES ADVANCING TO MANHOOD

Native nations and U.S. territories have been connected throughout U.S. history. According to George Washington, commander in chief of the continental army, "Settlement [sic] of the Western Country and making a Peace with the Indians are so analogous that there can be no definition of the one without involving considerations of the other."[188] One affected the other because the formation of new states required Indian dispossession by purchase or conquest.[189] But the parallels did not stop there. The rules for territorial governance that applied to one carried over to the other. This symbiotic relationship has existed since the simultaneous adoption of the Northwest Ordinance and the Constitution.[190]

This Part explores how the American empire has always consisted of states and territories.[191] The majority of U.S. states were originally ruled as territories with limited self-government.[192] Territories were at the center of important constitutional controversies—the Northwest Ordinance (II.A), the Louisiana Purchase (II.B), the Missouri Compromise and *Dred Scott v. Sandford* (II.C), and territorial expansion after the Civil War (II.D).[193] Despite their prominence since the closing of the American frontier, constitutional scholars have often ignored the constitutional legacy of territorial expansion and territorial

188. Dossett, *supra* note 82, at 231 (quoting Letter from George Washington, President of the United States, to James Duane, Mayor of New York City (Sept. 7, 1783), http://founders.archives.gov/documents/Washington/99-01-02-11798 [https://perma.cc/5M6T-LEGX].

189. *See* GREGORY ABLAVSKY, FEDERAL GROUND: GOVERNING PROPERTY AND VIOLENCE IN THE FIRST U.S. TERRITORIES 2 (2020) [hereinafter ABLAVSKY, FEDERAL GROUND] (describing how, in this process, "the federal government was itself remade" since "the lands it carved up on paper were not empty").

190. *See* PAUL FRYMER, BUILDING AN AMERICAN EMPIRE: THE ERA OF TERRITORIAL AND POLITICAL EXPANSION 55–56 (2017) (explaining how the Constitution's adoption enabled the success of American territorial expansion by, for example, providing avenues for territories to join as states).

191. *See* Loughborough v. Blake, 18 U.S. 317, 319 (1820) (concluding that the phrase "United States" in the Constitution refers to "our great republic, which is composed of States and territories"); Craig Green, *Beyond States: A Constitutional History of Territory, Statehood, and Nation-Building*, 90 U. CHI. L. REV. 813, 815 (2023).

192. *See* FRYMER, *supra* note 190, at 26 (illustrating that more than half of the fifty states were ruled as territories). With regards to the Indian tribes, the Ordinance proclaimed that their "lands and property shall never be taken from them without their consent." Ablavsky, *Savage Constitution*, *supra* note 30, at 1068 (quoting 32 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 340 (Roscoe R. Hill ed., 1936)).

193. *See* Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 449 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

governance.[194] Part II situates their place in constitutional history by examining how the American empire constituted the territories as dependent and denied full sovereignty, much like the Native tribes. Broad congressional power over territories was also premised on their "state of infancy," which terminated once they reached the "manhood" of statehood.[195]

A. The Northwest Ordinance and the Indeterminacy of the Territorial Clause

During the American Revolutionary War, one major constitutional and political question was governance of the land west of the Appalachian Mountains. Thomas Jefferson argued that states, including his home state of Virginia, should relinquish their sovereignty over this landmass.[196] In March 1784, two months before Great Britain recognized the independence of the United States, Virginia ceded its claims northwest of the Ohio River to the federal government.[197] The deed of cession expressly stated that "the territory so ceded shall be . . . formed into states . . . having the same rights of sovereignty, freedom, and independence, as the other states."[198] Eventually, Jefferson proposed a "temporary government" for each territory, a distinct political category,[199] to be governed by the federal

194. *See, e.g.*, Seth Davis, *American Colonialism and Constitutional Redemption*, 105 CALIF. L. REV. 1751, 1753 (2017) ("America's colonial history is not important to American constitutionalism."); Rana, *How We Study*, *supra* note 35, at 315 ("Most constitutional analysis ignores one of the defining features of American legal-political reality—the fact that the United States has from the founding been a project of empire.").

195. *Loughborough*, 18 U.S. at 324.

196. *See* JACK ERICSON EBLEN, THE FIRST AND SECOND UNITED STATES EMPIRES 20–21 (1968).

197. DANIEL IMMERWAHR, HOW TO HIDE AN EMPIRE: A HISTORY OF THE GREATER UNITED STATES 29 (2019).

198. Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212, 221 (1845) (quoting the deed of cession executed by Virginia).

199. EBLEN, *supra* note 196, at 22. Following Jefferson's colonial policy, the Confederation Congress adopted the Ordinance of 1784, setting the stage for the Northwest Ordinance of 1787. The Ordinance of 1784, reprinted in 6 THE PAPERS OF THOMAS JEFFERSON 613 (Julian P. Boyd ed., 1954).

government.[200] Territorial rule was, therefore, a bridge between "colony" and "state."[201]

The Northwest Ordinance established the method of governing this first territory, called the Northwest Territory.[202] The ordinance organized the process through which the territory would eventually become multiple states. During the first phase, the Continental Congress would appoint a governor to rule over the territory.[203] In the second phase, once the population reached five thousand free adult males, the territory would have an elected assembly and one nonvoting delegate in Congress.[204] After the population reached sixty thousand, a state constitution would be drafted and that portion of the territory could request admission to the Union.[205] This largely followed republican principles, since immediate statehood would complicate the balance of powers between states, and territorial government was supposed to be temporary.[206] The ordinance was considered a "compact between the original States, and the people and States in the said territory," which would "forever remain unalterable, unless by common consent."[207]

The Northwest Ordinance set a precedent for the racial and gendered organization of future territories on their path to statehood. But the transition from territory to state was not automatic, and the

200. ABLAVSKY, FEDERAL GROUND, *supra* note 189, at 5 ("The territories were unique sites of federal authority . . . .").

201. PETER S. ONUF, STATEHOOD AND UNION: A HISTORY OF THE NORTHWEST ORDINANCE 72 (1987).

202. 32 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 334 (Roscoe R. Hill ed., 1936).

203. *Id.* at 335 ("[T]here shall be appointed from time to time by Congress a governor . . . .").

204. *Id.* at 337. This nonvoting delegate was also included in the Land Ordinance of 1784, and it is similar to the deputy recognized to the Cherokee Nation in the Hopewell Treaty of 1785.

205. *See* Sanford Levinson & Bartholomew H. Sparrow, *Introduction* to THE LOUISIANA PURCHASE AND AMERICAN EXPANSION, 1803–1898, at 1, 11 (Sanford Levinson & Bartholomew Sparrow eds., 2005) (arguing that, until statehood, the inhabitants "served under a kind of pupilage or guardianship").

206. *See* DANIEL J. HULSEBOSCH, CONSTITUTING EMPIRE 220 (2005) (discussing the debates surrounding the Northwest Ordinance).

207. An Act to Provide for the Government of the Territory Northwest of the River Ohio, ch. 8, 1 Stat. 50, 52 n.(a) (1789) (adapting the original Northwest Ordinance to the newly ratified Constitution) [hereinafter *Northwest Ordinance*]. Whether this unalterable compact was binding or aspirational remains an important controversy that, as we shall see in Part IV, still ties together the emancipatory paths of the Indian tribes and the U.S. territories.

ordinance did not provide a timetable.[208] The Articles of Confederation did not grant the Continental Congress power over the territories, and centralized rule was at odds with decentralization.[209] The delegates at the Philadelphia Convention, however, were aware of the Northwest Ordinance, and most supported it.[210] In 1789, the first Congress reenacted the Northwest Ordinance, thus approving territorial governance.[211]

While the Northwest Ordinance provides a necessary backdrop to understand the New States Clause and the Territorial Clause, the resulting text owes much to the hidden agendas of the delegates at the Philadelphia Convention. As mentioned in Part I, managing Native relations and territorial expansion were related, and both animated the adoption of the new Constitution.[212] At the Constitutional Convention, James Madison proposed congressional powers over land disposal, temporary territorial government prior to statehood, and Native internal affairs.[213] Temporary territorial government, however, was not added to the Constitution.[214] Madison also advocated for including the equality of old and new states in the New States Clause, which came to be known as the equal footing doctrine.[215] However, Gouverneur

208. *See* IMMERWAHR, *supra* note 197, at 30 (noting that, even if territories crossed certain thresholds, Congress maintained the power to deny them advancement into states); RANA, TWO FACES, *supra* note 7, at 109; GARY LAWSON & GUY SEIDMAN, THE CONSTITUTION OF EMPIRE: TERRITORIAL EXPANSION AND AMERICAN LEGAL HISTORY 79–80 (2004).

209. *See* RANA, TWO FACES, *supra* note 7, at 142 (describing how and why the Articles of Confederation did not provide solid guidance on how to administer the new territories).

210. AKHIL REED AMAR, AMERICA'S CONSTITUTION 264 (2006).

211. *See Northwest Ordinance*, *supra* note 207, at 51 ("[I]t is requisite that certain provisions should be made, so as to adapt the [Northwest Ordinance] to the present Constitution . . . ."). The only significant change was to give the president the power to appoint all territorial officials, with the consent of the Senate, pursuant to the Appointments Clause. EBLEN, *supra* note 196, at 52.

212. *See* Ablavsky, *Savage Constitution*, *supra* note 30, at 1066 (explaining how Federalist arguments at ratification convincingly depicted Indians as an aggressive threat to the United States).

213. *See* Dossett, *supra* note 82, at 241 (describing three of Madison's proposals for congressional power over western territory and the Indians); 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 324 (Max Farrand ed., 1911) (noting that Madison's proposal reads: "To institute temporary Governments for New States arising therein").

214. *See* AUSTIN ALLEN, ORIGINS OF THE *DRED SCOTT* CASE 189 (2006) (explaining that "a provision for temporary governments became superfluous because the Northwest Ordinance already provided for them").

215. *See* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 213, at 454 ("If the admission be consented to, the new States shall be admitted on the same terms with the original States . . . .").

Morris, delegate from Pennsylvania, opposed the language of equality.[216] Against Madison's opposition, Morris won by a 9-2 vote, and the equal footing doctrine was not included in the Constitution.[217]

Morris' machinations did not stop there. At his request, the Constitutional Convention added the sentence that eventually became the Territorial Clause: "The Legislature shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the U[nited] States."[218] A few decades later, when asked about this wording in the context of the Louisiana Purchase, Morris argued that Congress could not "admit, as a new State, territory, which did not belong to the United States."[219] Instead, he believed Congress could "govern them as provinces, and allow them no voice in our councils," and his wording in the Territorial Clause "went as far as circumstances would permit to establish the exclusion."[220] Morris admitted, however, that he did not express this intent loudly because "a strong opposition would have been made."[221] As the main drafter of the preamble, Morris concealed his desire to permanently exclude the territories from "We the People."[222] This deliberate indeterminacy made it difficult for future constitutional decisionmakers to settle on its meaning, especially whether federal rule was meant to be temporary.[223] While statehood is seen today as a

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216. Thomas B. Colby, *In Defense of the Equal Sovereignty Principle*, 65 DUKE L.J. 1087, 1100 (2016) (describing how Morris instead intended for Congress to govern the new states "as provinces" (quoting William A. Dunning, *Are the States Equal Under the Constitution?*, 3 POL. SCI. Q. 425, 437 (1888)). Supporting Morris, delegate John Langdon argued that "circumstances might arise which would render it inconvenient to admit new states on terms of equality." *Id.* at 1100 n.63 (quoting 5 THE DEBATES IN THE SEVERAL STATE CONVENTIONS OF THE ADOPTION OF THE FEDERAL CONSTITUTION 492 (Jonathan Elliot ed., J.B. Lippincott & Co. 2d ed. 1891)).

217. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 213, at 454.

218. *Id.* at 466. The final text replaced "Legislature" with "Congress." U.S. CONST. art. IV, § 3, cl. 2.

219. 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 404 (Max Farrand ed., 1911) (quoting Letter from Gouverneur Morris to Henry W. Livingston (Dec. 4, 1803)).

220. *Id.*

221. *Id.*

222. *See* John Patrick Coby, *America's Machiavellian: Gouverneur Morris at the Constitutional Convention*, 79 REV. POL. 621, 648 (2017) (describing Morris's role in the Constitutional Convention, including writing the preamble).

223. *See* PETER HARDEMAN BURNETT, THE AMERICAN THEORY OF GOVERNMENT 32 (1861) ("It is not at all surprising that so many difficulties of construction have arisen, when those who framed the Constitution candidly admit, that the fear of opposition made them *purposely clothe their ideas in ambiguous terms*."); DON E. FEHRENBACHER, THE *DRED SCOTT* CASE 84 (1978) ("The one thing not entirely clear was whether this power derived from the statehood

foregone conclusion, the path from territory to statehood at the time was contingent on the racial formation of the territory, the expansion of slavery, and partisan politics.[224]

Because of Morris' influence at the convention, Alexander Hamilton asked him to assist in writing the Federalist Papers.[225] When he rejected the offer, Hamilton recruited Madison, who held the opposite position regarding state equality and whether Congress could permanently rule colonies.[226] Madison analyzed the two clauses in Section 3 of Article IV together—the New States Clause and the Territorial Clause. He defended the New States Clause because the Articles of Confederation wrongly overlooked the admission of new states.[227] Meanwhile, the Territorial Clause was described as "a power of very great importance, and required by considerations similar to those which shew the propriety of the former."[228] Therefore, as in the constitutional text, for Madison, territorial governance and eventual statehood went hand in hand.

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clause, from the territory clause, or, as Madison apparently believed, from the two clauses combined."). *But see* ALPHEUS H. SNOW, THE ADMINISTRATION OF DEPENDENCIES: A STUDY OF THE EVOLUTION OF THE FEDERAL EMPIRE 462 (1902) ("The Convention, thus having before them the question whether all administration of dependencies by the Union was to be 'temporary' . . . declared that the power of the Union was without limit as to time, and was only limited by the necessity of each case."). *Compare* Roderick M. Hills Jr., *The Unwritten Constitution for Admitting States*, 89 FORDHAM L. REV. 1877, 1878 (2021) ("[T]he best reading of the original Federalist Constitution is that Congress enjoyed the power to rule western states as colonies without any limits on such power rooted in new states' alleged 'equal footing' to existing states."), *with* Cesar A. Lopez-Morales, *Making the Constitutional Case for Decolonization: Reclaiming the Original Meaning of the Territory Clause*, 53 COLUM. HUM. RTS. L. REV. 775, 794 (2022) ("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."); *see also* Gary Lawson & Guy Seidman, *Are People in Federal Territories Part of "We the People of the United States"?*, 9 TEX. A&M L. REV. 655, 661–62 (2022) (developing an original understanding of the place of the federal territories within the Constitution but rejecting any prescriptive consequences from their historical account).

224. *See* FRYMER, *supra* note 190, at 24 (describing the influence of partisan politics and race on statehood).

225. Jacob E. Cooke, *Introduction to* THE FEDERALIST, at xii (Jacob E. Cooke ed., 1961).

226. *See* William Michael Treanor, *The Case of the Dishonest Scrivener: Gouverneur Morris and the Creation of the Federalist Constitution*, 120 MICH. L. REV. 1, 14 (2021) ("Hamilton turned to Madison only after Morris rebuffed him . . . .").

227. *See* THE FEDERALIST NO. 43, *supra* note 225, at 290 (James Madison) ("In the articles of confederation no provision is found on this important subject [of the admission of new states].").

228. *Id.*

In another essay, he ascribed this link to the Northwest Ordinance through which Congress "proceeded to form new States; to erect temporary Governments."[229] Temporary territorial government and equal statehood, the model of the Northwest Ordinance, were indispensable for Madison's extended republic.[230] In the Federalist Papers, there is no public recognition of permanent territorial rule, as defended by Morris, because Madison held the opposite view of temporary territorial rule.[231] In any case, the Territorial Clause, like the Indian Commerce Clause, was an afterthought to the New States Clause and not central in ratification debates.[232]

Because of its long-term influence, the Northwest Ordinance's coupling of temporary territorial government and statehood was a constitutive element of settler colonialism.[233] While recognizing the need for Native consent, the Northwest Ordinance premised territorial expansion on Indigenous removal and population by white male settlers before territories could become states and be given equal status.[234] Instead of pursuing a traditional empire that extracted resources from its colonies, the American empire "emphasized the settlement of its own population."[235] The federal government, with its

229. THE FEDERALIST NO. 38, *supra* note 225, at 248 (James Madison). While Madison famously asserted that the Northwest Ordinance was enacted by the Confederation Congress "without the least colour of constitutional authority," he quickly added that "no blame has been whispered; no alarm has been sounded." *Id.*

230. *See* THE FEDERALIST NO. 10 (James Madison) (arguing that extending the republic, through "the greater number of citizens and extent of territory . . . . make[s] it less probable that a majority of the whole will have a common motive to invade the rights of other citizens").

231. *See* Earl M. Maltz, *The Constitution and the Annexation of Texas*, 23 CONST. COMMENT. 381, 398 (2006) ("Madison's statement in *The Federalist* suggests that the other delegates did not share Morris's understanding of Article IV.").

232. *See* ALLEN, *supra* note 214, at 189. One notable exception occurred during the Virginia Constitutional Convention. William Grayson, one of the leading Antifederalists, argued that the "sole intention" of the Territorial Clause "was to obviate all the doubts and disputes which existed, under the Confederation, concerning the western territory and other places in controversy in the United States." 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 505 (Jonathan Elliot ed., 2d ed. 1836).

233. *See* RANA, TWO FACES, *supra* note 7, at 3 (explaining that early projections of American power and ideas of liberty by colonists necessitated coercive use of other groups to guarantee colonists' access to property and free up colonists' own labor).

234. *See id.* at 109–10 (noting that Indigenous removal and Anglo settlement would ensure that "free laws and customs would take root in the new territory," eventually leading to "the ultimate establishment of republican government" (quoting PETER ONUF, JEFFERSON'S EMPIRE: THE LANGUAGE OF AMERICAN NATIONHOOD 39 (2000)).

235. FRYMER, *supra* note 190, at 276.

weak military infrastructure, relied on land policies to encourage settlement and protect its borders.[236] Because the United States thought of itself as a white nation, "a majority white population was a necessary condition for statehood."[237] Therefore, the process under which territories became states was essential for the racial and gendered formation of the American empire.

The Northwest Ordinance's promise of statehood did not preclude the federal government from ruling the Northwest Territory as a "dependent colony."[238] Despite the ordinance's language of a "compact" unalterable but by mutual consent, it was unclear whether Congress could unilaterally alter the ordinance.[239] For Arthur St. Clair, the Governor of the Northwest Territory, Congress retained the power "to alter or repeal [the ordinance] as a law which may have passed yesterday."[240] Because no one from the territories consented to the ordinance, he even questioned how there could be a compact with only one party: the United States.[241] In an address to the settlers, St. Clair promised that territorial governance "is temporary only, suited to your infant situation, and to continue no longer than that state of infancy shall last."[242] Inherent to infantilization was the character of temporality and eventual "political maturity under his paternal authority."[243] The "protracted colonial apprenticeships" of the original thirteen colonies was replicated in the territories, but statehood, rather than independence, became the standard "anticolonial—and pseudo-Revolutionary—rhetoric."[244]

Opponents of immediate statehood also relied on infantilization. For them, there was nothing "degrading" about territorial rule, just as there was nothing degrading in a "young man" being "under his father

236. *See id.* at 12 (noting that homesteading laws incentivized nearly one million people to resettle throughout the United States while the U.S. "did not have a powerful military or large bureaucracy").

