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Decolonizing Equal Sovereignty

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DECOLONIZING EQUAL SOVEREIGNTY

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In *Shelby County v. Holder*, 570 U.S. 529 (2013), the Supreme Court announced that a tradition of equal sovereignty among the states prohibits unwarranted federal intrusions into state sovereignty and invoked this newly created doctrine to strike down Section 4(b) of the Voting Rights Act. Scholarly critiques in *Shelby County*'s immediate aftermath debated the constitutional validity of the Court's equal sovereignty reasoning and warned of the dire threat the VRA's effacement posed to voting rights—concerns that recent litigation have vindicated.

But other recent litigation suggests that, abstracted from its problematic and consequential origins, equal sovereignty may be deployed as a rights-expanding, and not just rights-effacing, litigation strategy: in an amicus brief filed in *United States v. Vaello-Madero*, 142 S. Ct. 1539 (2022), attorneys general representing eighteen largely Democratic states and territories cited the principle of equal sovereignty to protest the unequal treatment of U.S. citizens who reside in U.S. territories. Despite this brief appearance at the Supreme Court, however, no scholarship has yet articulated a constitutional argument for whether or how the equal sovereignty doctrine can be deployed to achieve progressive aims—let alone whether there exists a constitutional justification to apply the doctrine to the U.S. territories. This Article fills this gap in the literature.

Building on scholarship that recognized how the Court's recent formulation of the equal sovereignty doctrine premised its constitutional foundations on the states' sovereign dignities and functions, rather than any nominal characteristics of states qua States, the Article interrogates equal sovereignty's sovereignty-based justifications to determine whether the principle encompasses the non-state sovereign entities that form part of the United States of America: the five inhabited U.S. territories. The Article derives two mutually compatible justifications for a territorial application of equal sovereignty,

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and explains how a principle of equal territorial sovereignty could be employed to challenge the ongoing subordination of U.S. citizens who reside in territories, with a particular focus on healthcare administration and democratic representation.

In doing so, this Article fulfills two worthy goals. First, the practical stakes of territorial discrimination—especially in the realms of voting and health care—are significant. Second, reframing and subverting the rights-effacing lineage of the equal sovereignty doctrine presents an instructive and fruitful exercise in progressive impact litigation strategy—a goal that is all the more relevant in light of the rightward shift in the federal courts.

INTRODUCTION

The United States currently exercises sovereignty over five inhabited overseas territories. The oldest of the five, Puerto Rico and Guam, acquired their territorial status nearly one hundred and twenty-five years ago;[1] the youngest U.S. territory, the Commonwealth of the Northern Mariana Islands, has possessed that status for nearly half a century.[2] Even though the territories are part of the United States[3] and their U.S. citizen-inhabitants part of "the people" who bestow sovereignty on the federal government,[4] the territories' "temporary"[5] colonial status subjects the U.S. citizens who reside there to vast economic, social, and political subordination.[6]

U.S. citizens who reside in the territories lack voting representation in both Congress and the electoral college.[7] Residents of one territory, American Samoa, are born "noncitizen nationals" rather than U.S. citizens, despite complete U.S. sovereignty over the territory for over a century; to become citizens, American Samoans must undergo the same intensive naturalization process as foreign nationals.[8] Relative to residents of states, residents of territories receive

1. Spain ceded Puerto Rico, Guam, and the Philippines at the culmination of the Spanish-American War of 1898. *See, e.g.*, SAM ERMAN, *Reconstructing Puerto Rico, 1904–1909*, *in* ALMOST CITIZENS 97, 98 (2018).

2. Chris Gelardi & Sophia Perez, *'This Isn't Your Island': Why Northern Mariana Islanders Are Facing Down the US Military*, THE NATION (June 12, 2019), https://www.thenation.com/article/archive/northern-mariana-islands-military-bases-tinian [https://perma.cc/RQ4V-DY9S].

3. For a more nuanced discussion of this point, see Joseph Blocher & Mitu Gulati, *Puerto Rico and the Right of Accession*, 43 YALE J. INT'L L. 229, 240–42 (2018).

4. *See, e.g.*, Ediberto Roman & Theron Simmons, *Membership Denied: Subordination and Subjugation Under United States Expansionism*, 39 SAN DIEGO L. REV. 437, 439–41 (2002).

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

6. For a comprehensive analysis of the colonial subjugation of the territories, see Juan R. Torruella, *Ruling America's Colonies: The* Insular Cases, 32 YALE L. POL'Y REV. 57, 58 (2013) and Tom C.W. Lin, *Americans, Almost and Forgotten*, 107 CAL. L. REV. 1249, 1252 (2019). For a discussion of the racial justice implications of discrimination against U.S. territories, see Stacey E. Plaskett, *The left and right's blind spot in systemic racism: The US colonies*, THE GRIO (June 24, 2020), https://thegrio.com/2020/06/24/stacey-plaskett-us-colonies-racism [https://perma.cc/6UTV-ACEY].

7. Neil Weare, *Equally American: Amending the Constitution to Provide Voting Rights to U.S. Territories and the District of Columbia*, 46 STETSON L. REV. 259, 269 (2017).

8. *See* Michael Levenson, *American Samoans Should Be Granted U.S. Citizenship*,

fewer benefits under many critical social welfare programs, including Supplemental Security Income,[9] Medicare, Supplemental Nutrition Assistance Program,[10] and Medicaid,[11] for no reason but their territorial residence.[12]

Questions of whether the Constitution countenances this territorial discrimination are being litigated across the circuits and at the Supreme Court. In 2021, a divided Tenth Circuit panel disregarded recent Supreme Court precedent[13] on its way to holding that American Samoans are not entitled to U.S. citizenship under the Citizenship Clause of the Constitution, basing its decision in significant part on Congress's historical practice of denying territorial residents birthright citizenship.[14] The Supreme Court declined to grant the plaintiffs' petition for a writ of certiorari in October 2022.[15] In April 2022, the Supreme Court upheld the exclusion of U.S. citizens who reside in Puerto Rico from the Supplemental Security Income program—a means-tested program designed to provide a baseline standard of living for the elderly and disabled[16]—under rational basis review.[17]

N.Y. TIMES (Dec. 13, 2019), https://www.nytimes.com/2019/12/13/us/american-samoa-us-citizenship.html [https://perma.cc/E276-EXF8] (discussing Fitisemanu v. United States, 426 F. Supp. 1155 (D. Utah 2019)).

9. *See* Mar-Vic Cagurangan, *Court: Guam's exclusion from SSI program unconstitutional*, PAC. ISLAND TIMES (June 20, 2020), https://www.pacificislandtimes.com/single-post/2020/06/20/Court-Guams-exclusion-from-SSI-program-unconstitutional [https://perma.cc/4M36-V939].

10. *See* Peña Martínez v. Azar, 376 F. Supp. 3d 191, 196, 203 (D.P.R. 2019).

11. *See* Selena Simmons-Duffin, *America's 'Shame': Medicaid Funding Slashed in U.S. Territories*, NPR: SHOTS (Nov. 20, 2019, 5:00 AM), https://www.npr.org/sections/health-shots/2019/11/20/780452645/americas-shame-medicaid-funding-slashed-in-u-s-territories [https://perma.cc/66QS-JLPF].

12. *See, e.g.*, Disability Rights Center of the Virgin Islands, SHADOW CITIZENS 8 (2021), https://drcvi.org/shadow-citizens [https://perma.cc/48ZX-MD33].

13. *See* Fitisemanu v. United States, 1 F.4th 862, 900 (10th Cir. 2021) (Bacharach, J., dissenting) (criticizing the majority's expansion of century-old precedent—the *Insular Cases*, *see infra* Section II.A—that the Supreme Court expressly cabined in Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC, 140 S. Ct. 1649, 1665 (2020)).

14. *Fitisemanu*, 1 F.4th at 874 (majority opinion).

15. *See* Brief of Fed. Resp'ts at 1, Fitisemanu v. United States, 1 F.4th 862 (10th Cir. 2021), *cert. denied*, 2022 WL 9552616 (2022).

16. SHADOW CITIZENS, *supra* note 12, at 32. The baseline standard of living created by the Supplemental Security Income (SSI) program is truly marginal. On average, a single adult SSI beneficiary receives about $600 per month. *Id.* at 33. In contrast, similarly situated U.S. citizens who reside in Puerto Rico receive only $77 per month, and those in the Virgin Islands receive about $176 per month. *Id.* at 33–34.

17. United States v. Vaello-Madero, 142 S. Ct. 1539, 1561 (2022). The opinion of the court rested in part on the "longstanding congressional practice" of "legislat[ing] differently with respect to the Territories," which the Court concluded permitted this differential treatment. *Id.* at 1541. This long-standing practice, and the mid-century precedent on which the Court relied, *see id.* at 1542–43 (citing Califano v. Gautier Torres, 435 U.S. 1 (1978) (per curiam) and Harris v. Rosario, 446 U.S. 651, 651 (1980) (per

In a fiery concurrence, Justice Gorsuch agreed that current precedent compelled the result, but objected to the explicitly racist foundation on which that precedent rested and called for its overruling.[18]

Despite their second-class status in the eyes of the federal government, however, the territories have engaged in varying degrees of self-government over the past century, both before and after their acquisition as territories.[19] Based on this history, a 2017 series in the *Harvard Law Review* pondered whether the relationship between the federal government and the territories—specifically, Puerto Rico—over the latter half of the twentieth century had developed into a sort of "territorial federalism,"[20] or "mimicry" of federal-state federalism.[21] The authors argued that territorial federalism warranted "[a] new model of judicial review . . . in territorial self-governance . . . that vindicates the functional federalism that has historically defined the structure of the federal-territory relationship," but left the specifics of such a doctrine up to the reader's—or the judiciary's—imagination.[22]

The late Judge Juan Torruella of the First Circuit responded forcefully and negatively to this proposal, criticizing the notion of territorial federalism as simply "a repackaging of the same unequal colonial relationship that has been in place since American troops landed in Guánica in 1898."[23] He explained that "'[t]erritorial federalism' without political power is not federalism. It is just another hollow and meaningless name for . . . colonial inequality."[24] Instead of innovating new methodologies of judicial review, Torruella emphasized

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curiam)), derive directly from the explicitly racist *Insular Cases*, *see infra* Section II.A. The opinion of the court did not consider whether something more than rational basis review should apply to classifications based on territorial residence. *Cf. Vaello-Madero*, 142 S. Ct. at 1560 n.4 (Sotomayor, J., dissenting) (disagreeing with the majority's conclusion that the SSI exclusion survived rational basis review and not considering whether the exclusion would survive heightened scrutiny).

18. *Vaello-Madero*, 142 S. Ct. at 1552 (Gorsuch, J., concurring) (describing the *Insular Cases*' holding that "the federal government could rule Puerto Rico and other Territories largely without regard to the Constitution" as "hav[ing] no foundation in the Constitution and rest[ing] instead on racial stereotypes."); *id.* at 1557 ("Because no party asks us to overrule the Insular Cases to resolve today's dispute, I join the Court's opinion. But the time has come to recognize that the Insular Cases rest on a rotten foundation. And I hope the day comes soon when the Court squarely overrules them . . . . Our fellow Americans in Puerto Rico deserve no less.").

19. *See infra* Section II.B; *see also Developments in the Law—The U.S. Territories*, 130 HARV. L. REV. 1617, 1634–36 (2017) [hereinafter *Developments in the Law*].

20. *Developments in the Law*, *supra* note 19, at 1632.

21. *Id.* at 1634.

22. *Id.* at 1655.

23. 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).

24. *Id.* at 104.

that "enforcement of the law of the land is the only experiment that the citizens of Puerto Rico need and want."[25]

But how does the law of the land—as it stands today, without further judicial experimentation—respect the sovereignty of the territories? Ever mindful of Torruella's critique,[26] this Article interrogates existing legal principles to derive a new strategy for challenging the territories' continued inequality. Instead of inventing a new, amorphous concept of "territorial federalism," I describe how an existing doctrine—the equal sovereignty principle articulated in *Shelby County v. Holder*[27] and *Northwest Austin Municipal Utility District No. 1 v. Holder* (*NAMUDNO*)[28]—may be reoriented and repurposed to serve sovereignty-reinforcing means.

First, a caveat: the equal sovereignty doctrine is (rightly) controversial. Its central precept—that Congress may not legislate in ways that discriminatorily and unwarrantedly impair states' sovereignty—was invoked to strike down Section 4(b) of the Voting Rights Act in *Shelby County*.[29] In addition to "revitaliz[ing] the oldest and most demeaning official insult to African Americans in American constitutional history,"[30] legal scholars, practitioners, and even judges have criticized *Shelby County*'s reasoning as defying constitutional text, precedent, and sheer logic.[31] They have expressed concern that

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25. *Id.* at 99, 104 ("The Court does not need to exercise extraordinary efforts, inventiveness, or experimentation, but only to enforce what is the Law of the Land . . . .").

26. Judge Torruella argues that the solution to the territories' colonial status is judicial enforcement of the United States' obligations under the International Covenant on Civil and Political Rights (ICCPR). *Id.* at 99. The theory outlined in this Article is neither inconsistent nor mutually exclusive with Torruella's strategy; instead, it offers an additional, alternative route for challenging territorial subordination.

27. Shelby Cnty. v. Holder, 570 U.S. 529, 544 (2013).

28. Nw. Austin Mun. Util. Dist. No. 1 v. Holder (NAMUDNO), 557 U.S. 193, 203 (2009).

29. *See Shelby Cnty.*, 570 U.S. at 556–57.

30. James Blacksher & Lani Guinier, *Free at Last: Rejecting Equal Sovereignty and Restoring the Constitutional Right to Vote:* Shelby County v. Holder, 8 HARV. L. POL'Y REV. 39, 39 (2014).

31. *Compare, e.g.*, Leah Litman, *Inventing Equal Sovereignty*, 114 MICH. L. REV. 1207, 1212 (2016) ("The equal sovereignty principle is not cleanly derived from any source that is widely recognized by courts or commentators as a valid basis for constitutional rules. The principle is not articulated in the constitutional text, its historical roots are thin, and it potentially undermines other principles of structure that are embodied in the Constitution at a similar level of generality, such as federalism and nationalism. Nor has equal sovereignty been established through a pattern of congressional practice or more gradually spelled out by courts over time."), *with* Blacksher & Guinier, *supra* note 30, at 39 (comparing *Shelby County* to *Dred Scott*); *see* Joel Heller, Shelby County *and the End of History*, 44 U. MEM. L. REV. 357, 357 (2013) (arguing that *Shelby County* ignores history); *and* Richard Posner, *The Supreme Court and the Voting Rights Act: Striking down the law is all about conservatives' imagination.*, SLATE (June 26, 2013, 12:16 AM), https://slate.com/news-and-politics/2013/06/the-supreme-court-and-the-voting-rights-act-striking-down-the-law-is-all-about-conservatives-imagination.html [https://perma.cc/6EUH-BHKB] ("[T]here is no doctrine of equal sovereignty. The opinion rests on air."), *with, e.g.*, Thomas B. Colby, *In Defense of the Equal Sovereignty Principle*, 65 DUKE L.J. 1087,

Shelby County's equal sovereignty principle forebodes further deconstruction of civil rights legislation enacted to enforce the Reconstruction Amendments[32] and argued that the Court improperly treated states' dignitary interests as morally and legally commensurate with individuals' liberty interests.[33]

Rather than intervene in these existing debates over *Shelby County*'s validity, however, this Article begins from the premise that the principle of equal sovereignty exists and takes *Shelby County*'s articulation of that principle at face value. From this starting point, the Article investigates a new frontier in equal sovereignty's applicability: how the constitutional and doctrinal justifications for the existence of the equal sovereignty principle apply equally to the U.S. territories, and how a territorial application of equal sovereignty can secure the constitutional rights and political power of U.S. citizens who reside in territories.[34]

Proceeding in this manner has multiple benefits. First, the Supreme Court is at its most conservative in over a century,[35] and a majority of its justices are unlikely to change their minds about the constitutional justification for a dual sovereignty-reinforcing doctrine.[36] Second, recognizing that equal sovereignty encompasses a territorial application subverts the doctrine's original rights-limiting

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1102 (2016) ("The lack of a clear textual mandate is far less significant than it might first appear, and both the history and the caselaw, along with the underlying structure of our constitutional system, actually provide powerful support for a constitutional commitment to equal sovereignty"); *and* Jeffrey M. Schmitt, *In Defense of* Shelby County*'s Principle of Equal State Sovereignty*, 68 OKLA. L. REV. 209, 212 (2016) ("[T]he 'principle that all States enjoy equal sovereignty' is deeply rooted in constitutional history and fully supported by the Court's precedent.").

32. *E.g.*, Blacksher & Guinier, *supra* note 30, at 39; Litman, *supra* note 31, at 1264; Reva B. Siegel, *Foreword: Equality Divided*, 127 HARV. L. REV. 1, 69 (2013).

33. *See* Vik Kanwar, *A Fugitive from the Camp of the Conquerors: The Revival of Equal Sovereignty Doctrine in* Shelby County v. Holder, 17 BERKELEY J. AFR.-AM. L. & POL'Y 272, 283 (2015).

34. A group of 18 states and territories served by Democratic attorneys general alluded to this application in an amicus brief filed before the Supreme Court in *United States v. Vaello-Madero*. *See* Brief of the District of Columbia et al. as Amici Curiae in Support of Respondent at 6–7, *Vaello-Madero*, 142 S. Ct. at 1539. The brief's discussion of equal sovereignty was brief and comparative and did not address whether that equal sovereignty should (or should not) apply to the U.S. territories as well as states. *See id.* at 7. *See infra* Section IV.A.2 for a thorough discussion of the implications of the equal sovereignty doctrine for federal benefits litigation.

35. *See* Amelia Thomson-Deveaux, Laura Bronner & Anna Wiederkehr, *What the Supreme Court's Unusually Big Jump to the Right Might Look Like*, FIVETHIRTYEIGHT (Sept. 22, 2020), https://fivethirtyeight.com/features/what-the-supreme-courts-unusually-big-jump-to-the-right-might-look-like [https://perma.cc/XC8D-F5T5]; Laura Bronner & Elena Mejía, *The Supreme Court's Conservative Supermajority Is Just Beginning to Flex Its Muscles*, FIVETHIRTYEIGHT (July 2, 2021), https://fivethirtyeight.com/features/the-supreme-courts-conservative-supermajority-is-just-beginning-to-flex-its-muscles [https://perma.cc/QQJ4-77JQ].

