

ARTICLE

THE TENTH AMENDMENT &  
THE TERRITORIAL CLAUSE

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*The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.*

TABLE OF CONTENTS

INTRODUCTION..... 1  
I. THE *INSULAR CASES* AS A POOR MECHANISM FOR CULTURAL PROTECTION ..... 8  
II. PURPOSES OF THE TENTH AMENDMENT & THE TERRITORIAL CLAUSE. 15  
    A. Origin, Purpose, and Interpretation of the Tenth Amendment .... 15  
    B. Original Understanding of the Territorial Clause ..... 19  
III. THE PEOPLE’S RIGHT TO SELF-DETERMINATION IN THE FOUNDING ERA ..... 22  
    A. The Northwest Ordinance ..... 22  
    B. The State of Franklin & Other Settler-Initiated Governments .... 26  
IV. THE TENTH AMENDMENT, THE TERRITORIAL CLAUSE, & THE FA’A SAMOA ..... 29  
    A. The Existence of the Territorial Government of American Samoa ..... 29  
    B. Land Alienation, Matai Titles, and Other Indigenous Practices.. 32  
V. CONCLUSION ..... 37

INTRODUCTION

Our government indoctrinates us from a very young age to believe that the

United States is a “democracy” where the people elect their own leaders. Elementary school children sit in classrooms adorned with maps of the United States that depict only fifty states and flags containing only fifty stars, where teachers tell stories of the American Revolution, the Declaration of the Independence, and the rallying cry of “No Taxation Without Representation.” Civics lessons venerate the U.S. Constitution and especially the Bill of Rights as safeguarding the people from tyranny through guarantees such as freedom of speech and freedom of religion.

Those lessons presume that the 333 million people who live in the United States all live in one of the fifty states, teaching that the people of each state vote for federal offices such as the President, Vice-President, and members of Congress, as well as state and local offices such as governor or mayor. More advanced textbooks use phrases such as “separation of powers” or “checks and balances” to explain why federal and state offices exist concurrently, extolling the virtues of this “federalist” system where the U.S. Constitution vests certain powers exclusively with the federal government and reserves others exclusively to the states.

But how do “democracy” or “federalism” work for the approximately four million Americans who live in the United States territories of American Samoa, Guam, Puerto Rico, the Northern Mariana Islands, and the U.S. Virgin Islands? These Americans live in the United States, but not in a state. They cannot vote for President or Vice-President or elect full-voting members of either house of Congress. While they may elect local government officials, those territorial governments may not always possess the authority to enforce their own laws.<sup>1</sup> And even seemingly fundamental provisions of the Bill of Rights such as the right to a jury trial attach only via congressional grace due to the interpretation of the Territorial Clause adopted by the Supreme Court in the *Insular Cases*.<sup>2</sup>

Yet the inhabitants of America’s territories often possess greater individual

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1. See, e.g., *Puerto Rico v. Sanchez Valle*, 579 U.S. 59, 59-60 (2016).

2. The *Insular Cases* typically refers to a series of six opinions issued by the Supreme Court of the United States during its 1901 term, including *De Lima v. Bidwell*, 182 U.S. 1 (1901), *Goetze v. United States*, 182 U.S. 221 (1901), *Dooley v. United States*, 182 U.S. 222 (1901), *Armstrong v. United States*, 182 U.S. 243 (1901), *Downes v. Bidwell*, 182 U.S. 244 (1901), and *Huus v. New York & Porto Rico Steamship Co.*, 182 U.S. 392 (1901). Some jurists and scholars include additional cases within the *Insular Cases*, such as *Dooley v. United States*, 183 U.S. 151 (1901), *Fourteen Diamond Rings v. United States*, 183 U.S. 176 (1901), *Kepner v. United States*, 195 U.S. 100 (1904), *Dorr v. United States*, 195 U.S. 138 (1904), and *Balzac v. Porto Rico*, 442 U.S. 465 (1922). See, e.g., Juan R. Torruella, *One Hundred Years of Solitude: Puerto Rico’s American Century*, in *FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION, AND THE CONSTITUTION* 248 (Christina Duffy Burnett & Burke Marshall eds., 2001). For purposes of this Essay, the term *Insular Cases* encompasses all cases decided by the Supreme Court of the United States prior to the transition of the insular territories from direct federal control to democratically elected local governments.

and collective rights than their counterparts who reside in the fifty states. Criminal defendants in Puerto Rico enjoy immunity from successive prosecutions by the federal and territorial governments for the same conduct.<sup>3</sup> The indigenous population of the Northern Mariana Islands benefits from land alienation laws that prohibit the purchase of land by non-indigenous “outsiders.”<sup>4</sup> The territorial government of Guam may support local businesses by enacting discriminatory taxes that apply to goods imported from the fifty states but not those made in Guam.<sup>5</sup> The entire government of American Samoa revolves around the *fa’a Samoa*, a series of cultural traditions that include communal ownership of land, vesting official government functions to tribal chiefs whose titles—known as *matai*—may transfer by hereditary right, and mandatory evening prayer curfews.<sup>6</sup> All of these practices, of course, would be clearly unconstitutional if adopted by a state government.

Nevertheless, the current constitutional treatment of United States territories remains “inconsistent, incoherent, and intellectually bankrupt” with the consistency of Swiss cheese.<sup>7</sup> A jury trial is a right in the U.S. Virgin Islands, but not in the Northern Mariana Islands.<sup>8</sup> The border between the mainland United States and Puerto Rico is a domestic border to which the full protections of the Fourth Amendment apply, while an international border purportedly divides the U.S. Virgin Islands and the rest of the United States.<sup>9</sup> Guam may enact discriminatory taxes, but the U.S. Virgin Islands may not, despite the organic acts of those territories being nearly identical.<sup>10</sup> The Northern Mariana Islands may limit land ownership only to its indigenous Chamorro people, but Guam may not<sup>11</sup>,

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3. *Sanchez Valle*, 579 U.S. 59 at 62.

4. See Robert Torres, *Ferreira v. Borja: Land Transactions in the Northern Marianas*, 29 NEW ENG. L. REV. 209, 209–10 (1994).

5. *Sakamoto v. Duty Free Shoppers, Ltd.*, 764 F.2d 1285, 1287–1288 (9th Cir. 1985).

6. See Daniel E. Hall, *Curfews, Culture, and Custom in American Samoa: An Analytical Map for Applying the U.S. Constitution to U.S. Territories*, 2 ASIAN-PAC. L. & POL’Y J. 3, 84–85 - (2001).

7. Anthony M. Ciolli, *Needful Rules and Regulations: Originalist Reflections on the Territorial Clause*, 77 VAND. L. REV. 1263, 1264 (2024).

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

9. Compare *United States v. Acosta-Colon*, 157 F.3d 9, 19–22 (1st Cir. 1998) (finding that a stop and detention at the San Juan airport exceeded the limits of a lawful Terry stop and violated the defendant’s constitutional rights), with *United States v. Hyde*, 37 F.3d 116, 118–22 (3d Cir. 1994) (holding that a person travelling to the United States from the U.S. Virgin Islands may be searched for customs purposes without any degree of suspicion).

10. Compare *Sakamoto*, 764 F.2d 1285, 1288 (holding that the Commerce Clause does not apply to Guam because Guam is not a state), with *Polychrome Int’l Corp. v. Krigger*, 5 F.3d 1522, 1534 (3d Cir. 1993) (stating that the Commerce Clause principles implicit in the Territorial Clause apply to the U.S. Virgin Islands).

11. Nicole Manglona Torres, *Self-Determination Challenges to Voter Classifications in the Marianas*, 14 ASIAN-PAC. L. & POL’Y J. 152, 198–99 (2012).

even though it is located one hundred miles away and its indigenous population is also Chamorro.<sup>12</sup>

How did the constitutional law of the territories get to this state? A major reason is the text of the U.S. Constitution itself: the entire document only mentions the territories three times.<sup>13</sup> But perhaps the greatest source of confusion is that the seminal cases interpreting the Territorial Clause—collectively known as the *Insular Cases*—did not “employ legally justified tools” such as “the Constitution’s text and its original understanding”<sup>14</sup> but rather created a distinction between so-called “incorporated” and “unincorporated” territories “entirely out of whole cloth” through reliance “on the white man’s burden and similar then-prevalent theories of white supremacy.”<sup>15</sup> While more recent Supreme Court decisions have raised uncertainty on the validity of the *Insular Cases* “whatever their continued validity,”<sup>16</sup> the lower federal courts continue to apply them as binding precedent,<sup>17</sup> and in the process often create circuit splits which remain unresolved for decades.<sup>18</sup>

For decades, scholars often described the *Insular Cases* as having “nary a friend in the world.”<sup>19</sup> This should come as no surprise. The majority opinions’ failure to engage with the plain text of the Constitution “give[s] nightmares to present day originalists,”<sup>20</sup> while they “look even worse” to those who “[view] the Constitution in more functional or normative terms.”<sup>21</sup> Moreover, “[c]onsistent with the legal profession’s evolving views on race,” “any judge or lawyer who used the same racist rhetoric relied upon in the *Insular Cases* would face professional discipline.”<sup>22</sup> In fact, the U.S. Department of Justice has recently directed that its attorneys not cite to the *Insular Cases* because “it is the Department’s view that the racist language and logic of the [*Insular Cases*] deserve no

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

13. See U.S. CONST. art. IV, § 3, cl. 2; *id.* amends. XVIII (repealed 1933), XXI.

14. *United States v. Vaello Madero*, 596 U.S. 159, 187-88 (2022) (Gorsuch, J., concurring).

15. See Ciolli, *supra* note 7, at 1264 n.1; *United States v. Lebrón-Caceres*, 157 F. Supp. 3d 80, 88 (D.P.R. 2016).

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

17. See, e.g., *Tuaua v. United States*, 788 F.3d 300, 307 (D.C. Cir. 2015); *Fitisemanu v. United States*, 1 F.4th 862, 873 (10th Cir. 2021); *Ballentine v. United States*, 486 F.3d 806, 812-13 (3d Cir. 2007); *Consejo de Salud Playa de Ponce v. Rullan*, 586 F.Supp.2d 22, 43 (D.P.R. 2008).

18. See, e.g., the cases cited in *supra* notes 8-10.

19. See, e.g., Christina Duffy Burnett, *A Convenient Constitution?: Extraterritoriality After Boumediene*, 109 COLUM. L. REV. 973, 982 (2009); Luis Fuentes-Rohwer, *The Land That Democratic Theory Forgot*, 83 IND. L.J. 1525, 1536 (2008).

20. Juan R. Torruella, *Ruling America’s Colonies: The Insular Cases*, 33 YALE L. & POL’Y REV. 57, 70 (2013).

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

22. Anthony Ciolli, *Territorial Constitutional Law*, 58 IDAHO L. REV. 206, 212 (2022).

place in our law.”<sup>23</sup>

But today it is no longer completely accurate to describe the *Insular Cases* as having “nary a friend in the world.” Over the last decade, several scholars—and at least one federal court of appeals<sup>24</sup>—endorsed the idea that territories and the courts may “repurpose” the *Insular Cases* to protect indigenous culture or otherwise purportedly improve the day-to-day lives of those who reside in the territories.<sup>25</sup> These theories, which rely on misconceptions and stereotypes of the territories and their people which are “nearly indistinguishable from the white man’s burden,”<sup>26</sup> would if implemented jettison the Constitution in favor of placing the federal government into the role of a “white savior”<sup>27</sup> that would “protect” the territories since they lack the means to advocate for their own interests while continuing to withhold the tools that would allow the territories to take care of themselves.<sup>28</sup>

The motivation to “repurpose” the *Insular Cases* in this manner largely stems from a fear of what might transpire if they were overturned. Significantly, these proposals to “repurpose” the *Insular Cases* all came about shortly after territorial-rights lawyers initiated litigation in multiple federal courts<sup>29</sup> by plaintiffs who were born in American Samoa and sought a declaration that they are citizens of the United States by virtue of the Citizenship Clause of the Fourteenth Amendment to the Constitution.<sup>30</sup> In these cases, the territorial government of American Samoa intervened for the purpose of arguing against constitutional birthright citizenship due to the fear that application of the Citizenship Clause of the Fourteenth Amendment to American Samoa would also result in extension of the Equal Protection Clause of the Fourteenth Amendment to the territory. Extending the Equal Protection Clause, according to the American Samoan

23. U.S. Dep’t of Just., Just. Manual § 1-21.100 (2024), <https://www.justice.gov/jm/1-21000-applicability-constitutional-provisions-us-territories>.

24. *Fitisemanu*, 1 F.4th 862 at 870.

25. See, e.g., Juan R. Torruella, *Territorial Federalism*, 130 HARV. L. REV. 1632, 1653 (2017); Russell Rennie, *A Qualified Defense of the Insular Cases*, 92 N.Y.U. L. REV. 1683, 1700-01(2017); Tom C.W. Lin, *Americans, Almost and Forgotten*, 107 CAL. L. REV. 1249, 1291-92 (2019).