237. *See id.* at 28.

238. ONUF, *supra* note 201, at 71; Gregory Ablavsky, *Administrative Constitutionalism and the Northwest Ordinance*, 167 U. PA. L. REV. 1631, 1657 (2019) [hereinafter Ablavsky, *Administrative Constitutionalism*] (explaining how Governor St. Clair described the Northwest Territory as a "dependent colony").

239. ONUF, *supra* note 201, at 75–77.

240. *Id.*

241. *Id.* at 74.

242. *Id.* at 69.

243. *Id.* at 70.

244. *Id.* at 72.

or his guardian."[245] St. Clair defended territorial self-government and the right of the territorial legislature to decide when it reached political adulthood.[246] Whereas before he had accepted broad federal authority, now he denied its powers over territorial "internal affairs."[247] Territorial citizens in favor of statehood, however, disowned territorial government and appealed directly to Congress "as the only guardians of our rights."[248] They undermined territorial sovereignty and conceded their dependency in exchange for immediate statehood.[249] Unilateral federal action was consistent with the broad powers conceived by Morris, but here, it was in service of territories' prompt admission as states rather than permanent dependency.[250] While Congress swiftly admitted territories into the Union, it was still an open question whether it could "delay or prevent admission altogether."[251] Power arising from their dependent status could be used to guide them toward statehood but also to subordinate them indefinitely.

B. Territorial Rule Premised on Eventual Statehood

1. *The Louisiana Purchase.* The Louisiana Purchase in 1803 resurfaced questions regarding the source and scope of federal power over territorial expansion and the admission of new states. One of the central dilemmas was Louisianans' lack of consent to their annexation as a territory. According to Vattel, consent was necessary because

245. *Id.* at 70 (citation omitted).

246. *See id.* at 83 (showing how St. Clair argued that "the territorial legislature was fully adequate 'for all internal affairs'" and gave Vermont as an example of a state that self-governed for eight years even after the United States had formed its government).

247. *Id.*; *see also* Ablavsky, *Administrative Constitutionalism*, *supra* note 238, at 1659 ("Congress . . . lacked authority over the Territory's 'internal affairs,' in which the Territory's own legislature was competent." (quoting Governor Arthur St. Clair, Remarks Before the Constitutional Convention (Nov. 3, 1802), *in* 2 THE ST. CLAIR PAPERS 594 (William Henry Smith ed. 1882))).

248. ONUF, *supra* note 201, at 78; *see id.* at 80 ("Their complaints about St. Clair's despotic rule suggested that the Territory would remain in this debased, dependent condition until redeemed by Congress.").

249. *See id.* at 78 (explaining how, in response to statehood advocates, Congress allowed northwesterners to hold a constitutional convention, stipulated "conditions for admission to the union," and "resolved to bypass the territorial legislature in organizing a state government").

250. FRYMER, *supra* note 190, at 26 (examining how long territorial rule lasted in each state and showing that the states making up the Northwest Territory were admitted as states relatively quickly).

251. ONUF, *supra* note 201, at 79.

"'sovereignty' belongs to the people and is thus unalienable."[252] When Jefferson convened a special session of Congress to ratify the treaty with France, a minority argued that the expansion was unconstitutional.[253] While international law did not feature prominently in the debates, some senators, including John Quincy Adams, argued that the "the formal consent of the two people was . . . indispensable" and "their natural right."[254] But because most senators wanted to incorporate Louisiana, the treaty was ratified within a year of purchase by a 24-7 vote.[255]

Louisiana's territorial government followed the framework established by the Northwest Ordinance: federal control prior to statehood and no national political rights, since only the white male citizens of the states could be represented in Congress.[256] In opposing this government, Adams remarked that it was "a Colonial system of government" and a "bad precedent," though it was consistent with the territorial governance of the Northwest Territory.[257] Colonial rule was premised, once again, on its temporary character. Because of the "foreignness" of the Louisiana Territory, some of it populated by French-speaking whites and creoles, its inhabitants were not suitable for self-rule.[258] It was not until the 1820s, once it became clear that the

252. Stéphane Beaulac, *Vattel's Doctrine on Territory Transfers in International Law and the Cession of Louisiana to the United States of America*, 63 LA. L. REV. 1327, 1345 (2003). In cases of extreme necessity, however, consent could be based on the silent acquiescence of the people. *Id.* at 1353.

253. *See id.* at 1357 (explaining that a "resistance movement" within Congress refused to sign the Louisiana Purchase because "expansion was not authorized by the constitution of the Union").

254. BARBÉ MARBOIS, THE HISTORY OF LOUISIANA: PARTICULARLY OF THE CESSION OF THAT COLONY TO THE UNITED STATES OF AMERICA 323 (1830); EVERETT SOMERVILLE BROWN, THE CONSTITUTIONAL HISTORY OF THE LOUISIANA PURCHASE, 1803-1812, at 46 (1920) ("Adams believed that the consent of the people of the United States and of the people of Louisiana was necessary to make Louisiana a part of the American Union.").

255. *See* Beaulac, *supra* note 252, at 1357 n.162 (noting that "[m]ost Federalists appear to have remained faithful to their party's earlier expansionist credo" and "*wanted Louisiana*").

256. *See* RANA, TWO FACES, *supra* note 7, at 144 (explaining how Congress allowed the "president to govern the territory until legislation could be passed"); U.S. CONST. art. II, § 1, cl. 2 ("Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress . . . .").

257. Ablavsky, *Administrative Constitutionalism*, *supra* note 238, at 1660–61 (quoting BROWN, *supra* note 254, at 131).

258. *See* COLIN D. MOORE, AMERICAN IMPERIALISM AND THE STATE, 1893-1921, at 39–40 (2017) (explaining that, because most of Louisiana's inhabitants were foreign, they needed to be

territory would be populated by Anglo-American settlers, that "the perceived need for a strong centralized territorial government began to disappear."[259] In contrast to the foreigners, there was no need to directly rule white settlers who had republican virtues.[260]

The Louisiana Purchase illustrates the democratic limitations of the constitutional system.[261] Prior to their admission as states, these territories were required to adopt a state constitution. The expansion of constitutionalism throughout the mainland was based on territorial expansion and the political subordination of the territories by the federal government. In this way, constitutionalism and colonialism were not inconsistent but coextensive.

2. *Territorial Rule at the Supreme Court.* Soon after the Louisiana Purchase, the Supreme Court examined—in three opinions penned by Chief Justice Marshall—the constitutional foundations of territorial government. In the first one, *Sere v. Pitot*,[262] the controversy was whether the district court could entertain jurisdiction even though the defendants were citizens of the Territory of Orleans and not citizens of any state.[263] Concerning the constitutional power to govern territories, Marshall did not rely on the Territorial Clause but on "the inevitable consequence of the right to acquire and to hold territory."[264] In his analysis, the Territorial Clause only comes into play if "this position be contested."[265] But regardless of its source, Congress has "the absolute and undisputed power of governing and legislating for the territory of

taught "republican culture, racial hierarchy, and attachment to the nation" through "a complex process of incorporation"). President Jefferson even installed a military governor. Levinson & Sparrow, *supra* note 205, at 5. The rhetoric of infantilization and dependence was used to described both the territories and the residents of the territories. This was more pronounced in territories like Louisiana that were not populated by white Anglo-American settlers.

259. MOORE, *supra* note 258, at 39.

260. *See id.* at 40 ("Once settlers began to arrive and local elites made common cause with the American administrators, any rationale for the establishment of a coercive colonial government quickly evaporated . . . .").

261. Levinson & Sparrow, *supra* note 205, at 11 (criticizing "the problematic constitutional status of the territories in a United States to be governed of, by, and for the people").

262. Sere v. Pitot, 10 U.S. 332 (1810).

263. *See id.* at 334 (explaining an objection made to the jurisdiction of the district court, that the district court "cannot entertain jurisdiction, because the defendants are not citizens of any state").

264. *Id.* at 336.

265. *Id.* at 336–37.

Orleans."[266] The Court concluded that the district court had jurisdiction since, for diversity purposes, the Territory of Orleans was the same as any state.[267]

In the second case, *Loughborough v. Blake*,[268] the Supreme Court addressed the constitutional place of U.S. territories, though the central issue was congressional taxing power in Washington, D.C.[269] Marshall first decided that the general power to tax extended to the states and territories, the two components of the "American empire."[270] The requirements of uniformity and apportionment in taxation did not render this power "defective."[271] Instead, Congress could decide whether to extend taxes to territories or to exempt them.[272] Imposing taxes on D.C. and the territories did not violate the revolutionary principle of no taxation without representation. The situation of the thirteen colonies, separated "by a vast ocean" from and having "no common interest" with Great Britain, differed from the territories, who were "in a state of infancy advancing to manhood, looking forward to complete equality so soon as that state of manhood shall be attained."[273] In the territories, therefore, the Supreme Court justified taxation without representation on their infantilization and on temporality. Echoing St. Clair, Marshall constituted the territories as dependent peoples under the tutelage of the federal government.[274]

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266. *Id.* at 337.

267. *Id.* at 338 (holding that citizens of Orleans may sue and be sued in the court that Kentucky citizens may sue and be sued in). Because of its ambiguity on the source of constitutional power, *Sere v. Pitot* is a forerunner to *Cherokee Nation v. Georgia*, where Marshall considered the Indian Commerce Clause as a source of additional, but not definitive, support. *See* Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 53 (1831).

268. Loughborough v. Blake, 18 U.S. 317 (1820).

269. *See id.* at 318, 322 (asking whether Congress has "a right to impose a direct tax on the District of Columbia" and extending direct taxation to territories).

270. *See id.* at 319 (noting that the Commerce Clause imposes "duties, imposts, and excises . . . throughout the United States" and that the United States includes the whole "American empire," composed of "[s]tates and territories"). The year before *Loughborough*, Marshall, in *McCulloch v. Maryland*, 17 U.S. 316, 422 (1819), argued that, because of the similar language of the Necessary and Proper Clause and the "needful rules and regulations" of the Territorial Clause, the constitutionality of territorial government supported the constitutionality of the National Bank.

271. *Loughborough*, 18 U.S. at 321.

272. *Id.* at 323. Similar to *Sere v. Pitot*, Marshall stated that if the general power fails, the District Clause grants Congress exclusive power over D.C. legislation. *Id.* at 324.

273. *Id.*

274. Here, Marshall used the language of infancy to describe the territories rather than the peoples of the territories. *See id.* (referring to the territories as "a part of the society . . . in a state

American Insurance Co. v. 356 Bales of Cotton[275] is the final case of the Marshall Territorial Trilogy. The Supreme Court evaluated whether admiralty cases needed to be adjudicated by an Article III court instead of a territorial court. The treaty with Spain that incorporated Florida into the United States in 1819 stipulated that Florida's residents would become citizens of the United States.[276] Despite their citizenship, they would not "participate in political power" until Florida became a state.[277] While these citizens awaited statehood, Congress could govern Florida as a territory consistent with the Territorial Clause.[278] Marshall added that the right to govern territories may also derive from the right to acquire territory—that is, a "general right of sovereignty."[279] Since territories only "acquired the means of self-government" by becoming states, they must be "within the power and jurisdiction of the United States."[280] In Marshall's formulation, since there are only two sovereigns—the states and the national government—the territories have no sovereignty, and the national government governed the territories. But like his analysis in *Sere v. Pitot*, Marshall refused to answer whether this "unquestioned" power derives from the Territorial Clause or general sovereignty.[281]

The Supreme Court concluded that, since territorial courts were legislative courts and not constitutional courts, they could exercise admiralty jurisdiction.[282] Because, "[i]n legislating for them, Congress exercise[d] the combined powers of the general, and of a state government," the limitations of Article III did not extend to them.[283]

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of infancy advancing to manhood"). But throughout history, presidents, members of Congress, justices, and governors infantilized both the territories and the people living in those territories to justify congressional power.

275. Am. Ins. Co. v. 356 Bales of Cotton, 26 U.S. (1 Pet.) 511 (1828).

276. *Id.* at 542. Marshall avoided answering whether they had to be naturalized "independent of stipulation." *Id.*

277. *Id.*

278. *Id.*

279. *Id.* at 546. Early on, Marshall stated that the right to acquire territory derives from "the powers of making war, and of making treaties." *Id.* at 542.

280. *Id.* at 542–43.

281. *Id.* at 543 ("Whichever may be the source . . . the possession of it is unquestioned."). *Kagama* later cited *American Insurance Co.* for the proposition that sovereignty, and not any constitutional clause, provides the constitutional power to govern U.S. territory—in that case, an Indian reservation. *See* United States v. Kagama, 118 U.S. 375, 380 (1886). Accordingly, *American Insurance Co.* was instrumental in the development of the plenary-power doctrine.

282. *Id.* at 546.

283. *Id.*

This amalgamation of power in the federal government, the remaining sovereign, implied congressional power over internal affairs. But in *Worcester*, decided a few years later, Marshall relaxed his rigid view of sovereignty and found constitutional space for a third sovereign: Native nations.[284] Although limited in external matters, Native sovereignty included power over internal affairs.[285] Could a similar sovereignty exist for the territories?

While the Supreme Court premised territorial rule on eventual statehood and the temporary character of territorial governance, it did not clarify the source of territorial government nor the scope of the Territorial Clause.[286] In his *Commentaries on American Law*, published in 1826, jurist James Kent worried that, while territories awaited settlement and statehood, "the colonists would be in a state of the most complete subordination," similar to the thirteen colonies.[287] According to Kent, the "absolute sovereignty" of the federal government and the "absolute dependence" of the territories violated the "spirit of our native institutions" and would lead to "abuse and oppression."[288] In 1833, Justice Joseph Story recognized the authority of Congress over temporary territorial government prior to statehood through either the Territorial Clause or as an attribute of sovereignty.[289] He described this power as "exclusive and universal," "subject to no control," and "absolute, and unlimited."[290]

The Supreme Court continued to uphold broad territorial powers and stressed that they were exercised during the temporary period prior to equal statehood. In *Pollard's Lessee v. Hagan*,[291] the question was whether certain lands in Alabama were reserved to the United States prior to statehood.[292] The Supreme Court decided that the federal government only held "municipal sovereignty" and "right of

284. *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 519 (1832) (acknowledging the presence of "Indian nations" as granted by various treaties with the United States).

285. *Id.* at 547.

286. *See* ALLEN, *supra* note 214, at 182–83.

287. JAMES KENT, 1 COMMENTARIES ON AMERICAN LAW 360 (1826).

288. *Id.* at 361.

289. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 476 (1833).

290. *Id.* at 479.

291. Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212 (1845).

292. *Id.* at 220–21.

soil" for "temporary purposes."[293] During this temporary rule, Congress held the territory "in trust" for the new states.[294] Congress could only hold both municipal and national powers prior to statehood.[295] But once Alabama became a state "upon an equal footing," the United States lost its municipal sovereignty.[296] After statehood, Congress could only interfere through the Commerce Clause, which *Gibbons v. Ogden*[297] had previously described as "plenary" and "vested in Congress as absolutely as it would be in a single government."[298] Congressional power over the territories finally clashed with the principles of state and territorial sovereignty in the most consequential constitutional controversy of the nineteenth century: whether Congress could abolish slavery in the territories.

C. Slavery and Territorial Sovereignty

1. *Congressional Power over Slavery in the Territories.* After the Louisiana Purchase, the most pressing question was whether Congress would sanction slavery in the territories and future states.[299] In 1804, Congress divided Louisiana and extended a federal statute prohibiting the slave trade there.[300] Pierre Derbigny, a French inhabitant of Louisiana, denounced temporary territorial government as inconsistent with the republican principles of the Declaration of Independence in a letter to Congress.[301] Because statehood was tied to population thresholds, he worried that the division into two territories could be an attempt to "prolong our state of political tutelage."[302] But Derbigny's anticolonial politics and his desire for freedom

293. *Id.* at 221.

294. *Id.* at 222.

295. *Id.* at 223–24. According to the Court, the only other place where these powers can be combined is D.C. *Id.* at 223.

296. *Id.* at 224.

297. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824).

298. *Pollard's Lessee*, 44 U.S. at 229–30 (quoting Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824)).

299. *See* Levinson & Sparrow, *supra* note 205, at 6 ("The United States' purchase of Louisiana and the expansion it endangered made slavery *the* issue of American politics—trumping partisanship, nationalism and nativism, and the tariff.").

300. An Act Erecting Louisiana into Two Territories, and Providing for the Temporary Government Thereof, ch. 38, §§ 1, 7, 2 Stat. 283, 285 (1804).

301. *See* Letter from Pierre Derbigny to the U.S. Congress (1804), https://www.digitalhistory.uh.edu/disp_textbook.cfm?smtID=3&psid=261 [https://perma.cc/AZQ5-XGCJ].

302. *Id.*

complemented his proslavery politics. He asserted the territorial right to decide on slavery on "an equal footing with other states" while defending slavery as necessary for "the very existence of our country."[303] For Derbigny, republicanism was thus inconsistent with tutelage but dependent on the subordination of enslaved Africans.

In a publicized response letter, Thomas Paine asserted that the problem with Derbigny's stance was not the "principles of liberty" he expounded but "the misapplication of them."[304] Louisianans, with no experience of self-government, needed to be "initiated into the principles and practice of the representative system of government."[305] Paine justified territorial government, under the "guardianship of Congress," because of its temporary character and the promise of equal statehood.[306] But slavery was the topic that most concerned Paine, not defense of territorial rule. The language of rights and self-government, of statehood and equality, was only the thin disguise to "petition for power . . . to import and enslave Africans!"[307] While Derbigny invoked territorial sovereignty and equal statehood to protect slavery, Paine invoked the principles of the American Revolution to endorse federal guardianship and the abolition of slavery.

Since the Northwest Ordinance, which banned slavery in the territory, Congress had asserted legislative power to decide whether to prohibit or allow extending slavery in U.S. territories.[308] The three-fifths clause, which added representation according to the population of enslaved people,[309] the equal representation of states in the Senate,[310] and the Electoral College[311] aggravated the need to balance free states with slave states.

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303. *Id.*

304. Letter from Thomas Paine to the Inhabitants of Louisiana (Sept. 22, 1804), https://www.thomas-paine-friends.org/paine-thomas_to-the-inhabitants-of-louisiana.html [https://perma.cc/TF4X-NUPC].

305. *Id.*

306. *See id.*

307. *Id.* (emphasis omitted).

308. *See* ALLEN, *supra* note 214, at 199 ("Between 1790 and 1848, Congress prohibited slavery eight times and allowed it six.").

309. WILLIAM M. WIECEK, THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760–1848, at 106 (1977).

310. U.S. CONST. art. I, § 3, cl. 1.

311. U.S. CONST. art. II, § 1, cl. 2.

In 1819, after the Louisiana Territory (now named the Missouri Territory) sought admission into the Union, Congress debated whether it could condition statehood on the exclusion of slavery. Restrictionists like Rufus King argued that the Territorial Clause and the New States Clause gave Congress the power to restrict the spread of slavery in the territories and new states.[312] Antirestrictionists, by contrast, asserted that Congress could only admit or deny statehood and could not condition it on the abolition of slavery.[313] They argued that the Territorial Clause applied only to property, "not the people, government, or social order of the territories."[314] They also elaborated a "trustee theory" of congressional power: Congress held the territories in trust for the benefit of all the states, and excluding slavery would deprive citizens of their rights.[315] While both sides were equally committed to territorial expansion, for antirestrictionists, imperial powers were constitutionally limited by the institution of slavery. President Monroe's cabinet unanimously sided with the restrictionists on the congressional power under the Territorial Clause to condition statehood on slavery.[316] Through the Missouri Compromise, Congress admitted Maine as a free state, Missouri as a slave state, and forbade slavery in the territory north of the 36°30' parallel.[317]

After the Mexican-American War, the question over slavery in the territories returned to the forefront of constitutional debates. The common-property doctrine asserted that the territories were "the common property of the states" and the federal government could not discriminate against the states nor its citizens by banning slavery.[318] Meanwhile, the doctrine of popular sovereignty defended the right of

312. WIECEK, *supra* note 309, at 111.

313. *Id.* at 113.