36. *See* Bronner & Mejía, *supra* note 35.

purpose and illuminates its potential affirmative, rights-protecting power. In an increasingly partisan legal system,[37] recognizing the affirmative and defensive potential of judge-created law is a productive exercise for lawyers and scholars involved in impact litigation. Finally, a successful legal strategy based on equal territorial sovereignty would expand or reinforce the constitutional rights and power currently exercised by U.S. citizens in the territories. I argue that this is a normatively good outcome.

The path this Article charts is novel. Most post–*Shelby County* scholarship on the equal sovereignty principle has focused on its implication for *states*, and has failed to consider whether the equal sovereignty principle admits a territorial application.[38] On first glance, this omission may seem unsurprising given that *Shelby County* refers to "'equal sovereignty' among the *States*."[39] As I argue, however, a close examination of both the reasoning underlying *Shelby County* and the nature of statehood reveals that a principle of equal sovereignty among the states cannot be fully defined without reference to the relationship between territorial status and statehood. After all, most of the fifty states achieved statehood after years as territories, and the equal footing doctrine—equal sovereignty's cousin, which figures into both scholarly and judicial interpretations of equal sovereignty—guarantees sovereign equality among the former territories and the elder states.[40]

To understand whether the Supreme Court's recent articulation of the equal sovereignty principle encompasses a territorial application, this Article interrogates the principles of sovereignty emphasized in *Shelby County*[41] and *NAMUDNO*.[42] Part I looks to scholarly and doctrinal accounts of both equal sovereignty and related federalism doctrines, including equal footing and sovereign immunity doctrines,

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37. *See id.*

38. For instance, Leah Litman and Thomas Colby confine their discussions of the relationship between the equal sovereignty principle and U.S. territories to the eighteenth and nineteenth centuries. Litman, *supra* note 31, at 1235–36; Colby, *supra* note 31, at 1105–10. McCall briefly mentions this possibility in the context of Puerto Rican sovereignty but does not derive a general territorial application of equal sovereignty or pursue the consequences of such a theory further. Adam W. McCall, Note, *Why Congress Cannot Unilaterally Repeal Puerto Rico's Constitution*, 102 CORNELL L. REV. 1367, 1382 n.83 (2017) ("Perhaps one might argue that given Puerto Rico's similar standing with states under the 1952 Compact, Puerto Rico deserves the benefits of the Equal Sovereignty doctrine applied in *Shelby County v. Holder*[.] Yet neither the Supreme Court nor the lower federal courts have applied that doctrine since Shelby County." (internal citations omitted) (italics in original)).

39. *Shelby Cnty.*, 570 U.S. at 544 (emphasis added).

40. *E.g.*, Herrera v. Wyoming, 139 S. Ct. 1686, 1693 (2019); Alaska v. United States, 545 U.S. 75, 79 (2005); *see also infra* Section I.B.2 (discussing the equal footing doctrine).

41. *Shelby Cnty.*, 570 U.S. at 544.

42. *NAMUDNO*, 557 U.S. at 203.

to identify the constitutional principles at the doctrine's core. Locating the crux of equal sovereignty's constitutional foundations in respect for sovereign entities' local autonomy and authority, Part II then considers whether the situation of the U.S. territories necessarily implicates the same concerns. Ultimately, I conclude that the sovereign characteristics of the U.S. territories implicates the foundational principles at the core of the equal sovereignty doctrine and brings them within equal sovereignty's protective scope.

Part III then considers the scope of protection offered by the equal sovereignty principle and its territorial application. Relying on equal sovereignty's animating purpose, I first explore the distinction between infringements of sovereignty that the principle permits and those it forbids. I then identify two significant areas of sovereign interest where, I argue, federal intrusions into sovereignty are likely to infringe on equal territorial sovereignty: public healthcare and democratic participation. The second half of Part III then considers whether the equal sovereignty principle applies to infringements by omission in addition to the more obvious, affirmative violations of sovereignty addressed in Part III's first half. In taking this approach, this section simultaneously addresses an omission that has characterized much of the recent scholarship on equal sovereignty—the assumption that Congress transgresses the equal sovereignty principle via expansive, affirmative action[43]—and theorizes the existence of a uniquely territorial sovereign interest arising from congressional inaction.

Building on the theoretical discussion of the preceding parts, Part IV sketches the outlines of two different legal strategies that incorporate the equal sovereignty doctrine. One strategy uses equal sovereignty as a basis for challenging federal legislation that discriminates against the U.S. territories. I describe how this cause of action enables the territories to vindicate the sovereign interests outlined in the first half of Part III, and how an equal-sovereignty cause of action provides a useful complement to individual-rights-based litigation in these areas. The second strategy builds on the theory developed in Section III.B and seeks to enforce Congress's obligations under the equal footing doctrine. Part V then concludes by evaluating the normative implications of the Article's theoretical argument and proposed litigation strategies.

I. EQUAL SOVEREIGNTY

The modern equal sovereignty doctrine originated in *Northwest Austin Municipal Utility District No. 1 v. Holder* (*NAMUDNO*),[44]

43. *E.g.*, Litman, *supra* note 31, at 1252; Colby, *supra* note 31, at 1153.
44. *NAMUDNO*, 557 U.S. at 203 (2009).

where Chief Justice Roberts's majority opinion extrapolated a "doctrine of equality of States"[45] from the discussion of the equal footing doctrine in *South Carolina v. Katzenbach*.[46]

In *Katzenbach*, the Supreme Court rejected South Carolina's challenge to certain provisions of the Voting Rights Act of 1965 that distinguished among states.[47] The Court explained, "[t]he doctrine of the equality of States"—on which South Carolina relied—"applies only to the terms upon which States are admitted to the Union, and not to the remedies for local evils which have subsequently appeared."[48] In *NAMUDNO*, the Supreme Court reiterated this conclusion, but added a constraint that *Katzenbach* had not identified, namely that "a departure from the fundamental principle of equal sovereignty requires a showing that a statute's disparate geographic coverage is sufficiently related to the problem that it targets."[49]

Four years later, the Court solidified its contemporary conception of the equal sovereignty principle, and anchored it on *NAMUDNO*'s caveat to *Katzenbach*. In *Shelby County v. Holder*, the Court explained that, "[n]ot only do States retain sovereignty under the Constitution, [but] there is also a 'fundamental principle of *equal* sovereignty' among the States."[50] According to *Shelby County*, this principle constrains Congress's ability to treat states differently;[51] in particular, transgressions of states' sovereignty are rarely constitutional.[52] When legislation treats states disparately in a manner that infringes on their sovereignty, the disparate treatment must be "sufficiently related" to the underlying legislative purpose and the "'current burdens' must be justified by 'current needs.'"[53]

Scholarly debate surrounding the Court's elaboration of the equal sovereignty principle in *Shelby County* has sought to disentangle and understand three distinct issues: the principle's theoretical effect and scope, its constitutional justification, and its practical

45. *NAMUDNO*, 557 U.S. at 203; *see also* Zachary S. Price, NAMUDNO*'s Non-Existent Principle of State Equality*, 88 N.Y.U. L. REV. ONLINE 24, 31–32 (2013).

46. 383 U.S. 301, 328–29 (1966). *See infra* notes 47–49 and accompanying text.

47. *Katzenbach*, 383 U.S. at 328–29.

48. *Id.*

49. *NAMUDNO*, 557 U.S. at 203. *Compare* South Carolina v. Katzenbach, 383 U.S. 301, 328–29 (1966) ("The doctrine of the equality of States, invoked by South Carolina, does not bar this approach, for that doctrine applies only to the terms upon which States are admitted to the Union, and not to the remedies for local evils which have subsequently appeared."), *with NAMUDNO*, 557 U.S. at 203 ("'The doctrine of the equality of States . . . does not bar . . . remedies for *local* evils which have subsequently appeared.'" (omissions in original) (emphasis added)).

50. *Shelby Cnty.*, 570 U.S. at 544 (citing *NAMUDNO*, 557 U.S. at 203).

51. *Id.*

52. *See id.* at 545.

53. *Id.* at 556 (quoting *NAMUDNO*, 557 U.S. at 203).

effect.[54] This Section considers the principles articulated by the Supreme Court in *Shelby County* and related cases, as well as academic interpretations of the express and implied meaning of this judicial reasoning. It identifies equal sovereignty's fundamental purpose as manifesting protective respect for specific attributes of sovereignty, inherent to sovereign entities, for which *state* status is not a prerequisite. Specifically, Section A provides an overview of the major debates surrounding the equal sovereignty principle's practical and doctrinal effects. Section B then explores the principle's constitutional and doctrinal foundations, building in particular on equal sovereignty's relationship with the narrower doctrines of sovereign immunity and equal footing. Finally, Section C identifies the specific attributes of the equal sovereignty principle that are relevant for determining whether the doctrine encompasses a principled application to the U.S. territories.

A. Theoretical Scope and Practical Implications

Shelby County asserts that the equal sovereignty principle prohibits Congress from legislating differentially for the states in a manner that constrains states' sovereignty when the burden of such impairment is insufficiently justified.[55] Thus, not all congressional acts that infringe on sovereignty violate the equal sovereignty principle. Instead, only those infringements whose burden is not justified by current needs—in other words, *unwarranted* infringements of sovereignty—violate equal sovereignty.

Some scholars conceive of the principle as protecting states' dignity (and thus conceive of states as entities possessing dignity). For instance, Seth Davis construes this conception of equal sovereignty as a "right of states against remedies that offend their dignity as separate sovereigns."[56] Likewise, Leah Litman has explained how *Shelby County* reflects the belief that "a certain kind of respect"[57] is due to states on the basis of their sovereign status, encompassing "a kind of unaccountability"[58] and assumptions of good-faith adherence to federal law.[59] This interpretation associates the equal sovereignty principle with "other federalism doctrines, such as the state sovereign

54. *See, e.g.*, Seth Davis, *Equal Sovereignty as a Right Against a Remedy*, 76 LA. L. REV. 83, 105–06 (2015).

55. *See Shelby Cnty.*, 570 U.S. at 545, 556.

56. Davis, *supra* note 54, at 110.

57. Litman, *supra* note 31, at 1253.

58. *Id.* at 1255.

59. *See id.* at 1256–57.

immunity and commandeering doctrines," where "states' dignity entitles them to be viewed as well-behaving institutions that deserve to be treated with respect."[60]

Other scholars view the equal sovereignty principle as safeguarding states' internal autonomy and sovereign function. For instance, Thomas Colby has described the equal sovereignty principle as a guarantee of states' equal rights to the same measures of self-government and internal autonomy.[61] Similarly, Jeffrey Schmitt interprets the equal sovereignty principle as requiring "that the states should be equal in political authority."[62] Under this framework, only coercive or compulsive federal regulation that "limit[s] the sovereign authority of some states, but not others,"[63] or "limits the political power of a state in [a] way that does not apply to all other states,"[64] will violate the equal sovereignty principle.

Both the dignity-based and the sovereign-function-based frameworks conceive of the equal sovereignty principle as an obstacle to Congress's ability to enforce remedial legislation enacted to protect discrete and insular minorities,[65] and critics of the Court's reasoning have pointed out the irony of this outcome in light of the clear purpose of the Reconstruction Amendments.[66] However, scholars disagree about the degree of impediment posed by the doctrine, with the dignity-based conception of the doctrine posing the greater obstacle.[67]

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60. *Id.* at 1252; *see also* Davis, *supra* note 54, at 107 ("The *Shelby County* majority treated the states as political communities with collective interests in 'integrity' and 'dignity' protected by a collective right to 'equal sovereignty.'").

61. Colby, *supra* note 31, at 1149–50.

62. Schmitt, *supra* note 31, at 220.

63. Colby, *supra* note 31, at 1153.

64. Schmitt, *supra* note 31, at 220.

65. *See, e.g.*, Litman, *supra* note 31, at 1272 (noting that the dignity-based conception of the principle will "uniquely limit" Congress's remedial authority under the Reconstruction Amendments, even as those amendments "uniquely empowered Congress to remedy racial discrimination"); Colby, *supra* note 31, at 1168 ("[H]istory supports a claim that Congress should be afforded greater leeway to bend the equal sovereignty principle when it is acting pursuant to its Thirteenth, Fourteenth, and Fifteenth Amendment enforcement powers.").

66. *E.g.*, Kanwar, *supra* note 33, at 283 ("[T]he Reconstruction Amendments were expressly designed to limit state sovereignty, granting Congress vast new power at the direct expense of the states."); Price, *supra* note 45, at 31 ("It would be particularly surprising to apply a principle of state equal treatment to Congress's enforcement powers under the Fourteenth and Fifteenth Amendments . . . . [T]here is little doubt that their drafters were concerned principally with discriminatory practices concentrated in one region of the country—the former Confederacy."); Siegel, *supra* note 32, at 67–72.

67. *Compare, e.g.*, Litman, *supra* note 31, at 1272–73, *with* Schmitt, *supra* note 31, at 221 ("The only category of federal legislation that violates the equal sovereignty principle . . . is legislation that prohibits some states—but not others—from passing certain types of regulations. Such federal laws are exceedingly rare."), *and* Colby, *supra* note 31, at 1155–56 (contending that "equal sovereignty is not absolute" but instead simply triggers heightened scrutiny).

Nevertheless, scholars on both sides of the interpretative divide believe that Congress retains significant power to enact remedial civil rights legislation, under certain conditions, such as where individuals, rather than states, constitute the legislative focus,[68] or are subject to a heightened standard of review.[69]

To a large degree, the debates about the extent and consequences of the equal sovereignty doctrine eclipse the focus of this Article. Understanding how the equal sovereignty principle protects sovereignty from congressional infringement is important for operationalizing the doctrine,[70] but does not explain why the principle operates that way. Probing the substantive scope of equal sovereignty's protections, and the manner and standard of judicial review to be applied to claims of equal sovereignty violations, assumes the existence and applicability of the principle.[71] Consequently, although this inquiry is sufficient in the case of states because the Supreme Court has asserted the existence of the principle of equal sovereignty among the states, it is insufficient to derive a territorial application. The latter inquiry requires interrogating equal sovereignty's constitutional foundations to determine whether the constitutional underpinnings of the doctrine apply equally to the U.S. territories as well as states.

B. Constitutional Foundations

For all that *Shelby County* tells us about what the equal sovereignty principle protects and prohibits, the decision was notably opaque and widely criticized with respect to its discussion of the principle's constitutional foundations.[72] The Court appears to identify

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68. *E.g.*, Litman, *supra* note 31, at 1246 ("The equal sovereignty principle could be narrowly defined, for example, only to apply to laws that have differential effects on different states' law-making powers, as opposed to laws that treat private individuals differently by virtue of the fact that those individuals are in different states.").

69. *E.g.*, Colby, *supra* note 31, at 1159 ("[T]here is a strong argument—the possibility of which was ignored by the *Shelby County* majority—that the courts should be more forgiving of violations of the equal sovereignty principle in the context of federal civil-rights laws, like the Voting Rights Act, that were enacted pursuant to the Reconstruction amendments.").

70. *See infra* Parts III–IV.

71. *See* Colby, *supra* note 31, at 1095.

72. *E.g.*, Litman, *supra* note 31, at 1212 ("[W]hile the principle of equal sovereignty, or equal states, has deep roots in both constitutional discourse and doctrine, it is far from a core constitutional principle. The equal sovereignty principle is not cleanly derived from any source that is widely recognized by courts or commentators as a valid basis for constitutional rules."); *id.* at 1232 (arguing that textual support for the principle is "not much worse than the textual support for other constitutional rules, especially ones associated with the Tenth Amendment.").

the source of the equal sovereignty principle in the negative implications of the Supremacy Clause, which allows:

> States [to] retain broad autonomy in structuring their governments and pursuing legislative objectives . . . . This "allocation of powers in our federal system preserves the integrity, dignity, and residual sovereignty of the States." But the federal balance "is not just an end in itself: Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power."[73]

The principle is thus both a vertical constraint against congressional encroachment and a horizontal constraint on states' dealings with each other.[74] Its existence is both "essential to the harmonious operation of the scheme upon which the Republic was organized"[75] and, as the Court explained more recently in *Franchise Tax Board v. Hyatt*, a necessary consequence of the "transformation of the States from a loose league of friendship into a perpetual Union."[76]

Scholars have inferred the existence of a constitutional principle of equal sovereignty from precedent and constitutional structure.[77] Litman describes equal sovereignty as a tradition invented in the Court's federalism jurisprudence, such that "it shares several characteristics common to [other] invented traditions."[78] In particular, *Shelby County*'s discussion of the equal sovereignty principle's constitutional foundations echoes the Court's approach to two closely related doctrines: equal footing and sovereign immunity.[79] As special cases of the equal sovereignty principle,[80] the constitutional

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73. *Shelby Cnty.*, 570 U.S. at 543 (citation omitted) (quoting Bond v. United States, 564 U.S. 211, 221 (2011)).

74. *See* Franchise Tax Bd. v. Hyatt, 139 S. Ct. 1485, 1497 (2019) (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 293 (1980)) ("Each State's equal dignity and sovereignty under the Constitution implies certain constitutional 'limitation[s] on the sovereignty of all of its sister States.'").

75. *Shelby Cnty.*, 570 U.S. at 544 (citing Coyle v. Smith, 221 U.S. 559, 580 (1911)).

76. *See Franchise Tax Bd.*, 139 S. Ct. at 1497 (discussing *Shelby Cnty.*, 570 U.S. at 544).

77. Colby, *supra* note 31, at 1102; Schmitt, *supra* note 31, at 212–13.

78. Litman, *supra* note 31, at 1228.

79. *See* Va. Off. for Prot. & Advoc. v. Stewart, 563 U.S. 247, 258 (2011) ("Denial of sovereign immunity . . . offends the dignity of a State; but not every offense to the dignity of a State constitutes a denial of sovereign immunity.").

80. Scholars and the Supreme Court have described equal footing and sovereign immunity as special cases of the broader equal sovereignty doctrine. *E.g.*, Davis, *supra* note 54, at 111 ("[S]overeign immunity is a species of equal sovereignty."); Colby, *supra* note 31, at 1108 (interpreting equal footing as a special case of a "broad, generalized principle of equal state sovereignty"); *Stewart*, 563 U.S. at 258 ("Denial of sovereign immunity . . . offends the dignity of a State; but not every offense to the dignity of a State constitutes a denial of sovereign immunity.").

justifications of these long-established doctrines can help illuminate the constitutional foundations and animating principles of the modern equal sovereignty doctrine.