26. Anthony Ciolli, *Territorial Paternalism*, 40 MISS. C. L. REV. 103, 116 (2022).

27. “The ‘white savior’ is a common trope in literature in which the hero of the story—typically a white man portrayed by the author as enlightened or even Christ-like—serves as a champion of a marginalized group—such as blacks in the Jim Crow South or the indigenous people of what is portrayed as a ‘foreign’ land—but in the process reinforces the oppression by providing validation that the marginalized group is not able to take care of itself.” *Id.* at 108 n.36.

28. Torruella, *supra* note 25, at 1653-54.

29. See *Fitisemanu*, 1 F.4th 862; *Tuaua*, 788 F.3d 300.

30. Under current federal statutory law, those born in American Samoa are not conferred with United States citizenship, but “are instead designated by statute as ‘nationals, but not citizens, of the United States.’” *Fitisemanu*, 1 F.4th 862 at 865 (quoting 8 U.S.C. § 1408)). “As a result, American Samoans are denied the right to vote, the right to run for elective federal or state office outside American Samoa, and the right to serve on federal and state juries” even if they move from American Samoa to one of the fifty states unless they undergo the naturalization process. *Id.*

government, may threaten the *fa'a Samoa*, the “traditional and distinctive way of life” in the territory which includes, among other things, communal ownership of land, conferral of hereditary chieftain titles, and restricting membership to the upper house of its legislature to holders of such titles.<sup>31</sup> In other words, the government of American Samoa and other proponents of “repurposing” the *Insular Cases* do not necessarily support their racist rhetoric or reasoning, but simply prefer maintenance of the status quo because “[u]nder the *Insular Cases*, the American Samoan restrictions preserving native ownership of land are plainly constitutional.”<sup>32</sup>

This Article builds on recent originalist scholarship<sup>33</sup> to posit that there is no need to do further damage to the constitutional law of the territories by “repurposing” the *Insular Cases* because the Constitution already provides a powerful tool to protect the *fa'a Samoa* and other practices: the Tenth Amendment. Surprisingly, “very little attention has been devoted to examining the application of the Ninth and Tenth Amendments of the U.S. Constitution to the territories,” even though “they would appear to encompass a right to cultural preservation in the territories.”<sup>34</sup> While one cannot say for certain why scholars, courts, and practitioners seem to prefer “to stick the proverbial square peg of territorial rights into the *Insular Cases*’ round hole”<sup>35</sup> rather than examine the plain text of the Constitution, one cannot deny that practical considerations play at least some role. To quote the government of American Samoa, “[t]he principles established by the Supreme Court in *Downes*, *Barber*, and the other *Insular Cases* provide the beginning and the end” for virtually any claim that any federal or territorial legislation pertaining to American Samoa is unconstitutional.<sup>36</sup>

Part I of this Article begins not with constitutional analysis, but rather deconstructs the argument that “repurposing” the *Insular Cases* will protect the *fa'a Samoa* and other aspects of indigenous culture in the five inhabited territories. While the government of American Samoa has thus far succeeded in invoking the *Insular Cases* to defeat attempts to apply the Citizenship Clause to the territory, those very same arguments were later used by the federal government to justify Congressional legislation or judicial decisions that destroyed or undermined other aspects of indigenous culture. Even if one were to overlook that the doctrine of territorial incorporation adopted in the *Insular Cases* has no basis in the text of the Constitution or contemporary historical practice, and even if it

31. *Fitisemanu*, 1 F.4th 862 at 866.

32. Brief for Am. Samoa as Amicus Curiae, *Tuaua v. United States*, 788 F.3d 300 (D.C. Cir. 2012) (Civ. No. 12-1143-RJL).

33. See, e.g., Ciolli, *supra* note 1; Micah Allred, *An Originalist Approach to Puerto Rico: Arguments Against the Status Quo*, 99 NOTRE DAME L. REV. REFLECTIONS 151 (2024); Joshua Stephen Ebner, *Democracy's Forgotten Possessions: U.S. Territories' Right to Statehood Through Constitutional Liquidation*, 98 NOTRE DAME L. REV. 885 (2023).

34. Anthony Ciolli & Dana Hrelac, *Third-Class Citizens: Unequal Protection Within United States Territories*, 55 SUFFOLK L. REV. 179, 193-94 (2022).

35. *Id.* at 194.

36. Brief for Am. Samoa, *supra* note 32, at 2.

were possible to disregard the racist rhetoric and reasoning of the *Insular Cases*, it is simply impossible to ignore their ultimate result: conferring Congress with virtually unrestricted, plenary authority over the territories. To put it bluntly, while the *Insular Cases*, whether “repurposed” or not, may authorize Congress to use its plenary authority to permit the government of American Samoa to give the *fa’a Samoa* the force of law, they likewise permit Congress to exercise that very same plenary authority to abolish the *fa’a Samoa* and impose an entirely different legal and cultural regime on the territory without the consent of the American Samoan government or its people.

Part II then puts the *Insular Cases* aside and examines the language and history behind the Tenth Amendment of the United States Constitution. Like the Territorial Clause, the Tenth Amendment is a highly misunderstood and under analyzed provision of the Constitution. The Tenth Amendment has often been erroneously invoked by conservatives as “a sword allowing states and localities to engage in passive resistance that frustrates federal programs,”<sup>37</sup> and on the other hand typically dismissed by liberals as a meaningless “truism” that contributes nothing to the Constitution<sup>38</sup> and whose text is “nearly vestigial.”<sup>39</sup>

While the Tenth Amendment perhaps rivals the *Insular Cases* with respect to its friends amongst contemporary legal scholars and judges, its reservation of power to “to the people”<sup>40</sup> is only redundant if one erroneously views the United States as a nation of states, rather than a nation of states, territories, and a federal district. The Tenth Amendment, when read in conjunction with the Territorial Clause as originally understood by the Founders, as well as through the lens of historical practice from the Founding Era, vests a powerful right to the people: the right to self-determination through the creation of a new legitimate government, particularly when a government either never operated or exists only on paper.

Part III then examines the interplay between the Tenth Amendment and the Territorial Clause. These two provisions, when read together, vest the people who reside in a territory with the right to exercise the right to self-determination through actions such as establishing a territorial constitution and territorial government; determining their political status within the United States constitutional framework; and, through their government, to enact laws appropriate for the territory which need not comport with the limitations the Constitution sets for the federal government or even the states. Importantly, this interplay is supported by actual historical practice in the Founding Era both before and after ratification of the U.S. Constitution and the Bill of Rights, including congressional treatment of the Northwest Territory, the Vermont Republic, the State of Franklin, and the Indian Stream Republic.

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37. *City of New York v. United States*, 179 F.3d 29, 35 (2d Cir. 1999).

38. *United States v. Darby*, 312 U.S. 100, 124 (1941).

39. Ian Bartrum, *The Constitutional Structure of Disestablishment*, 2 N.Y.U. J. L. & LIBERTY 311, 329 (2007).

40. U.S. CONST. amend. X.

Finally, Part IV applies the Tenth Amendment and Territorial Clause to the *fa'a Samoa* and similar cultural traditions in the territories. As a threshold matter, the Tenth Amendment actually provides the legal authority for the independent existence of the territorial government of American Samoa: under the Insular Cases framework, the government is at worst illegally constituted or at best subject to unilateral dissolution by the President of the United States or the Secretary of the Interior. Even putting that aside, the Tenth Amendment, as originally understood by the Founders, permits American Samoa to adopt racially restricted land alienation laws, recognize matai titles, and engage in other practices that would be plainly unconstitutional if done by the federal government or a state. And unlike the legal rule endorsed by the *Insular Cases*, the Tenth Amendment not only allows for territorial governments to enact laws that codify the *fa'a Samoa* or other cultural practices but prohibits the federal government from unilaterally annulling such legislation so long as the territory remains a territory and not a state.

#### I. THE *INSULAR CASES* AS A POOR MECHANISM FOR CULTURAL PROTECTION

Numerous judges, lawyers, and scholars have extensively analyzed the *Insular Cases* over the past several decades, and at this point there is relatively little to say that has not already been said.<sup>41</sup> The *Insular Cases* were “heavily imbued with notions of racial destiny and imperial domination,”<sup>42</sup> with the Supreme Court openly describing Puerto Rico and other newly-acquired territories as “inhabited by alien races” for whom it “may for a time be impossible” to govern “according to Anglo-Saxon principles.”<sup>43</sup> Moreover, the Supreme Court’s results-oriented interpretation of the Territorial Clause in the *Insular Cases* that implemented those racist beliefs was an “abomination” that “had absolutely no basis in the Constitution’s text or any context or pre-or early post-ratification history.”<sup>44</sup> Simply put, the reasoning employed by the Supreme Court in the

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41. See, e.g., Lawson & Sloane, *supra* note 12; Rennie, *supra* note 25; Fuentes-Rohweaver, *supra* note 19; Christina D. Ponsa-Kraus, *The Insular Cases Run Amok: Against Constitutional Exceptionalism in the Territories*, 131 YALE L.J. 2449 (2022); Adriel I. Cepeda Derieux, *To Lift a Dark Cloud: The Insular Cases’ Stubborn Vitality, Their Place in Civil Rights Law, and the Need to Overrule Them*, 56 SUFFOLK U. L. REV. 503 (2023); Sarah M. Kelly, *Toward Self-Determination in the U.S. Territories: The Restorative Justice Implications of Rejecting the Insular Cases*, 28 MICH. J. RACE & L. 109 (2023); Natalie Gomez-Velez, *De Jure Separate and Unequal Treatment of the People of Puerto Rico and the U.S. Territories*, 91 FORDHAM L. REV. 1727 (2023); Alan Mygatt-Tauber, *Overruling the Insular Cases on Their Own Terms*, 33 GEO. MASON U. CIV. RTS. L.J. 201 (2023); Christina Duffy Burnett, *Untied States: American Expansion and Territorial Deannexation*, 72 U. CHI. L. REV. 797 (2005); Juan R. Torruella, *¿Hacia Dónde vas Puerto Rico?*, 107 YALE L.J. 1503 (1998); Riley J. Gutierrez, *Unincorporated: A Case for American Samoa Through the Fog of the Insular Cases*, 18 LIBERTY U. L. REV. 641 (2024); JUAN R. TORRUELLA, *THE SUPREME COURT AND PUERTO RICO: THE DOCTRINE OF SEPARATE AND UNEQUAL* (1985).

42. Samuel Issacharoff et al, *What is Puerto Rico?*, 94 IND. L.J. 1, 9 (2019).

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

44. Ponsa-Kraus, *supra* note 41, at 2483 n.147 (quoting Michael Ramsey, *The Supreme*

*Insular Cases* is “the epitome of making it up as one goes along” towards the “indefensible goal” of “enabling the indefinite subordination of territories inhabited by racial minorities.”<sup>45</sup>

The flaws with the *Insular Cases* become exacerbated when one considers how the lower federal courts continue to expand them to apply to different constitutional contexts despite even the Supreme Court directing that they receive no further expansion.<sup>46</sup> Of course, there is much to despise about the *Insular Cases* without the need to exaggerate. For instance, some have claimed that the *Insular Cases* created or contributed to the “unjust legal formulation” that “voting in federal election is a crucial, fundamental right of American citizenship except when the citizen happens to live in a United States territory.”<sup>47</sup> While most Americans who reside in territories lack the constitutional right to vote for President and full voting members of Congress, their disenfranchisement is not due to the *Insular Cases* but the plain text of the pertinent provisions of Articles I and II of the Constitution that limit such franchise to the citizens of a state.<sup>48</sup>

Likewise, it is true that the *Insular Cases* did in fact hold that certain provisions of the Bill of Rights to the Constitution—such as the right to a jury trial—did not extend to the so-called unincorporated territories. Contemporary scholars often assume that the effect of that holding was to treat the people of the territories as second-class citizens who receive fewer protections than their fellow Americans who reside in the states. Yet “[i]t is easy to forget . . . that the incorporation of the Bill of Rights against the states is a relatively recent development in American jurisprudence” that did not occur until 1925.<sup>49</sup> This is because

[i]n 1833, the Supreme Court of the United States unanimously held in *Barron v. Baltimore* that the Bill of Rights did not apply to the states, and that the protections set forth in the Bill of Rights could only be provided in state constitutions. To reach this decision, Chief Justice John Marshall expressly relied on the fact that the plain text of the United States Constitution contained no dictatory language towards the states. In 1868, the United States Supreme Court reaffirmed the holding of *Barron* even though the Fourteenth Amendment had

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Court, *FOMB v. Aurelius Investment, and the Insular Cases*, ORIGINALISM BLOG (June 4, 2020, at 6:00 AM PT), <https://originalismblog.typepad.com/the-originalism-blog/2020/06/the-supreme-court-and-the-insular-casesmichael-ramsey.html> [<https://perma.cc/6TL5-FYD9>].