314. *Id.* at 116.

315. *Id.*

316. *Id.* at 115. Monroe also consulted James Madison, who felt the restriction was not "within the true scope of the Constitution." Robert R. Russell, *Constitutional Doctrines with Regard to Slavery in Territories*, 32 J. S. HIST. 466, 468 (1966).

317. *See* JOHNSON, *supra* note 35, at 85–87 (discussing the Missouri Compromise and the exclusionary Missouri constitution of 1820).

318. Russell, *supra* note 316, at 470. This doctrine is also known as the Calhoun doctrine, named after then-Senator John C. Calhoun. *Id.*

territories to decide on this question, similar to Derbigny's Louisiana letter.[319] This doctrine was also known as "territorial sovereignty."[320]

During the discussion of the Wilmot Proviso, which sought to prohibit slavery in the territory Mexico ceded, Senator Calhoun combined both positions to protect slavery. By defending the right of territories and new states to decide on slavery without conditions, the slaveholding states were furthering equality and the "fundamental principles of self-government."[321] By contrast, the proposal to ban slavery interfered with the right of citizens to settle in the territory alongside their slave "property."[322] For the slavocracy, the protection of slavery was consistent with territorial sovereignty, equal statehood, and the rights of state citizens.

2. Dred Scott v. Sandford*: Territorial Sovereignty for White Settlers.* In the subsequent years, Congress could not provide a comprehensive answer to the question of congressional power over slavery in the territories.[323] Instead, Congress invited the Supreme Court to situate the territories within the constitutional system.[324] In *Dred Scott v. Sandford*, the Supreme Court decided that the privileges and immunities of citizens were reserved only to white persons and that Congress could not forbid slavery in any territory; thus, the Missouri Compromise was unconstitutional.[325] But Chief Justice Taney also evaluated the source and scope of federal power over the territories and whether Congress could delay or deny statehood altogether.[326]

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319. FEHRENBACHER, *supra* note 223, at 137.

320. JOHN SUVAL, DANGEROUS GROUND 100 (2022) (quoting Congressman Robert Barnwell Rhett, who described this as the "doctrine of territorial sovereignty"). While these doctrines were a blend of old and new ones, FEHRENBACHER, *supra* note 223, at 136–37, for Douglas the territories had the right to ban slavery, not only to protect it, *see id.* at 495 ("Douglas . . . reaffirm[ed] the principle of nonintervention and . . . oppose[d] any effort to establish a congressional slave code for the territories."). Before he developed this view of popular sovereignty, for Douglas the territories were "subject to the jurisdiction and control of Congress during their infancy, their minority." Robert W. Johannsen, *Stephen A. Douglas, Popular Sovereignty and the Territories*, 22 HISTORIAN 378, 384 (1960).

321. John C. Calhoun, *Speech on the Oregon Bill at the U.S. Senate* (June 27, 1848), *reprinted in* 4 THE WORKS OF JOHN C. CALHOUN 479, 480 (Richard K. Crallé ed., 1854).

322. *Id.*

323. Russell, *supra* note 316, at 474.

324. *Id.*

325. Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 395–96 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

326. *Id.* at 443.

In *American Insurance Co.*, Chief Justice Marshall had avoided answering whether territorial government derived from the Territorial Clause or a power to acquire territory that is inherent in sovereignty. Taney, his successor, finally settled this question by limiting the Territorial Clause to territory that belonged to the United States at the time the Constitution was adopted.[327] The right to govern future territories derived, therefore, from "the right to acquire territory."[328]

Because there was no general power to rule the territories, the power to govern future territories was limited by both the text and principles of the Constitution.[329] In Taney's formulation, the promise of equal statehood and the right to own slaves constrained territorial rule. Consistent with previous judicial precedents, Congress could only govern territories temporarily before their admission into the Union. The Constitution provided no power "to acquire a Territory to be held and governed permanently in that character."[330] It demanded statehood and forbade the federal government from holding a "colony" and ruling it "with absolute authority."[331] Similar to the common-property doctrine, Taney argued that Congress could only rule these territories as a trustee "for the benefit of the people of the several States."[332] Since the Constitution applied in the territories, a citizen coming from a state did not lose his right to property—in this case, to own enslaved Africans—by settling there.[333] Congress could not abolish slavery in the territories nor delegate that authority to the territorial government.[334]

The anticolonial rhetoric of statehood, equality, and territorial sovereignty for white settlers denied the federal government the power to prohibit slavery. *Dred Scott* secured the place of the territories

327. *Id.* at 436. In his concurring opinion, Justice Campbell disagreed with Taney's interpretation of the Territorial Clause but denied that it provided a "corresponding authority to determine the internal polity, or to adjust the domestic relations, or the persons who may lawfully inhabit the territory." *Id.* at 501 (Campbell, J., concurring); *see also* ALLEN, *supra* note 214, at 193.

328. *Dred Scott*, 60 U.S. at 443 (quoting Am. Ins. Co. v. 356 Bales of Cotton, 26 U.S. 511, 542 (1828)).

329. *Id.* at 447.

330. *Id.* at 446.

331. *Id.* at 447.

332. *Id.* at 448.

333. *Id.* at 449–50.

334. *Id.* at 451.

"within the constitutional system."[335] In other words, it did for the U.S. territories what *Worcester* did for the Native nations: recognize territories within the federal system.[336] This was, however, a territorial sovereignty reserved for slave owners at the expense of free Black people, enslaved Africans, and Indigenous peoples.[337]

In 1858, lawyer Henry Sherman criticized the idea of "[a] Popular Territorial Sovereignty" as "contradictory and antagonistic" and asserted that "[t]erritorial is colonial; it implies dependence, and sovereign dependence is a political absurdity."[338] This was also the view of Abraham Lincoln during his debates with Stephen A. Douglas. For Lincoln, "no such thing as sovereign power attache[d] to a territory while a territory."[339] Territorial sovereignty and dependence could not coexist. For Douglas, however, there was a "residual popular sovereignty," meaning that a territory could decide for itself whether to exclude slavery in the territory.[340]

Dred Scott contributed to the outbreak of the Civil War, and its holding on slavery in the territories and Black citizenship were repudiated by the Thirteenth and Fourteenth Amendments.[341] But those amendments did not address the ban on perpetual colonies.[342] The remaining questions, then, were whether *Dred Scott*'s rejection of

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335. ALLEN, *supra* note 214, at 178–79.

336. *See id.* at 186 (arguing that *Dred Scott* "integrated the territories into the system of concurrent sovereignty").

337. *See* United States v. Rogers, 45 U.S. 567, 572 (1846) (limiting Indian sovereignty).

338. HENRY SHERMAN, SLAVERY IN THE UNITED STATES OF AMERICA, at xi (1858). For Sherman, people living in a "dependent Territory" have no "inherent right" to "form a government." *Id.* at xi–xii. Congress can "delegate a portion of its authority, by the establishment of a local Territorial government, but it does not thereby relinquish its own Supremacy." *Id.* at xii.

339. SUVAL, *supra* note 320, at 192. Moreover, for Lincoln, *Dred Scott* rejected what he dismissed as "squatter sovereignty" by impairing territorial governments from abolishing slavery themselves. *Id.* at 191. For Douglas, this part of the opinion was dictum. FEHRENBACHER, *supra* note 223, at 494.

340. FEHRENBACHER, *supra* note 223, at 494–95. After *Dred Scott*, this came to be known as the Freeport doctrine. *Id.* But his defense of popular sovereignty was highly selective, especially when it came to federal control over the Utah Territory. *See* BRENT M. ROGERS, UNPOPULAR SOVEREIGNTY: MORMONS AND THE FEDERAL MANAGEMENT OF EARLY UTAH TERRITORY 171 (2017).

341. U.S. CONST. amends. XIII, XIV.

342. According to Professor Sam Erman, the Fourteenth Amendment "discouraged overseas empire building by making citizenship, rights, and eventual statehood prerequisites to any annexation." SAM ERMAN, ALMOST CITIZENS: PUERTO RICO, THE U.S. CONSTITUTION, AND EMPIRE 8 (2019) [hereinafter ERMAN, ALMOST CITIZENS].

absolute federal power was still in force and whether the idea of territorial sovereignty could survive without slavery.[343]

D. Pupilage over "Others": Plenary Power over the Territories

Following the Mexican-American War, parts of the ceded territory became states less than two years after incorporation, including California.[344] But not all territorial government was temporary. In New Mexico, Utah, and Arizona, the lack of racial and cultural homogeneity meant denying territorial sovereignty and postponing statehood.[345] The Utah governor defended this colonial arrangement by recognizing that all communities have "an inherent right of revolution and self-government" but that these rights are subject to "periods of infancy and tutelage."[346] These differing timelines for statehood, influenced by racism and partisan politics, confirmed the contingent character of the path toward statehood.

While Congress postponed statehood, the Supreme Court gradually acquiesced to broader assertions of power over the territories. The Court was willing to pay lip service to *Dred Scott*'s version of territorial self-government—at first.[347] In *Clinton v.*

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343. While for Taney the idea of territorial sovereignty did not include the power to prohibit slavery, it did mean that Congress could not rule the territories as "mere colonists, dependent upon the will of the General Government." Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 447 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

344. FRYMER, *supra* note 190, at 26.

345. *See* LAURA E. GÓMEZ, MANIFEST DESTINIES: THE MAKING OF THE MEXICAN AMERICAN RACE 75 (2007) (discussing the relationship between race and statehood); FRYMER, *supra* note 190, at 180. Statehood was also granted or denied because of "considerations of sectional balance and partisan advantage." *Id.* at 26. Once a territory became a state, it would be represented by two senators and with as many representatives as required by its population. Accordingly, national parties often used statehood to "to entrench their power in Congress and the Electoral College." *Id.*; *see* ROGERS, *supra* note 340, at 167 (discussing how statehood was denied because residents of Utah were considered unfit for self-government).

346. *See* ROGERS, *supra* note 340, at 295 (discussing how the residents of the Utah Territory were considered "minors or wards of the federal government because they had not proven their readiness for republican self-government"); SYDNEY GEORGE FISHER, THE LAW OF THE TERRITORIES 70 (1859) ("The Territories are treated as infant republics, the wards, until they attain their majority, of a mature republic; inchoate States, trusted under watchful care, until they learn how to use them, with political power and the apparatus for applying it, as children are trusted with guns and horses.").

347. FEHRENBACHER, *supra* note 223, at 583 ("The Dred Scott decision was most influential as precedent, however, in cases calling for judicial elucidation of the source, nature, and limits of congressional power in the territories.").

Englebrecht,[348] the Supreme Court asserted that the theory of territorial governance gives "to the inhabitants all the powers of self-government consistent with the supremacy and supervision of National authority."[349] Congress, however, could always annul the laws of the territorial legislatures.[350] Two years later, in *Snow v. United States*,[351] the Court once again sanctioned federal "pupilage" and constituted the territories as "mere dependencies of the United States."[352] Their self-government depended on the population and was always subject to alterations by Congress.[353] These cases preserved the idea of temporary territorial rule prior to statehood but reconstituted the territories as dependencies subject to complete congressional authority.

As any possibility of territorial sovereignty faded from constitutional memory, the Supreme Court assented to congressional interference with internal territorial affairs. In *First National Bank v. County of Yankton*,[354] the Court addressed Congress's decision to annul and reenact a territorial statute that allowed counties to pay railroad companies.[355] For the Court, it was "too late to doubt the power of Congress to govern the Territories," yet it refused to identify the constitutional clause that granted this power.[356] Instead, in stating that the "power is an incident of sovereignty, and continues until granted away," it followed *Dred Scott*'s logic that the right to govern territory derived from the right to acquire territory.[357] But whereas *Dred Scott* rejected federal municipal authority over the territories, at least over slavery, *Yankton* explicitly recognized a "full and complete legislative authority."[358] Congress could even "legislate directly for the local government."[359] Thus *Yankton* marked the most significant retreat from the antebellum constitutional understanding of territorial sovereignty.

348. Clinton v. Englebrecht, 80 U.S. 434 (1871).

349. *Id.* at 441.

350. *Id.* at 445.

351. Snow v. United States, 85 U.S. 317 (1873).

352. *Id.* at 320.

353. *Id*.

354. Nat'l Bank v. County of Yankton, 101 U.S. 129, 129–30 (1879).

355. *Id.* at 129–30.

356. *Id.* at 132.

357. *Id.* at 133; Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 443 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

358. *Yankton*, 101 U.S. at 133.

359. *Id.*

Territorial dependency continued in *Murphy v. Ramsey*.[360] In 1882, Congress legislated that no polygamist or bigamist could vote in territorial elections.[361] The Supreme Court, echoing Chief Justice Marshall, upheld this because Congress was vested with all legislative power in the territories.[362] Accordingly, the political rights of territorial citizens were subject to the "legislative discretion" of Congress.[363] Only the "purposes for which it was conferred" limited this power.[364] Imposing conditions on suffrage civilized and prepared the territories for statehood and self-government, and those purposes were consistent with congressional power.[365] While territorial rule was always premised on federal tutelage prior to statehood, now eventual statehood justified any assertion of power consistent with it. Territorial self-government did not exist by itself but only at the pleasure of Congress.

To summarize, while *American Insurance Co.* left whether the Territorial Clause or sovereignty justified power over the territories undecided, *Dred Scott* held that the power to govern territories resulted from sovereignty.[366] The Territorial Clause did not apply, and the lack of "express regulation" meant that the power was limited by "the provisions and principles of the Constitution."[367] *Murphy*, by contrast, transformed sovereignty into a supreme assertion of authority—the sovereign power can even "declare that no one but a married person shall be entitled to vote."[368] *Kagama* was decided one year later and relied on both *American Insurance Co.* and *Murphy* to derive federal power over colonized peoples from their dependence instead of any enumerated power.[369] In both *Kagama* and *Murphy*, the Supreme Court disregarded local self-government and legitimized federal power over internal affairs. It did so by constituting the

360. Murphy v. Ramsey, 114 U.S. 15 (1885).

361. Edmunds Act, ch. 47, 22 Stat. 30, 31 (1882) (codified at 48 U.S.C. § 1461) (repealed 1983).

362. *Murphy*, 114 U.S. at 44.

363. *Id.* at 45.

364. *Id.*

365. *Id.*

366. Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 443 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

367. *Id.* at 447.

368. *Murphy*, 114 U.S. at 43.

369. *See supra* note 153 (discussing the influence of *Murphy* on *United States v. Kagama*, 118 U.S. 375, 380 (1886)).

inhabitants of the territories and the Native nations as uncivilized and dependent upon the political guardianship of the national government.

The Supreme Court consolidated this transformation of sovereignty and federal power in *Late Corporation of the Church of Jesus Christ of Latter-Day Saints v. United States*,[370] where it validated a federal statute that repealed the charter of the church and seized its property because of its continued defense of polygamy.[371] The Court now described the power of Congress over the territories as "general and plenary."[372] The power to acquire and govern the territories was "an incident of national sovereignty," and once territories were acquired, the United States "could impose laws upon them, and its sovereignty over them was complete."[373] Following Marshall's initial formulation in *American Insurance Co.*, the territories were under the sovereignty of the federal government, since there were only two legitimate sovereigns. The church promoted polygamy, which was "a blot on our civilization" and "a return to barbarism," so Congress could repeal territorial laws that protected polygamy without violating the constitutional right of religious freedom.[374] As in *Murphy*, appeals to civilization justified plenary power over the territories. Together, *Yankton*, *Murphy*, and *Late Corporation* dismantled the territorial sovereignty that Taney originally conceived to protect slavery.

Unlike most territorial cases, *Late Corporation* did not ground territorial rule in eventual statehood. But a year later, *McAllister v. United States*[375] returned to this justification in an opinion penned by Justice Harlan.[376] A federal statute authorized the president to suspend any civil officer except "judges of the courts of the United States."[377] The question in *McAllister* was whether territorial judges were within that exception. Citing *American Insurance Co.*, the Supreme Court

370. Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1 (1890).

371. *See id.* at 65.

372. *Id.* at 42. One year before, in *Stephens v. Cherokee Nation*, 174 U.S. 445 (1899), the Supreme Court described the power over Indian affairs as "plenary." *Id.* at 478.

373. *Late Corp.*, 114 U.S. at 42.

374. *Id.* at 49. In the territories, Congress is only limited by the "fundamental limitations," not by "direct application" of the Constitution. *Id.* at 44.

375. McAllister v. United States, 141 U.S. 174 (1891).

376. *See id.* at 187–88 ("The absence from the Constitution of such guaranties 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.").

377. *Id.* at 177.

decided that Judge McAllister of the Territory of Alaska was not protected because territorial courts were legislative courts, not courts of the United States.[378] In the territories, Congress had "plenary municipal authority," so territorial courts could not be considered Article III courts.[379] The Supreme Court justified the lack of Article III constitutional protections in territorial courts because they were "temporary."[380] Since these courts would "cease to exist, as territorial or legislative courts, when the Territory becomes a State," the constitutional protections of life tenure and good behavior did not apply.[381] Plenary power over municipal affairs was premised on its temporality.[382]

The uneasy relationship between colonial rule and constitutionalism prompted dissenting opinions in *Late Corporation* and *McAllister*. In the first, Chief Justice Fuller rejected the existence of a congressional "absolute power" since congressional powers were only "delegated and not inherent."[383] In the second, Justice Field, who had joined the Chief Justice's dissent in *Late Corporation*, argued that territorial courts were courts of the United States; thus, their courts should be integrated into the constitutional system.[384] The subordination of territorial judges reminded Field of the Declaration of Independence, which denounced that the King of Great Britain "made judges dependent on his will alone."[385] Field's dissent articulated a narrative of the Constitution as anti-imperial and the United States as postcolonial. While for Harlan, territorial rule was justified by eventual statehood, for Field, this form of colonial rule was inconsistent with the Constitution even if it was temporary.

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378. *See id.* at 182 ("This was decided long since in *The American Insurance Company v Canter*, 1 Pet. 546 . . . ." (citing Am. Ins. Co. v. 356 Bales of Cotton, 26 U.S. 511 (1828))).

379. *Id.* at 184.

380. *Id.* at 188.

381. *Id.* at 190.

382. *See, e.g.*, Shively v. Bowlby, 152 U.S. 1, 49 (1894) (describing how territories "are held with the object, as soon as their population and condition justify it, of being admitted into the Union as States").

383. Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States, 114 U.S. 1, 67 (1890) (Fuller, C.J., dissenting).

384. *See McAllister*, 141 U.S. at 198 (Field, J., dissenting) ("The courts for the Territories, though not permanent like the courts referred to in the Constitution, are courts of the United States . . . .").

385. *Id.* at 196.