1. Sovereign Immunity

The Supreme Court has identified protecting states' dignitary interests as the "preeminent purpose" of sovereign immunity,[81] and noted that the Eleventh Amendment prevents "the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties."[82] In 2019, the Court explained that "[e]ach State's equal dignity and sovereignty under the Constitution" entitles it to immunity from the compulsory judicial process of another state.[83] According to the Court, state sovereign immunity protects two distinct dignitary interests related to state sovereignty: first, states' dignitary interest in the exercise of their reserved sovereignty;[84] and, second, the dignitary interest arising from states' status as former sovereigns.[85]

Despite the clarity with which the Court has articulated these concurrent interests, the case law has largely failed to resolve the inherent tension between the sources of these interests. That is, states' reserved-sovereignty dignitary interest arises from their contemporary joint sovereignty, whereas states' status-based dignitary interest arises from the extinction of their former sovereignty.[86] The Court's failure to address this tension is unsurprising, as the source

81. Fed. Mar. Comm'n v. S.C. State Ports Auth., 535 U.S. 743, 760 (2002); *see also Franchise Tax Bd.*, 139 S. Ct. at 1497 (describing state sovereign immunity as a necessary consequence of the Constitution's respect for "[e]ach State's equal dignity and sovereignty").

82. *In re* Ayers, 123 U.S. 443, 505 (1887).

83. *Franchise Tax Bd.*, 139 S. Ct. at 1497.

84. Alden v. Maine, 527 U.S. 706, 714 (1999) (explaining that the Constitution "preserves" states' sovereignty by "reserv[ing] to them a substantial portion of the Nation's primary sovereignty, together with the dignity and essential attributes inhering in that status."); *see also Fed. Mar. Comm'n*, 535 U.S. at 760 ("The preeminent purpose of state sovereign immunity is to accord States the dignity that is consistent with their status as sovereign entities.").

85. *Alden*, 527 U.S. at 714–15 (emphasis added) (quoting THE FEDERALIST NO. 39, at 245 (J. Madison) (Clinton Rossiter ed., 1961)) (explaining that federalism preserves states' "'residuary and inviolable sovereignty'" comprising "the dignity, though not the full authority, of sovereignty"); *see also* Timothy Zick, Note, *Are the States Sovereign?*, 83 WASH. U. L.Q. 229, 237–38 (2005).

86. *Compare Fed. Mar. Comm'n*, 535 U.S. at 765 ("[T]he doctrine's central purpose is to 'accord the States the respect owed them as' joint sovereigns." (quoting P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 146 (1993))), *and id.* at 760 ("The preeminent purpose of state sovereign immunity is to accord States the dignity that is consistent with their status as sovereign entities."), *with Franchise Tax Bd.*, 139 S. Ct. at 1497 (emphasizing that entering the Union necessarily entails a limiting transformation of state sovereignty).

of a state's sovereign immunity is largely irrelevant to judicial determinations of whether a state or the federal government has transgressed the protections afforded by that immunity.[87] However, to glean a perspective on the scope of state sovereignty from sovereign immunity doctrine requires unpacking the distinction between these dignitary interests.

States' status-based dignitary interest does little to illuminate the contours of state sovereignty. This interest stems from the entry fiction in which formerly independent sovereigns become part of the United States via ratification or accession, thereby transforming their independent sovereignty into the joint and subordinate sovereignty that characterizes the United States.[88] According to one scholar, this framework perceives sovereign immunity as "a fundamental right of statehood" analogous to the individual right to equality.[89] However, due to the entry fiction, which will be discussed in greater depth in Section I.B.2, the status-based dignitary interest does not tell us which aspects of sovereignty the sovereign immunity doctrine seeks to protect.[90] In contrast, states' reserved-sovereignty dignitary interest can be helpful for defining the contours of state sovereignty.[91] But first it is necessary to determine what reserved state sovereignty encompasses.

Franita Tolson has identified the Court's tendency to define sovereignty by negative implication as one reason why "the boundaries of the 'residual sovereignty' that the Constitution reserves to the states are unclear."[92] Tolson suggests that defining sovereignty, especially as distinct from mere autonomy, is critical "to understand[ing] what 'power' states and their citizens retain postratification."[93] According to Tolson, autonomy is the "ability to make policy in the absence of congressional action,"[94] whereas the "defining characteristic of sovereignty . . . is finality in decisionmaking by the

87. Timothy Zick, *Statehood as the New Personhood: The Discovery of Fundamental "States' Rights"*, 46 WM. & MARY L. REV. 213, 264–65 (2004).

88. I refer to this as an "entry fiction" because the vast majority of states did not enter the Union as formerly independent states; instead, most states entered the Union as formerly dependent territories. However, the equal footing doctrine, among other things, ensures that states entering the Union receive the same privileges, rights, and obligations as did the original thirteen states. This includes the fiction of sovereignty. *See infra* note 99 and accompanying text; Craig Green, *United/States: A Revolutionary History of American Statehood*, 119 MICH. L. REV. 1 (2020).

89. Zick, *supra* note 87, at 264, 266.

90. *See infra* Section I.B.2 for a discussion of this fiction.

91. *See infra* note 96 and accompanying text.

92. Franita Tolson, *Reinventing Sovereignty?: Federalism as a Constraint on the Voting Rights Act*, 65 VAND. L. REV. 1195, 1199 (2012).

93. *Id.* at 1244–45.

94. *Id.* at 1197.

supreme authority."[95] Sovereignty thus refers to a sphere of independent authority backed by a structural guarantee or common understanding, whereas autonomy is merely a zone in which the federal government has not acted to limit state action. "Reserved sovereignty" thus encompasses spheres in which states continue to possess finality of decision-making after accession.

Under this interpretation, protecting states' dignitary interest in their reserved sovereignty encompasses protecting the states from disrespectful incursions into realms over which they exert final decision-making authority. By protecting states from the compulsory judicial process of another state and from suits by private persons, sovereign immunity thus preserves states' final decision-making authority over their susceptibility to suit as part of their reserved sovereignty.[96]

2. Equal Footing

Like sovereign immunity, the equal footing doctrine exists to protect state dignity.[97] The doctrine requires Congress to admit new states on the same terms as existing states, regardless of when a state enters the Union.[98] Because the original states entered the Union as formerly independent states,[99] the equal footing doctrine perpetuates a fiction that each state enters the Union as a formerly independent

95. *Id.* at 1244. In other words, sovereignty "requires a level of decisionmaking that is insulated from disruption." *Id.* at 1245; *see also* Robert Yazzie, *Indigenous Peoples and Postcolonial Colonialism*, *in* RECLAIMING INDIGENOUS VOICE AND VISION 39, 46 (Marie Battiste ed., 2000) ("'Sovereignty' is nothing more than the ability of a group of people to make their own decisions and control their own lives.").

96. States possessed this authority prior to entering the Union. *P.R. Aqueduct & Sewer Auth.*, 506 U.S. at 144; *see supra* note 88 (discussing entry fiction); *infra* Section I.B.2 (discussing entry fiction). The Court has interpreted the Eleventh Amendment to guarantee the preservation of this authority after accession. Seminole Tribe v. Florida, 517 U.S. 44, 64–65 (1996); *P.R. Aqueduct & Sewer Auth.*, 506 U.S. at 144–46, subject only to the limitations on state sovereignty imposed by the Fourteenth Amendment, *Seminole Tribe*, 517 U.S. at 54, 72–74. The Court explained that "the Fourteenth Amendment, by expanding federal power at the expense of state autonomy . . . fundamentally altered the balance of state and federal power struck by the Constitution." *Id.* at 59.

97. Coyle v. Smith, 221 U.S. 559, 566–67 (1911).

98. Colby, *supra* note 31, at 1097; *Coyle*, 221 U.S. at 570 ("[T]here is to be found no sanction for the contention that any State may be deprived of any of the power constitutionally possessed by other States, as States, by reason of the terms in which the acts admitting them to the Union have been framed.").

99. *See* Heath v. Alabama, 474 U.S. 82, 89 (1985); *Coyle*, 221 U.S. at 567; *see also* Puerto Rico v. Sánchez Valle, 136 S. Ct. 1863, 1871 (2016) (listing cases); *id.* at 1879 (Breyer, J., dissenting) ("One might argue, as this Court has argued, that the source of new States' sovereign authority to enact criminal laws lies in the Constitution's equal-footing doctrine . . . ."); *see also* Gary Lawson & Robert D. Sloane, *The Constitutionality of Decolonization by Associated Statehood: Puerto Rico's Legal Status Reconsidere*d, 50 B.C. L. REV. 1123, 1170 (2009); Green, *supra* note 88, at 10.

sovereign entity, relinquishing most—but retaining a "residuum" of—sovereignty upon admission. Although the Court has invoked "equal footing" infrequently over the past century—predominantly in the context of admitted states' rights to land, navigable waters, and the seabed[100]—the United States' continued colonial administration of overseas territories illustrates the urgency of understanding the nexus between the equal footing and equal sovereignty doctrines.[101]

The Court has explained that equal footing requires that new states be "admitted with all of the powers of *sovereignty* and jurisdiction which pertain to the original states."[102] A core purpose of the equal footing doctrine is thus to guarantee the equal sovereignty of states. In practice, this purpose is interpreted to signify that although "Congress may require, under penalty of denying admission, that the organic laws[103] of a new State at the time of admission shall be such as to meet its approval,"[104] Congress can neither prohibit the government of the newly admitted state from subsequently overturning such laws[105] nor impair the newly admitted state's sovereignty by seeking to enforce superseded entry conditions.[106]

The Court explained the necessity of the equal footing doctrine's guarantee of equal sovereignty by observing that the absence of such a guarantee would allow the Union to "come to be a union of states unequal in power, as including states whose powers were restricted only by the Constitution, with others whose powers had been further restricted by an act of Congress accepted as a condition of admission."[107] This scenario would offend the Constitution in two ways: first, by defining the powers of Congress outside the Constitution, via the expansions or limitations on Congress's constitutional authority implied by the entry conditions imposed on new states; and,

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100. *E.g.*, Herrera v. Wyoming, 139 S. Ct. 1686, 1693 (2019) (relationship between equal footing and Indian treaty rights to land); Alaska v. United States, 545 U.S. 75, 79 (2005) (seabed rights upon admission); Idaho v. United States, 533 U.S. 262, 273–74 (2001) (right to navigable waters within a state).

101. *See* sources cited *supra* note 6.

102. *Coyle*, 221 U.S. at 573 (emphasis added).

103. A territory's organic act confers the powers of government upon the territory and is the territorial equivalent of a constitution. *See* Brow v. Farrelly, 994 F.2d 1027, 1032 (3d Cir. 1993).

104. *Coyle*, 221 U.S. at 568. In fact, Congress has imposed and enforced different entry conditions for different states. Price, *supra* note 45, at 32 (summarizing the case law).

105. Congress's authority to impose entry conditions is not—as it might seem on first glance—inconsistent with equal footing's equal *sovereignty* requirement, due to the legal significance of admission. Admission transforms the organic act of a non-state entity into the constitution of a state, which becomes imbued with corresponding legal significance. *Coyle*, 22 U.S. at 567–68.

106. *Id.* at 567.

107. *Id.*

second, by imposing greater limitations on new states' reserved powers than the Constitution alone contemplates.[108] Vik Kanwar has described the equal footing doctrine as guarding against the propensity of either Congress or the existing states to use entry conditions to create "second-class states."[109] Kanwar distinguishes between states "who feel they are differentially burdened by Federal regulation" and "the literal possibility of sub-states or pseudo-states . . . , in effect, held as 'conquered provinces' available for plunder by Federal authorities and existing states."[110] According to Kanwar, the equal footing doctrine exists to prevent the latter.

Despite equal footing's clear requirement that new states join the Union on terms of equal sovereignty, the doctrine nevertheless recognizes *limited* congressional authority to impose legislative burdens on a new state concurrent to admission.[111] However, this corollary only applies to legislation within "the sphere of the plain power of Congress," such as legislation affecting Indian tribes or federal lands located within a new state's boundaries.[112] "[S]uch legislation would derive its force not from any agreement or compact with the proposed new state, nor by reason of its acceptance of such enactment as a term of admission, but solely because the power of Congress extended to the subject."[113] The equal footing doctrine admits this exception because legislation that is "plainly within the regulating power of Congress" does not "operate to restrict the state's legislative power" in violation of equal footing's equal sovereignty guarantee.[114] Although the infrequency with which states are admitted to the Union has resulted in a dearth of case law probing the frontier of this "exception," Thomas Colby argues that the Court's limited equal footing jurisprudence clearly precludes Congress from enacting "*discriminatory, unequal* burdens on the sovereignty of the new states" in the course of their admission.[115]

C. Common Sovereignty

Both equal footing and sovereign immunity doctrines reflect the same underlying constitutional concern for state dignity that characterizes the equal sovereignty doctrine. Sovereign immunity ensures

108. *Id.*
109. Kanwar, *supra* note 33, at 281–82; *see also* Schmitt, *supra* note 31, at 229 ("For the Court, a union of states that possessed unequal power was unthinkable.").
110. Kanwar, *supra* note 33, at 282.
111. *Coyle*, 221 U.S. at 574.
112. *Id.*
113. *Id.*
114. *Id.*
115. Colby, *supra* note 31, at 1108 (emphasis in original).

that states retain final authority over their susceptibility to suit,[116] and equal footing ensures that states' internal lawmaking authority cannot be abridged by Congress as a condition of admission.[117] The broader sovereignty that these doctrines protect embodies Tolson's definition of sovereignty as final decision-making authority or insulation from disruptive second-guessing. This is the same sovereignty at the heart of the equal sovereignty doctrine, regardless of whether one adopts a dignity- or sovereign-function-based framework for understanding it.

According to Litman, the dignity-based conception of equal sovereignty entitles states to "a kind of unaccountability," a hierarchical relationship with their citizens, and the respectful assumption that they "will behave themselves in ways that reflect their status."[118] The dignity comparator here is other states and those states' relationships with the federal government and with their own citizens. The jurisprudential justifications for these entitlements do not turn on states' statehood, but rather on their status as sovereign entities with a unique relationship to their citizens and their sovereign peers that exists independently of and concurrently with their citizens' relationship to the federal government. Similarly, the sovereign-function definition guarantees states "broad autonomy in structuring their governments and pursuing legislative objectives."[119] According to this perspective, the equal sovereignty principle insulates states' authority over their own internal ordering and management of their domestic sphere from unwarranted external disruption. Here, again, the equal sovereignty principle protects not states per se but states' internal sovereign function.[120]

The sovereign functions and dignities at the core of the equal sovereignty doctrine are common to U.S. states and U.S. territories. The Court made clear in *Shelby County* that equal sovereignty protects the states, but has not had the opportunity to consider whether the principle offers any protection to U.S. territories.[121] The absence of case law discussing the doctrine's territorial application does not indicate the absence of a territorial application; rather, the lack of discussion arises from a lack of opportunity to do so. As an atextual

116. *See, e.g.*, *P. R. Aqueduct & Sewer Auth.*, 506 U.S. at 146.

117. *See, e.g.*, *Sánchez Valle*, 579 U.S. at 82–83.

118. Litman, *supra* note 31, at 1253, 1255–57.

119. Schmitt, *supra* note 31, at 220 (quoting *Shelby Cnty.*, 570 U.S. 529); *see also* Colby, *supra* note 31, at 1154 ("[E]qual sovereignty *would be* implicated by a federal law that . . . discriminatorily regulate[d] the states directly, in their exercise of their sovereign authority.").

120. *See* Colby, *supra* note 31, at 1092.

121. On the other hand, the case law indicates that U.S. territories are clearly protected by both equal footing, *see Coyle*, 221 U.S. at 577, and sovereign immunity, *see P.R. Aqueduct & Sewer Auth.*, 506 U.S. at 146.

amalgam of constitutional principles derived from constitutional structure and other doctrine, equal sovereignty's applicability to the U.S. territories thus depends on the breadth of the protective ambit contemplated by the doctrine's animating principles. Whether the doctrine applies to U.S. territories thus depends on the breadth of the protective ambit contemplated by the doctrine's underlying principles.

II. EQUAL TERRITORIAL SOVEREIGNTY

The Supreme Court has confined its limited discussion of the equal sovereignty principle to the principle's application to *states*; it has never considered whether the equal sovereignty principle applies to the other sovereign[122] non-state jurisdictions that comprise the remainder of the United States: the District of Columbia and the five U.S. territories That the Court has only examined equal sovereignty in the state context does not foreclose the possibility that it applies to these other jurisdictions as well. Indeed, as an atextual doctrine,[123] the text of the Constitution provides no basis for limiting the application of the equal sovereignty doctrine to states alone. Building from Part I's discussion of the principles underlying the contemporary equal sovereignty doctrine, this Part explores the contours of the state-territory relationship in the Constitution, judicial precedent, and contemporary practice to evaluate whether U.S. territories possess the attributes of sovereignty at the heart of equal sovereignty's protective aims.

Section A provides a brief overview of the history and law governing the United States' relationship with its remaining territories—a relationship the U.N. Special Committee on Decolonization has repeatedly condemned.[124] Despite their doctrinal and practical relegation to second-class status, however, the Supreme Court has recognized that the territories nevertheless exercise a multitude of sovereign authorities and functions. Section B explains how the principles that animate the equal sovereignty doctrine, coupled with the current

122. Although the territories are not sovereign in all the same ways as the states, *see infra* note 151, this Article contends that the territories' exercise of sovereignty makes them sovereign, *see infra* Part II.

123. *See supra* note 72.

124. *See, e.g.*, Report of the Special Committee on the Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples for 2018, UNITED NATIONS 14–16, 111–15, 132 (2018), https://digitallibrary.un.org/record/1642023?ln=en#record-files-collapse-header; Press Release, Special Committee on Decolonization Approves Text Calling upon United States to Promote Puerto Rico's Self-Determination, Eventual Independence, U.N. Press Release GA/COL/3346 (June 18, 2021), https://www.un.org/press/en/2021/gacol3346.doc.htm [https://perma.cc/VZD5-9RSN]; *see infra* notes 127–28.

circumstances of the territories, support a territorial application of equal sovereignty.

A. A Brief History of the United States–Territories Relationship

The United States' dominion over territories predates the Constitution. For most of the country's history, territorial acquisition and administration were understood to culminate in accession to statehood.[125] Yet, in 2021, five majority-minority territories persist in that status, with no clear prospects for accession.[126] Territorial status today causes quantifiable economic, social, and political harm to the residents of the territories,[127] and withholds from their U.S. citizen-inhabitants the remedy available to all other U.S. citizens: democratic accountability in the federal government.[128]

The origin of the territories' contemporary unequal treatment lies in the *Insular Cases*[129] and the federal policies they sanctioned.[130] In

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

126. Whether the territories want accession is a separate question, to which there is likely no uniform answer, and which will not be considered here. For an argument that at least one of the territories possesses a legal right of accession, see Blocher & Gulati, *supra* note 3, at 240–42. For arguments about the (im)possibility of non-pejorative colonial status, *compare* José Trías Monge, *Injustice According to Law: The* Insular Cases *and Other Oddities*, *in* FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION, AND THE CONSTITUTION (Christina Duffy Burnett & Burke Marshall eds., 2001), *with* JUAN R. TORRUELLA, *One Hundred Years of Solitude: Puerto Rico's American Century*, *in* FOREIGN IN A DOMESTIC SENSE (Christina Duffy Burnett & Burke Marshall eds., 2001). This Article is concerned with the application of and rights created by the equal sovereignty doctrine for U.S. territories on the basis of their current status. *See infra* Parts III–IV.