45. *Id.* at 2483-84.

46. *Fin. Oversight & Mgmt. Bd. for P.R.*, 140 S. Ct. 1649 at 1665; *Reid*, 354 U.S. 1 at 14 (1957).

47. Lisa M. Kömives, *Enfranchising a Discrete and Insular Minority: Extending Federal Voting Rights to American Citizens Living in United States Territories*, 36 U. MIAMI INTER-AM. L. REV. 115, 118 (2004).

48. *See, e.g., Attorney Gen. of Guam v. United States*, 738 F.2d 1017, 1019 (9th Cir. 1984) (“The right to vote in presidential elections under Article II inheres not in citizens but in states: citizens vote indirectly for the President by voting for state electors.”); *see also* Neil Weare, *Equally American: Amending the Constitution to Provide Voting Rights in U.S. Territories and the District of Columbia*, 46 STETSON L. REV. 259, 261 (2017) (“As unbalanced as the relationship between the national government and Americans living in non-state areas is, it is admittedly part of the constitutional structure established at our nation’s founding.”).

49. Ciolli, *supra* note 22, at 220-21.

been ratified several months earlier, holding that the Fifth and Sixth Amendments did not apply to criminal prosecutions in the courts of Pennsylvania or other states because they were intended only to limit federal power.

Four decades later, in the *Slaughter-House Cases*, the United States Supreme Court again reaffirmed the core holding of *Barron*. Although it recognized that the plain text of the Privileges or Immunities Clause of the Fourteenth Amendment provides that no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, a majority of the United States Supreme Court interpreted this language exceptionally narrowly, so that states were only prohibited from interfering with those rights that owe their existence to the Federal government, such as traveling to the seat of government, free access to seaports, transacting business with the government, and the privilege of habeas corpus. This interpretation of the Fourteenth Amendment effectively rendered it a vain and idle enactment, which accomplished nothing. The United States Supreme Court thereafter expressly held in subsequent cases that the First, Second, and Fifth Amendments did not apply to state governments pursuant to the interpretation of the Fourteenth Amendment adopted in the *Slaughter-House Cases*.

*Barron*, the *Slaughter-House Cases*, and their progeny remained binding precedent throughout the entire two-decade period from 1901 to 1922 in which all the *Insular Cases* were decided. Moreover, throughout this period the United States Supreme Court and the lower federal courts issued numerous additional decisions expressly holding that various provisions of the Bill of Rights did not apply to the states. For instance, in 1908, the United States Supreme Court reaffirmed its earlier holding that the Fifth Amendment right against self-incrimination did not apply in cases brought in the New Jersey court system and in other state courts.<sup>50</sup>

In other words, at the time they were decided, “[t]he *Insular Cases* did not treat residents of the territories differently than residents of the states with respect to the constitutional protections of the Bill of Rights,” but rather “provided equal treatment, in that the people of the territories were denied the protections of the Bill of Rights by the federal government on the same basis as the people of the states.”<sup>51</sup>

Yet lower courts seemingly uniformly apply a “badly distorted version” of the *Insular Cases* where “every constitutional challenge involving an unincorporated territory” seeking to extend a part of the Constitution to that territory over the objection of the federal government fails.<sup>52</sup> This appears largely due to the contemporary media and opponents of the *Insular Cases* characterizing the Supreme Court as holding that the Constitution does not “follow the flag” and endorsing a “Constitution-free zone” in the so-called unincorporated territories.<sup>53</sup>

This simplification is “fundamentally wrong” in that it overstates and exaggerates the already poor reasoning of the *Insular Cases* to make them appear

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50. *Id.* (footnotes and quotation marks omitted).

51. *Id.* at 222.

52. Ponsa-Kraus, *supra* note 41, at 2484.

53. Christina Duffy Burnett, *United States: American Expansion and Territorial Deannexation*, 72 U. CHI. L. REV. 797, 797 (2005).

even worse.<sup>54</sup> Contrary to the common wisdom, “the questions raised in many of the decisions comprising the *Insular Cases* were not of a constitutional magnitude,” but instead “involved relatively mundane questions of statutory interpretation” of federal maritime, tariff, and immigration law.<sup>55</sup> Certainly, some of the *Insular Cases* did involve constitutional issues.<sup>56</sup> Yet even in those cases the Supreme Court did not grant Congress and the lower federal courts the unlimited and unrestricted authority to “switch the Constitution on and off” in the territories.<sup>57</sup> Nevertheless, that is precisely what the lower federal courts have done, relying upon the *Insular Cases* as the basis to deny the people of the territories even fundamental rights such as birthright citizenship and the right to be free from unreasonable searches and seizures.<sup>58</sup>

Those who propose that the courts “repurpose” the *Insular Cases* typically do not dispute any of the above points. For instance, the first contemporary scholar to write in favor of this reimagining readily conceded without hesitation that “[t]he *Insular Cases* bear the unmistakable taint of racism and the apologetics of empire, and the doctrines offer little in the way of coherence or consistency,”<sup>59</sup> while another acknowledges that they are “rooted in outdated, racist logic from a bygone era of American imperialism.”<sup>60</sup> These scholars seek to “repurpose” the *Insular Cases* not because they correctly interpreted the Territorial Clause or other portions of the Constitution, but rather because it represents a “more pragmatic, modest” approach that “may be less satisfying” but purportedly “more meaningful in practice . . . given the current bleak realities in the Territories.”<sup>61</sup> Or, to put it bluntly, these scholars believe that overruling the *Insular Cases* is such “a difficult and impractical path to progress” that it should take a backseat to “real and workable opportunities” to benefit the territories under the *Insular Cases* framework.<sup>62</sup>

The reasoning employed to support the “repurposing” of the *Insular Cases* is no different from the white man’s burden rationale utilized in those very cases. These scholars characterize the Americans who call the territories home as “politically powerless,” living in “geographic isolation” on “crumbling island[s]” with “simple econom[ies]” that are “generally stagnant,” have “problems securing safe drinking water,” live in fear of being “prime targets for enemies of the United States,” and generally live their lives with “a sense of hopelessness” because of the “cauldron of burdens that their fellow citizens in the States do not

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54. *Id.*

55. Ciolli, *supra* note 22, at 218.

56. *See, e.g., Balzac*, 258 U.S. 298 at 313; *Dorr*, 195 U.S. 138 at 149; *Hawaii v. Mankichi*, 190 U.S. 197, 212 (1903).

57. *Boumediene v. Bush*, 553 U.S. 723, 765 (2008).

58. *See, e.g., Fitisemanu*, 1 F.4th 862 at 881; *Tuaua* 788 F.3d 300 at 308; *Hyde*, 37 F.3d 116 at 120–22.

59. Rennie, *supra* note 25, at 1717.

60. Lin, *supra* note 25, at 1286.

61. *Id.* at 1253.

62. *Id.* at 1284, 1292.

have to carry.”<sup>63</sup> They believe that people of the territories should not make achieving equal rights their primary focus, because any victories achieved would “seem like pyrrhic victories when juxtaposed with the grim long-term outlooks of storm-torn neighborhoods, shuttered businesses, bombing threats, dilapidated schools, and mass exoduses of family and friends.”<sup>64</sup> Because the people of the territories lack the ability to “meaningfully advocate on [their] behalf via the normal political process,” these scholars maintain that they must be “protect[ed]” by the federal courts—but only to a certain point.<sup>65</sup> And since they believe the people of the territories cannot be trusted to preserve their culture, “territorial residents, to co-exist meaningfully—to be equal, in a sense—in the American republican system requires a different set of rights and obligations for locals,” such as allowing them to enact race- or ancestry-based restrictions on alienation of land to “mainlanders.”<sup>66</sup> While purporting to take a moderate or pragmatic position,<sup>67</sup> these proposals effectively use softer language to embrace the reasoning and result of the *Insular Cases*: that residents of the territories are unable to care for themselves and should be treated differently by the federal government.<sup>68</sup>

But what of the practical reality that the *Insular Cases* remain “good law” more than 125 years later? Even if one were inclined to overlook the racist stereotypes and implicit biases that form the basis for their repurposing,<sup>69</sup> the territorial incorporation doctrine adopted by the Supreme Court in the *Insular Cases* is substantively an extraordinarily poor vehicle to protect the *fa’a Samoa* and

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63. Lin, *supra* note 25, at 1252.

64. *See id.* at 1284.

65. *Territorial Federalism*, *supra* note 25, at 1654.

66. Rennie, *supra* note 25, at 1709-10.

67. Interestingly, Professor Lowell, whose article in the *Harvard Law Review* provided the reasoning for the holdings of the *Insular Cases*, had also portrayed his proposal as a moderate one, as evidenced by the very title of his article proposing a “Third Way” to resolve the question of territorial incorporation.

68. Juan R. Torruella, *Why Puerto Rico Does Not Need Further Experimentation with its Future: A Reply to the Notion of “Territorial Federalism,”* 131 HARV. L. REV. F. 65, 66 (2018) (“[T]his ‘new’ scheme is not only not new, but is in fact a repackaging of the same unequal colonial relationship that has been in place since American troops landed in Guánica in 1898.”).

69. Recently, one leading scholar has bravely challenged the proposition that the *Insular Cases* are imbued with racism and proposed the surprisingly novel concept of not repurposing or reimagining the *Insular Cases* to protect indigenous cultural practices, but rather of applying the *Insular Cases* as they are written. *See* Richard A. Epstein, *The Natural Law Origins of Private and Public Law*, 17 N.Y.U. J. L. & LIBERTY 205, 279–280 (2024). While it may well be the case that some detractors of the *Insular Cases* may have, in some instances, exaggerated the claims of their naked racism, the fact remains that the *Insular Cases* established a judicially-created legal regime in which every territory with a majority non-white population was subject to a different legal framework than every territory with a majority white population. More importantly, for purposes of this article the motives of the Justices who decided the *Insular Cases* are simply irrelevant—as I shall soon explain, even if decided with non-racist intentions, the *Insular Cases* as a matter of substantive constitutional doctrine fail to provide any meaningful protection for the *fa’a Samoa* or other similar indigenous practices.

similar indigenous practices. This is because the *Insular Cases* did not reject, but in fact reaffirmed, earlier precedents that interpreted the Territorial Clause as providing Congress with “plenary power” over all territories, whether incorporated or unincorporated.<sup>70</sup> Congress possessing plenary power over the territories means that “Congress has the entire dominion and sovereignty, national and local, Federal and state, and has full legislative power over all subjects upon which the legislature of a state might legislate within the state.”<sup>71</sup>

Of course, if Congress possesses plenary power over all territories, it could certainly enact legislation that destroys all aspects of the *fa’a Samoa* and similar practices. At its discretion, Congress could nullify race- or ancestry-based land alienation laws; prohibit official government recognition of *matai* titles; eliminate mandatory prayer curfews; and take other action to make American Samoa legally no different than Hawai’i or Maine.

This is not a hypothetical fear. In recent years, Congress has exercised this plenary authority to unilaterally reduce or outright eliminate the authority of territorial governments in ways once thought unthinkable. In the wake of the Jack Abramoff scandal, Congress unilaterally passed, over the objection of the Northern Mariana Islands government, the Consolidated Natural Resources Act of 2008 to repeal the long-standing authority of the Northern Mariana Islands—which had been bilaterally negotiated and memorialized in the treaty that set forth the terms of it joining the United States as a territory—to regulate its own immigration and minimum wage laws.<sup>72</sup> In 2016, Congress effectively rescinded fundamental provisions of Puerto Rico’s territorial constitution and right to self-government by enacting the Puerto Rico Oversight, Management, and Economic Stability (“PROMESA”) Act to grant an unelected federally-appointed board largely unrestricted authority over its budget, including the authority to nullify territorial law.<sup>73</sup>

But while the potential for intervention by Congress is certainly real, an even more realistic threat is a change in heart by the federal courts. Perhaps one of the more obvious flaws with the *Insular Cases* regime is the unauthorized transfer of power from Congress to the federal courts. While the Territorial Clause vests Congress with the power to enact needful rules and regulations, the *Insular Cases* and their progeny grant the federal courts the authority to determine whether portions of the Constitution apply or do not apply in particular territories, based on nothing more than the subjective whims of a federal judge. And since the Supreme Court has seemingly proactively avoided hearing any case implicating the *Insular Cases*, whether a constitutional limitation is “fundamental” not only

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70. For a comprehensive analysis of this, see Christina D. Ponsa-Kraus, *The Insular Cases Run Amok; Against Constitutional Exceptionalism in the Territories*, 131 YALE L.J. 2449, 2472 (2022).

71. *Simms v. Simms*, 175 U.S. 162, 168 (1899).