This analysis shows that from the Northwest Ordinance to the late nineteenth century, political and judicial actors justified territorial rule by portraying it as temporary, meant to last only during the territories' state of infancy. The Territorial Clause, however, did not provide a time limit.[386] Congress prolonged federal rule due to sectional debates over slavery, the racial and gendered formation of the states, and partisan politics. While awaiting statehood, these territories yearned for sovereignty over internal affairs, particularly over the incorporation of slavery. As the memory of territorial sovereignty faded from constitutional consciousness, Congress exercised plenary powers over both the Native nations and the territories. At the turn of the century, the legal status of these dependent peoples took center stage, once again, in the greatest constitutional controversy of the time: Could the United States hold overseas colonies as permanent dependencies?

III. "POLITICAL CHILDHOOD": TUTELAGE OF OVERSEAS COLONIES

Because the anti-imperialist reading of the Constitution relied on the supposed temporary nature of territorial rule, the possession of overseas colonies undermined the foundational principles of constitutionalism. After the Spanish-American War, the Spanish empire ceded the overseas colonies of the Philippines, Puerto Rico, and Guam to the United States.[387] In the *Insular Cases*, the Supreme Court evaluated the place of these overseas colonies within the constitutional system.[388] Constitutional analysis of these cases has focused on the categorization of the ceded territories as incorporated

386. By contrast, other clauses of the Constitution incorporate notable time limits and rules. *See* Alvin Padilla-Babilonia, *Time and Constraint: Executive Sunset and Executive Sunrise Rules*, 51 U. MEM. L. REV. 141, 149–50 (2020) (discussing the concept of time in constitutional law).

387. EFRÉN RIVERA RAMOS, AMERICAN COLONIALISM IN PUERTO RICO 35 (2d ed. 2009).

388. On the *Insular Cases*, see generally Burnett, Untied *States*, *supra* note 66; RECONSIDERING THE INSULAR CASES: THE PAST AND FUTURE OF THE AMERICAN EMPIRE (Gerald L. Neuman & Tomiko Brown-Nagin eds., 2015); JOSÉ J. ÁLVAREZ GONZÁLEZ, DERECHO CONSTITUCIONAL DE PUERTO RICO Y RELACIONES CONSTITUCIONALES CON LOS ESTADOS UNIDOS (2009); RIVERA RAMOS, *supra* note 387; Jaime B. Fuster, *The Origins of the Doctrine of Territorial Incorporation and Its Implications Regarding the Power of the Commonwealth of Puerto Rico To Regulate Interstate Commerce*, 43 REV. JUR. U.P.R. 259 (1974); Marcos A. Ramírez, *Los Casos Insulares*, 16 REV. JUR. U.P.R. 121 (1946); Francisco Ponsa Feliú, *Status Constitucional de los Territorios de Estados Unidos*, 8 REV. JUR. U.P.R. 275 (1939); Frederic R. Coudert, *The Evolution of the Doctrine of Territorial Incorporation*, 26 COLUM. L. REV. 823, 832 (1926).

or unincorporated and the consequences for citizenship and constitutional rights.[389] While they are now understood as posing a radical break with past colonial practice,[390] the political and intellectual actors of the time identified the continuities in imperial politics.[391] In Puerto Rico and the Philippines, the American empire reproduced the dualities of sovereignty and dependence. Because the people of these overseas colonies were still in their "political childhood," the United States could take them "in tutelage" and teach them "the foundations for [their] future self-government."[392]

Part III traces the parallels in past and present colonial rule—the influence of tribal guardianship and territorial tutelage on the overseas colonies (III.A), the debates concerning temporary pupilage in the *Insular Cases* (III.B), and the concealment of colonialism in the doctrine of plenary power (III.C). Plenary power over the territories remained despite separation from the promise of statehood. After more than 125 years of colonial rule, tutelage in democracy—with different degrees of self-government—survives to this day in American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands.

A. The Temporality Debate after the Spanish-American War

The long-held practice, since the Northwest Territory, was a temporary period of federal tutelage. By 1898, however, the federal government had ruled New Mexico and Arizona as territories for nearly fifty years.[393] Oklahoma and Indian Territory were still territories.[394] Alaska had been a U.S. possession since 1867, but it was

389. *See* Ramírez, *supra* note 388, at 125–27; ERMAN, ALMOST CITIZENS, *supra* note 342, at 6.

390. H.R. Res. 279, 117th Cong. (2021) ("[T]he Supreme Court's decisions in the Insular Cases broke from its prior precedent to establish a doctrine of territorial incorporation.").

391. Williams, *supra* note 30, at 817–18 ("The imperialists did not see things in that light."); Burnett, Untied *States*, *supra* note 66, at 834 ("[T]he Court's nineteenth-century jurisprudence on the Constitution in the territories afforded ample support for the conclusion that certain constitutional provisions did not apply in the territories annexed in 1898."); Efrén Rivera Ramos, *The Insular Cases: What Is There To Reconsider?*, *in* RECONSIDERING THE INSULAR CASES, *supra* note 388, at 36 ("The Insular Cases represented both a continuation of and a break from the past.").

392. DAVID JAYNE HILL, AMERICANISM: WHAT IT IS 177 (1916).

393. FRYMER, *supra* note 190, at 203.

394. *See id.* at 165 (discussing the "Oklahoma Territory").

not even an organized territory.[395] In 1898, Spain ceded the Philippines, Guam, and Puerto Rico and relinquished its title over Cuba.[396] Because of their distance and significant populations, these territories could not be settled by white Anglo-Saxons. Statehood was off-limits, especially for the Philippines.[397] This foreshadowed a shift from a settler empire to the more traditional empires of Europe.[398] But did the Constitution allow permanent dependencies, or was territorial rule premised on temporary federal tutelage prior to statehood?

In the pages of the Harvard Law Review, constitutional scholars of the time debated the place of the overseas colonies within the constitutional system.[399] The collective focus of their inquiry was not whether constitutional rights would apply in these territories nor whether their inhabitants needed to be naturalized.[400] Instead, their concern was whether the national government could possess territories permanently with no promise of statehood.[401] To answer this question,

395. LAWSON & SEIDMAN, *supra* note 208, at 106.

396. RIVERA RAMOS, *supra* note 387, at 35.

397. *See* Theodore S. Woolsey, *The Government of Dependencies*, 13 ANNALS AMER. ACAD. POL. & SOC. SCI., Supp. June 1899, at 3, 7 (1899) ("Between Porto Rico and the Philippines, both now equally under the sovereignty of the United States, there is a gulf fixed, climatic, social, racial, as well as geographical."); Elmer B. Adams, *The Causes and Results of Our War with Spain from a Legal Stand-Point*, 8 YALE L.J. 119, 131 (1898) (discussing the likelihood of statehood for Puerto Rico).

398. *See* FRYMER, *supra* note 190, at 30 (describing how "the United States at the beginning of the twentieth century . . . began to think of an overseas empire with the potential of going beyond the settler model"); JANE BURBANK & FREDERICK COOPER, EMPIRES IN WORLD HISTORY: POWER AND THE POLITICS OF DIFFERENCE 8 (2011) (discussing "[t]he concept of empire"); RANA, TWO FACES, *supra* note 7, at 273 ("Settler empire had to give way to the pressing demands of American global dominance and domestic security.").

399. *See* Carman F. Randolph, *Constitutional Aspects of Annexation*, 12 HARV. L. REV. 291, 292 (1898) (arguing that territorial rule is temporary, prior to statehood); C. C. Langdell, *Status of Our New Territories*, 12 HARV. L. REV. 365, 365 (1899) (discussing the constitutional meaning of the "United States"); Simeon E. Baldwin, *The Constitutional Questions Incident to the Acquisition and Government by the United States of Island Territory*, 12 HARV. L. REV. 393, 404 (1899) (questioning whether the United States could hold a territory as a colonial dependent permanently); James B. Thayer, *Our New Possessions*, 12 HARV. L. REV. 464, 473 (1899) [hereinafter Thayer, *Our New Possessions*] (dismissing the idea of temporary territorial rule as a political theory, not constitutional law); Abbott Lawrence Lowell, *The Status of Our New Possessions: A Third View*, 13 HARV. L. REV. 155, 176 (1899) (arguing that Congress can decide whether to incorporate the territory into the Union).

400. For a discussion of citizenship, see Thayer, *Our New Possessions*, *supra* note 399, at 472 and Langdell, *supra* note 399, at 376. However, the crucial question was whether the American empire could hold overseas colonies.

401. *See* Randolph, *supra* note 399, at 307 ("Conceding the highest authority and the widest significance to this passage, it contemplates merely a transitory condition . . . ."); Baldwin, *supra*

they examined two precedents—the ward status of Native nations and prior territorial rule.[402] While precedent dealing with Native nations was consistent with governing the islands as permanent colonial subjects, the prevailing model of territorial governance was federal tutelage leading to statehood. Absent from the debate once again was whether the islanders consented to the transfer of sovereignty.[403] Two constitutional positions emerged on what these possessions could become: temporary territories or permanent dependencies.[404]

Representing temporary territorial rule, Carman F. Randolph and Simeon E. Baldwin provided the most comprehensive doctrinal

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note 399, at 412 (contemplating "[w]hether Puerto Rico can be held permanently and avowedly as a colonial dependence"); Langdell, *supra* note 399, at 392 (discussing "the government of dependent countries"); Thayer, *Our New Possessions*, *supra* note 399, at 471–73 ("As regards permanent arrangements, we may . . . govern them precisely as we have governed our territories heretofore."); Lowell, *supra* note 399, at 176 (discussing whether "possessions may also be so acquired as not to form part of the United States"); Burnett, Untied *States*, *supra* note 66, at 864–68 (discussing the terms of the contemporary debate about annexation and deannexation).

402. *See* Randolph, *supra* note 399, at 292 (discussing prior "annexed territory"); Baldwin, *supra* note 380, at 406–07, 411–13 ("The Indian tribes on our own continent are held not to be subject to our jurisdiction . . . ."); Langdell, *supra* note 399, at 388–89 (comparing the status of Hawaii and Texas); Thayer, *Our New Possessions*, *supra* note 399, at 473 (discussing Hawaii and the District of Columbia); Lowell, *supra* note 399, at 176 (discussing which "theory . . . best interprets the Constitution in the light of history").

403. In 1898, Eugenio María de Hostos, as founder of the League of Patriots (*Liga de Patriotas*), demanded a plebiscite so that Puerto Ricans could freely decide whether to become U.S. citizens. Eugenio María de Hostos, *To All Puerto Ricans*, HOSTOS CMTY. COLL. – CUNY (Sept. 10, 1898), https://commons.hostos.cuny.edu/archives/works-by-hostos/biography_by_hernandez_eng/to-all-puerto-ricans [https://perma.cc/2LBG-AK3U] (advocating for "a plebiscite so that we may become or not become American citizens"). For Hostos, it made more sense for the United States to have allies rather than "dependent peoples." EUGENIO MARÍA DE HOSTOS, MADRE ISLA: CAMPAÑA POLÍTICA POR PUERTO RICO, 1898-1903, at 457 (2022) (translation by the author).

404. This classification differs from other academic accounts of these debates. RIVERA RAMOS, *supra* note 387, at 75; JUAN R. TORRUELLA, THE SUPREME COURT AND PUERTO RICO 24–32 (1985). One of its benefits, however, is that it allows us to see past the popular discussion of whether the Constitution followed the flag. OWEN FISS, TROUBLED BEGINNINGS OF THE MODERN STATE, 1888-1910, at 228 (1993) (describing this formulation as "problematic"); Burnett, Untied *States*, *supra* note 66, at 821 ("But while the popular rhetoric captures something of the tone of these contemporary political debates, neither that rhetoric nor its 'legal' translation accurately describes the doctrinal content of the *Insular Cases*."). These scholars recognized that the Constitution applied, at least to some extent. *See, e.g.*, James B. Thayer, *The Insular Tariff Cases in the Supreme Court*, 15 HARV. L. REV. 164, 165 (1901) [hereinafter Thayer, *Insular Tariff Cases*] (describing as "obvious enough" that "wherever the flag is rightfully carried the Constitution attends it"). The main question, therefore, was whether the United States could hold permanent dependencies. *Compare* Burnett & Marshall, *supra* note 66, at 12 (asserting that the real question was whether territories must become states), *with* RIVERA RAMOS, *supra* note 387, at 98 (arguing that the real issue was whether the Constitution followed the flag).

analysis of the territorial jurisprudence of the nineteenth century. For Randolph, these precedents sustained that territorial rule is "temporary" prior to the "permanent condition of statehood."[405] While the "segregation of tribal Indians" was "an established feature of our polity," Randolph argued that the classification of tribes within the Philippines as wards "could not be done arbitrarily."[406] That still left millions of islanders who would be "unquestionably citizens" with the right to move freely to the states and vote in state elections once there.[407] Randolph, therefore, refused to generalize Native dependency, not out of anticolonial solidarity, but to persuade the U.S. government away from annexing the Spanish islands.

Baldwin assumed the same position on citizenship but was more hesitant regarding permanent dependencies.[408] For Baldwin, there was "no constitutional objection to . . . temporary government of military or colonial form."[409] Congress could therefore establish a government in Puerto Rico and "maintain it until the inhabitants may be fit to govern themselves."[410] But how long could this temporary government last?[411] Baldwin argued that "[n]o fixed limit of time [could] be assigned for the duration of such a *régime*."[412] Alaska and New Mexico, after all, had been territories for decades.[413] On the timing of admission, "every presumption is to be made in favor of the good faith of Congress and the wise exercise of its discretion."[414] Baldwin considered unresolved whether the United States could govern territories like Puerto Rico or the Philippines "permanently" and as "colonial dependen[ts]."[415] Despite the difficulties that would arise from ruling the Philippines and

405. Randolph, *supra* note 399, at 292; *see also id.* at 307 (describing territorial government as a "transitory condition").

406. *Id.* at 309.

407. *Id.* at 310.

408. *See* Baldwin, *supra* note 399, at 406–07 (comparing the condition of "Indian tribes" to that of "the people of Puerto Rico and the natives of Hawaii").

409. *Id.* at 411.

410. *Id.*

411. This question has remained unanswered since the Northwest Territory. ONUF, *supra* note 201, at 79.

412. Baldwin, *supra* note 399, at 411.

413. *See id.* (describing New Mexico as undeserving of statehood because "the character and traditions and laws of a Latin race are still so deeply stamped upon her people and her institutions" and Alaska as undeserving of autonomy thirty years since "she was a Russian province").

414. *Id.*

415. *See id.* at 412 (characterizing this question as "unsettled").

Puerto Rico, for Baldwin, those were the consequences of living "under a written Constitution" in contrast to Great Britain.[416] Because the Constitution, as written, limited congressional power over the territories, the only way to counter this limitation was through constitutional amendment.[417]

In defense of permanent colonial rule, Christopher C. Langdell replaced doctrinal analysis with textualism.[418] *Loughborough*, which construed the United States to mean both states and territories, was disregarded as dicta.[419] For Langdell, whether the United States established a uniform taxing system in the territories was a matter of policy, not a decision compelled by the Constitution.[420] He cited the cases establishing territorial courts as legislative courts, not constitutional courts, in support of his position, but he ignored their rhetoric of territorial rule having a temporary role prior to statehood.[421] While Langdell did not directly engage with the temporality debate, he sided with the constitutionality of permanent dependencies by arguing that these islands were not acquired to become states and that the Constitution does not prevent governing "dependent countries."[422]

Of these articles, James B. Thayer's is the one that most directly confronted the question of whether the United States could govern permanent dependencies.[423] Consistent with his views on judicial review,[424] Thayer asserted that the political status of the new

416. *See id.* at 415–16 (illustrating the racist rhetoric of the anti-imperialists through descriptions of "the half-civilized Moros of the Philippines" and "the ignorant and lawless brigands that infest Puerto Rico," who had not experienced the challenges of constitutional rule).

417. *Id.* at 416.

418. *See* Langdell, *supra* note 399, at 377 (discussing that the only constitutional clauses that apply beyond the states are the Admissions Clause, the Territorial Clause, and the Thirteenth Amendment); Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 782 (1999) (recognizing Langdell's work as one of the first instances of intratextualism).

419. *See* Langdell, *supra* note 399, at 380–82.

420. *See id.* at 389–90.

421. *See id.* at 378 n.1; Thayer, *Our New Possessions*, *supra* note 399, at 482 (adopting the same argument as Langdell by reasoning that "if the restraints of this part of the Constitution do not operate in the territories, why should those of the rest of it reach them?").

422. Langdell, *supra* note 399, at 392.

423. *See* Thayer, *Our New Possessions*, *supra* note 399, at 478.

424. *See generally* James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 156 (1893) [hereinafter Thayer, *Origin and Scope*] ("The checking and cutting down of legislative power . . . cannot be accomplished without making the government petty and incompetent. . . . Under no system can the power of courts go far to save a people from ruin; our chief protection lies elsewhere.").

possessions was a question for the political departments.[425] Thayer compared these territories with the Native tribes, who were "in the hollow of our hand" and argued that the federal government, not to the tribes, would "say whether they shall continue to hold this relation."[426] Thayer also saw the similarities between past and present territorial practice. Territories were, in fact, "colonies, dependencies," but "we choose to call them 'territories.'"[427] According to Thayer, they never had a right to statehood unless the treaty ceding them stipulated as such. The idea of temporary territorial rule "for the purpose of nursing [a territory] into a State" was dismissed as "merely a political theory."[428] But nothing in the Constitution prevented the United States from "permanently governing territory" as any other sovereign could under the law of nations.[429] For Randolph and Baldwin, past territorial practice was bound to statehood; for Thayer, Puerto Rico and the Philippines could be permanently governed as "extra-continental dependencies," just as previous "continental colonies" had been, without promising them statehood.[430]

Finally, Abbott L. Lowell proposed a third view: the extension of the Constitution to the territories depended on whether they were "incorporated into the union, or admitted to the rights of citizens."[431] Marshall had refused to decide whether inhabitants of Florida became citizens "independent of stipulation" in *American Insurance Co*.[432] Lowell reinterpreted this to mean that Congress could decide whether to incorporate territory into the United States or to keep territories as national possessions for the purposes of international law. Meanwhile, Lowell dismissed Taney's prohibition of colonies and dependent territories as dicta because of the "political circumstances."[433] Like Thayer before him, Lowell saw the future of territorial governance

425. Thayer, *Our New Possessions*, *supra* note 399, at 471.

426. *Id.* at 472 (relying on Justice Taney's opinion in *United States v. Rogers*, 45 U.S. 567, 572 (1846)).

427. *Id.* at 473–74.

428. *Id.* at 473.

429. *Id.* at 478–79 ("The Constitution has to be read side by side with the customs and laws of nations.").

430. *Id.* at 483.

431. Lowell, *supra* note 399, at 171.

432. *Id.* at 165 (quoting Am. Ins. Co. v. 356 Bales of Cotton, 26 U.S. 511, 542 (1828)).

433. *Id.* at 175; *cf.* ALLEN, *supra* note 214, at 180 (arguing that the "claim of obiter dicta thus had little foundation in court doctrine" because the case properly "proceeded to the merits only after the court found that it had jurisdiction").

exclusively in the political authorities.[434] While differing in approach from Langdell and Thayer, Lowell ended at the same place he had advocated in his previous writing: sanctioning permanent dependencies.[435]

The political decision-makers on the future of Puerto Rico and the Philippines also relied on past imperial practice.[436] Senator Henry Cabot Lodge stated that Marshall's designation of the Cherokee Nation as a "'domestic and dependent nation' . . . solved the question of our constitutional relations to the Philippines."[437] Through the direct analogy to Indigenous people as infants, the inhabitants of the overseas colonies were similarly constituted as dependent peoples. Imperialists also relied on past territorial practice. Since there was no difference between a territory and a colony, congressional power over the new territories should also be "full and plenary."[438]

But prior territorial rule that had been premised on statehood also provided an argument for anti-imperialists: annexation of these territories would lead to statehood. Senator John L. McLaurin quoted Marshall's description in *Loughborough* of territories as "in a state of infancy advancing to manhood."[439] Following an argument Madison made in the Federalist Papers, the "coupling" of the New States Clause and the Territorial Clause made evident the "intimate connection between acquiring territory and giving it statehood."[440] Since the Constitution forbade permanent dependencies, allowing only territories on their way to statehood, McLaurin rejected the annexation of "any territory that cannot be Americanized."[441] Both imperialists and anti-imperialists, therefore, cited past territorial practice that infantilized Indigenous tribes and territories for opposite purposes while jointly denying their capacity for self-government.