127. *See supra* notes 6–11; *see also* James Campbell, *Island Judges*, 129 YALE L.J. 1888, 1942 (2020) (describing territories' lack of Article III protections); Neil Weare, Rosa Hayes & Mary Charlotte Carroll, *The Constitution, Covid-19, and Growing Healthcare Disparities in U.S. Territories*, ACS BLOG (Apr. 28, 2020), https://www.acslaw.org/expert forum/the-constitution-covid-19-and-growing-healthcare-disparities-in-u-s-territories [https://perma.cc/6SDF-465K] (describing Medicaid and SSI discrimination against territories).

128. U.S. citizens who reside abroad are able to vote by absentee ballot in the state of their former residence. In contrast, U.S. citizens who move to territories lose their right to vote in federal elections and to be represented by *voting* members of Congress. *See, e.g.*, Maria Murriel, *Millions of Americans can't vote for president because of where they live*, PUB. RADIO INT'L: THE WORLD (Nov. 1, 2016, 2:45 PM), https://theworld.org/stories/2016-11-01/millions-americans-cant-vote-president-because-where-they-live [https://perma.cc/Z5ML-WGQL].

129. *The Insular Cases* are a series of cases decided in the early twentieth century that constitutionalized United States modern control over inhabited overseas territories. *See, e.g.*, Rasmussen v. United States, 197 U.S. 516 (1905); Dorr v. United States, 195 U.S. 138 (1904); Gonzales v. Williams, 192 U.S. 1 (1904); Downes v. Bidwell, 182 U.S. 244 (1901); De Lima v. Bidwell, 182 U.S. 1 (1901). Balzac v. Puerto Rico, 258 U.S. 298 (1922), is occasionally included in the broader set of the *Insular Cases*. *See infra* note 6.

130. *Downes*, 182 U.S. at 293 (White, J., concurring). *See Vaello-Madero*, 142 S. Ct. at 1552–57 (Gorsuch, J., concurring) (describing the origins and consequences of the *Insular Cases*).

these early twentieth-century cases, the same Justices who decided *Plessy v. Ferguson*[131] relied on similarly explicitly racist beliefs to create the "separate and unequal" doctrine of territorial incorporation.[132] In *Downes v. Bidwell*—a case about the tax owed on Puerto Rican oranges—the Justices declared that U.S. territories may be "incorporated" or "unincorporated," but whereas the Constitution applies in full force in the former, the Constitution only guarantees "fundamental" rights in the latter.[133]

The Court quickly extrapolated the doctrine's reach beyond agricultural goods, to devastating human effect. In *Dorr v. United States*[134] and *Hawaii v. Mankichi*,[135] the Court held that the right to a trial by jury was nonfundamental and thus not applicable in unincorporated territories.[136] In *Gonzales v. Williams*, the Court refused to decide if residents of Puerto Rico were U.S. citizens, even as it firmly declared them to be non-aliens.[137] Finally, in *Balzac v. Puerto Rico*, the Court held that the Sixth Amendment did not apply to U.S. citizens in Puerto Rico even though by 1922 Congress had extended statutory citizenship to the island.[138]

The *Insular Cases*' defining characteristic, apart from the stark divergence between their definitions of fundamental rights and the rights most Americans deem fundamental today, is their express and animating racism. In his concurring opinion in *Downes*, which has come to represent the case's controlling holding, Justice White explained the necessity of the doctrine of territorial incorporation by counterfactual:

> If the treaty-making power can absolutely, without the consent of Congress, incorporate territory, and if that power may not insert conditions against incorporation, . . . then millions of inhabitants of alien territory, if acquired by treaty, can, without the desire or consent of the people of the United States speaking through Congress, be immediately and irrevocably incorporated into the United States, and the whole structure of the government be overthrown.[139]

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131. Tuaua v. United States, 788 F.3d 300, 307 (D.C. Cir. 2015); Boumediene v. Bush, 553 U.S. 723, 759 (2008).

132. *E.g.*, *Dorr*, 195 U.S. at 148; *Downes*, 182 U.S. at 287; *see also* Torruella, *supra* note 6, at 68.

133. *See Downes*, 182 U.S. at 342.

134. 195 U.S. at 148.

135. 190 U.S. at 217–18.

136. The Court reached the opposite conclusion about the right to a trial by jury in the Alaska Territory in *Rasmussen*, 197 U.S. at 518–19. *See infra* Section III.B.3.a for a discussion of the racialized motivation for and consequences of this disparate treatment.

137. 192 U.S. at 13.

138. 258 U.S. at 300.

139. Downes v. Bidwell, 182 U.S. 244, 312–13 (1901).

Concerns about the effect of incorporating "alien communities" on America's "Anglo-Saxon" traditions similarly abound throughout the cases.[140]

The *Insular Cases* have been much criticized for both their constitutional interpretation and their constitutionalized racism since their initial publication.[141] By 1957, a plurality of Justices strongly cautioned against extending the cases further.[142] Despite this caution, lower courts continue to not only cite them but to *expand* them.[143]

In June 2020, the Supreme Court acknowledged that the *Insular Cases* were "much-criticized," but again declined to overrule them.[144] As if responding to the Court's invitation, the United States' opening brief in *United States v. Vaello-Madero* attempted to justify the exclusion of U.S. citizens who reside in territories from the Supplemental Security Income program by analogy to the Sugar Act of 1948, which imposed different sugar quotas in Puerto Rico and the mainland.[145] Because the court upheld the differential treatment of Puerto Rican sugar in 1950, the Solicitor General argued that Congress may discriminate against Puerto Rican people, who have lived as U.S. citizens and under U.S. dominion for over a century.[146]

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140. *See, e.g.*, *Balzac*, 258 U.S. at 310–11 ("Congress has thought that a people like the Filipinos, or the Porto Ricans, trained to a complete judicial system which knows no juries, living in compact and ancient communities, with definitely formed customs and political conceptions, should be permitted themselves to determine how far they wish to adopt this institution of Anglo-Saxon origin, and when . . . [w]e cannot find any intention to depart from this policy in making Porto Ricans American citizens, explained as this is by the desire to put them as individuals on an exact equality with citizens from the American homeland, to secure them more certain protection against the world, and to give them an opportunity, should they desire, to move into the United States proper, and there without naturalization to enjoy all political and other rights."); *Vaello Madero*, 142 S. Ct. at 1552 (Gorsuch, J., concurring).

141. Justice Harlan, who is known as the "great dissenter" for his dissenting opinions in *Plessy v. Ferguson*, among other cases of that era, expressed vehement dissent in most of the *Insular Cases* as well. For summaries of more recent criticism, see United States v. Vaello-Madero, 142 S. Ct. 1539, 1552 (2022) (Gorsuch, J., concurring); Kyla Eastling, Danny Li & Neil Weare, *The Supreme Court Just Passed Up a Chance to Overrule Appallingly Racist Precedents*, SLATE (June 1, 2020, 5:42 PM), https://slate.com/news-and-politics/2020/06/puerto-rico-insular-cases-supreme-court.html [https://perma.cc/V277-3SHL]; Adriel I. Cepeda Derieux & Neil C. Weare, *After* Aurelius: *What Future for the* Insular Cases*?*, 130 YALE L.J. 283, 292 (2020).

142. Reid v. Covert, 354 U.S. 1, 14 (1957).

143. *See* Cepeda Derieux & Weare, *supra* note 141, at 294; *see also supra* notes 13–14.

144. Fin. Oversight & Mgmt. Bd. v. Aurelius Inv., LLC, 140 S. Ct. 1649, 1665–66 (2020). The majority opinion in United States v. Vaello-Madero, decided two years later, failed to mention them. *See* 142 S. Ct. 1539, 1552 (2022) (Gorsuch, J., concurring).

145. Brief for the United States at 31, *Vaello-Madero*, 142 S. Ct. at 1539 [hereinafter Opening Brief] (citing Sec'y of Agric. v. Central Roig Refining Co., 338 U.S. 604 (1950)).

146. *Id.*

B. Deriving Equal Territorial Sovereignty

In spite of the Supreme Court's continued refusal to overrule the ignominious legal backbone of U.S. territorial law, the territories nevertheless possess and exercise—both legally and practically—the attributes of sovereignty at the heart of the equal sovereignty doctrine.[147] The extent of the territories' contemporary exercise of sovereignty reflects the evolution of both domestic and international law over the last twelve decades, and the status of the territories' political institutions. Because the equal sovereignty principle respects certain attributes of sovereignty, and because the territories exercise the elements of sovereignty relevant for equal-sovereignty analysis, I argue that the foundations of equal sovereignty support a territorial application of the equal sovereignty principle.

There are at least two distinct but mutually compatible ways to derive this principle of equal territorial sovereignty, which I address in turn. First, Section 1 outlines the "sovereign function" conception of territorial sovereignty, which looks to the facts on the ground and the territories' functional sovereignty. Section 2 then outlines the notion of "Reconstructed sovereignty," which examines the influence of Reconstruction on modern understandings of sovereignty and locates equal territorial sovereignty in the sovereignty shared by all U.S. citizens—including those who reside in territories.[148] Both derivations imply that the equal sovereignty principle should protect territorial sovereignty against unwarranted federal intrusion.

1. Sovereign Functions and Dignity

The equal sovereignty principle insulates sovereigns from federal second-guessing of their management of their own internal affairs and governance.[149] This orientation highlights the importance—to equal sovereignty analysis—of defining sovereignty with reference to a sovereign's final decision-making authority rather than on the basis of "sovereign" status, alone.[150]

Although the Supreme Court recently reiterated century-old precedent holding that territories are not "sovereign" in the same manner

147. Colby, *supra* note 31, at 1114.

148. The citizenship status of residents of American Samoa complicates this picture but does not invalidate the argument. Furthermore, the status of American Samoan citizenship has not been determined by the Supreme Court. *Compare Fitisemanu*, 426 F. Supp. at 1190–91 (holding American Samoans to be citizens), *with Tuaua*, 788 F.3d at 301–02 (reaching the opposite conclusion).

149. Zick, *supra* note 85, at 324.

150. *See id.* at 258–59 (discussing "internal" sovereignty).

as states with respect to their prosecutorial authority,[151] it recognized that "constitutional developments"—such as the relinquishment of congressional authority over local affairs and the grant of "autonomy comparable to that possessed by the States"—supported an inference of territorial sovereignty in zones *outside* the prosecutorial sphere.[152] The Court's distinction between prosecutorial authority and other forms of sovereign authority stems from past decisions about how double jeopardy applies in the territories.[153] But in its latest double jeopardy decision, the Court admitted: "For whatever reason, the test we have devised to decide whether two governments are distinct for double jeopardy purposes overtly disregards common indicia of sovereignty."[154] With respect to all other zones of sovereignty, in contrast, the Court's long-standing precedent makes clear that territories can and do possess and exercise inherent aspects of sovereignty, as defined for equal sovereignty purposes.

For example, the Court has recognized that Puerto Rico possesses "control over the organization of the local affairs of the island,"[155] including the authority to "elect[] its Governor and legislature; appoint[] its judges, all cabinet officials, and lesser officials in the executive branch; set[] its own educational policies; determine[] its own budget; and amend[] its own civil and criminal code."[156] In light of Puerto Rico's status as "an autonomous political entity, 'sovereign over matters not ruled by the Constitution,'" the Supreme Court has held that the territory's exercise of its sovereign authority is "entitled to substantial deference."[157] Puerto Rico has also been treated as a state for purposes of sovereign immunity under the Eleventh Amendment,[158] and its entitlement to common law sovereign immunity is

151. *Sánchez Valle*, 136 S. Ct. at 1873. The decision relied on by the Court was handed down within the first decade of modern territorial administration. Grafton v. United States, 206 U.S. 333, 355 (1907). Given that the United States' continued territorial administration appears to violate a constitutional condition precedent to such administration—temporariness, described *infra* Section III.B.1—the controlling effect of this precedent deserves reevaluation.

152. *Sánchez Valle*, 136 S. Ct. at 1866; *see also* Lawson & Sloane, *supra* note 99, at 1127 (noting "Congress's evident disinclination to intervene in Puerto Rico's local affairs and the federal government's solicitude for Puerto Rico"); McCall, *supra* note 38, at 1371.

153. *See, e.g.*, *Sánchez Valle*, 136 S. Ct. at 1870.

154. *Id.*

155. Examining Bd. of Engineers, Architects and Surveyors v. Flores de Otero, 426 U.S. 572, 597 (1976).

156. *Id.* at 594.

157. Rodriguez v. Popular Democratic Party, 457 U.S. 1, 8 (1982).

158. *See* Metcalf & Eddy, Inc. v. P.R. Aqueduct & Sewer Auth., 991 F.2d 935, 943 n.1 (1st Cir. 1993) (holding Puerto Rico subject to the Eleventh Amendment), *rev'd on other grounds*, 506 U.S. 139 (1993) (not opining on the Eleventh Amendment issue); Ezratty v. Puerto Rico, 648 F.2d 770, 776 n.7 (1st Cir. 1981) ("The principles of the Eleventh

well established.[159] And, even in its recent decision upholding the exemption of members of the Financial Oversight and Management Board (FOMB) for Puerto Rico from the Senate confirmation requirement of the Appointments Clause, the Supreme Court took care to explain why the FOMB's prescribed appointment procedure did not "work havoc with Puerto Rico's (federally ratified) democratic methods for selecting many of its officials."[160]

Though much of the territorial case law to reach the Supreme Court has concerned the sovereign functions of Puerto Rico, the situation of other territories, as recognized by Congress and the federal judiciary, evinces a similar federal respect for and intent to allow the territories' exercise of sovereign functions. For example, the Supreme Court has held that Congress intended for the territories to be treated like the states for purposes of 42 U.S.C. § 1983.[161] And, over time, Congress has increasingly recognized territorial authority over internal self-governance. The Organic Act of the Virgin Islands created the "trappings of . . . sovereignty"[162] for the territory, including the right to establish and operate a judicial system "as if it were a state court system"[163] and the "'inherent' power to investigate as a necessary incident to [the] power to legislate."[164] Similarly, Congress recently clarified Guam's authority to establish and operate its own judicial system,[165] and the Covenant of the Commonwealth of the Northern Mariana Islands reserves to the territory authority over local governance.[166]

The territories' exercise of these sovereign functions implicates the notion of sovereignty at the heart of the equal sovereignty doctrine. Despite their non-state status, the territories wield final decision-making authority over a wide array of their internal functions that have been insulated from the disruption of federal second-guessing.[167] The constitutional justifications underlying the equal

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Amendment, which protect a state from suit without its consent, are fully applicable to the Commonwealth of Puerto Rico.").

159. *See* People of Porto Rico v. Rosaly y Castillo, 227 U.S. 270, 273–74 (1913); *see also* Adam D. Chandler, Comment, *Puerto Rico's Eleventh Amendment Status Anxiety*, 120 YALE L.J. 2183, 2187–88 (2011).

160. Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Investments, 140 S. Ct. 1649, 1661 (2020); *see also id.* at 1667 (describing the expansiveness of Congress's delegation of authority to territorial governments).

161. Ngiraingas v. Sanchez, 495 U.S. 182, 183 (1990).

162. People of the V.I. v. Clarke, 53 V.I. 183, 199 (Super. Ct. 2010).

163. Balboni v. Ranger Am. of the V.I., Inc., 70 V.I. 1048, 1081 (2019).

164. *In re* Fin. Comm. of Legislature, 242 F.2d 902, 905–06 (3d Cir. 1957).

165. Campbell, *supra* note 127, at 1923–26.

166. John M. Van Dyke, *The Evolving Legal Relationships Between the United States and Its Affiliated U.S.-Flag Islands*, 14 HAW. L. REV. 445, 481–83 (1992).

167. *Id.* at 447.

sovereignty doctrine make clear that the doctrine operates to prevent *unwarranted* infringements on sovereignty.[168] Territories' practical and judicially sanctioned sovereignty should thus bring the territories within equal sovereignty's protective shelter.

2. Reconstructed Sovereignty

The effect of Reconstruction on notions of state versus federal sovereignty vis-à-vis the people suggests an alternative way to derive a territorial application of the equal sovereignty principle. This derivation takes seriously Thomas Colby's suggestion that Reconstruction fundamentally changed the sovereign body with which the equal sovereignty principle is concerned.[169]

According to at least one scholar, *Shelby County*'s "invocation of dignity is meant to evoke a pre-democratic idea of the dignity of the sovereign, an idea that predates the modern conceptions of human dignity that are now so central to the constitutional law and jurisprudence of many nations and international bodies."[170] But, as many scholars have observed, the Reconstruction Amendments fundamentally transformed this concept of "state equality," and it is no longer valid.[171] To understand the significance of this transformation, it is necessary to briefly summarize pre–Civil War conceptions of state equality.

James Blacksher and Lani Guinier have described how the proslavery theory of state equality, as articulated in *Dred Scott v. Sandford*, reflected notions of confederation, in which states "have the same rights of sovereignty, freedom, and independence, as other States."[172] Defining state equality in this way enabled the Supreme Court to limit the Privileges and Immunities Clause of the Constitution to whites, and to forever exclude free and enslaved Black people from constitutional citizenship.[173] Essential to this definition was Chief Justice Taney's distinction between rights conferred by virtue of citizenship with a state, and rights conferred by membership of the Union.[174] Taney equated "member of the Union" with "citizen of

168. *See supra* notes 67–69.

169. Colby, *supra* note 31, at 1168 (observing that Reconstruction "alter[ed] the federalist system to prioritize" equal sovereignty of the people over the equal sovereignty of the states).

170. Joseph Fishkin, *The Dignity of the South*, 123 YALE L.J. ONLINE 175, 176 (2013).

171. Kanwar, *supra* note 33, at 284; Schmitt, *supra* note 31, at 239.

172. Blacksher & Guinier, *supra* note 30, at 45 (citing Dred Scott v. Sandford, 60 U.S. 393, 433 (1857) (enslaved person)); see *infra* Section III.B.1 for additional context and criticism of *Dred Scott*.

173. *Id.* at 46–47.