72. For more detailed information, see U.S. Gov’t Accountability Off., *Commonwealth of the Northern Mariana Islands: DHS Implementation of U.S. Immigration Laws*, <https://www.gao.gov/assets/gao-19-376t.pdf> (Feb. 27, 2019).

73. See Pub. L. 114-87.

varies from territory to territory but also is subject to change even within a territory when there are changes in the composition of judges on the pertinent federal courts of appeals.

Again, this is no exaggeration. As mentioned earlier, the territory of Guam may enact taxes that discriminate against goods imported from the fifty states. This is because a panel of the United States Court of Appeals for the Ninth Circuit held in a 1985 decision—*Sakamoto v. Duty Free Shoppers, Ltd.*—that Guam is not a “state” for purposes of the dormant commerce clause but, due to its status as an unincorporated territory, acts as an alter ego of Congress.<sup>74</sup> However, prior to *Sakamoto*, Ninth Circuit precedent suggested that territories were no different than states under the dormant commerce clause<sup>75</sup>, with the *Sakamoto* court either distinguishing or outright overruling those prior decisions.<sup>76</sup> And while the Ninth Circuit held, in *Wabol v. Villacrusis*,<sup>77</sup> that the Northern Mariana Islands may constitutionally codify race-based restrictions on the alienation of land in its territorial constitution, paradoxically another panel recently struck down race-based restrictions on amending that very same provision of the territorial constitution, in effect permitting those not of Northern Marianas origin to eliminate that cultural-preservation protection if they were to one day become the majority of qualified voters.<sup>78</sup>

The regime established by the *Insular Cases*—whether repurposed or in their original form—is thus an extraordinarily poor mechanism to preserve the *fa’ā Samoa* or other indigenous practices. But is there a better doctrinal alternative for those who believe that such practices are constitutional and that territorial governments, and not Congress, should be the final decision-makers on such matters? As the following sections shall explain, that alternative exists, and is precisely what those who have sought to repurpose the *Insular Cases* have opposed: the full and unrestricted application of the United States Constitution to the territories, with its provisions interpreted based on the plain language and original meaning and intent of the Founders.

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74. *Sakamoto*, 764 F.2d 1285 at 1286.

75. See *Anderson v. Mullaney*, 191 F.2d 123, 127 (9th Cir. 1951) (“[T]he limitations on the Territory’s power to regulate [commerce] are not in any substantial respect different from those applicable to a State.”).

76. See *Sakamoto*, 764 F.2d 1285 at 1286 (In three cases, [we] assumed without discussion that the commerce clause limits the government of Guam in the same manner that it limits the states. . . [w]e do not view these cases as controlling precedent on the applicability of the commerce clause to Guam.”). The three cases were “*Pacific Broadcasting Corp. v. Riddell*, 427 F.2d 519 (9th Cir.1970) (gross receipts tax not violative of the commerce clause); *Asiatic Trans-Pacific, Inc. v. Maddox*, 371 F.2d 132 (9th Cir.1967) (gross receipts tax not violative of the commerce clause); [and] *Manila Trading & Supply Co. v. Maddox*, 335 F.2d 150 (9th Cir.1964) (gross receipts tax violative of the commerce clause).” *Id.* at 1287–88.

77. *Wabol*, 958 F.2d 1450 at 1462.

78. See *Davis v. Commw. Elec. Com’n*, 844 F.3d 1087, 1089 (9th Cir. 2016).

## II. PURPOSES OF THE TENTH AMENDMENT &amp; THE TERRITORIAL CLAUSE

## A. Origin, Purpose, and Interpretation of the Tenth Amendment

The Tenth Amendment to the United States Constitution simultaneously serves as both the most pivotal and least practical provision of the Bill of Rights—to the point that even the Supreme Court has occasionally said that it does not belong in the Bill of Rights at all.<sup>79</sup> The Tenth Amendment states, in its entirety, that

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.<sup>80</sup>

Scholars have written entire treatises trying to deconstruct the meaning of this simple sentence, which delve into the amendment’s drafting, ratification, and judicial interpretation in far more detail than one can in a single law review article.<sup>81</sup> While scholars continue to debate the substantive meaning of its language, the historical circumstances that led to the adoption of the Tenth Amendment—as well as the First through Ninth Amendments—are beyond reasonable dispute. Simply put, a majority of the delegates to the 1787 Constitutional Convention in Philadelphia had—after considerable debate and dissent—declined to include a bill of rights in the draft United States Constitution. They did so on grounds that a bill of rights was simply “unnecessary” since the Constitution vested the federal government with limited enumerated powers and “if you have granted an enumerated set of limited powers, you have accomplished the same thing as if you had included a bill of rights” since “the people evidently retained every thing which they did not in express terms give up.”<sup>82</sup> Of course, a further unstated assumption underlying this interpretation of the Constitution is “that the states were governments of plenary powers, subject only to being limited by the terms of the written state constitutions.”<sup>83</sup>

While persuasive to the Constitutional Convention delegates, such arguments did not assuage the fears of the states at their respective ratifying conventions. Although states disagreed on what express rights to codify in the Constitution, language similar or identical to “the Tenth [Amendment] was the only one proposed by every one of the state ratifying conventions that proposed amendments.”<sup>84</sup> In proposing the language that would ultimately become the

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79. *See, e.g., Bolln v. Nebraska*, 176 U.S. 83, 87 (1900) (referring to the “first eight amendments” as the “Bill of Rights”).

80. U.S. CONST. amend. X.

81. *See, e.g.,* THOMAS B. MCAFEE, JAY S. BYBEE & A. CHRISTOPHER BRYANT, *POWERS RESERVED FOR THE PEOPLE AND THE STATES: A HISTORY OF THE NINTH AND TENTH AMENDMENTS* (2006).

82. *Id.* at 29

83. *Id.* at 50 n.7.

84. AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 123 (1998).

Tenth Amendment, the First Congress heavily borrowed from a proposal that originated from the New York ratifying convention that reserved undelegated powers to the people or to the states,<sup>85</sup> relying on the “doctrine of popular sovereignty” previously invoked “to justify the Philadelphia Convention’s decision to draft a new Constitution, rather than to follow the original charge to amend the Articles of Confederation.”<sup>86</sup> In other words, the Tenth Amendment “reflect[s] that it is the people who grant and reserve powers to both federal and state governments.”<sup>87</sup>

Yet the reservation of powers to the states or to the people necessarily raises several critical questions. What are these “powers”? Are such “powers” exercised first by the “States” or by “the people”? Who even are “the people,” and how can “the people” even exercise these “powers” as a practical matter?

While some scholars attempt to answer these questions,<sup>88</sup> the Supreme Court of the United States has largely punted. As Justice Stone famously wrote in the majority opinion of *United States v. Darby*,<sup>89</sup>

The amendment states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment or that its purpose was other than to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers.

From the beginning and for many years the amendment has been construed as not depriving the national government of authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end.<sup>90</sup>

The context for this observation, of course, was a case where a private employer asserted that the federal Fair Labor Standards Act of 1938 was unconstitutional as violative of the Tenth Amendment. The same is true for other decisions in which the Supreme Court “took a weak reading of the Tenth Amendment”: all were made in the context of a party seeking to utilize the Tenth Amendment as a sword to strike down federal legislation enacted pursuant to an enumerated power.<sup>91</sup> And even the relatively few decisions that actually strike down an act of Congress as violative of the Tenth Amendment focus exclusively on the reservation of unenumerated power to the states, with no

85. NEW YORK PROPOSED AMENDMENTS (1788), reprinted in 2 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 911-12 (1971).

86. MCAFFEE, *supra* note 81, at 42.

87. *Id.* at 43.

88. See, e.g., Elizabeth Anne Reese, *Or to the People: Popular Sovereignty and the Power to Choose a Government*, 39 CARDOZO L. REV. 2051 (2018); John R. Vile, *Truism, Tautology or Vital Principle?*, 27 CUMB. L. REV. 445 (1996).

89. *Darby*, 312 U.S. 100 at 124.

90. *Id.* at 462.

91. Reese, *supra* note 88, at 2073.

analysis of the reservation to the people.<sup>92</sup> It appears that jurists such as “Justice Scalia, Justice Thomas, and others have discounted the text and glossed over ‘the people’ in the Tenth Amendment by reasoning that the last four words are redundant and unnecessary because two competitive governments”—federal and state—“sufficiently protect the people.”<sup>93</sup>

There is significant merit to the seeming consensus that the Tenth Amendment does not further narrow the enumerated powers of Congress, and that the reserved powers not delegated to the federal government and not also withheld from state governments first flow to state governments. After all, “an affirmation of sovereignty not ‘in the people as a whole’ but in the ‘people-as-States’ is fully consistent with the broad constitutional scheme mandated by the Framers.”<sup>94</sup> Yet perhaps the biggest weakness of this interpretation is that it seemingly writes the phrase “or to the people” out of the amendment, and potentially even renders the entire amendment redundant.<sup>95</sup>

*Or does it?* The jurists, scholars, and others opining on the meaning of the Tenth Amendment in recent years typically overlook that the United States is made up of more than just the states. Today, the United States consists of fifty states, the District of Columbia, five inhabited territories, and numerous uninhabited territories. While American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, the U.S. Virgin Islands, and to a lesser extent the District of Columbia, are considered “marginal places”<sup>96</sup> whose constitutional status has often been dismissed as “a footnote within a footnote of an already niche field,”<sup>97</sup> this had not been the case at the time of the drafting and ratification of the Constitution. The United States’ first territory—the Northwest Territory—predates the Constitution itself.<sup>98</sup> By the time the states ratified the Tenth Amendment in late 1791, the United States acquired additional land which Congress designated as the Southwest Territory.<sup>99</sup> And, of course, the Constitution itself provided for the creation of a brand-new federal district to serve as the seat of government, which would not be part of any state, and whose boundaries had already largely been fixed after Maryland and Virginia ceded the land that would make up the

92. *Id.* at 2077-78 (collecting cases).

93. *Id.* at 2085 (collecting cases).

94. Jesse H. Choper, *The Scope of National Power Vis-à-Vis the States: The Dispensability of Judicial Review*, 86 YALE L.J. 1552, 1613 (1977) (quoting JAMES JACKSON KIRKPATRICK, *THE SOVEREIGN STATES* 15 (1957)).

95. *See, e.g.*, *Gustafson v. Alloyd Co.*, 513 U.S. 561, 562 (1995) (“[T]his Court will avoid a reading which renders some words altogether redundant”).

96. Christina Duffy Burnett, *A Convenient Constitution? Extraterritoriality After Boumediene*, 109 COLUM. L. REV. 973, 1040-41 (2009).

97. Ciolli, *supra* note 22, at 248 (quoting J.M. Balkin, *The Footnote*, 83 NW. U.L. REV. 275, 302 n.65 (1989)).

98. *See* James Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 HARV. L. REV. 643, 656 n.44 (2004).

99. *See* James Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 HARV. L. REV. 643, 656 n.44 (2004).

federal district in 1788 and 1789, respectively.<sup>100</sup>

The very existence of the District of Columbia and the territories provided a strong counterargument to the claim that a bill of rights was unnecessary because the Constitution established the federal government as one of limited enumerated powers. Even if that were the case, the Constitution granted Congress the power “[t]o exercise exclusive Legislation in all Cases whatsoever” over the District of Columbia,<sup>101</sup> and to “make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.”<sup>102</sup> As one scholar explained,

[W]hen Congress enacts laws governing territories or the District, it does not need to find authorization for those laws in the specific subject-matter enumerations in Article I, Section 8 or the Sweeping Clause. It has general legislative authority, equivalent to a state government, by virtue of targeted enumerations that create such general authority within limited spheres. If the reason why laws abridging speech, authorizing general warrants, and abolishing jury trial were unconstitutional before December 15, 1791, is that such laws would not be “necessary and proper for carrying into Execution” federal powers, then such reasoning would not apply to territories and the District because Congress would not need to invoke the Sweeping Clause as justification for any laws in that setting. . . . The Bill of Rights, however, is phrased generally enough to apply to all exercises of congressional power, including exercises grounded in the District Clause or Territories Clause.<sup>103</sup>

Opponents to the Bill of Rights experienced great difficulty providing a persuasive response to this argument, since “Congress would be empowered to regulate the press in the District of Columbia given its general regulatory powers there” vested by the plain and unambiguous text of the Seat of Government Clause.<sup>104</sup> The counterargument—that the “compact” or “fundamental law” of the District of Columbia “should include a provision for freedom of the press” in the same manner as a state constitution would—presupposes that Congress would voluntarily provide this protection when exercising its authority under the Seat of Government Clause.<sup>105</sup>

Of course, the naked assertion that Congress would include such protections in the “covenant” or “fundamental law” governing the District of Columbia or the territories obviously provides no assurance to one who already fears Congress will infringe on freedom of the press nationally unless the states ratify the First Amendment. But before delving deeper into the intersection between the Tenth Amendment and America’s non-state polities—the territories and the District of Columbia—it is necessary to understand and appreciate precisely what powers the Framers intended to vest in Congress to legislate for those areas pursuant to

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100. See Act of May 26, 1790, ch. 14, 1 Stat. 123.