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434. *See* Lowell, *supra* note 399, at 176.

435. *See, e.g.*, Abbott Lawrence Lowell, *The Colonial Expansion of the United States*, ATL. MONTHLY, Feb. 1899, at 145, 147–50 (arguing explicitly for permanent dependencies by claiming both the Indian tribes and the "career of colonization" from the Northwest Territory onwards as precedents for ruling the Spanish islands as colonies).

436. *See* Williams, *supra* note 30, at 817; CLARK, *supra* note 33, at 102; Schlimgen, *supra* note 33, at 343–44.

437. Williams, *supra* note 30, at 818.

438. *Id.* (quoting 32 CONG. REC. 96 (1898) (statement of Sen. Orville Platt)).

439. 32 CONG. REC. 640 (1899) (statement of Sen. John McLaurin).

440. *Id.*

441. *Id.*

Native tribes set the precedent for permanent colonial subjects, but territories were only temporary infants on their way to manhood.

B. Temporary Pupilage in the Insular Cases

Eventually, the question of how to govern the overseas colonies reached the Supreme Court. *Downes v. Bidwell*, one of the *Insular Cases*, addressed whether the uniformity requirement of the Taxing and Spending Clause applied to Puerto Rico.[442] In opinions by Justices Brown, White, and Gray, the Supreme Court concluded that the clause did not extend to these new possessions. Brown and White relied on textual, doctrinal, and prudential arguments like those elaborated by Langdell, Thayer, and Lowell.[443] The five-member majority continued the rhetoric of temporality and left the door open for Congress to indefinitely postpone statehood and extend territorial rule.[444]

Justice Brown, who wrote the judgment for the Court, cited the territorial cases of the nineteenth century while ignoring how plenary power was premised on its temporary character.[445] Perhaps, for Brown, these justifications for territorial rule were only dicta,[446] like *Dred Scott*'s prohibition of permanent dependencies.[447] While he used the arguments of Thayer and Lowell on *Dred Scott*, Brown did not support permanent dependencies. After clarifying that "certain natural rights" apply in the territories,[448] Brown stated that "[w]hatever may *be finally decided* . . . whether they shall be introduced into the sisterhood of States or be permitted to form independent governments—it does not follow that, *in the meantime*, *awaiting that decision*," they are subject to

442. *See* Downes v. Bidwell, 182 U.S. 244, 249 (1901).

443. *See generally id.* (reasoning that the Uniformity Clause does not apply in both the majority and concurring opinions); *see* ERMAN, ALMOST CITIZENS, *supra* note 342, at 40–41 (discussing the history of such arguments as first elaborated by Elihu Root, as Secretary of War, and Charles E. Magoon, as legal advisor to the U.S. Department of War).

444. *See* Burnett, Untied *States*, *supra* note 66, at 866 (asserting that the Supreme Court justified a "temporary entanglement" that "became a permanent commitment").

445. *Downes*, 182 U.S. at 268 ("The power of Congress over the territories of the United States is general and plenary, arising from and incidental to the right to acquire the territory itself . . . ." (quoting Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1, 42 (1890))).

446. *Id.* at 270 (describing other parts of these decisions as "expressions unnecessary to the disposition of the particular case").

447. *Id.* at 272–73. *But see* ALLEN, *supra* note 214, at 180 (questioning the idea that the decision on the Missouri Compromise was dicta).

448. *Downes*, 182 U.S. at 282.

the "arbitrary control of Congress."[449] In the last paragraphs of his opinion, he added that self-government "may *for a time* be impossible" since these distant possessions were "inhabited by alien races."[450] Brown, following longstanding practice, premised the exclusion of self-government and other constitutional provisions on territorial government being temporary. But now future independence, not only statehood, justified temporary territorial rule.[451]

For Justice White, following Lowell, the central question was whether Congress had decided to incorporate Puerto Rico.[452] While Lowell's theory of incorporation legitimized permanent dependencies, however, White's doctrine of incorporation did not. In *Neely* v. *Henkel*,[453] decided a few months before *Downes*, a unanimous Supreme Court decided that Cuba was not a U.S. territory in the domestic sense.[454] Instead, Cuba was under the "temporary occupancy" of the United States, which held it "in trust for the inhabitants of Cuba."[455] However, it was not for the Supreme Court to decide "the question of the length of time" of this temporary occupation because that was "the function of the political branch."[456]

In *Downes*, White applied *Neely*'s treatment of Cuba to Puerto Rico.[457] White concluded that the United States could take possession of a territory without incorporating it and then determine, under its "obligations of honor and good faith," to "terminate the dominion and control, when, in its political discretion, the situation is *ripe* to enable it to do so."[458] White conceded that, if it violated the Constitution to "permanently hold territory which is not intended to be incorporated," the legislative department would "be faithful to its duty under the Constitution" and terminate the occupation "when the unfitness of

449. *Id.* at 283 (emphasis added).

450. *Id.* at 287 (emphasis added).

451. *See* Burnett, Untied *States*, *supra* note 66, at 863 (arguing that the main doctrine of the *Insular Cases* is that U.S. territories can be deannexed through independence).

452. *See id.* at 877.

453. Neely v. Henkel (No. 1), 108 U.S. 109 (1901).

454. *See id.* at 119.

455. *Id.* at 120, 122 (describing Cuba as "so occupied and controlled by the United States for temporary purposes").

456. *Id.* at 124.

457. Downes v. Bidwell, 182 U.S. 244, 343 (1901) (White, J., concurring); *see also* Gerald L. Neuman, *Whose Constitution?*, 100 YALE L.J. 909, 963 n.328 (1991) (mentioning that Justice White cited *Neely* in his decision in *Downes*).

458. *Downes*, 182 U.S. at 343 (White, J., concurring) (emphasis added).

particular territory for incorporation is demonstrated."[459] Congress could extend its "benign sovereignty" over the territory until, at its discretion, "it be relinquished."[460] On this point, White echoed Baldwin, who also presumed the good faith of Congress in deciding when a territory should become a state. Crucially, however, White extended this logic to independence, not only statehood.

Finally, Justice Gray corroborated the temporary character of White's doctrine of incorporation. In substance, he agreed with White but clarified that, since civil government could not "extend immediately," Congress could "establish a temporary government, which is not subject to all the restrictions of the Constitution."[461] The majority, therefore, did not openly sanction possessing permanent dependencies.[462] Their racist preoccupation with extending the institutions of self-government to "savages," "uncivilized race[s]," and "alien races, differing from us in religion, customs, [and] laws," led them towards rejecting the idea that statehood must follow territorial rule.[463] But rather than legitimizing permanent colonial rule, they left it up to Congress to determine when dependency would end, for either statehood or independence. Like Native guardianship, the length of time was a political rather than judicial question.[464] This left the territories, in the words of Chief Justice Fuller, "in an intermediate state of ambiguous existence for an indefinite period" while narrowing their emancipatory paths to statehood and independence.[465]

The references to temporary territorial government continued in the later *Insular Cases*.[466] In *Dorr v. United States*,[467] for example, the Supreme Court quoted Thomas M. Cooley's analysis of nineteenth-century territorial cases asserting that the territories are "in a condition

459. *Id.* at 343–44.

460. *Id.*

461. *Id.* at 345–46 (Gray, J., concurring).

462. Ponsa-Kraus, Insular Cases *Run Amok*, *supra* note 36, at 2541 ("Even Justice White understood that it would be wrong for the United States to subject a place and its people to territorial status indefinitely."). *But see id.* at 2512 ("The *Insular Cases* . . . gave the Court's endorsement to perpetual territorial status, and it continues to do so today.").

463. *Downes*, 182 U.S. at 279, 306, 384.

464. *See* Cleveland, *supra* note 12, at 237 ("Both the trust status of Indians and the 'unincorporated' status of territories were created, defined, and terminated at the will of Congress.").

465. *Downes*, 182 U.S. at 372 (Fuller, C.J., dissenting).

466. *See* RIVERA RAMOS, *supra* note 387, at 75 (including *Dorr* among the *Insular Cases*).

467. Dorr v. United States, 195 U.S. 138 (1904).

of temporary pupilage and dependence."[468] This rhetoric of temporality and pupilage, long-standing in judicial precedents, furthered what Lowell described as the "career of colonization"[469] while simultaneously concealing colonialism itself.[470]

C. Concealing Colonialism from the Doctrine of Plenary Power

In *Downes v. Bidwell*, Justice White relied on congressional refusal to extend citizenship to Puerto Rico to conclude that it was not incorporated.[471] Later, the Jones Act of 1917 imposed U.S. citizenship on Puerto Rico.[472] Yet in *Balzac v. Porto Rico*,[473] the Supreme Court rejected the idea that Congress incorporated Puerto Rico by extending it American citizenship.[474] Citizenship and territorial dependency could coexist, same as citizenship and Native guardianship. As with the Indian Commerce Clause, the Court ultimately ascribed plenary power over the territories to the Territorial Clause.[475] This marked a shift, since the Supreme Court had been ambivalent about whether that power derived from the Territorial Clause or sovereignty since *American Insurance Co*.[476] *Balzac*, however, identified the Territorial

468. *Id.* at 148 (quoting THOMAS M. COOLEY, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA 165 (1880)).

469. Lowell, *supra* note 435, at 147; *see also* SNOW, *supra* note 223, at 572 ("By the decision in the Insular Tariff Cases, the purpose of the framers of the Constitution has been at last recognized and fulfilled, and the American Empire is recognized as a Federal Empire.").

470. *See* RANA, TWO FACES, *supra* note 7, at 280 ("New dependencies—despite talk of their temporary status—appeared indistinct from classic European colonies, useful primarily for economic extraction and the projection of power.").

471. *See Downes*, 182 U.S. at 340 (stating that Congress did not intend for Puerto Rico to be incorporated into the United States). Some years later, the Court concluded that Alaska was incorporated when citizenship was granted to their inhabitants. Rassmussen v. United States, 197 U.S. 516, 516 (1905). Hawaii was also deemed incorporated, even though the cases were more ambiguous. *Compare* Hawaii v. Mankichi, 190 U.S. 197, 211 (1903) (declaring Hawaii incorporated), *with id.* at 218–19 (White, J., concurring) (arguing against incorporation). Despite their incorporation, however, Congress could still decide how much self-rule to grant the territories. *Downes*, 182 U.S. at 289 (White, J., concurring). Congressional power over the territories was still considered plenary. Marcos E. Kinevan, *Alaska and Hawaii: From Territoriality to Statehood*, 38 CALIF. L. REV. 273, 280 (1950). It was also uncertain whether, from a constitutional perspective, Congress was bound to admit an incorporated territory as a state. Ponsa Feliú, *supra* note 388, at 279–80.

472. RIVERA RAMOS, *supra* note 387, at 152.

473. Balzac v. Porto Rico, 258 U.S. 298 (1922).

474. *Id.* at 305.

475. *See supra* Part I.C.

476. *See supra* Part II.B.

Clause as the source of congressional power in creating territorial courts.[477] Thus during the nineteenth century, the duality of sovereignty and dependence justified plenary powers, but in the twentieth century, federal courts interpreted the Territorial Clause as the source of plenary powers.[478]

Balzac also shifted the question of the *Insular Cases* from one of power to one of rights and concealed the ambiguities left by the rhetoric of temporality. A unanimous Supreme Court stated that Justice White's opinion in *Downes* "ha[d] become the settled law of the court."[479] In the last pages, however, the Court interpreted White's doctrine to mean not that territorial rule is temporary but that only "fundamental" constitutional rights extend to the territories.[480] And since the right to a jury trial was not a fundamental right, that constitutional right did not apply in Puerto Rico.[481]

This emphasis on rights misunderstood the most important question debated during annexation—whether the United States had constitutional authority to control overseas colonies as permanent dependencies.[482] While *Balzac* ignored this, future cases reiterated the temporary character of territorial rule. Soon after, the Supreme Court characterized White's opinion in *Downes* as one consistent with the "transitory character of the territorial governments."[483] In a case about whether D.C. courts were legislative or constitutional, the Supreme Court described the territories as in a "period of pupilage" and "destined for admission as a state."[484] The settled law, if anything, was temporary territorial rule, even if it became less provisional each

477. *Balzac*, 258 U.S. at 312.

478. Cleveland, *supra* note 12, at 241 ("[T]he rhetoric of inherent powers has largely disappeared from judicial analysis, and modern courts have assumed that the authority derives from the Constitution."). *See, e.g.*, District of Columbia v. Carter, 409 U.S. 418, 430 (1973) (citing U.S. CONST. art. IV, § 3, cl. 2 (Territorial Clause)) ("It is true, of course, that Congress also possessed plenary power over the Territories.").

479. *Balzac*, 258 U.S. at 305.

480. *Id.* at 312–13.

481. *Id.* At the time, the right to a trial by jury was not considered a fundamental right in the states. Maxwell v. Dow, 176 U.S. 581 (1900).

482. *See* Burnett, Untied *States*, *supra* note 66, at 835–52 (arguing that the difference between incorporated and unincorporated territories has been overstated).

483. O'Donoghue v. United States, 289 U.S. 516, 536 (1933).

484. *Id.* at 537. This temporary character justified categorizing territorial courts as legislative, not constitutional courts, without the protections Article III afforded. *See id.* at 537–38.

passing decade.[485] Justice Black adopted this same position in *Reid v. Covert*,[486] a case involving the extraterritorial application of the Constitution.[487] Black understood the *Insular Cases* as involving congressional power "to govern temporarily territories with wholly dissimilar traditions and institutions."[488] But he noted that even that narrow interpretation should not be given "any further expansion."[489]

Cases directly concerning the overseas colonies were more ambivalent on their constitutional status. In *Cincinnati Soap Co. v. United States*,[490] which addressed local taxes bound for the Philippines treasury, the Supreme Court asserted that the "absolute power over a dependent people carries with it great obligations."[491] Just as with Native tribes and previous territories, Congress could appropriate funds for the welfare of these territories.[492] Citing *Yankton*, among others, the Supreme Court argued that since these dependencies did not have sovereignty, the national government possessed both general and local powers.[493] While power over local government could be conferred to the dependency, Congress could withdraw it at any moment.[494] In the Philippines in particular, "the sovereignty of the United States has not been, and, for a long time, may not be, finally withdrawn."[495] Echoing *Neely* and previous plenary power cases, the Supreme Court concluded that, on matters of congressional discretion, "courts have nothing to do."[496] The doublespeak concealed that nothing assured territorial governments of their temporary status, since the question was always left to Congress.

The idea of tutelage over dependent peoples eventually became an institutionalized system of education in self-government. After World War I, the mandate system of the League of Nations governed

485. *See* Glidden Co. v. Zdanok, 370 U.S. 530, 547 (1962) (observing a "transitory period"); District of Columbia v. Carter, 409 U.S. 418, 432 (1973) (considering the "transitory nature of the territorial condition").

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

487. *Id.* at 14.

488. *Id.*

489. *Id.*

490. Cincinnati Soap Co. v. United States, 301 U.S. 308 (1937).

491. *Id.* at 314.

492. *Id.* at 315.

493. *Id.* at 317.

494. *Id.* at 318.

495. *Id.* at 319.

496. *Id.* at 324.

those territories and colonies that were no longer under the rule of their previous sovereign and were "not yet able to stand by themselves."[497] The Charter of the United Nations, which replaced the League of Nations, established "an international trusteeship system," and territories under supervision would now be called "trust territories."[498] The Northern Mariana Islands, the last unincorporated territory to be acquired by the United States, first came into possession as a trust territory.[499] While international law had justified European imperialism since the sixteenth century, these systems provided "legal cover for neo-colonialism in the twentieth century."[500] The colonial concept of dependent peoples now lives on through neocolonialism: the economic dependence that continues even after the end of direct political control.[501]

Though the Philippines became independent in 1946, Congress enacted the Puerto Rican Federal Relations Act in 1950.[502] The law declared that Congress had "progressively recognized the right of self-government of the people of Puerto Rico."[503] Inspired by the Northwest Ordinance, it stated that, "in the nature of a compact,"[504] the people of Puerto Rico could adopt their own constitution and form their own government, named *Estado Libre Asociado*.[505] Soon after, Puerto Rico was removed from the list of trust and non-self-governing territories of the United Nations.[506] During the congressional debate, however, the secretary of the interior assured Congress that the bill "would not change Puerto Rico's fundamental political, social, and

497. League of Nations Covenant art. 22.

498. U.N. Charter art. 75.

499. Joseph E. Horey, *The Right of Self-Government in the Commonwealth of the Northern Mariana Islands*, 4 ASIAN-PAC. L. & POL'Y J. 180, 181 (2003).

500. Evan J. Criddle, *A Sacred Trust of Civilization: Fiduciary Foundations of International Law*, *in* PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW 404, 410 (Andrew S. Gold & Paul B. Miller eds., 2014).

501. *See* GETACHEW, *supra* note 46, at 23 (discussing Kwame Nkrumah's definition of neocolonialism).

502. Puerto Rican Federal Relations Act, Pub. L. No. 81-600, 64 Stat. 319 (1950).

503. *Id.*

504. JOSÉ TRÍAS MONGE, PUERTO RICO: THE TRIALS OF THE OLDEST COLONY IN THE WORLD 111 (1997) (describing the influence of the Northwest Ordinance's language of a "compact" that was "unalterable, unless by common consent").

505. 64 Stat. 319 (1950).

506. *List of Former Trust and Non-Self-Governing Territories*, UNITED NATIONS, https://www.un.org/dppa/decolonization/en/history/former-trust-and-nsgts [https://perma.cc/68XT-SJSD].

economic relationship to the United States."[507] The federal government reserved the power to annul local laws as previously exercised in *Yankton*.[508] Puerto Rican self-government, therefore, continued the idea of progressive recognition of self-government and the logic of dependent sovereignty.[509]

The people of Puerto Rico ratified their constitution in 1952, but the scope of its territorial sovereignty remained uncertain, as did whether the compact could be amended or repealed unilaterally.[510] In 1976, *Examining Board v. Flores de Otero*[511] contributed to the confusion by stating that, after 1952, "Congress relinquished its control over the organization of the local affairs of the island and granted Puerto Rico a measure of autonomy comparable to that possessed by the States."[512] It was not clear, however, whether Congress could withdraw this relinquishment of sovereignty as stated in *Cincinnati Soap Co.* and *Snow v. United States*. While the power over municipal affairs was uncertain, in *Harris v. Rosario*,[513] the Supreme Court decided that under the Territorial Clause, Congress could discriminate in welfare legislation provided there was a "rational basis for its actions."[514] Puerto Rican constitutional scholar José Trías Monge reconciled these cases by arguing that Congress could legislate nationally (*Harris*) yet did not retain any power over local affairs (*Flores de Otero*).[515] But does territorial sovereignty over local affairs

507. *Puerto Rico Constitution: Hearings Before the Comm. on Public Lands*, H.R. 7674 and S. 3336, 81st Cong. 162 (1950).