174. *Id.* at 48 (quoting *Dred Scott*, 60 U.S. at 405).

the United States," and explained that only people who "formed the sovereignty and framed the Constitution" were entitled to this membership.[175] Critically, Congress had no power to expand this definition of the sovereign people;[176] the definition of the sovereign people was static. Although each state could, in the exercise of its sovereignty, grant rights and privileges to its citizens—both Black and white—other states, in their sovereignty, were not bound to recognize them.[177]

The Reconstruction Amendments directly repudiated both this reasoning and the antebellum Court's endorsement of the supremacy of state sovereignty.[178] Thus, to many, the Supreme Court's pronouncement in *Shelby County* of a "fundamental" principle of equal sovereignty among the states constituted negligent disregard of this history. As Reva Siegel aptly observed soon after the Court rendered its opinion, "[t]o begin interpretation of the Civil War Amendments with a demand that Congress justify departures from equal sovereignty effaces the history of the Civil War and the Second Reconstruction."[179]

Interpretations of the direction and extent of the Reconstruction transformation vary but are unified by their focus on the changed situation of individuals relative to their sovereigns.[180] At one extreme, Jeffrey Schmitt has interpreted the Reconstruction Amendments as authorizing Congress to limit state sovereignty "only . . . when its actions are sufficiently related to the protection of individual rights."[181] In this model, equal sovereignty prevents Congress from intruding into states' local legislative, executive, and judicial affairs unless a state has failed to prevent or has facilitated the violation of individual rights.[182] In addition to the narrow sphere of action, any such congressional intrusions must be minimal in kind: not narrowly tailored, necessarily, but "sufficiently related" to their legislative purpose.[183]

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175. *Id.* (quoting *Dred Scott*, 60 U.S. at 405).

176. *See id.* at 49.

177. *See id.*

178. *See, e.g.*, Akhil Reed Amar, *Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 105 (2000) (describing the Fourteenth Amendment as written to overrule *Dred Scott*); Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 435 (2011); Christopher A. Bracey, *Dignity in Race Jurisprudence*, 7 U. PA. J. CONST. L. 669, 689 (2005); Sam Erman, Book Review, *Truer U.S. History: Race, Borders, and Status Manipulation*, 130 YALE L.J. 1188, 1222 (2021) (reviewing DANIEL IMMERWAHR, HOW TO HIDE AN EMPIRE: A HISTORY OF THE GREATER UNITED STATES (2019)); Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 62–64 (2019).

179. Siegel, *supra* note 32, at 71.

180. *E.g.*, Bruce Ackerman, *We the People: Foundations*, 29 HARV. J. ON LEGIS. 581, 582 (1992).

181. Schmitt, *supra* note 31, at 249.

182. *Id.*

183. *Id.* at 213.

At the other end of the spectrum, Vik Kanwar describes the Reconstruction Amendments as "[a]mending" the operative understanding of the Tenth Amendment, thereby abridging the unenumerated powers reserved to the states.[184] Kanwar argues that the Amendments effectively transferred a reserved power from the states to Congress and replaced it with federal supremacy in the sphere of protecting individual rights.[185]

Bridging the gap between these visions of Reconstructed sovereignty lies the interpretation Akhil Amar (among others) advances, which interprets the Reconstruction Amendments as settling the Federalist/anti-Federalist debate—about the balance of sovereignty between the people and the states—in favor of the Federalists.[186] Under the Federalist conception, "the states and federal government derive[] their sovereignty from different sources"[187] whereas the people "conferred sovereign power on the federal government and placed limitations on the sovereignty of the states"[188] via the ratification of the Constitution, the citizens of "each state granted power to the state governments, and when doing so, they had an equal right to determine the amount of sovereignty granted."[189] Colby interprets Reconstruction to have "alter[ed] the federalist system to prioritize" the equal sovereignty of the people over the equal sovereignty of the states.[190] Concurrently, Amar has observed that Reconstruction engendered a broadening conception of the people who exercise sovereignty, extending beyond the class of "political rights holders" to encompass politically disempowered groups.[191]

Under any of these theories, state sovereignty after Reconstruction is of a different kind than state sovereignty before the Civil War. In particular, scholars largely agree that the purpose of the Reconstruction Amendments was to diminish, if not destroy, the tradition of equal sovereignty among the states on which Chief Justice Taney relied in *Dred Scott*.[192] In its place arose a new perspective on dual

184. Kanwar, *supra* note 33, at 286.

185. *Id.* at 286; *cf.* Gregory Ablavsky, *Empire States: The Coming Age of Dual Federalism*, 128 YALE L.J. 1792, 1809 (2019) (discussing the post-Reconstruction expansion of federal sovereignty over Native peoples).

186. Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1429 (1987); Colby, *supra* note 31, at 1168; Schmitt, *supra* note 31, at 242; *see also* James W. Fox, Jr., *Citizenship, Poverty, and Federalism*, 60 U. PITT. L. REV. 421, 486 (describing the Amendments' effects on citizenship and its relationship to sovereignty).

187. Schmitt, *supra* note 31, at 242.

188. *Id.*

189. *Id.*

190. Colby, *supra* note 31, at 1168.

191. Akhil Reed Amar, *Reconstructing Rights*, *in* THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 231, 245 (1998).

192. Kanwar, *supra* note 33, at 279–80, 283–84.

sovereignty that emphasized federal sovereignty and its source within the newly expanded definition of "the people" of the United States.[193]

This understanding of post-Reconstruction sovereignty suggests a derivation of equal territorial sovereignty arising from the territories' shared representation among the people of the United States, who give life to both federal and state sovereignty. Reconstruction did not annihilate all claims to sovereignty from sub-federal entities; instead, Reconstruction emphasizes the people as the source of both state and federal sovereignty. A corollary to the interpretation of Reconstruction as deprioritizing state sovereignty in favor of national sovereignty, or sovereignty derived from the people, recognizes that the membership of the sovereignty-bestowing group retains the power to bestow national and local sovereignty. U.S. citizen-residents of territories contribute to the conferral of sovereignty on the national government and also confer sovereignty on their territorial governments.[194] Insofar as equal sovereignty is concerned about respecting the hierarchical relationship between sovereign entities and the people who grant them sovereignty,[195] or the distinction between sovereigns in a system of joint sovereignty, the post-Reconstruction conception of sovereignty encompasses both territorial sovereignty and state sovereignty.

III. TRANSGRESSING SOVEREIGNTY

Deriving a territorial application of the equal sovereignty principle does not fully demarcate the scope of the principle's territorial application. *Shelby County* explains that "federal intrusion into sensitive areas of state and local policymaking" that "represents an 'extraordinary departure from the traditional course of relations between the States and the Federal Government'" presumptively violates the principle, but the opinion does not enumerate the full set of violative "federal intrusions."[196]

At first glance, the field of federal legislation appears to be fertile ground for deploying equal sovereignty to target territorial discrimination. Myriad federal statutes subject the territories to discriminatory treatment.[197] Some of these discriminatory statutes

193. Colby, *supra* note 31, at 1168.

194. *See* Puerto Rico, 136 S. Ct. 1863, 1869 (2016) (describing the sovereignty of the people of Puerto Rico); Lawson & Sloane, *supra* note 99, at 1178–79.

195. *See supra* notes 106–07 and accompanying text.

196. *Shelby Cnty.*, 570 U.S. at 545 (2013).

197. *See, e.g.*, GOV'T ACCOUNTABILITY OFF., PUERTO RICO: REPORT ON HOW STATEHOOD WOULD POTENTIALLY AFFECT SELECTED FEDERAL PROGRAMS AND REVENUE SOURCES (Mar. 4, 2014) [hereinafter GAO REPORT], https://www.gao.gov/assets/670/661334.pdf

surely constitute impermissible "federal intrusions" into territorial sovereignty, against which a territorial application of the equal sovereignty principle could provide a meaningful weapon. Critically, however, only legislative infringements of sovereignty that are not "sufficiently related to the problem" they target violate the equal sovereignty principle.[198] Thus, not all infringements of territories' sovereignty necessarily contravene the principle.[199]

To understand which kinds of federal intrusions impermissibly infringe on territorial sovereignty and violate the equal sovereignty principle, it is first necessary to account for the sovereign interests that equal sovereignty protects. Section A identifies two significant areas where a territorial application of the equal sovereignty principle could be employed to challenge territorial discrimination: public healthcare and democratic participation. I argue that the territories have significant sovereign interests in each of these areas, and describe how the federal-territorial relationship in these spheres is characterized by discrimination that infringes on territorial sovereignty.

Even beyond the principle's application to legislative action, however, lies the question of its application to federal governmental inaction. Can the federal government infringe sovereignty by omission, procrastination, or sandbagging? This question has gone unanswered in the equal sovereignty literature, where the assumption that the federal government transgresses the equal sovereignty principle via expansive, affirmative acts underlies discourse on equal sovereignty's practical implications.[200] Section III.B explores the questions of whether the political branches can transgress the principle by inaction or whether the principle imposes affirmative obligations on Congress or the Executive Branch to act by examining a uniquely territorial sovereign interest. I argue that the relationship between equal sovereignty and equal footing in the context of U.S. territories represents a special case of sovereign infringement by the federal government.

[https://perma.cc/3SSJ-TDN3] (discussing territorial discrimination in federal programs); *see supra* notes 6–11.

198. Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 203 (2009).

199. Different scholars interpret the principle's protective scope differently. Jeffrey Schmitt has argued that the principle only prohibits congressional action that discriminatorily limits the political power of a subset of states. Schmitt, *supra* note 31, at 220. Thomas Colby has suggested a broader application, encompassing congressional action that curtails the revenue-raising authority. Colby, *supra* note 31, at 1155. Even for congressional action that infringes sovereignty, however, scholars agree that "sufficient" relation to a valid legislative objective can validate the infringement. *Id.*; Price, *supra* note 45, at 26.

200. *See, e.g.*, Litman, *supra* note 31, at 1213, 1252; Colby, *supra* note 31, at 1153.

The focus of this Part is largely theoretical, although I confine my discussion to the sovereign interests that are most practically relevant to a territorial application of the equal sovereignty principle. Subsequent parts will explore how to operationalize the equal sovereignty doctrine to vindicate these sovereign interests and discuss the normative benefits of using equal sovereignty as an affirmative tool.

A. Sovereign Interests and Federal Intrusions

Legislation and administrative regulations that apply differentially based on geography do not necessarily fall within the ambit of the equal sovereignty doctrine. Instead, "[r]egulating individuals differently in different states implicates the equal sovereignty principle only when it has the effect—in conjunction with the Supremacy Clause—of limiting the sovereign authority of some states, but not others."[201] As outlined in Part I, equal sovereignty prohibits legislation that discriminatorily impairs sovereign prerogatives without sufficient justification.[202]

Before addressing whether a particular federal intrusion into sovereignty is (un)constitutional, it is essential to delineate the sovereign interests eligible for protection. Case law helps to define the universe of states and territories' sovereign interests. Within this universe of sovereignty, the equal sovereignty doctrine prohibits only unwarranted legislative infringements, and permits intrusions that are sufficiently related to a problem Congress may constitutionally seek to rectify.[203]

In *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, the Supreme Court explained that states and territories have sovereign interests, quasi-sovereign interests, and non-sovereign interests.[204] Non-sovereign interests are the most easily defined, and encompass proprietary interests and private interests.[205] Purely sovereign interests—though a bit more amorphous, according to *Snapp*—encompass the sovereign's interest in its existence as a sovereign, including the power to make

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201. *See* Colby, *supra* note 31, at 1153.

202. *See supra* notes 63–64 and accompanying text.

203. *See* Colby, *supra* note 31, at 1093.

204. *See* 458 U.S. 592, 601–02 (1982).

205. *Id.* ("A State may, for example, own land or participate in a business venture. As a proprietor, it is likely to have the same interests as other similarly situated proprietors . . . . Second, a State may . . . pursue the interests of a private party, and pursue those interests only for the sake of the real party in interest. Interests of private parties are obviously not in themselves sovereign interests, and they do not become such simply by virtue of the State's aiding in their achievement.").

laws and be recognized as sovereign.[206] Finally, the Court explained that it could present "neither an exhaustive formal definition nor a definitive list of qualifying [quasi-sovereign] interests," but nevertheless identified them as falling in "two general categories"—"[f]irst, a State has a quasi-sovereign interest in the health and well-being—both physical and economic of its residents in general. Second, a State has a quasi-sovereign interest in not being discriminatorily denied its rightful status within the federal system."[207]

Quasi-sovereign interests, according to *Snapp*'s definition, fall within this Article's definition of "sovereign interests," because they accrue uniquely to sovereign entities.[208] In effect, *Snapp*'s distinction between sovereign and quasi-sovereign interests recognizes that sovereign entities have inherent interests—those that pertain to the entity's sovereign existence—and functional interests—those that pertain to the entity's sovereign functioning. Equal sovereignty is concerned with the protection of both purely sovereign and quasi-sovereign interests;[209] henceforth, I will refer to the universe of these interests as "sovereign interests" without accounting for the distinctions between the two.

Without necessarily considering their internal gradations, scholars have considered which types of sovereign interests are likely to implicate (or not) the equal sovereignty principle. Zachary Price has cited the treatment of federal property as an example of congressional legislation whose geographic differentiation (if any) was presumed—pre–*Shelby County*—to trigger only rational basis review.[210] Even after *Shelby County*, this type of legislation remains unlikely to implicate the equal sovereignty doctrine because it is not clear how it infringes on state sovereignty, let along constitutes an unwarranted infringement.[211] It is hard to see how the federal government's treatment of its property could impinge on states' interest in their own sovereign existence, their ability to make laws, or the health and welfare of their citizens.

An example of a law at the other end of the spectrum would have been the Professional and Amateur Sports Protection Act (PASPA),[212] which prohibited all states but Nevada from authorizing

206. *Id.* at 601.

207. Although *Snapp* repeatedly refers to "states," its holding applies the opinion's reasoning to Puerto Rico, a territory. *Id.* at 607.

208. *See id.* at 593.

209. *See infra* Sections I.C and II.B.1–2.

210. *See* Price, *supra* note 45, at 28–29.

211. *See* Schmitt, *supra* note 31, at 220–21.

212. *See, e.g.*, Ryan M. Rodenberg & John T. Holden, *Sports Betting Has an Equal Sovereignty Problem*, 67 DUKE L.J. ONLINE 1, 5–7, 16–17 (2017); Michael Welsh, Note,

and regulating certain sports gambling.[213] Here, in contrast to the federal property example, states clearly have a purely sovereign interest in their ability to make laws and regulations. By removing a particular type of regulation from states' regulatory toolkit, Congress directly abrogated states' sovereign interest in lawmaking. Consequently, under *Shelby County*'s construction of the doctrine, PASPA should have triggered equal-sovereignty scrutiny if it had not been struck down on alternate grounds.[214]

But in between these obvious examples of laws that infringe (or not) on states and territories' sovereign interests lies a plethora of federal laws that distinguish between them, which more or less obviously suggest their vulnerability to an equal-sovereignty attack. Given this multitude, determining whether a particular law violates equal sovereignty will always be a context-specific inquiry.[215] This Section discusses two areas of legislative policy where states and territories possess clear sovereign interests: public healthcare and democratic participation and representation.

1. Public Healthcare

Traditionally, health law existed within the sphere of private and local law.[216] Over time, health law has been federalized, first with the passage of Medicare and Medicaid and more recently with the passage of the Affordable Care Act (ACA).[217] But despite the increasingly national scope of health *law*, health care and health policy remain a largely local endeavor.[218] Indeed, despite Justice Ginsburg's conviction that health policy is an area of federal concern,[219] Chief

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Betting on State Equality, 55 B.C. L. REV. 1009, 1010, 1013 (2014); NCAA v. Governor of N.J., 730 F.3d 208, 214, 238–39 (3d Cir. 2018).

213. *See* Murphy v. NCAA, 138 S. Ct. 1461, 1485 (2018). Although New Jersey made an equal-sovereignty argument, the Supreme Court ultimately invalidated the statute under the anticommandeering doctrine.

214. *See id.* Indeed, the Third Circuit undertook the equal-sovereignty analysis before ultimately concluding that the limitations PASPA imposed were "sufficiently justified" in light of congressional purpose. *See NCAA*, 730 F.3d, at 225, 227. Scholars have criticized the Third Circuit's equal-sovereignty analysis. *See, e.g.*, Rodenberg & Holden, *supra* note 212, at 24, 33, 37; Welsh, *supra* note 212, at 1026–27, 1030.

215. *See Shelby Cnty.*, 570 U.S. 529, 542, 547–48 (2013) (indicating that this inquiry is circumstance-specific and fact-intensive, and relying on the legislative history of the VRA inform the Court's analysis of whether the "current burden[]" on state sovereignty is "justified by current needs").

216. Abbe R. Gluck, *Symposium Issue Introduction: The Law of Medicare and Medicaid at Fifty*, 15 YALE J. HEALTH POL'Y L. & ETHICS 1, 1 (2015); *see also* Nat'l Fed'n of Indep. Bus. v. Sebelius (NFIB), 567 U.S. 519, 680 (Scalia, J., dissenting) (describing health policy as an "area[] traditionally governed primarily at the state or local level").

217. Gluck, *supra* note 216, at 1–2.

218. *See infra* notes 237–39 and accompanying text.

219. *See NFIB*, 567 U.S. at 621 (Ginsburg, J., concurring in the judgment and dissenting in part) (describing health policy as an area of federal concern).

Justice Roberts—who provided the crucial fifth vote to uphold the ACA in *NFIB v. Sebelius*, the first significant challenge to the health care law—was unwilling to recognize congressional authority under the Commerce Clause to regulate health care and health policy within the states.[220] The Justices who dissented in *NFIB*—who would have struck down the ACA entirely—shared the Chief Justice's view.[221]

Today, the United States relies on a fractured system to administer health services and implement health policy, involving the federal government, state and territorial governments, and private parties. Although federal statutes provide health law's governing backbone,[222] state and territorial governments control day-to-day (and arguably year-to-year and decade-to-decade planning for) healthcare administration and control health policy for their jurisdictions.[223] And even though the federal government largely does not make direct decisions about local healthcare administration and policy priorities, federal decisions on Medicare and Medicaid funding indirectly influence the daily, yearly, and decadal planning of local health administrators.[224]

Medicare and Medicaid are two of the three largest federal budget expenditures every year; the other largest expenditure is Social Security.[225] Medicaid is particularly significant because of how it interacts with state and territorial budgetary administration. In effect, the federal government contributes federal funds to "match" state and territorial governments' spending on Medicaid-qualifying health expenditures.[226] Because of this, Medicaid is both the largest expenditure and source of federal funds in state and territorial budgets.[227]

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220. *See id.* at 559 (opinion of Roberts, C.J.) (describing health policy as an area of state and local concern into which Congress could not venture under its Commerce Clause authority); *see also id.* at 573–74 (opinion of the Court) (upholding the individual mandate as a tax in part because it "does not give Congress the same degree of control over individual behavior").