101. U.S. CONST., art. I, § 8, cl. 17.

102. U.S. CONST., art. IV § 3, cl. 2.

103. Gary Lawson, *A Truism With Attitude: The Tenth Amendment in Constitutional Context*, 83 NOTRE DAME L. REV. 469, 488-89 (2008).

104. MCAFFEE, *supra* note 81, at 32.

105. *Id.* at 32, 39.

the Territorial Clause and the Seat of Government Clause.

### B. Original Understanding of the Territorial Clause

The word “Territory” only appears three times in the entire Constitution: the Territorial Clause, and the two Prohibition amendments. The Territorial Clause reads, in its entirety, as follows: “The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.”<sup>106</sup>

It should come as no surprise that this language perhaps raises far more questions than provides answers for what the federal-territorial relationship looks like. What is “the Territory”? What are “Rules and Regulations” and how do they differ from laws? What makes a rule or regulation “needful”? Is there any significance to this language appearing in Article IV of the Constitution—titled “Relationships Between the States”—rather than as among the enumerated powers of Congress set forth in Article I?

As noted in the prior section, courts often describe the Territorial Clause as vesting Congress with plenary—that is, unrestricted—power over the territories.<sup>107</sup> But these judicial decisions that interpret the Territorial Clause as “confer[ing] Congress with the absolute and unrestricted plenary power to make any law whatsoever for the territories” plainly lack any grounding in the text of the Territorial Clause itself.<sup>108</sup> After all, the Territorial Clause not only confers Congress only with the power to make rules and regulations, but limits that already restricted power further by permitting it only to make *needful* rules and regulations.

So where did this idea of Congress possessing plenary power over the territories come from? While heavily emphasized in the *Insular Cases*, the plenary power doctrine precedes those decisions by nearly a century. In 1810, Chief Justice Marshall, writing for a unanimous Supreme Court, determined that “[t]he power of governing and legislating for a territory is the inevitable consequence of the right to acquire and to hold territory,” and that Congress thus “pos- sessed[ed] and exercise[d] the absolute and undisputed power of governing and legislating for the territory of Orleans.”<sup>109</sup> Yet the reference to this “absolute and undisputed power” occurs not just in dicta, but only in a portion of the opinion addressing a far more narrow question: “[w]hether the citizens of the territory of Orleans are to be considered as the citizens of a state, within the meaning of the constitution.”<sup>110</sup> In other words, the language used by Chief Justice Marshall

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106. U.S. CONST. art. IV, sec. 3, cl. 2.

107. See discussion *supra* Part I.

108. Ciolli, *supra* note 22, at 231.

109. *Sere v. Pitot*, 10 U.S. 336, 337 (1810).

110. *Id.* at 336.

referred not to the *extent* of Congress' power over the territories, but rather its *source*: that "Congress, in the exercise of its powers in the organization and government of the Territories, combin[es] the powers of both the Federal and State authorities."<sup>111</sup>

The first express reference to Congress exercising a "plenary" power over the territories appear in cases decided shortly after the Civil War, where—again, in dicta—the Supreme Court referenced the "plenary municipal authority which Congress has over the District of Columbia and the Territories of the United States."<sup>112</sup> Even this language is not without restriction, in that the "plenary" authority referenced is limited to "municipal authority"—that is, the authority to establish local governmental units like cities or towns.<sup>113</sup> But even more significantly, the Supreme Court stated in this dicta that such "plenary" authority exists over both the territories and the District of Columbia—without citing to any legal authority over why that would be the case.

The District of Columbia, despite sharing some similarities with the territories, is plainly "not a territory" since it is subject to the control of Congress not through the Territorial Clause but rather the Seat of Government Clause.<sup>114</sup> Unlike the Territorial Clause, the plain text of the Seat of Government Clause appears to set no meaningful limits on the authority of Congress over the District of Columbia; it reads: "[t]he Congress shall have Power . . . To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States."<sup>115</sup>

The Seat of Government Clause certainly vests Congress with plenary power over the District of Columbia. This is obviously apparent from the language of the clause itself, vesting Congress with the authority "[t]o exercise exclusive Legislation in all Cases whatsoever."<sup>116</sup> Yet the same cannot be said for the Territorial Clause:

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

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111. *Benner v. Porter*, 50 U.S. 235, 242 (1850).

112. *Hornbuckle v. Toombs*, 85 U.S. 648, 655 (1873).

113. BLACK'S LAW DICTIONARY 1175 (10th ed. 2014) (defining "municipal").

114. *Ciulli*, *supra* note 22, at 237.

115. U.S. CONST. art. I, § 8, cl. 17.

116. *Id.*

Clause in the same manner as the District of Columbia and federal buildings.<sup>117</sup>

Yet if the Framers did not intend for the Territorial Clause to confer Congress with plenary authority over the territories in the same manner as the Seat of Government Clause does for the District of Columbia, then what power *did* they intend to confer? Entire articles have been written on that very question, and in the interests of space this essay will not restate the authorities and arguments previously published elsewhere. But it will suffice to state that

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

In exercising this power under the Territorial Clause, Congress does not act in its capacity as a national legislature but exercises the same power and authority that a state could lawfully exercise when performing these functions. Thus, if the powers of a state government are limited by a constitutional provision, the authority of Congress under the Territorial Clause is similarly limited. Nevertheless, if—and only if—Congress could exercise its national legislative powers to take a certain action against a state, it may of course still exercise the same power against a territory.<sup>118</sup>

The primary power of Congress, then, is one of organization: creating the building blocks for a civil government consistent with American sovereignty. This power is perhaps plenary at its absolute peak, when the United States acquires brand new land that had never been under American sovereignty before. It may, for instance, justify imposing temporary military rule immediately upon acquisition of a territory that remains mired in insurrection or other armed conflict against the United States, such as the Philippines during the Philippine-American War.<sup>119</sup> Yet once a territory “has achieved stable self-government,” the Territorial Clause would not authorize Congress “to arbitrarily interfere with the structure of a territorial government” such as, for example, “unilaterally repealing the Constitution of Puerto Rico.”<sup>120</sup>

But this interpretation of the Territorial Clause begs the question: if the

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117. Ciolli, *supra* note 7, at 1283 (internal footnotes omitted).

118. *Id.* at 1292 (internal footnotes omitted).

119. See Off. of the Historian, *The Philippine-American War*, U.S. DEPT. OF STATE, <https://history.state.gov/milestones/1899-1913/war> (noting that armed insurrection against the presence of the United States occurred two days after the transfer of sovereignty from Spain to the United States, with hostilities lasting for three years and resulting in the deaths of thousands of Americans and Filipinos before American authority was finally established).

120. Ciolli, *supra* note 7, at 1293.

Territorial Clause does not authorize Congress to unilaterally modify a stable and civil territorial government, then who else can effectuate such changes? And what of a situation where territory falls under United States sovereignty, but Congress fails to take any meaningful action to establish a territorial government, whether temporary or otherwise? It is here where the Territorial Clause intersects with the Tenth Amendment: since there is no state government, and power is either withheld from or abdicated by Congress, the power of self-determination is ultimately reserved to the people. As the following section shall demonstrate, this division of power is not a mere hypothetical, but supported by actual historical practice during the Founding Era and beyond.

### III. THE PEOPLE'S RIGHT TO SELF-DETERMINATION IN THE FOUNDING ERA

#### A. The Northwest Ordinance

The Northwest Ordinance predates the U.S. Constitution itself, having been adopted as one of the final acts of the Confederation Congress prior to being reenacted nearly verbatim by the First Congress.<sup>121</sup> It is also widely considered alongside the Declaration of Independence and the U.S. Constitution as one of the organic documents of the United States, and to this day is reprinted in its entirety in the United States Code together with those documents.<sup>122</sup>

Given its purpose and history, the Northwest Ordinance must necessarily inform our understanding of the Territorial Clause.<sup>123</sup> But a largely unexplored aspect of the Northwest Ordinance is its relationship to the Tenth Amendment, and in particular the insight it may provide into that amendment's residual reservation of power to the people. One may not necessarily view the Northwest Ordinance and the Tenth Amendment as linked in the same manner as the Northwest Ordinance and the Territorial Clause. After all, the Northwest Ordinance and the Territorial Clause were drafted and debated largely contemporaneously with each other, while four years separate the Northwest Ordinance from the Tenth Amendment.

But as noted earlier, it is generally accepted "that the Tenth Amendment states but a truism that all is retained which has not been surrendered."<sup>124</sup> In that sense, "the text of the Tenth Amendment . . . is essentially a tautology," at least when it comes to ascertaining the limits of federal power.<sup>125</sup> Or, to put it another way, "the Tenth Amendment does not independently provide a substantive limitation on the powers of the United States" but "simply makes plain that the

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121. Anthony Ciolli, *United States Territories at the Founding*, 35 REGENT U. L. REV. 73, 77 (2022).

122. See An Ordinance for the Government of the Territory of the United States, North-West of the River Ohio, ch. 8, 1 Stat. 50 (1789).

123. Ciolli, *supra* note 7, at 1285.

124. *New York v. United States*, 505 U.S. 144, 156 (1992) (quoting *Darby*, 312 U.S. 100 at 124) (internal quotation marks omitted).

125. *Id.* at 156-57.

federal government possesses only the powers that have been given to it by the Constitution—and no more.”<sup>126</sup>

Yet while the Tenth Amendment may serve as essentially a glorified rule of construction when it comes to the exercise of federal power, that cannot be the case with respect to the powers which “are reserved to the States respectively, or to the people.”<sup>127</sup> Neither this language, nor any other express language in the Constitution, provides any direct insight into *who* exercises a *particular* power that is “not delegated to the United States by the Constitution[] nor prohibited by it to the States”<sup>128</sup>—the States, or the people? In other words, the Tenth Amendment “proves that there is such a residuum” but “does not define the residuum,” essentially envisioning a “triangular relationship among the federal government, state governments, and the people” where only the power vested in the federal government is clear—“[w]hether the people have reserved any particular power to themselves or have committed it to the state, the Tenth Amendment cannot tell us.”<sup>129</sup>

It goes without saying, of course, that “the amendment’s ‘people’ prong” possesses no “practical life,” with an “utter lack of Supreme Court (or any other court) precedent” attempting to apply it<sup>130</sup>—not necessarily due to a lack of desire, but the seeming impossibility of the people actually exercising their reserved powers in a manner that is truly separate and apart from the mechanisms of their state governments. After all, it would seem that “[a]t best, the Court can only find that the power has been reserved either to the states or to the people and then refer to the appropriate state constitution or charter”—and any claim that a power belongs to the people of a state rather than the state government ultimately “must be resolved in the state’s own courts,” effectively making exercise of any such power dependent on the whims of a branch of state government.<sup>131</sup>

How, then, can the Northwest Ordinance possibly provide any insight into what powers the Tenth Amendment vests directly in the people as opposed to the federal government or a state government? Part of the answer is obvious: the Northwest Territory was not a state, but a territory. Thus, the Northwest Ordinance did not involve the powers of state governments at all. Yet the Northwest Ordinance clearly implicates a power the Constitution explicitly vests in Congress through the Territorial Clause: the power to “make all needful Rules and Regulations respecting the Territory or other Property belonging to the United

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126. *Koog v. United States*, 79 F.3d 452, 455 (5th Cir. 1996) (citing *Darby*, 312 U.S. 100 at 61).

127. U.S. CONST. amend X.

128. *Id.*

129. Jay S. Bybee, *The Tenth Amendment Among the Shadows: On Reading the Constitution in Plato’s Cave*, 23 HARV. J. L. & PUB. POL’Y 551, 565 (2000).

130. *Florida v. U.S. Dep’t of Health & Hum. Serv.*, 648 F.3d 1235, 1365 (11th Cir. 2011) (Marus, J., concurring in part).

131. Bybee, *supra* note 129, at 566.

States.”<sup>132</sup> Is enactment of the Northwest Ordinance not then simply an example of the extent of Congress’s power over the territories, rather than the reserved power of the people?

No. The Northwest Ordinance certainly “established the basic principles that informed Congress’ effort of territorial expansion, and established supplementary principles for the interpretation of our Constitution’s territorial clause.”<sup>133</sup> But the plain text of the Northwest Ordinance reflects that Congress did so in a way that *constrained* its power over the Northwest Territory.