508. *Approving Puerto Rican Constitution: Hearings Before the Comm. on Interior and Insular Affairs*, S.J. Res. 151, 82nd Cong. 44 (1952) (statement of I. W. Silverman) (preserving "the inherent power under the Constitution to annul any law in any of our Territories").

509. 64 Stat. 319, 319 (1950).

510. *See* RIVERA RAMOS, *supra* note 387, at 56–58 (describing debates surrounding the adoption of the *Estado Libre Asociado*).

511. Examining Bd. v. Flores de Otero, 426 U.S. 572 (1976).

512. *Id.* at 597; *see also* Rodriguez v. Popular Democratic Party, 457 U.S. 1, 8 (1982) (Puerto Rico is "sovereign over matters not ruled by the [Federal] Constitution") (quoting Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 673, (1974)); Puerto Rico v. Branstad, 483 U.S. 219, 229–30 (1987) (describing the purpose of the federal statute as "to accord to Puerto Rico the degree of autonomy and independence normally associated with States of the Union") (quoting Examining Bd. v. Flores de Otero, 426 U.S. at 594).

513. Harris v. Rosario, 446 U.S. 651 (1980).

514. *Id.* at 651–52; *see also* Califano v. Torres, 435 U.S. 1, 5 (1978).

515. *See* José Trías Monge, *El Estado Libre Asociado ante los Tribunales*, *1952-1994*, 64 REV. JUR. U.P.R. 1, 20–26 (1995).

truly exist, or can Congress, in its tutelary role, withdraw it whenever it deems Puerto Rico to be failing at self-government?[516]

Any constitutional doubts regarding the prospect of territorial sovereignty in Puerto Rico disappeared in 2016. In *Puerto Rico v. Sánchez Valle*,[517] the Supreme Court decided that, while Puerto Rico has exercised local self-rule since 1950, the ultimate source of that sovereignty resided in Congress.[518] Territories, in contrast to Native tribes, had no pre-existing sovereignty.[519] Instead, territories only become a sovereign when they become independent or become a state.[520] While paying lip service to Puerto Rican autonomy, the Court concluded that federal prosecution bars local prosecution for double jeopardy purposes.[521] Justice Breyer, in his dissenting opinion, analogized the Commonwealth of Puerto Rico to territories that became states and to Native nations.[522] In all three instances, it was Congress's decision to admit a territory as a state,[523] to not withdraw tribal sovereignty,[524] and to create the Commonwealth of Puerto Rico.[525] But that did not mean that they were not sovereigns. While the majority opinion focused on the moment a "previously nonexistent entity, or a previously dependent entity, became independent,"[526] the dissenting opinion considered whether Puerto Rico had "gained

516. According to Trías Monge, Congress could not regulate Puerto Rican local affairs except to the extent that it could legislate for the states. *Id.* at 41. However, as an example of the limits of territorial sovereignty over local affairs, federal criminal statutes apply in Puerto Rico, even over local matters. United States v. Lebrón-Caceres, 157 F. Supp. 3d 80, 82 (D.P.R. 2016) (explaining that Section 2422(a) "allows [the] government to prosecute violations [in territories like Puerto Rico] even when the underlying conduct occurs solely within [the territory's] borders"). *See generally* Emmanuel Hiram Arnaud, *Llegaron los Federales: The Federal Government's Prosecution of Local Criminal Activity in Puerto Rico*, 53 COLUM. HUM. RTS. L. REV. 882 (2022) (arguing that the federal government's ability to prosecute local criminal activity in Puerto Rico is evidence of Congress's continued colonial control over the territory). Similarly, the Religious Freedom Restoration Act applies in the U.S. territories despite its unconstitutionality when applied to the states. 42 U.S.C. § 2000bb-2(2); Guam v. Guerrero, 290 F.3d 1210, 1210 (9th Cir. 2002).

517. Puerto Rico v. Sánchez Valle, 579 U.S. 59 (2016).

518. *Id.* at 74–76 (quoting United States v. Wheeler, 435 U.S. 313, 320 (1978)).

519. *Id.* at 70.

520. *See id.* at 72 n.5.

521. *See id.* at 77.

522. *See id.* at 81–84 (Breyer, J., dissenting).

523. *See id.* at 82–83.

524. *See id.* at 83–84.

525. *See id.* at 84.

526. *Id.* at 80.

sufficient sovereign authority."[527] One stressed dependence, the other sovereignty, and both perpetuated the duality of sovereignty and dependence.

But Congress sounded the death knell of Puerto Rican sovereignty, not the Supreme Court. Contemporaneous with *Sánchez Valle*, Congress invoked its powers under the Territorial Clause to enact the Puerto Rico Oversight, Management, and Economic Stability Act, which ended local self-rule.[528] This statute allows Puerto Rico to restructure its public debt, while subjecting its budget, economic development and even local laws to an oversight board.[529] Members of the board were recommended to President Obama by congressional majority and minority leaders but were not confirmed by the Senate.[530] The government of Puerto Rico can only be represented by an ex officio member.[531] Congress replaced sovereignty over internal affairs with federal guardianship once again.

IV. CONSTITUTIONALISM AND PATHS OF EMANCIPATION

By connecting the histories of the Native nations, territories, and overseas colonies, this Article condemns the U.S. constitutional project as colonial. Members of the Supreme Court, Congress, presidents, and governors of the territories considered colonial governance constitutional not due to any constitutional provision but because they viewed dependent peoples as incapable of living up to democratic self-government. Because they were dependent peoples, they needed federal tutelage. Tribal and territorial governments were sovereign over internal affairs but only at the mercy of the plenary powers of Congress. Infantilization and dependence are the central elements of the constitutional case for colonialism.

This Part discusses three paths to address this colonial arrangement through recent judicial precedents. The first path advocates for judicial interventions through the best reading of the Constitution (IV.A). The second path argues against judicial

527. *Id.* at 84.

528. *See* Puerto Rico Oversight, Management, and Economic Stability Act, Pub. L. No. 114-187, § 101, 130 Stat. 549, 553 (2016) (codified at 48 U.S.C. § 2101 et seq.).

529. *See* 48 U.S.C. § 2121. This last power was invoked by the Oversight Board to nullify a labor reform enacted by the local legislature. *See In re* Fin. Oversight & Mgmt. Bd., 650 B.R. 334, 358 (D.P.R. 2023).

530. *See* 48 U.S.C. § 2121.

531. *See id.*

intervention with congressional and local solutions (IV.B). The third path proposes deconstitutionalizing colonialism through democratic politics, anticolonial solidarities, and social movements (IV.C). While these solutions are neither mutually exclusive nor conclusive, each conceives of constitutionalism and its possibilities in addressing colonialism differently. The first two solutions perceive constitutionalism as part of the solution to colonialism. But they inadvertently perpetuate colonial dependence by amplifying the constitutional voices of Supreme Court justices and members of Congress. To break free from colonial dependence, the better path is to uplift the voices of colonized peoples, even when they do not speak in the constitutional register of the American empire.

A. Ending Plenary Powers Through Judicial Constitutionalism

The doctrine of plenary powers stands for congressional flexibility and limited judicial review over matters regarding Native nations, territories, and overseas colonies. One solution to ending plenary powers would be to overrule cases that sanctioned them, like *United States v. Kagama* and the *Insular Cases*. This strategy invites significant judicial review over congressional legislation, but for different reasons in each case. In the case of Native nations, ending plenary powers seeks to restore inherent tribal sovereignty and to limit congressional interference with tribal self-government.[532] Meanwhile, advocates of overruling the *Insular Cases*, usually from Puerto Rico, want to eliminate the second-class citizenship that comes with the doctrine—one they describe as "separate and unequal."[533] While different in approach—the first one seeks sovereignty, the other equality—they

532. *See generally* Bethany R. Berger, *"Power over This Unfortunate Race": Race, Politics and Indian Law in* United States v. Rogers, 45 WM. & MARY L. REV. 1957 (2004) (describing the significant role of *Rogers* in strengthening the plenary-power doctrine as a tool to challenge tribal sovereignty); Nell Jessup Newton, *Federal Power over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195 (1984) (analyzing the role of the plenary-power doctrine in how the courts preserve congressional power over Indian tribes); Natsu Taylor Saito, *The Plenary Power Doctrine: Subverting Human Rights in the Name of Sovereignty*, 51 CATH. U. L. REV. 1115 (2002) (critiquing the federal government's use of the plenary-power doctrine as legal justification for federal government control resulting in human rights problems).

533. *See, e.g.*, Adriel I. Cepeda Derieux & Rafael Cox Alomar, *Saying What Everyone Knows To Be True: Why Stare Decisis Is Not an Obstacle To Overruling the* Insular Cases, 53 COLUM. HUM. RTS. L. REV. 721, 728–29 (2022); TORRUELLA, *supra* note 404, at 264. *See generally* ALVIN PADILLA-BABILONIA, *The Citizenship Duality*, *in* THE LAW BETWEEN OBJECTIVITY AND POWER 449 (Philip M. Bender ed., 2022) (criticizing viewing the claims of Puerto Ricans as involving second-class citizens).

share a commitment to judicial constitutionalism and overruling Supreme Court precedents to further their collective goals. To convince federal courts, proponents argue that ending plenary powers is consistent with the best reading of the U.S. Constitution and judicial precedent.

In recent years, these critiques of plenary powers and judicial precedents have gained traction within the Supreme Court. No recent case better exemplifies this promise of judicial constitutionalism for Native nations than *McGirt v. Oklahoma*.[534] In *McGirt*, the Supreme Court held, in interpreting the Major Crimes Act, that Oklahoma did not have jurisdiction to prosecute a member of the Seminole Nation for crimes that occurred on the Creek Reservation.[535] While Justice Gorsuch, writing for the majority, did not question cases like *Kagama* or address plenary powers, the opinion defended tribal self-government against state encroachment, just like Chief Justice Marshall in *Worcester*.[536]

This judicial victory, however, was short-lived. In *Oklahoma v. Castro-Huerta*,[537] the Supreme Court narrowed the possibilities of tribal sovereignty by recognizing state jurisdiction over crimes committed by nonmembers on a reservation.[538] Rather than protecting tribal sovereignty, the majority chose to protect state sovereignty over its geographic territory, which now includes Native lands.[539] The Court dismissed *Worcester*, which promised tribal self-government over internal affairs, as resting "on a mistaken understanding of the relationship between Indian country and the States."[540] Just two short years after *McGirt*, Gorsuch defended *Worcester* and tribal sovereignty in dissent.[541] Whereas *Kagama* recognized federal jurisdiction only after Congress enacted the Major Crimes Act, in *Castro-Huerta* the

534. *See* McGirt v. Oklahoma, 140 S. Ct. 2452 (2020).

535. *See id.* at 2478; *supra* Part I (explaining the Major Crimes Act).

536. *See id.* at 2459.

537. Oklahoma v. Castro-Huerta, 142 S. Ct. 2486 (2022).

538. *Id.* at 2491.

539. *See id.* at 2493. In this way, the Supreme Court has returned to the dual-sovereign approach—federal and state—that Marshall articulated in the territorial case *Am. Ins. Co. v. 356 Bales of Cotton*, 26 U.S. 511, 543 (1828) and that proved so influential in *Kagama*.

540. *Castro-Huerta*, 142 S. Ct. at 2502.

541. *Id.* at 2505 (Gorsuch, J., dissenting).

Supreme Court recognized Oklahoma's "inherent" sovereignty over crimes on Native territory.[542]

These two cases illustrate the contradictions and diminishing returns of judicial constitutionalism. *McGirt* was rightly celebrated as a triumph for tribal sovereignty.[543] Two years later, *Castro-Huerta* was rightly criticized as a defeat for tribal sovereignty.[544] In both cases, however, Justice Gorsuch recognized the power of Congress in legislating for Native nations, even at the expense of tribal sovereignty.[545]

In *Haaland v. Brackeen*,[546] which upheld the Indian Child Welfare Act, the Supreme Court contended with two visions of congressional powers and tribal sovereignty. Both visions—one by Justice Gorsuch, the other by Justice Thomas—questioned *Kagama* and the doctrine of plenary powers.[547] Part of both arguments rested on the Constitution's omission of an Indian Affairs Clause, as discussed in Part II.A.[548] For Justice Gorsuch, the lack of plenary powers was consistent with federal laws that protected tribal sovereignty, like the Indian Child Welfare Act. For Justice Thomas, the Indian Child Welfare Act was unconstitutional because Congress lacks plenary powers; it only has enumerated powers.[549] He argued that *Kagama* did not rely on the constitutional text but based plenary powers on Native dependent status.[550] As such, "*Kagama* simply departed from the text and original meaning of the Constitution."[551] This debate focuses on the best

542. *Id.* at 2511.

543. *See* Maggie Blackhawk, *On Power and the Law:* McGirt v. Oklahoma, 2020 SUP. CT. REV. 367, 369.

544. *See* Ablavsky, *Too Much History*, *supra* note 34, at 296–98.

545. McGirt v. Oklahoma, 140 S. Ct. 2452, 2462 (2020) ("[T]he Legislature wields significant constitutional authority when it comes to tribal relations, possessing even the authority to breach its own promises and treaties."); *Castro-Huerta*, 142 S. Ct. at 2505 ("Native American Tribes retain their sovereignty unless and until Congress ordains otherwise.") (Gorsuch, J., dissenting).

546. Haaland v. Brackeen, 599 U.S. 255 (2023).

547. *Id.* at 308 (Gorsuch, J., concurring) ("[T]he Indian Commerce Clause gives Congress a robust (but not plenary) power to regulate the ways in which non-Indians may interact with Indians."); *id.* at 335 (Thomas, J., dissenting) ("I have searched in vain for any constitutional basis for such a plenary power, which appears to have been born of loose language and judicial *ipse dixit*.").

548. *See generally* Lorianne Updike Toler, *The Missing Indian Affairs Clause*, 88 U. CHI. L. REV. 413, 444–76 (2021) (explaining the origins of the missing clause).

549. *Haaland*, 599 U.S. at 362 (Thomas, J., dissenting).

550. *Id.* at 359–62.

551. *Id.* at 362.

reading of the Constitution: one to protect tribal sovereignty and the other to scrutinize federal legislation even when it protects tribal sovereignty. Both promise to end plenary powers, but with vastly different results for tribal sovereignty.

In Puerto Rico, lawyers have made similar judicial attempts at ending plenary powers and overruling the *Insular Cases*. After an Appointments Clause challenge to the Financial Oversight and Management Board, the board argued that because of the *Insular Cases* the clause did not apply in Puerto Rico.[552] Opponents of the *Insular Cases* saw an opportunity for the Supreme Court to overrule them and decide on the scope of plenary powers over the territories.[553]

The Supreme Court held, however, that the board did not need to be appointed and confirmed pursuant to the Appointments Clause.[554] While the Clause applied in Puerto Rico, the members of the board were not "Officers of the United States" because they have primarily local duties.[555] The opinion cited a nineteenth-century decision involving territorial courts to decide that Congress can directly exercise the expansive powers of local government in legislating for Puerto Rico.[556] To decide otherwise would, ironically, interfere with local self-government since even local governors and legislators would need to be appointed by the president and confirmed by the Senate.[557] In other words, for Puerto Rican self-government to exist at all, it needed to be subject to congressional power over the territories.[558] The Supreme Court indicated that it was not going to "overrule the much-criticized 'Insular Cases' and their progeny[,]" but added that "whatever their continued validity[,] we will not extend them."[559] While sympathetic to

552. Ponsa-Kraus, Insular Cases *Run Amok*, *supra* note 36, at 2526.

553. *See* Brief for Unión de Trabajadores de la Industria Eléctrica y Riego, Inc. (UTIER) in Opposition at 19–25, Fin. Oversight & Mgmt. Bd. v. Aurelius Inv., LLC, 140 S. Ct. 1649 (2020) (No. 18-1334).

554. Fin. Oversight & Mgmt. Bd. v. Aurelius Inv., LLC, 140 S. Ct. 1649, 1662–63 (2020).

555. *Id.* at 1655.

556. *Id.* at 1659 (citing Am. Ins. Co. v. 356 Bales of Cotton, 26 U.S. 511, 546 (1828)); *see supra* Part II.B.

557. *See id.* at 1663 (explaining that "[t]here is no reason to understand the Appointments Clause . . . as making it significantly more difficult for local residents of such areas to share responsibility for the implementation of (statutorily created) primarily local duties" (citation omitted)).

558. For an in-depth critique of *Aurelius* and its consequences for overseas colonies, see Campbell, *supra* note 34, at 2568.

559. *Aurelius Inv.*, 140 S. Ct. at 1665 (citing Reid v. Covert, 354 U.S. 1, 14 (1957)).

overruling the *Insular Cases*, the Supreme Court unanimously deferred to federal legislation on governance of the territories.

Although he is an avid defender of tribal sovereignty, Justice Gorsuch does not have a similar interest in territorial sovereignty. Instead, Justice Sotomayor has defended territorial sovereignty.[560] In *Financial Oversight & Management Board for Puerto Rico v. Aurelius Investment, LLC*,[561] Sotomayor argued that even if Puerto Rico can remain a territory under the Territorial Clause, that "does not necessarily allow Congress to repeal by mere implication its prior grant" of local self-rule.[562] Congressional plenary power over the territories, after all, "was never intended to last indefinitely."[563]

Sotomayor, therefore, would restore the temporary character of territorial rule. Before, temporary territorial rule led towards statehood; under this account, temporary territorial rule can also culminate with territorial autonomy. Sotomayor, relying on past precedents and textualism,[564] implied that Congress may constitutionally relinquish its authority over local affairs without pursuing the options of independence and statehood. If Congress authorizes full local self-rule, federal tutelage of local affairs is unconstitutional. In sum, Sotomayor, like Marshall in *Worcester*, Taney in *Dred Scott*, and Gorsuch in *McGirt*, widened federalism's scope to include territorial sovereignty over internal affairs.[565] She advocated for a judicial constitutionalism that reviews federal legislation when it intervenes with internal affairs.[566]

There is no consensus on the temporary nature of territorial rule nor willingness to end plenary powers. *United States v. Vaello*

560. *See id.* at 1671 (Sotomayor, J., concurring) (explaining that "territorial status should not be wielded as a talismanic opt out of prior congressional commitments or constitutional constraints").

561. Fin. Oversight & Mgmt. Bd. v. Aurelius Inv., LLC, 140 S. Ct. 1649 (2020).

562. *Id.* at 1679.

563. *Id.* at 1682.

564. *Id.* at 1679 (emphasizing the phrase "dispose of" in the Territorial Clause), 1682 (citing Nat'l Bank v. County of Yankton, 101 U.S. 129, 131–32 (1879), and Examining Bd. of Eng'rs, Architects & Surveyors v. Flores de Otero, 426 U.S. 572, 597 (1976), among others).

565. *See* Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. CHI. L. REV. 671, 676 (1989) (arguing that the study of U.S. federalism should incorporate the Indian tribes).

566. *See Aurelius Inv.*, 140 S. Ct. at 1679 (Sotomayor, J., concurring) (explaining that "the Territories Clause . . . does not necessarily allow Congress to repeal by mere implication its prior grant of authority to the people of Puerto Rico to choose their own governmental officers").