221. *See, e.g.*, *id.* at 680 (Scalia, J., dissenting).

222. The most significant statutes in this field are the Medicare and Medicaid Act of 1965 and the ACA. Gluck, *supra* note 216, at 2.

223. *See, e.g.*, Sara R. Collins & Jeanne M. Lambrew, *Federalism, the Affordable Care Act, and Health Reform in the 2020 Election*, COMMONWEALTH FUND 1, 5 (July 2019); Abbe R. Gluck & Nicole Huberfeld, *What Is Federalism in Healthcare For?*, 70 STAN. L. REV. 1689, 1700–01 (2018).

224. *See* Collins & Lambrew, *supra* note 223, at 4.

225. *See* Andrew Hammond, *Litigating Welfare Rights: Medicaid, SNAP, and the Legacy of the New Property*, 115 NW. U. L. REV. 361, 367 (2020); *see also* Grant A. Driessen, *The Federal Budget: Overview and Issues for FY2019 and Beyond*, CONG. RES. SERV. 7-5700, 7 (2018).

226. Laura Snyder & Robin Rudowitz, Issue Brief, *Medicaid Financing: How Does It Work and What Are the Implications?*, KAISER FAMILY FOUND. 1, 1 (May 2015). The mechanics of this matching program are complex, and this Article addresses some of the relevant complexities *infra* notes 237–39 and accompanying text.

227. Snyder & Rudowitz, *supra* note 226, at 6.

Critically, states and territories set local health policy and administer their healthcare systems with reference to the matching federal funds that will be made available by their policy-driven health expenditures.[228] For example, a temporary increase in the federal match rate may motivate a state or territorial health department to accelerate planned investments in healthcare infrastructure to take advantage of the time-limited increase in available funding.[229] Conversely, a temporary increase in the federal match rate for the purpose of temporarily expanding Medicaid eligibility—enacted by Congress to respond, for instance, to a natural disaster or nationwide economic downturn—may have a muted effect on a state or territory's Medicaid eligibility criteria if the local health administration is concerned about its (in)ability to maintain the more generous eligibility threshold after the temporary increase in federal funding expires.[230] Sometimes, states and territories do not even use increased federal Medicaid funding for healthcare expenditures, instead diverting the funds towards more urgent governmental obligations.[231]

Because of the way Medicaid drives state and territorial decisions about healthcare administration and beyond, Medicaid funding affects state and territorial sovereignty. The Supreme Court has recognized the centrality of Medicaid funding to state and territorial administration,[232] noting that, in reliance on federal Medicaid matching, "States have developed intricate statutory and administrative regimes over the course of many decades to implement their objectives."[233] Public healthcare is thus an area of state and territorial sovereign interest into which Congress has intruded by enactment and administration of the Medicaid program. And, critically for

228. WTJX V.I. PUB. BROAD. SYS., *AARP-VI in Conversation with Michal Rhymer-Browne, Assistant Comm'r of the U.S. Virgin Islands Department of Human Services, in St. Thomas, USVI*, FACEBOOK (May 5, 2021) [hereinafter *Interview with Michal Rhymer-Browne*], https://www.facebook.com/wtjx/videos/186643676701313/#_=_ [https://perma.cc/DHD3-KDAR].

229. *Id.*

230. *Id.*; SHADOW CITIZENS, *supra* note 12, at 22.

231. *See* SHADOW CITIZENS, *supra* note 12, at 23 ("[I]n 2014, the Territory accessed several million dollars in retroactive Medicaid payments that the Virgin Islands Government intended to put towards expanding health insurance and mental health care to those most in need. However, of the $4 million allocated to the Juan F. Luis Hospital on St. Croix, a staggering $1.5 million was immediately diverted to the Virgin Islands Water and Power Authority (WAPA) in order to reduce the facility's "severely past due accounts.").

232. *See NFIB*, 567 U.S. at 581 ("A State that opts out of the Affordable Care Act's expansion in health care coverage thus stands to lose not merely 'a relatively small percentage' of its existing Medicaid funding, but *all* of it. Medicaid spending accounts for over 20 percent of the average State's total budget, with federal funds covering 50 to 83 percent of those costs." (emphasis in original)).

233. *Id.*

purposes of this Article, Congress's intrusion into this sphere treats the states and territories differently, in a manner that I contend violates equal territorial sovereignty.

Medicaid differentiates between the states by allocating matching federal funds to states at different rates, based on their different per capita incomes.[234] However, this differentiation does not violate *states'* equal sovereignty because the state differentiation arises from the application of a neutral formula to states whose underlying circumstances differ.[235] However, this kind of differentiation is quite unlike the manner in which Medicaid differentiates between states and territories.[236] For example, the territorial match rate[237] does not depend on territorial residents' capita income—as it does in states—and is significantly lower than the match rate enjoyed by the nearest comparator state.[238] Moreover, the total amount of federal Medicaid funding each territory can receive is fixed at an arbitrary cap; otherwise-qualifying spending above the cap will not receive matching federal funds.[239] The federal Medicaid funding States are eligible to receive is not subject to any cap.[240]

The Medicaid statute imposes these detrimental, sovereignty-reducing conditions on the territories alone, solely based on their territorial status.[241] Whereas states' different treatment under the Medicaid statute arises from the application of a geography-neutral rule within the Medicaid statute, the territories' differential treatment arises from statutory provisions that discriminate based on

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234. *See* John Holahan & David Liska, *Variations in Medicaid Spending Among States*, URB. INST., Series A: A-3, 1,1 (Jan. 1997).

235. Cornelia Hall, Robin Rudowitz & Kathleen Gifford, *Medicaid in the Territories: Program Features, Challenges, and Changes*, KAISER FAMILY FOUND. 1, 3 (Jan. 2019); ALISON MITCHELL, CONG. RSCH. SERV., MEDICAID FINANCING FOR THE TERRITORIES 1 (May 27, 2020).

236. *See* Andrew Hammond, *Territorial Exceptionalism and the American Welfare State*, 119 MICH. L. REV. 1639, 1666–69 (2021).

237. Medicaid-qualifying spending by territories and states is matched by federal funding at a specified "match rate." A match rate of 50 percent means that for every qualifying $1 spent by a state or territory, the federal government contributes $1. *See Federal Medical Assistance Percentage (FMAP) for Medicaid and Multiplier*, KAISER FAMILY FOUND., https://www.kff.org/medicaid/state-indicator/federal-matching-rate-and-multiplier [https://perma.cc/5DDT-RMUK] (last visited Jan. 27, 2023).

238. SHADOW CITIZENS, *supra* note 12, at 14–15 (noting that the poorest U.S. state (Mississippi) has a Medicaid match rate of 74.17 percent whereas the territories have a match rate of 55 percent).

239. *Id.* at 15–16.

240. *See* Rachel Garfield, Elizabeth Hinton, Robin Rudowitz & Elizabeth Williams, *Medicaid Financing: The Basics*, KAISER FAMILY FOUND. 1 (May 7, 2021), https://www.kff.org/medicaid/issue-brief/medicaid-financing-the-basics [https://perma.cc/JGP6-6JYR].

241. *See* MITCHELL, *supra* note 235, at 1.

geography alone.[242] For this discrimination to comply with the principle of equal territorial sovereignty, it must be "sufficiently related" to the problem Congress sought to address in enacting the statute.[243] As I argue *infra* Section IV.A.2.a, the rationale behind territorial discrimination in the Medicaid statute falls short of this standard.

2. Democratic Participation

In the U.S. system of dual sovereignty, the federal legislative body represents the people, not the states.[244] It is uncontroversial that "[t]he right to vote and to equal political participation is pivotal to our constitutional system, if not democracy itself. The notions of political legitimacy and the consent of the governed are basic pillars of our system of government and are deeply rooted in our Nation's history."[245] Because of this, the people of the United States have an interest in their democratic participation and republican representation.

But, in addition to the people's interest in participatory democracy and federal representation, the subordinate sovereigns in our dual-sovereignty system also possess a sovereign interest in the representative democracy of the superior sovereign. States and territories have a purely sovereign interest in the United States' recognition of their sovereignty,[246] as well as quasi-sovereign interests in their situation within the federal system and in ensuring the representation of their people. Specifically, *Snapp* identified the phenomenon of "not being discriminatorily denied [a state or territory's] rightful status within the federal system" as a quasi-sovereign interest.[247] In addition, I argue that the second type of quasi-sovereign interest identified in *Snapp*—"the health and well-being—both physical and economic—of its residents in general"[248]—encompasses residents' capacity to participate in representative democracy.

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242. GAO REPORT, *supra* note 197, at 2–3.

243. *See* Colby, *supra* note 31, at 1093, 1156, 1158.

244. *See supra* notes 180–91 and accompanying text.

245. Igartúa v. U.S., 86 F. Supp. 3d 50, 63–64 (D.P.R. 2015), *aff'd sub nom.* Igartúa v. Obama, 842 F.3d 149, 160 (1st Cir. 2016); *see also* Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886) ("[T]he political franchise of voting . . . is regarded as a fundamental political right, because preservative of all rights."); Reynolds v. Sims, 377 U.S. 533, 555 (1964) ("The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government.").

246. *See* Michael J. Kelly, *Quiescent Sovereignty of the U.S. Territories*, 105 MARQ. L. REV. 501, 539 (2022). This is to say: regardless of whether Congress recognizes territories as inferior sovereigns—analogous to states—or not, the territories have a sovereign interest in Congress's recognition or nonrecognition.

247. *Snapp & Son, Inc.*, 458 U.S. at 593.

248. *Id.*

At present, the territories are wholly excluded from meaningful participation in national representative democracy.[249] For example, even though Puerto Ricans elect a resident commissioner and residents of the other four territories each elect a territorial delegate who serve in the House of Representatives, none of the territorial representatives are entitled to vote on legislation[250] or other congressional actions such as articles of impeachment.[251] This disenfranchisement is one of the most significant obstacles to full equality for residents of territories. By denying U.S. citizens who reside in territories the right to elect *voting* congresspeople to represent their home districts, the federal government has impaired the individual interests of the U.S. citizens who reside in territories as well as the sovereign interests of the territorial governments themselves. Because this exclusion infringes on the territories' sovereign interest in their representation in the federal government, as well as their *parens patriae* interest in their citizens' capacity to engage in nationwide participatory democracy, their exclusion will violate the equal sovereignty principle if the exclusion is unwarranted. Section IV.A.2.b argues that this is exactly the case.

In describing this sovereign interest in democratic representation and participation, I focus on congressional representation for two reasons. First, unlike the President and Vice President, senators and congresspeople represent their home jurisdictions in Congress, rather than the entire country. This connection to a home jurisdiction creates a particularized accountability of the elected officials towards the people and jurisdiction they represent. In turn, these ties enable residents and the territorial government itself to influence the manner in which their locally elected officials engage with the federal legislative process.[252] For state and territorial governments, this representation structure creates an avenue to enforce their status within the federal system and to ensure that its sovereign interests are respected.

Second, even if the territories possess a sovereign interest in ensuring their people's participation in presidential elections,[253] the

249. *See* Torruella, *supra* note 23, at 67, 98.

250. *See* CHRISTOPHER M. DAVIS, CONG. RSCH. SERV, DELEGATES TO U.S. CONGRESS: HISTORY AND CURRENT STATUS 1, 6 (Aug. 25, 2015). Although delegates may participate on committees, they "may not vote when the House is meeting as the Committee of the Whole nor when the House is operating as the House of Representatives." *See id.* at summary.

251. *See* Brakkton Booker, *Stacey Plaskett Is 1st Nonvoting House Delegate To Argue An Impeachment Trial*, NPR (Feb. 10, 2021, 6:58 PM), https://www.npr.org/sections/trump-impeachment-trial-live-updates/2021/02/10/966551148/stacey-plaskett-is-first-non-voting-house-delegate-to-argue-an-impeachment-trial [https://perma.cc/CZP4-8K6J].

252. *See infra* note 412.

253. Because all citizens of the United States possess an interest in the electing the

text of the Constitution prescribes a mode of presidential election that appears to exclude territorial residents from participating, thereby precluding any territorial attempts to vindicate this particular sovereign interest.[254] I do not discount the possibility that this bar may be surmountable, but, for expository facility and concision, I restrict the focus of this Article to the more straightforward application of the equal-sovereignty principle to congressional representation.

B. Inaction as Transgression

As a special case of equal sovereignty,[255] equal footing protects a particularized right within equal sovereignty's general prohibition against unwarranted impairments of sovereignty.[256] By requiring Congress to admit new states on the same terms as already admitted states,[257] equal footing prevents existing states from granting admission to new states on lesser terms and thereby increasing the relative power of existing states at the expense of the new. In short, equal footing protects new states from admission as second-class sovereigns.[258] Violations of equal footing thus constitute violations of equal sovereignty for sovereigns to whom the equal sovereignty principle applies.

This observation should be unremarkable: it simply reframes the most recent equal footing decisions in light of the Court's relatively new articulation of equal sovereignty doctrine.[259] However, most contemporary judicial consideration of equal footing has focused on the doctrine's consequences for states after admission.[260] Part II's argument that the equal sovereignty principle applies to the U.S. territories opens a new frontier in equal footing's contemporary relevance. In particular, the theory suggests that a violation of the territories' equal footing right, if a right exists, would give rise to an equal sovereignty claim.[261] This Section outlines a framework for conceptualizing the political status of the U.S. territories as an ongoing equal footing violation. By violating the territories' right of equal footing

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president and vice president, who represent the people of the United States, the territories arguably possess a *parens patriae* interest in the election of president and vice president. *See supra* notes 206–07 and accompanying text.

254. *See infra* notes 412, 433–34 and accompanying text.

255. *See* Va. Off. for Prot. & Advoc. v. Stewart, 563 U.S. 247, 258 (2011).

256. *See* Colby, *supra* note 31, at 1111.

257. *See, e.g.*, *id.* at 1097.

258. *See supra* notes 109–10 and accompanying text.

259. *See supra* Section I.B.2.

260. *See, e.g.*, Herrera v. Wyoming, 139 S. Ct. 1686, 1693 (2019); Alaska v. United States, 545 U.S. 75, 79 (2005); Idaho v. United States, 533 U.S. 262, 273–74 (2001).

261. *See infra* Section IV.B.

and impeding their exercise of sovereign functions, I argue that the federal government has violated the equal sovereignty principle.

1. The Path to Statehood

During the Union's first century, American case law conceived of U.S. territorial dominion as temporary. In 1787, the Confederation Congress enacted the Northwest Ordinance to provide for the temporary governance of the Northwest Territory and, "also, for the establishment of States, and permanent government therein, and for their admission to a share in the Federal councils on an equal footing with the original States, at as early periods as may be consistent with the general interest."[262] This foundational promise of eventual statehood and subsequent Supreme Court decisions contributed to an early nineteenth-century norm that all newly acquired territories would eventually become states.[263]

In 1857, as dicta to the explicitly racist reasoning and conclusion that forms its heinous substantive core,[264] Chief Justice Taney's lengthy majority opinion in *Dred Scott* expounded the history of—and prevailing scholarly, political, and doctrinal consensus regarding—the relationship of territories with the United States.[265] In doing so, the opinion incorporated the norm of territorial progression to statehood into constitutional doctrine. Even as it acknowledged Congress's constitutional authority to acquire new territory, the Court limited this power to acquiring "territory, not fit for admission at the time, but to be admitted as soon as its population and situation would entitle it to admission. It is acquired to become a State, and not to be held as a colony and governed by Congress with absolute authority."[266] The Court explained that a power to "obtain and hold colonies and dependent territories, over which [the federal government] might legislate without restriction, would be inconsistent with its own existence in its present form."[267] Furthermore, Congress's power over the people and property in territories

262. NORTHWEST ORDINANCE § 13.

263. ERMAN, *supra* note 1, at 11. In 1828, the Supreme Court held that the Constitution gives Congress the power to acquire, as well as govern, new territory. Am. Ins. Co. v. 356 Bales of Cotton, 26 U.S. (1 Pet.) 511, 541–42 (1828).

264. As an object of constitutional doctrine, *Dred Scott* is rightly overturned and repudiated; as a historical recording evidencing the majority perspective on the legal status of U.S. territories, however, its dicta can be instructive. *See* ERMAN, *supra* note 1, at 11.

265. Dred Scott v. Sandford, 60 U.S. 393, 403–49 (1857) (enslaved party).

266. *Id.* at 447.

267. *Id.* at 448.

> can never be a mere discretionary power under our Constitution . . . . The powers of the Government and the rights and privileges of the citizen are regulated and plainly defined by the Constitution itself. And when the Territory becomes a part of the United States, the Federal Government . . . enters upon it with its powers over the citizen strictly defined, and limited by the Constitution, from which it derives its own existence, and by virtue of which alone it continues to exist and act as a Government and sovereignty.[268]

The doctrine of territorial progression to statehood and the assumption that the Constitution applied in full force in U.S. territories governed the relationship between the United States and its territories throughout the latter half of the eighteenth century.[269] The Reconstruction Amendments reinforced this doctrine by seemingly "making citizenship, rights, and eventual statehood prerequisites to any annexation."[270]

In 1898, against this constitutional backdrop, the United States acquired the first of the inhabited territories that remain territories today: Puerto Rico and Guam.[271] Many scholars have already examined *how* the United States managed to evade what was, until 1898, seemingly settled doctrine.[272] For purposes of this Article, it suffices to note that, in the *Insular Cases*, the Supreme Court upended heretofore settled doctrine by inventing a distinction between "incorporated" and "unincorporated" territories. Under the territorial incorporation doctrine, only constitutional rights deemed "fundamental" automatically apply in unincorporated territories.[273] However, even as the

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268. *Id.* at 449.

269. *E.g.*, Christina Duffy Burnett, *Untied States: American Expansion and Territorial Deannexation*, 72 U. CHI. L. REV. 797, 799 (2005); ERMAN, *supra* note 1, at 11.

270. ERMAN, *supra* note 1, at 8.

271. The *Harvard Law Review* and *Yale Law Journal* published a series of articles soon after the 1898 acquisitions in which leading scholars debated how the United States could escape this constitutional obligation and govern its newly acquired territories without extending their citizens full and equal constitutional rights. *See, e.g.*, Abbott Lawrence Lowell, *The Status of Our New Possessions—A Third View*, 13 HARV. L. REV. 155, 176 (1899); Christopher Columbus Langdell, *The Status of Our New Territories*, 12 HARV. L. REV. 365, 391–92 (1899); Simeon E. Baldwin, *The People of the United States*, 8 YALE L.J. 159, 166–67 (1899); *see also Developments in the Law*, *supra* note 19, at 1617–19 (reflecting on this legacy). Lowell's argument formed the basis of the resulting doctrine.