Section 14 of the Northwest Ordinance provided that

It is hereby ordained and declared by the authority aforesaid, that the following articles shall be considered as *articles of compact* between the original States and the people and States in the said territory, *and forever remain unalterable, unless by common consent*.[.]<sup>134</sup>

This language, by its very own terms, is wholly inconsistent with the idea that Congress may exercise plenary, or unrestricted, authority over a territory. Scholars have long recognized that early Congresses utilized the phrase “articles of compact” when “a binding obligation on the part of the federal government was envisaged.”<sup>135</sup> This, too, is obvious from the plain text of section 14, which after characterizing itself as “articles of compact” then proceeds to identify the parties to the compact and provide that its terms shall “forever remain unalterable unless by common consent” of those parties.<sup>136</sup>

It is here that the Northwest Ordinance provides remarkable insight into some of the specific powers the Founders intended to reserve for the people rather than the states. It is well-established black-letter law that “[t]here must be at least two parties to a contract, a promisor and a promisee.”<sup>137</sup> The Northwest Ordinance identifies the parties as “the original States”—acting through Congress—and the people and States in the said territory.”<sup>138</sup> Yet at the time Congress enacted the Northwest Ordinance in 1787, no states existed in the Northwest Territory—in fact, no part of the Northwest Territory would become a state until 16 years later, when Congress admitted Ohio as the 17th state in 1803.<sup>139</sup> And while the Northwest Ordinance established a territorial government for the

132. U.S. CONST. art. IV, § 3, cl. 2.

133. Carlo E. Zayas Morales, *On Equal Footing: Re-Examining the Doctrine of Territorial Incorporation in Light of the Northwest Ordinance of 1787 and America’s Symbolic Constitution*, 3 REV. ASOCIACION ABOGADOS P.R. 141, 158 (2016).

134. NORTHWEST ORD. § 14 (emphases added).

135. See Arnold H. Leibowitz, *The Applicability of Federal Law to the Commonwealth of Puerto Rico*, 56 GEO. L. J. 219, 225 (1967)(citation omitted); see also Ciolli, *supra* note 7, at 1285; Gary Lawson & Robert D. Sloane, *The Constitutionality of Decolonization by Associated Statehood: Puerto Rico’s Legal Status Reconsidered*, 50 B.C. L. REV. 1123, 1149 & n.142 (2009).

136. NORTHWEST ORD. § 14.

137. RESTATEMENT (SECOND) OF CONTRACTS, § 9.

138. NORTHWEST ORD. § 14.

139. See *Perry v. Davis*, No. 2013 CA 6, 2013 WL 5314589, at \*2 (Ohio Ct. App. Sept. 20, 2013) (unpublished) (summarizing historical sources).

Northwest Territory, section 14 makes no mention of the territorial government as a contracting party. Nor would it make sense for the territorial government to be a party to the compact, since the first twelve sections of the Northwest Ordinance create the territorial government and it would be bizarre—if not outright impossible—for a contract to “provide for the creation and organization of one of the parties[.]”<sup>140</sup>

As such, at the time of its enactment in 1787, the Northwest Ordinance by its own terms necessarily constituted a compact between Congress and “the people . . . in the said territory.”<sup>141</sup> Modern-day scholars, as well as the antebellum Supreme Court,<sup>142</sup> have debated the nature of this compact, and particularly the provision that it “forever remain unalterable unless by common consent.”<sup>143</sup> In a series of mid-19th century rulings, the Supreme Court deemed the Northwest Ordinance a temporary enactment which automatically ceased to have any effect in the parts of the Northwest Territory that were later admitted into statehood, effectively developing what is now known as the equal footing doctrine.<sup>144</sup>

Essentially, the Supreme Court found—without expressly stating so—that statehood constitutes the “common consent” that permits alteration of the compact between Congress and the people of a territory: the people of the territory provide consent through drafting a proposed state constitution and petitioning for statehood, and Congress gives its consent by admitting the proposed state into the union through its authority under the Admissions Clause.<sup>145</sup> In other words, Congress lacked the right to unilaterally alter the political status of the Northwest Territory, and the people of the Northwest Territory possessed the right to negotiate—but not unilaterally determine—their political status.<sup>146</sup> It necessarily follows, of course, that the right of the people of a territory to negotiate their political status would be amongst the rights reserved to the people by the Tenth Amendment.

Some may question this reliance on the Northwest Ordinance, as well as the decisions of the antebellum Supreme Court interpreting it, to recognize the existence of a right of the people to negotiate their political status. But even if the Northwest Ordinance were treated as a *sui generis* enactment and the judicial decisions interpreting it dismissed as results-oriented jurisprudence issued by

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140. Allan W. Vestal, “No Person . . . Shall Ever Be Molested on Account of His Mode of Worship or Religious Sentiments . . .” *The Northwest Ordinance of 1787 and Strader v. Graham*, 102 MARQ. L. REV. 1087, 1105 (2019).

141. NORTHWEST ORD. § 14.

142. See, e.g., Vestal, *supra* note 140; cases cited *infra* note 144.

143. NORTHWEST ORD. § 14.

144. See, e.g., *Strader v. Graham*, 51 U.S. 82, 95 (1851); *Permoli v. City of New Orleans*, 44 U.S. 589, 610 (1845); *Pollard v. Hagan*, 44 U.S. 212, 222 (1845).

145. See U.S. CONST. art IV, § 3, cl. 1.

146. That Congress possesses the authority to only establish a temporary government for a territory under the Territorial Clause but lacks the power to unilaterally alter that territorial government after it has begun operations is wholly consistent with an originalist interpretation of the Territorial Clause. See *Ciulli*, *supra* note 7.

some of the same justices that would later decide *Dred Scott v. Sandford*,<sup>147</sup> there are other Founding-era instances of the people negotiating—sometimes successfully, and often unsuccessfully—their own political status with Congress and even individual states.

#### B. The State of Franklin & Other Settler-Initiated Governments

When the thirteen colonies declared independence from Great Britain, the metes and bounds of their borders were not fixed as they are today. Even during the Revolutionary War, several of the thirteen colonies expanded westward, claiming new lands “that were not part of any colony’s recognized borders.”<sup>148</sup> This unregulated westward expansion literally delayed enactment of the Articles of Confederation by four years as colonies that did not expand their borders demanded that the other colonies rescind their claims to those western lands.<sup>149</sup> Ultimately, the Articles of Confederation went into effect in 1781 after Virginia—arguably the most aggressive landgrabber—agreed to cede its western lands to Congress upon ratification of the Articles of Confederation.<sup>150</sup> The western lands ceded to Congress by Virginia and others would later become the Northwest Territory.

But this 1781 cession would not be the last transfer of western lands from a state to Congress. At the conclusion of the Revolutionary War, North Carolina continued to claim approximately 6,400 square miles of western lands in modern-day eastern Tennessee. To pay its portion of the war debt, the North Carolina legislature enacted the “Land Grab Act” that allowed citizens to purchase these lands.<sup>151</sup> Yet while North Carolina claimed sovereignty over these western lands, it failed “to provide legitimate legal and political authority” within them—an issue that then became greatly exacerbated in April 1784 when the North Carolina legislature ceded sovereignty over these lands to Congress to further satisfy its war debt, contingent on Congress affirmatively accepting them.<sup>152</sup> But despite this contingency, North Carolina effectively ceased to govern the area immediately upon authorizing the transfer to Congress.

After North Carolina pulled out of the region, “many living in the region felt obligated to establish their own government.”<sup>153</sup> This settler-created government—named the State of Franklin—came about after a settler-initiated

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147. 60 U.S. 393 (1857).

148. Ciolli, *supra* note 121, at 74–75 (2022).

149. *Id.*

150. *Id.* at 76–77.

151. See Troy L. Kickler, *The State of Franklin: Mountain Secession and Independent Thought*, N.C. HISTORY PROJECT, <https://northcarolinahistory.org/commentary/the-state-of-franklin-mountain-secession-and-independent-thought/>.

152. Jason Farr, *A Glorious Failure: The State of Franklin and American Independence*, 70 TENN. HIST. Q. 276, 278 (2011).

153. *Id.*

constitutional convention and claimed authority over these ceded lands.<sup>154</sup> In 1785, the Franklin Assembly elected lawyer and future U.S. Senator William Coker as its Delegate to Congress, with instructions to petition the Confederation Congress to admit Franklin as the 14th state of the union.<sup>155</sup> While those efforts did not ultimately succeed—only seven states voted in favor, short of the required two-thirds supermajority under the Articles of Confederation—the Franklin government continued to operate for the next four years, during which it opened courts, fixed taxes, entered into treaties with Native American tribes, and otherwise acted as a functioning government.<sup>156</sup>

When Congress failed to affirmatively accept the ceded lands, North Carolina attempted to reassert sovereignty over Franklin, establishing its own competing government which operated alongside—and at great odds with—the Franklin government.<sup>157</sup> Nevertheless, the Franklin government ultimately collapsed for a variety of reasons, including an inability to assemble an army or militia of sufficient size to address hostilities with the Cherokee and other tribes that declined to recognize the claims of Franklin or other European or American settlers to their land.<sup>158</sup> Ultimately, North Carolina would again cede the land to Congress, which affirmatively accepted it and included it in what would become the second territory created by Congress—the Southwest Territory—in 1790.<sup>159</sup>

Franklin is not the only example of American settlers organizing their own government during this period without the authorization of Congress. A more successful example is what is now the state of Vermont. Although depicted on contemporary maps as a part of the New York colony, representatives of the Vermont settlements declared themselves an independent state—the Vermont Republic—in January of 1777, due to dissatisfaction with *both* British and New York rule.<sup>160</sup> While largely fighting on the side of American independence,<sup>161</sup> the Continental Congress never recognized Vermont as a state due to objections from New York, which continued to claim sovereignty over the same area.<sup>162</sup> Nevertheless, New York was only able to engage in the most “feeble attempts to

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154. *Id.* at 276.

155. *Id.*; see also *On This Day, the State of Franklin Starts its Brief Existence*, NATIONAL CONSTITUTION CENTER (Aug. 23 2023), <https://constitutioncenter.org/blog/on-this-day-the-state-of-franklin-starts-its-brief-existence>; Michael Toomey, *State of Franklin*, N.C. HISTORY PROJECT, <https://northcarolinahistory.org/encyclopedia/state-of-franklin/>.

156. See Edwin R. Keedy, *The Constitutions of the State of Franklin, The Indian Stream Republic and the State of Deseret*, 101 U. PA. L. REV. 516 (1953).

157. See Jason Farr, *A Glorious Failure: The State of Franklin and American Independence*, 70 TENN. HIST. Q. 276, 284-85 (2011) (discussing tension between Franklin and North Carolina Governor Johnson).

158. See Farr, *supra* note 152.

159. *Id.* at 285.

160. See Jared S. Sunshine, “All States Are Equal, But Some States Are More Equal Than Others”: State Sovereignty Under the Equal-Footing Doctrine Through the Lens of Pre-admission Status, 50 U. MEM. L. REV. 47, 63-68 (2019).

161. *Id.* at 65-66.

162. *Id.* at 65.

assert its physical control” over Vermont, with the government established by the Vermont Republic actually exercising authority over the land New York claimed.<sup>163</sup> After the Revolutionary War, New York ultimately agreed to consent to Vermont statehood, conditioned on Vermont paying \$30,000 to compensate New Yorkers who had claimed land in Vermont whose claims had not been recognized by the Vermont Republic.<sup>164</sup>

A later example occurred decades after ratification of the U.S. Constitution. The Treaty of Paris—which ended the Revolutionary War in 1783—used ambiguous language to define the border between the United States and Canada, with there being three possible interpretations of what the phrase “the northwesternmost head of the Connecticut River” referred to.<sup>165</sup> As a result, both the United States and Great Britain staked a claim on a portion of what is now recognized as northern New Hampshire.<sup>166</sup> The settlers of this region declared their *temporary* independence from both the United States and Great Britain on July 9, 1832, as the Indian Stream Republic.<sup>167</sup> Significantly, the Constitution of Indian Stream declared that its new government would “exercise all the powers of a free, sovereign and independent state, so far as it relates to our own internal Government till such time as we can ascertain to what government we properly belong.”<sup>168</sup> The government of the Indian Stream Republic would voluntarily relinquish its independence nearly three years later, agreeing to annexation by New Hampshire,<sup>169</sup> which ultimately led to the Webster-Ashburton Treaty resolving the international boundary dispute in favor of the United States.<sup>170</sup>

One could easily dismiss the State of Franklin, the Vermont Republic, and the Indian Stream Republic as interesting but ultimately insignificant footnotes in United States history. Yet all three of these Congressionally unsanctioned governments provide extraordinary insight into what powers the Founders believed were vested in the people of the United States. All three instances involve the absence of a legitimate government, with settlers in the affected areas creating their own governments to establish law and order. One may have expected the federal government to treat the leaders of these unsanctioned governments as insurrectionists after they ceased operations and undisputably became part of the United States. However, they were not only not tried for treason but openly welcomed into leadership positions. The Governor of Franklin, John Sevier, later won election to the U.S. House of Representatives and served as the first post-statehood Governor of Tennessee.<sup>171</sup> Joseph Hardin, who served as Franklin’s

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163. Gary J Aichele, *Making the Vermont Constitution: 1777-1824*, 56 Vt. Hist. 166, 176-77 (1988).