Madero[567] involved an equal protection challenge to the Supplemental Security Income program because it excludes residents of Puerto Rico. During the oral argument, the lawyer for respondent Jose Luis Vaello Madero argued that the powers of the Territorial Clause were "intended to be temporary while the territory was in pupilage," but criticized that this power became "indefinite" through the *Insular Cases*.[568]

The Supreme Court upheld the constitutionality of the federal legislation pursuant to the Territorial Clause,[569] but continued the critique of the *Insular Cases*. Justice Gorsuch, concurring, argued that "the Insular Cases have no foundation in the Constitution."[570] Whether provisions of the Constitution apply should depend on the text, original understanding, and history, not upon the "fictions of the Insular Cases."[571] But even without the *Insular Cases*, Justice Gorsuch believed Congress could discriminate against the territories in social welfare legislation. Only Justice Sotomayor defended the judicial review of legislation enacted pursuant to the Territorial Clause in dissent.[572] She was a lone voice for ending absolute plenary powers and eliminating second-class citizenship through judicial constitutionalism.

In *Brackeen*, Gorsuch and Thomas emphasized the exclusion of an Indian Affairs Clause from the Constitution.[573] In *Vaello Madero*, however, they did not acknowledge that, with regards to the territories, the Constitution also failed to include Madison's provision for temporary territorial rule. This absence does not diminish the critique of those who argue that territorial rule should be temporary.[574] But this piece of constitutional history, just like any other, could be subject to multiple interpretations and consequences, as in *Brackeen*. These cases illustrate the limits of ending plenary powers and a judicial constitutionalism that believes constitutional interpretation will solve

567. United States v. Vaello Madero, 596 U.S. 159 (2022).

568. Transcript of Oral Argument at 47–48, United States v. Vaello Madero, 596 U.S. 159 (2022) (No. 20-303).

569. *Vaello Madero*, 596 U.S. 159, at 166.

570. *Id.* at 180 (Gorsuch, J., concurring).

571. *Id.* at 186–87.

572. *Id.* at 198 (Sotomayor, J., dissenting) ("Equal treatment of citizens should not be left to the vagaries of the political process.").

573. Haaland v. Brackeen, 599 U.S. 255, 318–19 (2023) (Gorsuch, J., concurring); *id.* at 341 (Thomas, J., dissenting).

574. As mentioned in Part II.A, this could be because, following the Northwest Ordinance, it was seen as unnecessary. FEHRENBACHER, *supra* note 223, at 83.

the demands and dreams of Native nations and overseas colonies today.[575]

B. Repurposing Plenary Powers and Legislative Constitutionalism

Because of the limitations of judicial review in addressing colonialism, legal scholars, federal judges, and political actors have proposed repurposing plenary powers rather than ending them.

Repurposing plenary power to promote self-government has a long history in federal Indian law. Repurposing plenary powers stands for the idea that there should be congressional flexibility and limited judicial review in the relationship between Congress and the Native nations and overseas colonies. Felix Cohen, the architect of the Indian Reorganization Act of 1934, defended tribal "internal sovereignty" and power over "local self-government."[576] But to fully incorporate Native tribes in the legal system on a more equal basis, Cohen first had to accept Congress's plenary power.[577] *United States v. Lara*, for example, aims to repurpose plenary power to further tribal sovereignty and undo tribal dependence.[578] These approaches seek similar outcomes through different legal vehicles. While federal Indian law scholars seek to insulate federal legislation from judicial review, the argument in the overseas colonies focuses on protecting local legislation, such as land alienation restrictions.[579]

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575. Ablavsky, *Too Much History*, *supra* note 34, at 306 ("*[R]ejecting* past Indian law precedents outright is not necessarily a solution for furthering decolonization today."). On alternative options, see *infra* Part IV.C.

576. Skibine, *supra* note 29, at 676 (citing FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 132 (1942)).

577. *Id.* at 677. Professor Alex Tallchief Skibine named this model of Indian government the "'plenary power–sovereignty' paradigm" in contrast with the "'dependency' paradigm" of *Kagama* and *Oliphant*. *Id.* at 668, 675, 677. This paradigm recognized Indian self-determination but at the expense of upholding plenary power. The Indian Self-Determination and Education Assistance Act of 1975, for example, provides for tribal self-government in educational programs, but it is Congress who defines the contours of this self-determination rather than Native nations themselves. Saito, *supra* note 532, at 1151.

578. United States v. Lara, 541 U.S. 193, 202 (2004); *compare* Dossett, *supra* note 82, at 209 (discussing similarities between *Kagama* and *Lara*), *with* Skibine, *supra* note 29, at 667–68 (discussing differences between the dependency paradigm of *Kagama* and the plenary power–sovereignty paradigm of *Lara*).

579. *See* Stanley K. Laughlin, Jr., *The Application of the Constitution in the United States Territories: American Samoa, a Case Study*, 2 U. HAW. L. REV. 337, 388 (1980) (explaining that "the incorporation doctrine which originally legitimated popular desire to fulfill America's manifest destiny now provides the theoretical basis for assuring a large measure of territorial self-

In response to critiques of judicial constitutionalism, legal scholars have developed legislative constitutionalism as a framework. Generalizing from the experience of areas of law historically thought to be exceptions, such as the law of Native tribes and immigration law, advocates of legislative constitutionalism argue that Congress is institutionally better positioned to address colonialism than federal courts and that courts should defer to Congress.[580] In this regard, they advocate for Thayerian judicial restraint and disempowering federal courts.[581]

Legislative constitutionalism also defends structural redistribution of power rather than judicial recognition of rights.[582] It sees federal courts as a threat to inherent tribal sovereignty.[583] Recent cases exemplify the danger of judicial constitutionalism and the possibilities of legislative constitutionalism. In *Lara* and *Brackeen*, for example, the Supreme Court upheld federal laws that protected tribal sovereignty rather than using an expansive reading of constitutional rights to invalidate federal legislation.[584]

In federal Indian law, legislative constitutionalism has inherent tribal sovereignty at its center. But judicial recognition of inherent sovereignty admits congressional power can modify or eliminate tribal sovereignty.[585] This has led some scholars to question whether Congress could use its plenary powers to renounce its plenary powers. Inspired by the Commonwealth of Puerto Rico and the idea of relinquishing sovereignty, T. Alexander Aleinikoff proposes a "mutual consent clause[]"[586] and Skibine a "compact of incorporation" between tribes and the federal government that would entail waiving plenary

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determination"); Russell Rennie, Note, *A Qualified Defense of the* Insular Cases, 92 N.Y.U. L. REV. 1683, 1687 (2017) (repurposing the *Insular Cases*).

580. Blackhawk, *Legislative Constitutionalism, supra* note 35, at 2206; Nikolas Bowie & Norah Rast, *The Imaginary Immigration Clause*, 120 MICH. L. REV. 1419, 1419–20 (2022); Michalyn Steele, *Comparative Institutional Competency and Sovereignty in Indian Affairs*, 85 U. COLO. L. REV. 759, 759 (2014).

581. *See* Thayer, *Origin and Scope*, *supra* note 424, at 152 ("The ultimate arbiter of what is rational and permissible is indeed always the courts . . . . They must not step into the shoes of the law-maker . . . .").

582. Blackhawk, *Legislative Constitutionalism, supra* note 35, at 2270.

583. Steele, *supra* note 580, at 759.

584. See *supra* Part I.C for a discussion on *Lara*; *supra* Part IV.A for a discussion of *Brackeen*.

585. *See supra* note 545 and accompanying text.

586. ALEINIKOFF, *supra* note 30, at 141, 186 (using Puerto Rico as an example).

powers and subject any future changes to mutual agreement.[587] If Congress unilaterally alters these treaties, they would have to survive rigid judicial interpretations of the last-in-time rule, which allows a future statute to repeal a treaty,[588] and the constitutional principle that Congress cannot bind future Congresses.[589] That is why, from the perspective of legislative constitutionalism, Native nations are better off arguing directly to members of Congress, who should decide based on their own constitutional commitments rather than the constitutional interpretation of federal courts.[590] If Congress continues to breach its promises,[591] the only apparent solution within constitutional law would be to amend the Constitution.[592]

Autonomists in Puerto Rico, like tribal advocates, favor this approach and aim to repurpose plenary powers in favor of a permanent compact.[593] But territorial sovereignty, as imagined by Sotomayor in *Aurelius*, faces similar constitutional challenges, such as the idea that one "Congress cannot bind a later Congress."[594] This path is thus

587. Skibine, *supra* note 29, at 692 (relying on both the Northwest Ordinance and unincorporated territories).

588. United States v. Kagama, 118 U.S. 375, 381 (1886) (explaining how treaties with Native nations are governed by the same rules as treaties with foreign nations); The Cherokee Tobacco, 78 U.S. (11 Wall.) 616, 621 (1870) (commenting on last-in-time rule).

589. Dorsey v. United States, 567 U.S. 260, 274 (2012) ("[S]tatutes enacted by one Congress cannot bind a later Congress . . . ."); Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 139 (1810) (establishing a prohibition against binding future legislatures); *see* José B. Márquez Reyes & Alvin Padilla Babilonia, *La Constitucionalidad de Vincular Legislaturas Futuras Mediante Referéndum*, 84 REV. JUR. U.P.R. 247, 262–63 (2015) (discussing the constitutional prohibition against Congress binding a future Congress, also known as legislative entrenchment).

590. *See generally* JOSEPH FISHKIN & WILLIAM E. FORBATH, THE ANTI-OLIGARCHY CONSTITUTION 7, 21 (2022); Jessica Bulman-Pozen & Olatunde C.A. Johnson, *Federalism and Equal Citizenship: The Constitutional Case for D.C. Statehood*, 110 GEO. L.J. 1269, 1324 (2022) (arguing that Congress should develop its own constitutional interpretations). *See* Blackhawk, *Legislative Constitutionalism*, *supra* note 35, at 2276 (discussing the last-in-time rule).

591. *See* Campbell, *supra* note 34, at 2632 (extending the idea of "promise-keeping" of federal Indian law to the overseas colonies).

592. Frank Pommersheim, *Is There a (Little or Not So Little) Constitutional Crisis Developing in Indian Law?: A Brief Essay*, 5 U. PA. J. CONST. L. 271, 285 (2003).

593. TRÍAS MONGE, *supra* note 504, at 171 (arguing that Congress can "permanently divest itself of the power to govern" the territories); Skibine, *supra* note 29, at 668 (discussing the "plenary power–sovereignty paradigm").

594. Dorsey v. United States, 567 U.S. 260, 274 (2012); *see* Christina D. Ponsa-Kraus, *Political Wine in a Judicial Bottle: Justice Sotomayor's Surprising Concurrence in* Aurelius, 130 YALE L.J.F. 101, 114 (2020) (arguing that Congress cannot relinquish its sovereignty except through statehood or independence).

dismissed as unconstitutional.[595] But while *Lara* and *Brackeen* reveal the possibilities of entrusting Congress to protect tribal sovereignty, cases from Puerto Rico illustrate its limitations for the overseas colonies.

In *Aurelius*, the Supreme Court deferred to a federal statute that undermined, rather than protected, local self-government.[596] In *Vaello Madero*, the Supreme Court applied Thayerian rational-basis review to uphold federal legislation that excluded residents of Puerto Rico from social welfare programs.[597] In *Financial Oversight & Management Board for Puerto Rico v. Centro de Periodismo Investigativo, Inc.*,[598] the Supreme Court protected the sovereign immunity of the Financial Oversight and Management Board created by PROMESA, but at the expense of the right of access to public information protected by the Puerto Rican constitution.[599] In all these cases, the Supreme Court purported to support local self-government, but deferred to federal legislation that limited the possibilities of Puerto Rican self-government.[600] They therefore show the limits of both judicial and legislative constitutionalism in addressing colonialism in the present.

What might explain the difference in how Congress and the Supreme Court protect tribal sovereignty and territorial sovereignty? One crucial difference between Native nations and overseas colonies is the judicial concept of inherent sovereignty. Since the *Marshall Trilogy*, federal courts have conceptualized tribal sovereignty as inherent, pre-constitutional, and pre-existing, even as they recognize plenary powers over tribal affairs.[601] In *United States v. Wheeler*[602] and

595. Burnett, Untied *States*, *supra* note 66, at 876.

596. Fin. Oversight & Mgmt. Bd. v. Aurelius Inv., LLC, 140 S. Ct. 1649, 1654 (2020).

597. United States v. Vaello Madero, 596 U.S. 159, 164–66 (2022).

598. Fin. Oversight & Mgmt. Bd. v. Centro de Periodismo Investigativo, Inc., 598 U.S. 339 (2023).

599. *Id.*

600. The first one limits self-governance because it recognizes federal power to annul the local constitution and local legislation. *Aurelius Inv.*, 140 S. Ct. at 1656 (upholding a federal statute that limits local self-government). The second one does so because it constrains the mobility of Puerto Ricans that seek to return to Puerto Rico. *Vaello Madero*, 596 U.S. at 164 (upholding the withholding of Supplemental Security income benefits to a resident of Puerto Rico because he moved from New York to Puerto Rico). And the final one does so because it limits civilian and political oversight of a FOMB that annuls the local budget and local legislation. *Centro de Periodismo Investigativo*, 598 U.S. at 351.

601. *See supra* Part I.A.

602. United States v. Wheeler, 435 U.S. 313 (1978).

Lara, this meant that tribes possessed inherent sovereignty for purposes of the dual-sovereignty exception to the Double Jeopardy Clause.[603]

Federal courts, however, have decided that territories, meaning overseas colonies like Puerto Rico and Guam, have "no inherent right to govern themselves."[604] Rather than conceptualize federalism as including current territories and thinking of sovereignty in functional terms, *Sánchez Valle* opted for the classical definition of sovereignty of "*nonderived* power."[605] This means that Puerto Rico and the other U.S. territories have never been sovereign and that they will not be sovereign until they choose either independence or statehood.[606] At most they are dependent sovereigns, partial sovereigns. In this way, Puerto Rican sovereignty is also postcolonial sovereignty since it has "no access to the majesty of the a priori and presupposed," and is "without recourse to the godly gloss of the nonderived and eternal."[607] The issue of the overseas colonies is, once again, circumscribed to the logic of prior territories that became sovereign states, rather than imagining future paths of emancipation alongside the Native nations.[608]

Legislative constitutionalism provides a democratic starting point for thinking about the relationship between constitutionalism and colonialism. While judicial constitutionalism empowers federal courts through individual rights and judicial review, legislative constitutionalism sees Congress as potentially willing and institutionally capable of protecting tribal sovereignty.[609]

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603. *Id.* at 322, 330; United States v. Lara, 541 U.S. 193, 199 (2004).

604. Guam v. Guerrero, 290 F.3d 1210, 1214 (9th Cir. 2002) (citing Guam v. Okada, 694 F.2d 565, 568 (9th Cir. 1982)); *see also* Puerto Rico v. Sánchez Valle, 579 U.S. 59, 72 n.5 (2016) ("[T]erritories are not distinct sovereigns from the United States because the powers they exercise are delegations from Congress." (citation omitted)).

605. NATASHA WHEATLEY, THE LIFE AND DEATH OF STATES 258 (2023).

606. These options, however, have never been offered by Congress through a binding referendum.

607. WHEATLEY, *supra* note 605, at 258 (discussing that, during the twentieth century, new states were formed through decolonization, but they were "postcolonial states" with only "conditional" and "partial sovereignty").

608. *See* YARIMAR BONILLA, NON-SOVEREIGN FUTURES: FRENCH CARIBBEAN POLITICS IN THE WAKE OF DISENCHANTMENT 15 (2015) (advancing the concept of "*non*-sovereign future," to "break free from the epistemic binds of political modernity").

609. *See* Steele, *supra* note 580, at 764–65 (describing the comparative institutional competency "to address sensitive and difficult questions of allocating sovereignty" between the legislature and the judiciary).

But by comparing congressional approaches to tribal and territorial sovereignty, we can appreciate the limits of legislative constitutionalism. In the overseas colonies, Congress limits democratic self-government.[610] The central idea of legislative constitutionalism, that Native nations have inherent sovereignty, ignores that Congress and federal courts have denied overseas colonies inherent sovereignty because of an imperialist discourse that justifies denying sovereignty to dependent peoples across the world, including to Indigenous peoples.[611] Instead of embracing constitutionalism—a comprehensive framework striving to reconcile judicial and legislative precedents with the Constitution—a different path of emancipation is to expose the limits of constitutionalism itself.[612]

C. Limits of Constitutionalism and Democratic Decolonization

The centrality of race and empire to U.S. constitutionalism should make us rethink our legal strategies and the role the Constitution plays in democratic debate. This echoes previous debates between William Lloyd Garrison and Frederick Douglass about whether the original Constitution was proslavery or antislavery.[613] Similarly, today's Supreme Court Justices argue that racist and imperialist judicial precedents are inconsistent with the best reading of the Constitution.[614] However, the broader political debate should not be about

610. One crucial distinction between Native nations and overseas colonies is that the federal government is often needed to limit state encroachment against Native nations. However, arguments can be made for federal support out of moral and ethical responsibility, without resorting to the language of constitutionalism or dependence.

611. WHEATLEY, *supra* note 605, at 266 (explaining how Indigenous people worldwide face similar issues).

612. *See* MARTIN LOUGHLIN, AGAINST CONSTITUTIONALISM 6 (2022) (describing constitutionalism as a comprehensive framework); ROBERTO MANGABEIRA UNGER, THE CRITICAL LEGAL STUDIES MOVEMENT 36 (2015) (criticizing the "political theology of a constitutionalism deficient in institutional imagination"); JAMES TULLY, STRANGE MULTIPLICITY: CONSTITUTIONALISM IN AN AGE OF DIVERSITY 39 (1995) (describing the limitations of the vocabulary of modern constitutionalism to address the claims of self-determination of Indigenous peoples).

613. NOAH FELDMAN, THE BROKEN CONSTITUTION 69, 73–74 (2021); Roberts, *supra* note 35, at 53.

614. Haaland v. Brackeen, 599 U.S. 255, 310 (2023) (Gorsuch, J., concurring); United States v. Vaello Madero, 596 U.S. 159, 180 (2022) (Gorsuch, J., concurring).

constitutional interpretation but about what can be gained politically by denouncing or celebrating the Constitution.[615]

Rather than insisting that the Constitution is anti-imperialist and that Supreme Court decisions should be overruled, this Article reveals how, for judicial and political actors throughout history, constitutionalism complemented and masked colonialism through the duality of sovereignty and dependence.[616] Judicial engagement with these issues cannot replace a political conversation about how constitutionalism and legal doctrine obfuscate the American empire.[617] Undoing colonial dependence, therefore, requires centering the popular struggles of colonized peoples and their inherent capacity to govern themselves.[618]

Justice Gorsuch's opinion in *Vaello Madero* exemplifies the limits of constitutionalism. While he criticizes the *Insular Cases*, Gorsuch believes, as Harlan before him, that the federal government *can* possess and govern territories.[619] The problem of the *Insular Cases* is erroneously reduced to one about constitutional interpretation, of which provisions of the Constitution apply to U.S. territories. He seeks to subject colonial rule to the Constitution, to make colonialism *more* constitutional. Territorial expansion and colonialism are constitutional

615. *See* Aziz Rana, *Progressivism and the Disenchanted Constitution*, *in* THE PROGRESSIVES' CENTURY: POLITICAL REFORM, CONSTITUTIONAL GOVERNMENT, AND THE MODERN AMERICAN STATE 41, 44 (Stephen Skowronek, Stephen M. Engel & Bruce Ackerman eds., 2016) (discussing the need to revisit history as "a useful tool in the present for thinking politically about the role of the Constitution in public life").