272. *See, e.g.*, ERMAN, *supra* note 1, at 11; Duffy Burnett, *supra* note 269, at 801–02; Torruella, *supra* note 6, at 58–59; Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 7–8, 209–14 (2002); *see also supra* notes 129–32 and accompanying text.

273. Torruella, *supra* note 6, at 74. At various times, the Court has held nonfundamental rights to include birthright citizenship, Gonzales v. Williams, 192 U.S. 1, 13 (1904), and the right to a trial by jury, Balzac v. Porto Rico, 258 U.S. 298, 303–05 (1922); Commw. of N. Mar. I. v. Atalig, 723 F.2d 682, 688 (9th Cir. 1984); King v. Morton, 520 F.2d 1140,

Court held that Congress possessed plenary authority to govern unincorporated U.S. territories "with wholly dissimilar traditions and institutions,"[274] it nevertheless recognized this authority as temporary.[275]

2. Waiting for Incorporation

When it held the former Spanish territories to be "unincorporated"—a status later applied to American Samoa, the U.S. Virgin Islands, and the Commonwealth of the Northern Mariana Islands—the Supreme Court suggested that incorporation would follow unincorporation.[276] The Court justified unincorporation as temporarily necessary to allow the acclimation of territorial residents to the American system.[277] Unincorporation was thus perceived as a step on the path to incorporation, which itself "ha[d] always been a step, and an important one, leading to statehood."[278] The only alternative to incorporation contemplated by the case law is deannexation, or dissolution of territorial relationship.[279] The Court held that when incorporation occurs, "it will be begun and taken by Congress deliberately,

1147 (D.C. Cir. 1975); *cf.* Gov't of the V.I. v. Bodle, 427 F.2d 532, 534 n.1 (3d Cir. 1970) (holding that the jury trial right has been established by Congress for the USVI).

274. Reid v. Covert, 354 U.S. 1, 14 (1957) (describing the *Insular Cases*); *see also* Blocher & Gulati, *supra* note 3, at 263; Torruella, *supra* note 6, at 74.

275. Dorr v. United States, 195 U.S. 138, 148 (1904) ("Congress has unquestionably full power to govern [a new territory]; and the people, except as Congress shall provide for, are not of right entitled to participate in political authority until the territory becomes a state. Meantime they are in a condition of temporary pupilage and dependence . . . ."); Downes v. Bidwell, 182 U.S. 244, 293 (1901) (White, J., concurring) (describing territories' "ephemeral nature"); *Downes*, 182 U.S. at 346 (Gray, J., concurring) ("[Congress] may establish a temporary government, which is not subject to all the restrictions of the Constitution."); *see also Balzac*, 258 U.S. at 305; Rassmussen v. United States, 197 U.S. 516, 532 (1905).

276. *See Dorr*, 195 U.S. at 143 (1904) ("Until Congress shall see fit to incorporate territory ceded by treaty into the United States, we regard it as settled by [*Downes v. Bidwell*] that the territory is to be governed under the power existing in Congress to make laws for such territories . . . ."); *Downes*, 182 U.S. at 339 (1901) (White, J., concurring) ("[I]ncorporation does not arise until in the wisdom of Congress it is deemed that the acquired territory has reached that state where it is proper that it should enter into and form a part of the American family."). Though a concurrence in *Downes*, Justice White's opinion expounded the doctrine of territorial incorporation that was relied on as precedential in *Dorr*, 195 U.S. 138.

277. Explicitly white supremacist beliefs informed the Court's opinion on the necessity of temporary unincorporation. *Balzac*, 258 U.S. at 310; *Downes*, 182 U.S. at 286–87; *Dorr*, 195 U.S. at 148.

278. *Balzac*, 258 U.S. at 311; *see also Dorr*, 195 U.S. at 148 ("Congress has unquestionably full power to govern [an unincorporated territory] . . . until the territory becomes a state." (quoting COOLEY, PRINCIPLES OF CONSTITUTIONAL LAW 164 (1898))).

279. *See* Duffy Burnett, *supra* note 269, at 875. *But see* Blocher & Gulati, *supra* note 3, at 243. A state of permanent unincorporation is inconsistent with both the *Insular Cases* and pre-1898 case law. *See supra* notes 263–77.

and with a clear declaration of purpose, and not left a matter of mere inference or construction."[280]

One might attempt to infer intent to incorporate from the federal government's early legal engagements with Puerto Rico. In 1937, the Supreme Court noted that

> [t]he aim of the Foraker Act and the Organic Act was to give Puerto Rico full power of local self-determination with an autonomy similar to that of the states and incorporated territories. The effect was to confer upon the territory many of the attributes of *quasi* sovereignty possessed by the states . . . .[281]

Despite the Supreme Court's optimistic interpretation, however, Judge Juan Torruella explained quite eloquently how the United States' early sovereignty over Puerto Rico is indistinguishable from colonialism.[282] Furthermore, the racism that expressly guided early twentieth-century expansionist and territorial policy should caution against inferring incorporationist intent from early federal territorial policy.[283] By the middle of the twentieth century, the most recently acquired territories were still unincorporated.[284]

In the early 1950s, in response to civil and political activism within the territories[285] and a growing international consensus around

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280. *Balzac*, 258 U.S. at 311.

281. Puerto Rico v. Shell Co., 302 U.S. 253, 261–62 (1937) (emphasis added). The Court cited the conferral of territorial legislative authority "nearly, if not quite, as extensive as those exercised by the state legislatures," *id.* at 262, as evidence that "the general purpose of Congress [was] to confer power upon the government of Puerto Rico to legislate in respect of all local matters," *id.* at 263.

282. Torruella, *supra* note 23, at 73–76 (describing the economic dependency created by federal regulation of Puerto Rico's economy).

283. *See, e.g.*, MARK S. WEINER, *Teutonic Constitutionalism: The Role of Ethno-Juridical Discourse in the Spanish-American War*, *in* FOREIGN IN A DOMESTIC SENSE 64, 65–66 (Christina Duffy Burnett & Burke Marshall eds., 2001); JUAN F. PEREA, *Fulfilling Manifest Destiny: Conquest, Race, and the* Insular Cases, *in* FOREIGN IN A DOMESTIC SENSE 155, 156–60 (Christina Duffy Burnett & Burke Marshall eds., 2001).

284. For example, whereas the grant of statutory citizenship to the territories of Alaska and Hawai'i had been held to accompany their incorporation, the Supreme Court held the opposite in the case of Puerto Rico. Torruella, *supra* note 23, at 73–74. Under *Balzac*, Congressional intent to incorporate must be clear and deliberate, 258 U.S. at 311, and the historical record lacks such evidence before the mid-twentieth century; *see* Consejo de Salud v. Rullan, 586 F. Supp. 2d 22, 41–43 (2008) (summarizing congressional engagement with the territories in the twentieth century).

285. *See, e.g.*, DANIEL IMMERWAHR, *Decolonizing the United States*, *in* HOW TO HIDE AN EMPIRE 227, 227–41 (2019); Rafael A. Declet, Jr., *The Mandate Under International Law for a Self-Executing Plebiscite on Puerto Rico's Political Status*, 28 SYRACUSE J. INT'L L. & COM. 19, 31–33 (2001); Michael P. Perez, *Colonialism, Americanization, and Indigenous Identity: A Research Note on Chamorro Identity in Guam*, 25 SOCIO. SPECTRUM 571, 572–73, 588–89 (2005).

decolonization and self-determination,[286] Congress passed new organic acts for the territories that increased their autonomy. In 1950, Congress enacted Public Law 600,[287] which empowered the people of Puerto Rico to draft and approve a territorial constitution[288] and created the Commonwealth of Puerto Rico.[289] Congress also passed the first Organic Act of Guam in 1950, which provided for some measures of local autonomy.[290] Shortly thereafter, Congress passed the Revised Organic Act of the Virgin Islands,[291] which ostensibly increased the USVI's local autonomy and, similar to PL 600, provided for the passage of a USVI Constitution.[292] Revisions to these organic acts were passed throughout the latter half of the twentieth century, delegating more local decision-making authority to the territorial governments.[293] Despite the territories' increasing local sovereignty, however, their state of unincorporation persists, over a century into U.S. colonial administration.[294]

3. Unequal Footing

The U.S. territories have been on the path to statehood since their acquisition[295] and, effectively, in the process of admission for over a century.[296] This "permanent territorial limbo"[297] manifests as an inherently subordinating colonial relationship in which the continued unavailability of certain fundamental rights in the territories causes territorial residents to be unequal citizens.[298] The endurance of modern American colonialism is inconsistent with the notion of unincorporation as a temporary status, and constitutes a continuing

286. *Developments in the Law*, *supra* note 19, at 1657–59.

287. For a brief history of Public Law 600, *see* Torruella, *supra* note 23, at 77–80.

288. Puerto Rico v. Sánchez Valle, 136 S. Ct. 1863, 1874 (2016).

289. Notably, the Spanish version of the Puerto Rican Constitution refers to the territory as the "Estado Libre Asociado" de Puerto Rico, or the freely associated state of Puerto Rico. Torruella, *supra* note 23, at 74 n.60.

290. VITO BREDA, *The USA: Constitutional Negotiations and Peripheral Nationalism*, *in* CONSTITUTIONAL LAW AND REGIONALISM 133, 171–72 (2018).

291. Revised Organic Act of the Virgin Islands, 68 Stat. 497 (1954).

292. BREDA, *supra* note 290, at 174–75. Despite authorization to create a constitution, the USVI has not yet succeeded in doing so. Lin, *supra* note 6, at 1260–61.

293. *See, e.g.*, William C. Gilmore, *The Search for Constitutional Change in the US Virgin Islands*, 33 SOC. & ECON. STUD. 143, 145 (1984).

294. *See* Financial Oversight & Mgmt. Bd. v. Aurelius Investments, 140 S. Ct. 1649, 1654–55 (2020); Puerto Rico v. Sánchez Valle, 136 S. Ct. 1863, 1867–68 (2016).

295. *See* Blocher & Gulati, *supra* note 3, at 263; *supra* notes 278–79.

296. *See* Blocher & Gulati, *supra* note 3, at 229–30, 262.

297. *Id.* at 263.

298. *See supra* notes 6–11.

violation of the equal footing doctrine, which requires "that all States are admitted to the Union with the same attributes of sovereignty . . . as the original 13 States."[299]

Although the Constitution commits the decision of *when* to admit new states to the "sound discretion of Congress,"[300] neither the Constitution nor the doctrine of territorial incorporation contemplates permanent unincorporation.[301] The decision of *whether* to admit or not admit is nondiscretionary under the doctrine of territorial incorporation.[302] Consequently, there is at some point congressional inaction necessarily changes from a bona fide exercise of discretion to purposeful avoidance of constitutional duty. The territories' centuries-long stagnation along the path toward incorporation, let alone the path to statehood, can only be interpreted as evidence that this point has passed. Here, the territories' indefinite unincorporation nullifies the constitutional justification underlying the territorial incorporation doctrine.

Furthermore, by failing to take steps to admit or not admit the current territories,[303] the United States has created the situation the equal footing doctrine exists to prevent: a class of conquered substates whose benefits the United States extracts without compensation or constitutional shield.[304] No existing state was subjected to the same indignity of indefinite unincorporation before admission or suffered such a protracted impairment of their sovereign function. In particular, the experience of the remaining territories diverges sharply from the paths to statehood of their immediate predecessors in the chronology of territorial acquisition, Alaska and Hawai'i.[305] The contrast between the formerly Spanish territories and the territorial progression of Alaska and Hawai'i illuminates both the particular affront to sovereign dignity caused by the remaining territories' perpetual unincorporation and the foundational racial animus that triggered their disparate treatment.

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299. Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 203 (1999).

300. Dred Scott v. Sandford, 60 U.S. 393, 447 (1857) (enslaved party).

301. *See supra* notes 278–79; Igartúa-de la Rosa v. United States, 229 F.3d 80, 89 (1st Cir. 2000); Blocher & Gulati, *supra* note 3, at 269.

302. *See supra* notes 276, 279–80.

303. *See* DANIEL IMMERWAHR, *Introduction: Looking Beyond the Logo Map*, *in* HOW TO HIDE AN EMPIRE 3, 7–8 (2019) (describing territories whose applications for admission were rejected).

304. *See supra* notes 109–10; DANIEL IMMERWAHR, *Power Is Sovereignty, Mister Bond*, *in* HOW TO HIDE AN EMPIRE 336, 345 (2019) (describing the United States' military installations on its territories).

305. *See generally* discussion *infra* Part III, Sections B.3.a–b.

a. Alaska

The United States purchased Alaska from Russia in 1867.[306] Although Alaska's annexation occurred over three decades before the Supreme Court created the doctrine of territorial incorporation in *Downes v. Bidwell*, the circumstances of the territory's acquisition figured prominently in the creation and perpetuation of the doctrine.

The treaty annexing Alaska declared, "The inhabitants of the ceded territory . . . shall be admitted to the enjoyment of all the rights, advantages, and immunities of citizens of the United States, and shall be maintained and protected in the free enjoyment of their liberty, property, and religion."[307] In his *Downes* concurrence, Justice White described this treaty language as "provi[ding] for incorporation,"[308] and also pointed out that the treaty "contained an express provision excluding citizenship from the uncivilized native tribes."[309] When directly presented with the question of Alaska's incorporation four years later in *Rasmussen v. United States*, the Supreme Court seized on White's characterization, observing that the "phraseology" in the treaty annexing Alaska "is the equivalent, as pointed out in *Downes v. Bidwell*, of the formula, employed from the beginning to express the purpose to incorporate acquired territory into the United States,—especially in the absence of other provisions showing an intention to the contrary."[310]

The Court's reasoning in *Rasmussen* obfuscates the fact that the doctrine of territorial incorporation did not exist until 1901, when it sprang from the pages of Justice White's concurrence in *Downes*.[311] Although the Court asserted "[t]hat Congress, shortly following the adoption of the treaty with Russia [in 1868], clearly contemplated the incorporation of Alaska into the United States as a part thereof, . . . [a]nd this is fortified by subsequent action of Congress, which it is unnecessary to refer to,"[312] this characterization is misleading. Whatever Congress contemplated in 1867 when annexing Alaska, it could not have been the idea of "incorporated" versus "unincorporated" territories, as the distinction did not yet exist. Via this sleight of hand, *Rasmussen* both came to stand for the proposition that treaty language could, if phrased accordingly, incorporate a territory with

306. Cession of Alaska, Russ.-U.S., Mar. 30, 1867, 15 Stat. 539.
307. *Id.*
308. Downes v. Bidwell, 182 U.S. 244, 335 (1901).
309. *Id.*
310. Rasmussen v. United States, 197 U.S. 516, 522 (1905).
311. *See Downes*, 182 U.S. at 289–90, 292 (White, J., concurring).
312. *Rasmussen*, 197 U.S. at 523.

a single stroke and ensured that Alaska was the only incorporated territory to benefit from this mechanism of incorporation.[313]

More than treaty text separated the incorporation of Alaska from the unincorporation of the former Spanish colonies. When Congress granted citizenship to Puerto Ricans in 1917,[314] they expected, based on the experiences of Alaska and other territories, the conferral of citizenship to effect incorporation.[315] In 1922, however, the Supreme Court held that Puerto Rico remained unincorporated.[316] Chief Justice Taft's majority opinion in *Balzac v. Porto Rico* acknowledged that "a law of Congress or a provision in a treaty acquiring territory, declaring an intention to confer political and civil rights on the inhabitants of the new lands as American citizens, may be properly interpreted to mean an incorporation of it into the Union," and that such had been the case for Alaska's incorporation.[317] But the Court distinguished the conferral of citizenship on the non-indigenous inhabitants of Alaska from the conferral of citizenship on Puerto Ricans by claiming that "Alaska was a very different case from that of Porto Rico."[318] While this statement was nominally accurate, the Court went further: "[Alaska] was an enormous territory, very sparsely settled, and offering opportunity for immigration and settlement by American citizens. It was on the American continent and within easy reach of the then United States. It involved none of the difficulties which incorporation of the Philippines and Porto Rico presents . . ."[319]

The disingenuousness of the Court's reasoning is belied by the actual relative situations of Alaska and Puerto Rico, with respect to the United States, in 1922.[320] Given that distance could not have

313. *Compare id.* at 523, *with* Hawaii v. Mankichi, 190 U.S. 197, 219 (1903) (White, J., concurring) ("The resolution of Congress annexing the islands, it seems to me, makes the conclusion just stated quite clear, and manifests that it was not intended to incorporate the islands *eo instanti*, but, on the contrary, that the purpose was, whilst acquiring them, to leave the permanent relation which they were to bear to the government of the United States to await the subsequent determination of Congress.").

The mechanism of incorporation applied to other incorporated territories has not been in question; the Supreme Court has not reconsidered whether the remaining "unincorporated" territories have been incorporated.

314. Organic Act of Porto Rico of March 2, 1917 (Jones Act), ch. 145, 39 Stat. 951, 953.

315. *See* Torruella, *supra* note 23, at 74; *see* ERMAN, *supra* note 1, at 144.

316. Balzac v. Porto Rico, 258 U.S. 298, 309 (1922) ("In Porto Rico, however, the Porto Rican can not [sic] insist upon the right of trial by jury . . . . The citizen of the United states [sic] living in Porto Rico cannot there enjoy a right of trial by jury under the federal Constitution, any more than the Porto Rican").