164. Sunshine, *supra* note 160, at 67-68.

165. Treaty of Paris, U.S.—Gr. Brit., art. 2. Sept. 3, 1783, 8 Stat. 80.

166. Keedy, *supra* note 156, at 521-22.

167. *Id.* at 522.

168. INDIAN STREAM CONST. p. II. at 55.

169. Keedy, *supra* note 156, at 525.

170. *Id.*

171. See Charles J. Reid, *America’s First Great Constitutional Controversy: Alexander*

delegate to Congress and the second Speaker of its legislature, became Speaker of the Southwest Territory's legislature.<sup>172</sup> One of the leaders of the Indian Stream Republic—Richard Blanchard—immediately became the deputy sheriff of Coos County, New Hampshire, after annexation.<sup>173</sup> And, of course, the leaders of the Vermont Republic essentially continued in their same positions after Congress admitted Vermont as the fourteenth state of the Union, including its governor, Thomas Chittenden.<sup>174</sup>

#### IV. THE TENTH AMENDMENT, THE TERRITORIAL CLAUSE, & THE FA'A SAMOA

How, then, would these originalist interpretations of the Territorial Clause and the Tenth Amendment, if ultimately accepted and applied by judges, affect the governmental institutions presently in effect in American Samoa? Surprisingly, it would bring about little or no change at all—and *that is precisely its strength*.

##### A. The Existence of the Territorial Government of American Samoa

Let us begin with the very existence of the government of American Samoa itself. American Samoa is unique in that it is not only an unincorporated territory, but an *unorganized* territory—that is, a territory where Congress has *not* established a civil government via an organic act.<sup>175</sup> Courts, scholars, and others rarely focus on the significance of Congress leaving a territory unorganized, —likely because all unorganized United States territories, other than American Samoa—, are mere uninhabited islands.<sup>176</sup> Moreover, under the *Insular Cases* framework, a territory need not be “organized” in order for the United States Constitution to apply to it *ex proprio vigore*, but only “incorporated.” This, of course, leads to perhaps one of the most absurd results of the *Insular Cases* framework: the uninhabited island of Palmyra Atoll is an incorporated territory, with the United States Constitution applying to it in full, simply because it had once been a part of Hawai'i, even though it is unorganized with no territorial government due to having no permanent population.<sup>177</sup>

Yet the fact that American Samoa is unorganized *yet operates a locally*

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*Hamilton's Bank of the United States*, 14 U. ST. THOMAS L.J. 105, 171 n.563 (2018) (collecting authorities).

172. See WILLIAM ROBERTSON GARRETT & ALBERT VIRGIL GOODPASTURE, *HISTORY OF TENNESSEE*, 109 (1903).

173. See DANIEL DOAN, *INDIAN STREAM REPUBLIC: SETTLING A NEW ENGLAND FRONTIER, 1785-1842*, 191 (1997).

174. See generally FRANK SMALLWOOD, *THOMAS CHITTENDEN: VERMONT'S FIRST STATESMAN* (1997).

175. See Duffy Burnett, *supra* note 41, at 807 & n.35.

176. See Michael J. Kelly, *Quiescent Sovereignty of U.S. Territories*, 105 MARQ. L. REV. 501, 536 (2022).

177. See *id.*; see also Joel Andrews Cosme Morales, *Palmyra Atoll: America's 51st State?*, 49 S.U. L. REV. 97 (2021).

*elected territorial government pursuant to a locally adopted territorial constitution* is extraordinarily significant. After all, the Territorial Clause vests Congress with the authority to create needful rules and regulations for the territories—if Congress has not exercised its powers under the Territorial Clause to establish a territorial government for American Samoa, then on what authority can a territorial government exist there?

The legal basis for the creation and existence of the American Samoan government has a rather shaky foundation. Although American Samoa became part of the United States upon the execution of Deeds of Cession in 1900, Congress took no action to establish a territorial government for nearly thirty years. Rather, Congress affirmatively acted for the first time through a joint resolution passed on February 20, 1929,<sup>178</sup> which provided for the President of the United States to exercise all civil, judicial, and military powers over American Samoa until Congress provides for a government.<sup>179</sup> This, however, simply preserved what had already been the existing status quo; for the first 50 years under the United States flag, American Samoa operated under military rule headed by a Presidentially-appointed naval governor.<sup>180</sup> During this period, the military retained traditional Samoan laws and customs—as well as existing political structures—and enacted ordinances intended to preserve indigenous culture, such as the land alienation laws that largely remain in effect.<sup>181</sup>

Eventually, the United States would take affirmative steps to establish a civilian, locally elected government in American Samoa. On June 29, 1951, the President of the United States signed Executive Order 10264, which transferred administration of American Samoa from the navy to the Department of Interior effective July 1, 1951. During this time, the Department of Interior had also lobbied Congress to formally adopt an organic act for American Samoa; but perhaps surprisingly, traditional American Samoan leaders actively opposed the measure out of fear “that an organic act would bring all of the provisions of the Constitution of the United States into American Samoa, jeopardizing such ancient and sacred Samoan customs as the *matai* and land-tenure systems.”<sup>182</sup> Rather, the leaders of American Samoa “quickly embraced the idea of developing home rule, or self-government, on the basis of a constitution developed and voted on by the people themselves,” without the input—let alone approval—of Congress.<sup>183</sup> And that is precisely what occurred: the people of American Samoa drafted their own

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178. Act of Feb. 20, 1929, ch. 275, 45 Stat. 1253 (codified as amended at 48 U.S.C. § 1661(a)).

179. *Id.*

180. See J. ROBERT SHAFFER, AMERICAN SAMOA: 100 YEARS UNDER THE UNITED STATES FLAG, 185 (2000).

181. *Id.* at 117-18.

182. *Id.* at 186. Of course, it is unclear why enactment of an organic act by Congress—in and of itself—would somehow extend each and every provision of the United States Constitution to American Samoa. Under the *Insular Cases* framework, so-called fundamental rights would apply *ex proprio vigore* regardless of what Congress does or does not do.

183. *Id.* at 189.

constitution, which went into effect on April 27, 1960, with only the approval of then-Interior Secretary Fred Seaton.<sup>184</sup>

To say that the present-day territorial government of American Samoa stands on shaky ground is an understatement. As a threshold matter, the very existence of the territorial government may well be unconstitutional under the nondelegation doctrine, in that the 1929 joint resolution completely vested *all* authority over American Samoa to the President—despite the Territorial Clause clearly vesting *Congress* with the authority to make needful rules and regulations for the territories. While most—although certainly not all<sup>185</sup>—contemporary scholars rightly agree that the nondelegation doctrine is not violated when Congress exercises its Territorial Clause powers to establish a territorial government,<sup>186</sup> the primary legal reason used to justify the creation of these governments, and the assignment of powers to them, is that these territorial governments are instrumentalities or agents of *Congress*.<sup>187</sup> Since the Executive Branch is a separate co-equal branch of the federal government established directly by the United States Constitution, the legal reasoning that permits exercise of authority by territorial governments created by Congress would likely not apply to a territorial government created by the Executive Branch pursuant to a joint resolution purporting to vest the entirety of Congress’s Territorial Clause powers to the President (which the President then sub-delegated to the Secretary of the Interior).

But even putting aside this constitutional question, a more practical concern exists: a territorial constitution and territorial government whose legality stands solely on a 1960 approval by the then-Secretary of the Interior exercising sub-delegated authority from the President pursuant to a 1951 executive order can be set aside, in whole or in part, at the whim of either a future Secretary of the Interior or a future President. The stroke of a pen by literally one person is literally all that stands in the way between civilian self-government in American Samoa and a reversion to military rule—at least under the framework established by the *Insular Cases* and their progeny.

It is here that the Tenth Amendment’s residual reservation of rights to the people is extraordinarily important. Historical practice firmly establishes a right to self-determination, in which the people can come together to create their own government where one either does not exist or operates only nominally without the ability to perform all legitimate government functions. This is perhaps best

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184. *Id.* at 190.

185. *See, e.g.*, Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277 (2021).

186. *See, e.g.*, Ciolli, *supra* note 7; Eli Nachmany, *The Irrelevance of the Northwest Ordinance Example to the Debate About Originalism and the Nondelegation Doctrine*, 2022 U. ILL. L. REV. ONLINE 17 (2022); Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327 (2002).

187. *See, e.g.*, *Sakamoto*, 764 F.2d 1285 at 1286 (government of Guam was “an instrumentality” of Congress); *United States v. Husband R.*, 453 F.2d 1054, 1059 (5th Cir. 1971) (governor of the Canal Zone was an “agent” of Congress); *see also* Alexandra K. Langton, *The Inconsistent Limits of the Commerce and Import-Export Clauses on Territorial Governments’ Taxing Ability*, 69 TAX LAW. 883, 889 (2016).

reflected in the Founding-Era experiences of Franklin, the Vermont Republic, and the Indian Stream Republic, in which the people of each area got together to create new governments to fulfill the governmental functions that either the federal government, a state government, or even both were unable to do on their behalf. Such right, of course, is not unlimited—after all, the plain text of the United States Constitution requires Congress to take action to admit a new state into the Union, regardless of how much support statehood may have in the proposed state. However, were these precedents applied to the unique case of American Samoa, it would certainly provide a firm foundation for the proposition that the President or the Secretary of the Interior cannot unilaterally dismantle the civilian elected government of American Samoa.

#### B. Land Alienation, Matai Titles, and Other Indigenous Practices

The *fa'a Samoa* consists of a series of cultural traditions that include, but are not limited to, communal ownership of land, governmental recognition of hereditary matai titles, and mandatory prayer curfews.<sup>188</sup> Both scholars and litigants often assert that some or all the aspects of the *fa'a Samoa* violate various provisions of the United States Constitution. For instance, it is typically alleged—if the entire United States Constitution applied to American Samoa—that race-restricted communal land ownership laws violate the Equal Protection Clause of the Fourteenth Amendment;<sup>189</sup> that matai titles are titles of nobility that violate the Nobility Clauses of Article I;<sup>190</sup> and that mandatory prayer curfews either violate the First Amendment directly or the First Amendment as incorporated through the Due Process Clause of the Fourteenth Amendment.<sup>191</sup>

Given the seeming reverence that the average American Samoa has for the *fa'a Samoa* and the great lengths that the territorial government of American Samoa has gone to preserve it, it is certainly understandable why the American Samoan government has been perhaps the most vocal modern-day supporter of the *Insular Cases* and the doctrine of territorial incorporation. But as described in greater detail in Part I, the *Insular Cases* framework—whether the territorial incorporation doctrine as generally understood or the various proposals to “reimagine” the *Insular Cases*—provide only the barest support for the *fa'a Samoa*, for one simple reason: if Congress (or, in this case, the Executive Branch) may exercise plenary authority over American Samoa to give the *fa'a Samoa* the force of law because the Equal Protection Clause and other inconsistent provisions of the United States Constitution are not “fundamental” and do not apply to American Samoa, then that very same plenary power could be invoked to

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188. Hall, *supra* note 6, at 72–73, 77–78, 97.

189. See, e.g., Jeffrey B. Teichert, *Resisting Temptation in the Garden of Paradise: Preserving the Role of Samoan Custom in the Law of American Samoa*, 3 GONZ. J. INT'L L. 2 (1999).

190. See, e.g., Ian Falefuafua Tapu, *Who Really Is a Noble? The Constitutionality of American Samoa's Matai System*, 24 ASIAN PAC. AM. L.J. 61, 79–80 (2020).

191. See, e.g., Hall, *supra* note 6, at 104–05.

completely abolish the *fa'a Samoa* regardless of how the people of American Samoa feel about the matter.

Yet this would not be the case if courts were to apply the Territorial Clause and the Tenth Amendment consistent with their original meaning. As a reminder, under “the plain text and original understanding” of the Territorial Clause, Congress may not exercise plenary authority over the territories, as it may with the District of Columbia and federal property; its authority to enact ‘needful Rules and Regulations’ is limited to establishing a temporary territorial government “to ensure a peaceful and orderly transition to U.S. sovereignty from whatever may have come before.”<sup>192</sup> And when exercising such power, “Congress does not act in its capacity as a national legislature but exercises the same power and authority that a state could lawfully exercise when performing these functions.”<sup>193</sup> In other words, “if the powers of a state government are *limited* by a constitutional provision, the authority of Congress under the Territorial Clause is similarly limited.”<sup>194</sup> This interpretation, however, must come with one important caveat: it is based largely on the original meaning of the language of the Territorial Clause with respect to the powers of Congress, without consideration of the powers of territorial governments, or how the meaning of the Territorial Clause might have been modified by subsequent amendments to the United States Constitution, such as the Tenth Amendment.