616. *See* Erman, *Status Manipulation*, *supra* note 47, at 878; Erman, *Truer U.S. History*, *supra* note 35, at 1208 (describing how, through legal doctrines and "status manipulation," federal courts obfuscate the American empire); Blackhawk, *Federal Indian Law*, *supra* note 35, at 1801 ("The issue of American colonialism was born into the Constitution at the Founding with a compromise between those who aimed to constitutionalize colonialism and those who saw colonialism as an abomination and incompatible with constitutional democracy." (footnote omitted)).

617. *See* Ponsa-Kraus, Insular Cases *Run Amok*, *supra* note 36, at 2539 (arguing that overruling the *Insular Cases* should lead "to an American reckoning with the reality of U.S. imperialism that would, in turn, lead to the demise of perpetual colonialism in the United States").

618. *See* Amna A. Akbar, *Non-Reformist Reforms and Struggles over Life, Death, and Democracy*, 132 YALE L.J. 2497, 2526 (2023) (emphasizing the importance of social movements and popular struggles "to create ruptures or breaks within the political, economic, social order for deep transformation").

619. *See* Thayer, *Insular Tariff Cases*, *supra* note 404, at 165–66 (arguing that Harlan and the other dissenters agree that the United States can acquire territories "without any qualification as to kind or quantity, or as to the character of its population").

as long as they comply with the applicable provisions of the U.S. Constitution.[620]

Even before the Supreme Court decided the *Insular Cases*, legal scholars understood that colonialism could be constitutional. For Henry Wolf Biklé, the United States could govern territories, temporarily or indefinitely, subject to the Constitution.[621] He named these territories "Constitutional Colonies," perfectly describing the coexistence of constitutionalism and colonialism.[622] If the problem with colonialism is not that it is unconstitutional, the solution cannot be to constitutionalize colonialism.[623]

Overruling the *Insular Cases* is a story of constitutional redemption that challenges colonialism as a constitutional evil.[624] But the history of colonialism, in the words of Seth Davis, "poses a fundamental challenge to our faith in the Constitution's promises of justice."[625] The constitutional redemption story ignores that limiting plenary powers, extending constitutional rights, and ending second-class citizenship is not the same as democratic self-governance and decolonization. It questions colonialism only from the inner morality of U.S. constitutional law. This debate about constitutional

620. This is a view of constitutionalism that confuses what is constitutional with what is right. *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 670 (1943) (Frankfurter, J., dissenting) ("The tendency of focussing attention on constitutionality is to make constitutionality synonymous with wisdom, to regard a law as all right if it is constitutional. Such an attitude is a great enemy of liberalism.").

621. *See* Henry Wolf Biklé, *The Constitutional Power of Congress over the Territory of the United States*, 49 AM. L. REG. 11, 11 (1901) ("The constitutional relation of the United States to her possessions is more frequently and more earnestly discussed than the question as to what is her best policy with reference to their control.").

622. *Id.* at 98.

623. *See* Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405, 441 (2018) (discussing the shortcomings of "constitutional policing" in addressing racial inequality and police brutality).

624. *See* JACK M. BALKIN, CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD 5 (2011) (describing constitutional redemption as a commitment to the Constitution that was "always promised . . . but never was"); MARK A. GRABER, *DRED SCOTT* AND THE PROBLEM OF CONSTITUTIONAL EVIL 8 (2006); J.M. Balkin, *Agreements with Hell and Other Objects of Our Faith*, 65 FORDHAM L. REV. 1703, 1706 (1997) (defining constitutional evil as "the possibility that the Constitution is responsible, directly or indirectly, for serious injustices" which poses a challenge to constitutional fidelity (footnote omitted)).

625. Davis, *supra* note 194, at 1754; *see also* Sherally Munshi, *"The Courts of the Conqueror": Colonialism, the Constitution, and the Time of Redemption*, *in* LAW'S INFAMY 50, 77 (Austin Sarat, Lawrence Douglas & Martha Merrill Umphrey eds., 2021) (criticizing redemptive constitutionalism in the context of colonialism).

interpretation overshadows the more important debate about democracy and decolonization. Overruling *Kagama*, *Lone Wolf*, and the *Insular Cases* will not, by itself, decolonize the Native nations or the U.S. territories.[626] Ending plenary powers will not protect tribal sovereignty if it means judicial review of federal legislation that currently protects it. Puerto Rico, Guam, American Samoa, the Northern Mariana Islands, and the U.S. Virgin Islands would still be governed by the federal government, simply under constitutional limitations. They would become "Constitutional Colonies"—but colonies nonetheless.

What we need is to deconstitutionalize colonialism through democratic decolonization—to take self-rule seriously.[627] We need to move away from the countermajoritarian institutions of "individual rights, constitutionalism, [and] judicial review."[628] Instead, only through local democratic politics, social movements, and anticolonial solidarities can we imagine future paths of emancipation that undo colonial dependence.

This path of democratic decolonization abandons the judicial politics of ending plenary powers. But it is not a repurposing of plenary powers, as legislative constitutionalism would suggest. Instead, it reorients the debate from one about how the American empire can govern its colonies constitutionally, through either federal courts or Congress (*constitutional colonies*), to one that questions how the Native nations and overseas colonies can, through an inclusive democracy, undo the dependencies and hierarchies of the colonial encounter (*democratic decolonization*). Law is not irrelevant to this endeavor.[629] But judicial review of federal laws, the full extension of the Bill of Rights, equalizing Native nations and overseas territories to U.S. states, and denouncing second-class citizenship will not undermine oppression. It may, instead, legitimize and reproduce

626. *See* Campbell, *supra* note 34, at 2558; Ablavsky, *Too Much History*, *supra* note 34, at 309.

627. *See* Robin West, *From Choice to Reproductive Justice: De-Constitutionalizing Abortion Rights*, 118 YALE L.J. 1394, 1412 (2009) (discussing the need to deconstitutionalize abortion rights and protect them through democratic deliberation); G.A. Res. 1514 (XV), at 66–67 (Dec. 14, 1960) (recognizing the right of self-determination of all dependent peoples).

628. Robin L. West, *Tragic Rights: The Rights Critique in the Age of Obama*, 53 WM. & MARY L. REV. 713, 717 (2011).

629. *See* Akbar, *supra* note 623, at 447 (describing how movement groups "have not given up on law" even if they "have largely refrained from fighting to strengthen preexisting rights, or to demand legal recognition of new ones" (footnote omitted)).

colonial dependence. The challenge, then, is whether these dependent peoples can imagine new political and legal arrangements that emancipate them from current colonial rule.[630]

Two recent cases about sovereign immunity speak to the limits of constitutionalism and how it binds together Native nations and overseas colonies. In the first, the Centro de Periodismo Investigativo ("CPI"), a nonprofit news organization, sought disclosure of public documents by the Financial and Oversight Management Board of Puerto Rico.[631] The board, which was created by Congress, claimed to have Eleventh Amendment sovereign immunity.[632] The CPI argued, among other things, that the Eleventh Amendment did not apply to U.S. territories.[633]

The Supreme Court sidestepped this issue, held that Congress did not abrogate sovereign immunity, and remanded the case to lower courts.[634] In this way, it constitutionalized the issue of sovereign

630. One possible avenue is to internationalize the debate. For instance, Professor Robert Williams renounces the racist precedents from the *Marshall Trilogy* onwards and advocates, instead, for the internationalization of federal Indian law. ROBERT A. WILLIAMS JR., LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA 166 (2005). The international recognition of self-determination and the rights of Indigenous peoples could, therefore, provide a backdrop to interpret domestic Indian law, even when international treaties are not directly enforceable. Frickey, *supra* note 123, at 79. Similarly, residents of the overseas colonies have proposed internationalizing the issue of self-determination. In a recent letter to Congress, constitutional scholars argued that self-determination requires the choices to be "*constitutional* and *non-territorial*," which narrows the options to statehood and independence. But Puerto Rican legal scholars, on the other hand, questioned whether "the political status of Puerto Rico should be addressed merely as a matter of U.S. domestic law." *Compare* Letter from Legal and Const. Scholars in Support of the P.R. Admission Act, H.R. 1522 & S. 780, and in Opposition to the P.R. Self-Determination Act, H.R. 2070 & S. 865, to Nancy Pelosi, Rep., Kevin McCarthy, Rep., Charles Schumer, Sen. & Mitch McConnell, Sen. (Apr. 12, 2021), https://www.law.columbia.edu/sites/default/files/2021-04/Puerto%20Rico%20Letter.pdf [https://perma.cc/7RXP-QTEV], *with* Letter of Const. L. in P.R. from Const. L. Professors (Apr. 9, 2021), https://www.academiajurisprudenciapr.org/letter-of-constitutional-law-in-puerto-rico [https://perma.cc/96KR-FQ88]. However, any appeal to international law must also confront the colonial origins of international law and how international law today operates to serve capitalism. Natsu Taylor Saito, *Asserting Plenary Power over the "Other": Indians, Immigrants, Colonial Subjects, and Why U.S. Jurisprudence Needs To Incorporate International Law*, 20 YALE L. & POL'Y REV. 427, 468 n.249 (2002); Skibine, *supra* note 29, at 694 n.151.

631. Fin. Oversight & Mgmt. Bd. v. Centro de Periodismo Investigativo, Inc., 598 U.S. 339, 344 (2023).

632. *Id.* at 344.

633. *Id.* at 352.

634. *Id.* at 352 (Thomas, J., dissenting) (arguing that the Supreme Court skips the argument about sovereign immunity).

immunity rather than detaching it from the Eleventh Amendment so that the overseas colonies, as Puerto Rican legal scholars argued, would "not be bound by Eleventh Amendment precedents and structural considerations."[635] In doing so, it missed an opportunity to "listen to the people of the territories on the scope of their sovereign immunity."[636]

One month later, the Supreme Court held that the Bankruptcy Code abrogated the sovereign immunity of Native nations.[637] It applied the same clear statement rules that apply in the states (and Puerto Rico) rather than requiring Congress to unequivocally abrogate tribal sovereign immunity.[638] In these cases, through constitutional interpretation, the Supreme Court treated Puerto Rico and the Native nations as states for sovereign immunity purposes. It applied the same constitutional doctrines across the board. But this act of constitutionalism is precisely what undermines local self-government.

These examples suggest that debates about colonialism should be politicized rather than constitutionalized. Instead of focusing on how federal courts or Congress can constitutionally protect tribal and territorial self-government, we should prioritize how these peoples are governing themselves through democratic politics.[639] Every day, through local democratic politics, Native nations and overseas colonies exercise sovereignty and "reimagine and remake the structure of social life."[640] It is through these acts of democratic politics and legislation—land alienation restrictions, the protection of natural resources, multilingual education—that these dependent peoples demonstrate they do not need tutelage in democracy. These are the laws that deserve deference. Unfortunately, constitutionalism focuses on how a

635. Brief of Puerto Rican Legal Scholars as *Amici Curiae* in Support of Respondent at 11, Fin. Oversight & Mgmt. Bd. v. Centro de Periodismo Investigativo, Inc., 598 U.S. 339 (2023) (No. 22-96), 2022 WL 18019985, at *11.

636. *Id.* at 11–12.

637. Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin, 599 U.S. 382, 399 (2023).

638. Brief on Behalf of *Amici Curiae* Professors of Federal Indian Law in Support of Petitioners at 1, Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin, 599 U.S. 382 (2023) (No. 22-227), 2022 WL 10070701, at *1.

639. *See* Adom Getachew & Karuna Mantena, *Anticolonialism and the Decolonization of Political Theory*, 4 CRITICAL TIMES 359, 366 (2021).

640. UNGER, *supra* note 612, at 105.

different set of political actors conceptualize sovereignty.[641] To end colonial dependence, we need to defend these acts of democratic self-government against judicial and congressional interference.[642]

Local legislatures and councils will not be able to resist and contest colonial impositions by themselves. Social movements—including the labor movement, environmental activism, the feminist movement, LGBTQ advocacy, land advocacy, and student protests—need to be part of mass-movement politics to end colonial dependence. Constitutionalism often fails to include the insights of these social movements and how they "make, interpret, and change law."[643] But from the perspective of colonialism, we need to think of social movements not exclusively in terms of how they transform constitutional meaning but how they can open new avenues to undo colonial dependence, even outside of constitutionalism.[644]

Social movements can change the role that law and constitutionalism have in political debates.[645] Thinking alongside social movements can help us see paths not taken and lead us to imagine different "emancipatory horizons."[646] Theorizing from the perspective of student strikes and antimilitarization protests, Puerto Rican scholar José Atiles-Osorio suggests abandoning law made through

641. Elizabeth A. Reese, *The Other American Law*, 73 STAN. L. REV. 555, 583 (2021) ("Federal Indian law is not the law *of* Indian people; it is primarily the law of their conquest and the erosion of their tribal sovereignty.").

642. This defense of democratic politics needs to be complemented by an even more significant project of radical democracy, where we democratize our democratic institutions and the economy. *See* Amna A. Akbar, *Demands for a Democratic Political Economy*, 134 HARV. L. REV. F. 90, 106 (2020).

643. Lani Guinier, *The Supreme Court, 2007 Term — Foreword: Demosprudence Through Dissent*, 122 HARV. L. REV. 4, 47 (2008).

644. *See* Akbar, *supra* note 623, at 475 (arguing that social movement scholarship focuses on transforming constitutional meaning, but that it is "time to go further"); Monica Bell, Stephanie Garlock & Alexander Nabavi-Noori, *Toward a Demosprudence of Poverty*, 69 DUKE L.J. 1473, 1510 (2020) ("[D]emosprudence need not be centrally concerned with the interpretation of the U.S. Constitution.")

645. *See* Douglas NeJaime, *Constitutional Change, Courts, and Social Movements*, 111 MICH. L. REV. 877, 893 (2013) ("Social movement activists draw on symbols that are accessible and resonant, and Balkin shows that the Constitution and canonical judicial decisions provide those symbols.").

646. Jocelyn Simonson, Sameer Ashar & Amna A. Akbar, *What Movements Do to Law*, BOS. REV. (Apr. 26, 2022), https://www.bostonreview.net/articles/what-movements-do-to-law [https://perma.cc/AS3W-7QBE].

colonialism.[647] Similarly, through social movements coming from Native nations and overseas colonies, we can rethink property and land reclamation,[648] our relationship with the ocean,[649] and even ways of auditing public debt[650] without being limited by constitutionalism.

The two cases about sovereign immunity exemplify how judicial constitutionalism can be homogenizing. Federal courts have not adequately distinguished between Native nations, indigeneity, colonized peoples, and race, and they seem unlikely to do so.[651] This presents a challenge for lawyers, who must craft legal arguments in ways that do not harm their clients or other groups.[652] Reorienting the conversation to democratic decolonization, rather than constitutional interpretation, can help Indigenous, colonized, and racialized peoples make political claims against local and federal governments, rather than constitutional ones. These claims can be anchored in the communities' specific racial and colonial context without worrying about how underlining inherent sovereignty or the right to self-determination can, paradoxically, be used by federal courts to justify not giving a different group a differentiated right.[653] If democratic decolonization is going to be a path of emancipation, it needs to center these anticolonial solidarities.[654]

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647. *See* José M. Atiles-Osorio, Colonialismo, Derecho y Resistencia 330–31 (2013) (Ph.D. dissertation, University of Coimbra) (on file with author); JOSÉ M. ATILES-OSORIO, APUNTES PARA ABANDONAR EL DERECHO: ESTADO DE EXCEPCIÓN COLONIAL EN PUERTO RICO 187 (2016) (arguing that decolonization will only be possible outside the law).

648. ÉRIKA FONTÁNEZ TORRES, CASA, SUELO Y TÍTULO 233 (2020) (discussing the movement to occupy and rescue land).

649. Tiara R. Na'puti & Sylvia C. Frain, *Indigenous Environmental Perspectives: Challenging the Oceanic Security State*, 54 SEC. DIALOGUE 115, 120–21 (2023) (describing how different movements and organizations oppose and resist United States militarism in Oceania).

650. ROCÍO ZAMBRANA, COLONIAL DEBTS 103 (2021) (discussing how the work of the Citizen Front for the Debt Audit (*Frente Ciudadano para la Auditoría de la Deuda*) is "conceived as a political rather than economic tool").

651. Rolnick, *supra* note 30, at 2654, 2658.

652. Mark Tushnet, *The Critique of Rights*, 47 SMU L. REV. 23, 26–27 (1994) (discussing the risks of legal arguments for progressive social change).

653. *See* Tom C.W. Lin, *Americans, Beyond States and Territories*, 107 MINN. L. REV. 1183, 1239 (2023) ("Instead of fixating on overcoming legal and political obstacles entrenched in Constitutional law and political status, the territorial diversity legal framework bypasses those historical hinderances and focuses on pragmatic solutions to help the people of the Territories in the present.").

654. *See* SANDY GRANDE, RED PEDAGOGY: NATIVE AMERICAN SOCIAL AND POLITICAL THOUGHT 8 (2004) (proposing a "Red pedagogy" that "emerges from a collectivity of critique

CONCLUSION

By telling this historical narrative, this Article conjoins the disparate histories of Native nations, U.S. territories, and overseas colonies. From the founding forward, Native nations like the Cherokee Nation, U.S. territories like Louisiana, and overseas colonies like Puerto Rico have been deemed as incapable of self-government as children. Federal courts masked and justified colonialism by resorting to the idea that they were "domestic dependent nations," "in a state of infancy advancing to manhood," and "in a condition of temporary pupilage and dependence."[655] Judicial and political operators concealed colonialism by constituting Indigenous peoples, territorial inhabitants, and residents of overseas colonies as dependent peoples who needed tutelage in democracy. These ideas were part of the constitutional memory of the nation at the turn of the twentieth century. Imperialists defended the colonization of overseas colonies by relying on these precedents. What if they were right that the Constitution did not constrain colonialism and that constitutionalism and colonialism supported one another?

Throughout the rest of the twentieth century, this colonial history was erased from the canon of constitutional history.[656] But "the colonial contract," premised on the promise that, one day, colonial subjects could "be permitted to achieve adulthood," lived on.[657] This adulthood took many forms—tribal sovereignty, statehood, independence, and territorial sovereignty. While the adulthood of statehood was considered permanent, tribal and territorial sovereignty were still dependent on Congress.

But the anticolonial rhetoric of statehood—and, for that matter, independence—obscures how dependency can reproduce itself under the adulthood of statehood and independence. Anticolonial politics must be conscious of this interconnectedness. Constitutional arguments against autonomy in Puerto Rico could impair tribal sovereignty and territorial sovereignty in other unincorporated territories. Coalition-building within anticolonial politics, moreover,

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and solidarity between and among indigenous peoples, other marginalized groups, and peoples of conscience").

655. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831); Loughborough v. Blake, 18 U.S. (5 Wheat.) 317, 324 (1820); Dorr v. United States, 195 U.S. 138, 148 (1904).

656. *See* Sanford Levinson, Essay, *Why the Canon Should Be Expanded To Include* The Insular Cases *and the Saga of American Expansionism*, 17 CONST. COMMENT. 241, 243–45 (2000).

657. MILLS, *supra* note 17, at 84.

should not be anchored in constitutional interpretation, judicial politics, or the discourse of first-class citizenship. Any paths forward for Native nations and U.S. territories cannot be limited to changes in constitutional law. Instead, by freeing ourselves from constitutionalism, we can detach dependence from sovereignty through democratic politics and social movements that challenge all forms of dependence. Only the collective belief in our capacity to govern ourselves and the daily exercise of self-determination can undo our constitution as dependent peoples.