Without that caveat in mind, it might appear that an originalist interpretation of the Territorial Clause would provide no comfort to most if not all the indigenous practices that make up the *fa'a Samoa*, since they arguably could never be constitutionally enacted by a state (at least so long as the Due Process Clause of the Fourteenth Amendment is interpreted to incorporate much of the Bill of Rights onto the states). Past writings in support of the originalist Territorial Clause highlighted a potential loophole—which has already been accepted by the High Court of American Samoa and a panel of the United States Court of Appeals for the Ninth Circuit<sup>195</sup>—in that preservation of the *fa'a Samoa* was originally guaranteed by the terms of the treaty transferring sovereignty of American Samoa to the United States, and thus must remain in effect so long as such treaty remains valid.<sup>196</sup> Nevertheless, some may wish not to stake the survival of the *fa'a Samoa* entirely on the treaty power given that another Ninth Circuit panel has recently narrowed this ruling with respect to the land alienation laws of the Northern Mariana Islands.<sup>197</sup>

It is here where the Tenth Amendment, and originalism more generally, provides firmer grounding for the *fa'a Samoa*. It should go without saying that perhaps the most cardinal principle of originalist constitutional interpretation—or

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192. Ciolli, *supra* note 7, at 1292.

193. *Id.*

194. *Id.* (emphasis in original).

195. See Craddick v. Territorial Registrar, 1 Am. Samoa 2d 10, 12-13 (1980); *Waboh*, 958 F.2d 1450 at 1458-62.

196. Ciolli, *supra* note 7, at 1297-98.

197. *Commw. Elec. Com'mn*, 844 F.3d 1087 at 1089-1090.

really, the law in general—is that “words matter.”<sup>198</sup> And for words to matter, we must presume “that the same words occurring at different places in a constitution will be given the same meaning” except in the very rare situations where “the context requires a different meaning.”<sup>199</sup> Thus, one should expect words like “Congress,” “United States,” “President,” “state,” and “territory” to possess the same meaning regardless of where they appear in the United States Constitution, particularly in provisions that were drafted contemporaneously with each other. When courts fail to do so, it gives rise not just to accusations of results-orientated decision-making by judges or constitutional amendment by judicial fiat but also makes the law inconsistent and difficult to follow.

This is a circumstance easily seen within the law of the territories under the *Insular Cases* framework, where much of the Swiss cheese jurisprudence stems from courts interpreting the word “state” to mean “state” in some parts of the Constitution but inexplicably and without justified reason construing “state” to mean “state or territory” in other parts.<sup>200</sup> Unfortunately, “[t]here is no principled way to harmonize” such decisions, for this treatment “can only be reconciled in a single, unprincipled way: for the purposes of the United States Constitution, a territory is a state when that interpretation would result in fewer rights for its government or people, but a territory is not a state when treating it as one would result in greater rights.”<sup>201</sup> Of course, “[i]mplicit in these decisions is a clear value judgment: That territories must inherently be inferior to the states, simply because they are territories.”<sup>202</sup>

It is hopefully by now not necessary to devote many words to explaining why the idea that territories must be constitutionally inferior to states in every way is simply wrong. One need only look to the Northwest Ordinance, whose bill of rights conferred greater individual and collective rights and liberties on the people of the Northwest Territory than the Bill of Rights to the United States Constitution, such as by abolishing slavery and codifying a right to public education.<sup>203</sup> And even putting aside practices such as the *fa’a Samoa*, the United States Constitution guarantees that the people of today’s territories enjoy, at an absolute minimum, greater double jeopardy rights than their stateside counterparts.<sup>204</sup> Or, to put it another way, there is simply no legitimate reason for “state” to not mean “state” and for “territory” to not mean “territory” when those words are used in the Constitution.<sup>205</sup>

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198. Hillary Chutter-Ames, *From Language to Law: Interpretation and Construction in Early American Judicial Practice*, 114 NW. U. L. REV. 149, 150 (2019).

199. *Kirkpatrick v. King*, 91 N.E.2d 785, 789 (Ind. 1950).

200. See *supra* Part I.

201. Anthony Ciolli, *What is a “State”? The Inconsistent Constitutional Treatment of United States Territories*, 85 ALB. L. REV. 781, 796 (2022).

202. *Id.* at 797.

203. See Jon Lauck, “*The Organic Law of a Great Commonwealth*”: *The Framing of the South Dakota Constitution*, 53 S.D. L. REV. 203, 212 (2008) (collecting authorities).

204. See *Sanchez Valle*, 579 U.S. 59.

205. See Ciolli, *supra* note 201 at 796-99; see also Ciolli, *supra* note 7, at 1272-73, 1291-

Of course, “[i]nterpreting the word ‘State’ in the U.S. Constitution to mean a state—and *only* a state—has longstanding support in some of the earliest Supreme Court precedents,” with Chief Justice Marshall writing for a unanimous court as early as 1805 “that ‘state’ simply means ‘state’ and not any type of ‘distinct political society’ operating within the United States.”<sup>206</sup> In other words, the Founders intended to establish a “bright-line interpretative rule,” where “[i]f a governmental entity is not a state, then it is not a ‘State’ for purposes of the Constitution, regardless of how distinct of a political entity it has become or how much autonomy it possesses in practice.”<sup>207</sup>

What, then, does this mean for the *fa’a Samoa*? Simply put, under an originalist interpretation of the United States Constitution, such practices remain constitutional within the metes and bounds of American Samoa. The Equal Protection and Due Process Clauses of the Fourteenth Amendment provide that

No *State* shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any *State* deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.<sup>208</sup>

American Samoa is not a state; therefore, the land alienation laws cannot violate the Equal Protection Clause, which by its own terms only concerns itself with the conduct of states, not territories. Nor would American Samoa’s mandatory prayer curfews infringe upon the First Amendment as incorporated through the Due Process Clause of the Fourteenth Amendment, since—again, *by the plain text of the amendment itself*—this would extend only to the states. The same, of course, would hold true for the prohibition on a “State” conferring “any Title of Nobility”:<sup>209</sup> American Samoa is a territory and not a state, and may therefore confer matai titles without running afoul of that constitutional provision.

But what about the role of Congress in making needful rules and regulations for a territory? As noted earlier, when exercising that power under the Territorial Clause, Congress may “exercise[] the same power and authority that a state could lawfully exercise when performing these functions.”<sup>210</sup> Does that not mean, then, that Congress could not pass an organic act for American Samoa that recognizes *matai* titles or imposes race-based restrictions on the alienation of land, since a state government cannot lawfully exercise those powers?

The answer should be that it depends. When the United States obtains sovereignty over brand new land, the power of Congress to make needful rules and regulations should serve at its absolute peak: Congress must necessarily possess the authority to exercise its discretion to do what it believes necessary “to ensure

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206. Ciolli, *supra* note 7, at 1291-1292 (quoting *Hepburn & Dundas v. Ellzey*, 6 U.S. (2 Cranch) 445, 452 (1805)).

207. *Id.* at 1292.

208. U.S. CONST. amend XIV § 1 (emphases added).

209. U.S. CONST. art. I § 10.

210. Ciolli, *supra* note 7, at 1292.

a peaceful and orderly transition to U.S. sovereignty from whatever may have come before,” which may require permitting preexisting laws put in place by a prior sovereign to remain in effect at least temporarily.<sup>211</sup> It may go so far as to permit outright military rule for a temporary period—a power which Congress may exercise, and actually *has* exercised, even within a state.<sup>212</sup> Yet the power of Congress to impose race-based land alienation restrictions, mandatory prayer curfews, and similar practices on the people of a territory—especially an unwilling territory—during peacetime would certainly not be authorized by the Territorial Clause.

It is here where the Tenth Amendment again becomes relevant. The territorial government of American Samoa was not established by Congress under the Territorial Clause—it, and the Constitution of American Samoa which delineates its authority, was directly created by the people of American Samoa as part of a process that *deliberately* excluded Congress. The American Samoan government does not serve as a mere alter ego or agent of Congress—how could it, when Congress neither created it nor delegated any authority to it? Nor is the Government of American Samoa a state government. It is, in effect, the embodiment of the will of the people of American Samoa: a government established by the Tenth Amendment that exercises neither federal nor state power, but which is instead imbued with the residual powers vested in the people. While Congress may not possess the power to unilaterally impose the *fa'a Samoa* on American Samoa, the people of American Samoa, through the government they created through exercising their rights under the Tenth Amendment, may certainly do so in the absence of any constitutional provision that prohibits such practices.

Some may worry that this characterization of its territorial government may constitutionally create a Constitution-free zone in American Samoa. Could this analysis, for instance, permit American Samoa to summarily execute without trial any individual who its government accuses of violating a prayer curfew? It is important at this stage to remember that “the U.S. Constitution is not simply a series of clauses to interpret in isolation from each other” but “must necessarily be interpreted in a way that ensures the internal consistency and coherence of the *entire* document.”<sup>213</sup> And again, words matter. The Founders wrote some of the most critical provisions of the federal Bill of Rights in the passive voice; for instance, the Eighth Amendment provides that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted,”<sup>214</sup> while the Second, Third, Fourth, Fifth, Sixth, and Seventh Amendments likewise to do so with the rights they safeguard. Because such obligations are not imposed only against the federal government or the states but presumably all entities that exercise governmental power within the United States, the American Samoan government should of course also be bound by those limitations.

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211. *Id.*

212. *Id.* at 1293; see also *Georgia v. Stanton*, 73 U.S. (6 Wall.) 50 (1867).

213. Ciolli, *supra* note 7, at 1291 (emphasis in original).

214. U.S. CONST. amend. VIII.

Those limitations, however, should not threaten the overall constitutionality of any of the components of the *fa'a Samoa*.

## V. CONCLUSION

The United States is not now, nor ever has been, a democracy. It is, at best, a constitutional republic based on the ideals of federalism—that multiple governments should “each pursue the same set of largely overlapping goals, each exercising independent authority within what is for many if not most purposes essentially the same sphere of authority.”<sup>215</sup> In effect, our nation actively chooses to “sacrifice efficiency . . . on the altar of values such as checks and balances, greater governmental accountability and transparency, and interjurisdictional innovation and competition.”<sup>216</sup>

History has largely shown that like the states, America’s territories desire the best of both worlds: the protection and assistance of the federal government, and the autonomy to govern themselves based on their culture and other peculiar circumstances with minimal interference from the federal government. But federalism in the territories has long been difficult to implement in practice. In the Founding Era, America’s territories were the site of the true frontier: sparsely populated, far from organized government, and constantly under threat. Today, America’s territories are geographically distant from the epicenter of United States government, have struggled with in some cases as much as 125 years of inconsistent and ever-changing levels of federal oversight, and often incorporate cultural or other indigenous traditions into formal government in ways that have consistently been denied to the states.

Indigenous rights supporters who care about codifying the *fa'a Samoa* and similar practices in into a territory’s supreme law more than they do integrating territories into the American political order have found it very easy to accomplish their goal—at least for now. Such practices are already in force in American Samoa and to a lesser extent the Northern Mariana Islands, and the *Insular Cases*—whether as originally decided or as “reimagined” by certain scholars—provide easy support for maintaining the status quo. These victories, however, may be extraordinarily short-lived: regardless of the form it takes, the legal framework endorsed by the *Insular Cases* vests plenary power over the territories with the federal government. While supporters of the *fa'a Samoa* may celebrate the positions currently taken by the federal government with respect to the administration of American Samoa, the same legal theories which courts have accepted to not disturb the federal government’s actions would also support the very opposite actions by a different President or different Congress. Simply put, under the *Insular Cases* framework, the federal government could destroy the *fa'a Samoa* with a single pen stroke.

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215. JAMES A. GARDNER, INTERPRETING STATE CONSTITUTIONS: A JURISPRUDENCE OF FUNCTION IN A FEDERAL SYSTEM 234–35 (2005).

216. Ciolli, *supra* note 19, at 1699.

As Justice Gorsuch recently observed, “settling this question right would raise difficult new ones” in that “[d]isputes are sure to arise about exactly which of its individual provisions applies in the Territories and how,” and that “[s]ome of these new questions may prove hard to resolve.”<sup>217</sup> But ultimately, the answers to those questions can be found in the United States Constitution and historical practices. While many may find it difficult to imagine the Tenth Amendment’s residual reservation of power to the people working in practice, that is precisely what has already occurred in American Samoa: a government created by the people for the people, without the input or approval of Congress, which is empowered to codify the *fa’a Samoa* and exercise other powers which are not expressly denied to it by the United States Constitution. I hope that the people of American Samoa (and those who advocate for them), as well as the courts, will accept the invitation to participate in a constitutional dialogue to develop this new framework that safeguards the *fa’a Samoa*, celebrates what American Samoa accomplished through creation and implementation of its 1960 constitution, and is consistent with the plain text and original meaning of the United States Constitution.

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217. *Vaello Madero*, 142 S. Ct. 1539 at 1556.