317. *Id.*

318. *Id.*

319. *Id.*

320. Despite Alaska's contiguity with the United States (via Canada), it was not practicably reachable by commercial land transportation until decades after *Balzac* was decided. *See* IMMERWAHR, *supra* note 285, at 168–73; *see also Alaska Highway 75th*

presented the primary difficulty, Chief Justice Taft's opinion alludes to the real obstacle in the path of Puerto Rican—and Philippine, Guamanian, and Virgin Islander—incorporation:

> Congress has thought that a people like the Filipinos, or the Porto Ricans, trained to a complete judicial system which knows no juries, living in compact and ancient communities, with definitely formed customs and political conceptions, should be permitted themselves to determine how far they wish to adopt this institution of Anglo-Saxon origin, and when.[321]

Balzac's reference to "a people" with non-Anglo-Saxon customs and other-seeming community models recalls the racist language from the early *Insular Cases*.[322] The mention of opportunities for settlement similarly adverts to the racist sentiments that had animated expansionist policy in the late nineteenth century[323]: according to this logic, Alaska, but not Puerto Rico or the other Spanish territories, could be a suitable destination for Anglo-Saxon migration, and thus was deserving of incorporation and requiring the extension of U.S. citizenship. For territories less suited to "Anglo-Saxon" settlement, such as Puerto Rico, the Court explained that the grant of citizenship merely "enabled [Puerto Ricans] to move into the continental United States and becoming residents of any State there to enjoy every right of any other citizen of the United States, civil,

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Anniversary, ALASKA DEP'T TRANSP., http://dot.alaska.gov/nreg/akhwy75/akhwy75.shtml [https://perma.cc/Q9RW-R6QB]. In 1922, the journey from the mainland to either Alaska or Puerto Rico required travel over sea or through air. The distance between the Ports of Miami and San Juan is only thirty-six nautical miles greater than the distance between the Ports of Tacoma and Juneau, *see* SEA-DISTANCES.ORG, https://sea-distances.org [https://perma.cc/3MQ5-VVMC]. Furthermore, in 1922, the commercial ties connecting Puerto Rico to the East Coast of the United States were longer and better established than the commercial ties connecting Alaska to the West Coast. *Compare* Torruella, *supra* note 6, at 82–89 (discussing the (exploitative) commercial connections between Puerto Rico and the mainland), *and* Jason M. Colby, *Race, Empire, and New England Capital in the Caribbean, 1890–1930*, 11 MASS. HIST. REV. 1, 3–4 (2009) (discussing New England's long-standing commercial investment and exploitation in the Caribbean generally and including Puerto Rico), *with* Grace Beckett, *Comments on Alaska's Trade*, 10 J. MKTG. 291, 292 (1946) (estimating Alaska's "exports" to the mainland); *see also* Juan R. Torruella, *The* Insular Cases*: The Establishment of a Regime of Political Apartheid*, 29 U. PA. J. INT'L L. 283, 326 (2007).

321. *Balzac*, 258 U.S. at 310.

322. *See supra* note 132 and accompanying text.

323. *See, e.g.*, ERIC T.L. LOVE, *Santo Domingo*, *in* RACE OVER EMPIRE 27, 28 (2004) (comparing the acquisition of Alaska to the hypothetical, disfavored acquisition of tropical territories); *id.* at 32 (describing a Harvard biologist's suggestion, to Senator Charles Sumner, that "[c]limate made Alaska a desirable acquisition . . . because it was perfectly suited to the Anglo-Saxon temperament and because it was largely unpopulated").

social and political."[324] In other words, the Court seemed to say, Puerto Ricans were valued as American citizens only so long as they gave up their homeland and assimilated.

b. Hawai'i

In 1893, American plantation owners supported by the U.S. military overthrew the constitutional monarchy of the independent state of Hawai'i.[325] In 1898, President McKinley signed the Newlands Resolution that created the Territory of Hawaii.[326] Five months after Hawai'i's annexation, Spain and the United States signed the Treaty of Paris to end the Spanish-American War of 1898; when the treaty went into effect in early 1899, the United States assumed sovereignty over Puerto Rico, Guam, and the Philippines.[327] Though separated by less than a year, the experiences of the Territory of Hawaii and the former Spanish territories diverged sharply on the path toward statehood. Unlike Alaska, Hawai'i was not deemed, ex post facto, to be incorporated into the United States at the time of acquisition; however, the Supreme Court determined its incorporation to have arisen soon thereafter.

Between 1898 and 1900, the United States governed the Territory of Hawaii pursuant to the Newlands Resolution.[328] In 1900, Congress passed the Hawaiian Organic Act, which granted U.S. citizenship to the territory's inhabitants.[329] Two years after the invention of the doctrine of territorial incorporation and two years before it decided *Rasmussen*, the Supreme Court determined, in *Hawaii v. Mankichi*, that the enactment of the Hawaiian Organic Act had transformed the Territory of Hawaii from an unincorporated to an incorporated territory.[330] As was the case for Alaska, the Supreme Court located the date of Hawai'i's incorporation *before* the advent

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324. *Balzac*, 258 U.S. at 308. Residents of the Philippines were even worse off: "A citizen of the Philippines must be naturalized before he can settle and vote in this country." *Id.*

325. Rice v. Cayetano, 528 U.S. 495, 505 (2000); ERIC T.L. LOVE, *The Policy of Last Resort*, *in* RACE OVER EMPIRE 73, 73–75 (2004); Davianna P. McGregor & Melody K. MacKenzie, *Mo'olelo Ea O Nā Hawai'i: History of Native Hawaiian Governance in Hawai'i*, OFF. HAWAIIAN AFF. 387, 387–401 (Dec. 21, 2015).

326. McGregor & MacKenzie, *supra* note 325, at 51–52.

327. Merlin M. Magallona, *The Treaty of Paris of 10 December 1898: History and Morality in International Law*, 75 PHIL. L.J. 159, 159 (2000); *see generally* Paolo E. Coletta, *Bryan, McKinley, and the Treaty of Paris*, 26 PAC. HIST. REV. 131, 132 (1957) (describing the political context during the ratification of the Treaty of Paris).

328. McGregor & MacKenzie, *supra* note 325, at 429–30.

329. Hawaiian Organic Act, ch. 339, § 4, 31 Stat. 141, 141 (1900).

330. 190 U.S. 197, 214–15 (1903).

of the doctrinal distinction between incorporated and unincorporated territories.[331] Judge Torruella and others have identified *Mankichi* as the origin of the then-contemporary understanding, subsequently solidified in *Rasmussen*, that the grant of citizenship to territorial residents implied territorial incorporation,[332] which the Court subsequently abrogated in *Balzac*.[333]

It would have been less believable for the Court to describe Hawai'i as "sparsely settled, and offering opportunity for immigration and settlement by American citizens," "within easy reach of the then United States," as it had described Alaska in *Balzac*.[334] The Hawaiian islands were twice as far from the mainland as Puerto Rico and the U.S. Virgin Islands (though closer than Guam, the Philippines, and American Samoa),[335] significantly smaller than Alaska, and had existed as an independent state for centuries prior to U.S. annexation.[336] Nevertheless, one scholar's observation that Hawai'i "was closer to North America and significantly whiter than the [Spanish colonies]"[337] is apt. Despite Hawai'i's geographic distance, a long history of white settler colonialism and exploitative capitalism[338] had resulted in a resident population that was a quarter white at the time of annexation and which wielded disproportionate political power.[339] In contrast, "there were almost no United States citizens residing [in Guam, Puerto Rico, and the Philippines] when the change in sovereignty took place, and . . . much if not most of the large native populations inhabiting these islands were non-white."[340] Thus, Hawai'i's "closeness" to the United States mainland can be conceptualized as its relatively greater racial similarity.

Hawai'i's annexation occurred in the aftermath of a coup supported, initiated, and overseen by wealthy white sugar barons. The white insurrectionists who overthrew the government of Queen Liliuokalani attempted to establish, in the provisional Republic of Hawai'i, a system of government that concentrated formal legal and

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331. *See id.*; *see supra* notes 306–13 and accompanying text.

332. *E.g.*, Torruella, *supra* note 320, at 314; Sean Morrison, *Foreign in a Domestic Sense: American Samoa and the Last U.S. Nationals*, 41 HASTINGS L.Q. 71, 104–05 (2013); Duffy Burnett, *supra* note 269, at 858.

333. *See supra* notes 314–19 and accompanying text.

334. Balzac v. Porto Rico, 258 U.S. 298, 309 (1922).

335. *See* SEA-DISTANCES.ORG, *supra* note 320; Torruella, *supra* note 320, at 326.

336. *See* McGregor & MacKenzie, *supra* note 325, at 25.

337. IMMERWAHR, *supra* note 303, at 6.

338. *See* John M. Van Dyke, *The Political Status of the Native Hawaiian People*, 17 YALE L. & POL'Y REV. 95, 101–03 (1998); McGregor & MacKenzie, *supra* note 325, at 180, 387.

339. *See* McGregor & MacKenzie, *supra* note 325, at 297–300; ERIC T.L. LOVE, *Hawaii Annexed*, *in* RACE OVER EMPIRE 115, 115–16, 145 (2004).

340. Torruella, *supra* note 320, at 289.

political power in the hands of Hawai'i's white residents.[341] And the Republic's leaders sought annexation by the United States in part in order to control non-white immigration to the islands and to maintain their economic hegemony.[342] The significant size and interests of Hawai'i's white population—as well as growing fears about Japanese dominance in the Pacific—strongly influenced the federal government's eventual accession to the annexationists' entreaties.[343] Following annexation, "[e]lite control and inequality were not limited to the formal political arena; they penetrated virtually every facet of community life."[344] In particular, "the territory was dominated by the Republicans, the Caucasians, with the result that there was a double wage standard based on race, informal but obvious residential segregation along ethnic lines, and the exclusion of many nonwhites from equal participation in community affairs, extending to sports and social clubs."[345]

Unlike Hawai'i, the former Spanish possessions had no significant prospects of white immigration, and their resources could be exploited without white settlement.[346] Whereas Hawai'i's rapidly expanding white population[347] counseled toward statehood for the territory—as evidence of the islands' realized, and potential for, Americanization[348]—this factor was not present in the other territories. Thus, despite the other territories' successful assimilation of the supposed "Anglo-Saxon" ideas of jury trials and popular government,[349] for example, racism and their majority-minority demography posed an obstacle for the other territories from following Hawai'i's path to incorporation and statehood.[350]

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Effects of the racial animus that caused the unincorporated territories to diverge from the Alaskan and Hawaiian paths to

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341. *See* LOVE, *supra* note 339, at 118.

342. *Id.* at 138.

343. *See id.* at 145–48.

344. ROGER BELL, *Incorporated but Not Equal, 1898–1941*, *in* LAST AMONG EQUALS: HAWAIIAN STATEHOOD AND AMERICAN POLITICS 37, 53 (1984).

345. *Id.*

346. *See* DANIEL IMMERWAHR, *The War of Points*, *in* HOW TO HIDE AN EMPIRE 372, 387 (2019).

347. ROGER BELL, *Postwar Hawaii: An Americanized Community?*, *in* LAST AMONG EQUALS: HAWAIIAN STATEHOOD AND AMERICAN POLITICS 100, 109, 111 (1984).

348. *Id.* at 112.

349. Torruella, *supra* note 320, at 327.

350. *Id.* at 321–27 (discussing the racism underlying Balzac v. Porto Rico, 258 U.S. 298, 309 (1922)).

statehood continue to manifest in the territories' relationship with the United States. In 1959, Alaska and Hawai'i became the forty-ninth and fiftieth states of the United States after ninety-two and fifty-nine respective years of incorporated status.[351] As of 2022, all but one of the of the five remaining "unincorporated" territories have existed in that status for longer than their nearest comparators, Alaska or Hawai'i, existed as incorporated territories,[352] with no obvious political resolution in sight.[353]

The equal footing doctrine "prevents the Federal Government from impairing fundamental attributes of state sovereignty when it admits new States into the Union."[354] Although the remaining territories possess significant degrees of functional sovereignty over their internal affairs,[355] their indefinite unincorporation deprives them of the fundamental right to participate and be represented in national politics, and sanctions discriminatory treatment in other critical areas that affect local sovereignty. The extent and duration of this deprivation is unparalleled in the history of U.S. territorial administration[356] and constitutes an impairment of a fundamental attribute of sovereignty.

IV. ENFORCING EQUAL TERRITORIAL SOVEREIGNTY

Thus far, states have wielded equal sovereignty as a cudgel against federal legislation that seeks to protect individual rights by, in part, discriminating on the basis of state identity.[357] These origins

351. Hawaii Admission Act, Pub. L. 86-3, 73 Stat. 4 (1959); Alaska Statehood Act, Pub. L. 85-508, 72 Stat. 339 (1958) (admitting Alaska as of January 1959).

352. The Commonwealth of the Northern Mariana Islands has been a U.S. territory since 1976. Prior to that and subsequent to World War II, the CNMI was under U.N. trusteeship, administered by the United States. CNMI Covenant Agreement, Pub. L. No. 94-241, § 103, 90 Stat. 263, 263–64 (1976).

353. *See, e.g.*, Mar-Vic Cagurangan, *Lawyer: It's time to deal with Guam's political status in 'a realistic way'*, PAC. ISLAND. TIMES (May 11, 2020), https://www.pacificislandtimes.com/single-post/2020/05/11/Lawyer-Its-time-to-hold-political-status-vote-in-a-realistic-way [https://perma.cc/MF5J-GXC5]; Statement by Tregenza A. Roach (United States Virgin Islands), to the U.N. Special Committee on Decolonization 2019th Session (2019), https://www.un.org/dppa/decolonization/sites/www.un.org.dppa.decolonization/files/2019_2_united_states_virgin_islands_crs_2019_crp.6.pdf [https://perma.cc/4LCQ-N4BH]; R. Sam Garrett, *Political Status of Puerto Rico: Brief Background and Recent Developments for Congress*, CONG. RSCH. SERV., R44721, at 18–19 (June 12, 2017).

354. Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 203–04 (1999).

355. *See, e.g.*, CNMI Covenant Agreement, note 353, at §§ 101–03.

356. *See* Stacy Plaskett, *The Second-Class Treatment of U.S. Territories Is Un-American*, ATLANTIC (Mar. 11, 2021), https://www.theatlantic.com/ideas/archive/2021/03/give-voting-rights-us-territories/618246 [https://perma.cc/MJD3-2LB7] (noting that Americans in unincorporated territories continue to be denied the right to vote).

357. *See* Shelby Cnty. v. Holder, 570 U.S. 529, 544 (2013).

have given the equal sovereignty doctrine a veneer of anti-democracy and rights effacement. After all, *Shelby County* and *NAMUDNO* invoked the principle of equal sovereignty to tear down a crucial enforcement mechanism of the VRA—"one of the most consequential, efficacious, and amply justified exercises of federal legislative power in our Nation's history,"[358] designed to protect the individual right to vote from invidious racial discrimination.[359] The Supreme Court's recent decision in *Brnovich v. Democratic National Committee* emphasizes the doctrine's ignominious use.[360] Despite equal sovereignty's history, however, this Part suggests the doctrine possesses an affirmative and rights-reinforcing potential. Moreover, it is *because of* the doctrine's inimical beginning and obvious potential for harm that repurposing the doctrine as a progressive counterweight to rights-effacing legislation is a worthy and necessary goal.

After all, *Shelby County* conceived of equal sovereignty "as a right, not just a policy-based limit on a remedy."[361] By recognizing the territorial applicability of an existing, judicially enforceable right, equal territorial sovereignty provides an affirmative tool for challenging federal legislation that infringes on territories' sovereignty without sufficient justification. Repurposed in this way, equal sovereignty offers an additional or alternative cause of action—based on *territorial* discrimination—that complements ongoing legal efforts challenging discriminatory federal legislation under constitutional provisions that protect *individual* rights—for example, litigation under the Equal Protection Clause. Equal territorial sovereignty may also illuminate novel routes to challenging the territories' unequal treatment that are unavailable to individual litigants.

This Part sketches the outlines of two distinct affirmative litigation strategies based on equal sovereignty. Section A describes how equal territorial sovereignty offers a constitutional cause of action for territories to enforce their sovereign interests against federal legislation that unreasonably infringes on those interests. Section B then theorizes a novel alternative application of the equal sovereignty principle that builds on Section III.B's proposition of an

358. *Id.* at 562 (Ginsburg, J., dissenting); *see infra* Section IV.A.

359. Without Section 4(b)'s coverage formula, Section 5 lacks teeth; removed from the threat of Section 5 enforcement, formerly covered states seized upon *Shelby County*'s invitation and enacted slews of restrictive voting laws. *See* Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321, 2355–56 (2021) (Ginsberg, J., dissenting) (describing the laws passed in the aftermath of *Shelby County*).

360. *Id.* at 2355.

361. Davis, *supra* note 54, at 107; *see also Shelby Cnty.*, 570 U.S. at 542 (requiring the government to justify departures from the principle of equal sovereignty); *In re Trump*, 958 F.3d 274, 286 (4th Cir. 2020) (identifying violations of equal sovereignty as a cognizable injury for Article III standing).

ongoing equal footing violation: a territorial challenge to the territories' persistent unequal footing.

A. Challenging Discriminatory Legislation

Under *Shelby County*, equal sovereignty is an enforceable right: through an equal-sovereignty cause of action, states seek to vindicate their sovereign interests.[362] Although scholars debate the expansiveness of state or territorial standing to vindicate individuals' equality interests,[363] there is consensus that states and territories have standing to vindicate their sovereign and "quasi-sovereign" interests.[364] Recognizing a territorial application of equal sovereignty extends this same right to the territories.[365] Equal territorial sovereignty thus recognizes a cause of action whereby the territories, like the states, can vindicate their sovereign interests.

For decades, individuals in the territories have sought to expand or reinforce their *individual* interests in federal entitlement programs and the democratic process.[366] But as I argued in Section III.A, the territories also have *sovereign* interests in their citizens' democratic representation and participation in national politics and in federal spending programs, such as Medicaid, that affect territories' local authority and policy. Equal sovereignty offers a mechanism through which the territories can vindicate infringements of these sovereign interests caused by how the federal government administers these privileges and entitlements. In this way, equal territorial sovereignty

362. *See, e.g.*, *In re Trump*, 958 F.3d at 286.

363. *See* Seth Davis, *State Standing for Equality*, 79 LA. L. REV. 147, 149–50 n.17 (2018) (summarizing recent literature).

364. It is well-established that territories have a *parens patriae* interest in and standing to enforce their residents' individual rights. Alfred L. Snapp & Son, Inc. v. Puerto Rico, 458 U.S. 592, 602 (1982). Although states and territories may not assert a *parens patriae* interest "to protect [t]he[i]r citizens from the operation of federal statutes," Massachusetts v. E.P.A., 549 U.S. 497, 520 n.17 (2007) (citing Massachusetts v. Mellon, 262 U.S. 447 (1923)), they have standing to "assert [their own] rights under federal law," *id.* That is, states and territories have *parens patriae* standing to vindicate their quasi-sovereign interests against federal infringement. *See also* Tara Leigh Grove, *When Can a State Sue the United States?*, 101 CORNELL L. REV. 851, 855 (2016); Jonathan Remy Nash, *Sovereign Preemption State Standing*, 112 NW. U.L. REV. 201, 211–12 (2017); *see also* Jessica Bulman-Pozen, Symposium, *Federalism All the Way Up: State Standing and "The New Process Federalism"*, 105 CALIF. L. REV. 1739, 1748 (2017) (distinguishing "quasi-sovereignty" as a state or territory's "ability to stand for their people's interests vis-à-vis federal actors"); *In re Trump*, 958 F.3d at 286.

365. *See* Hammond, *supra* note 236, at 1659.

366. *See, e.g.*, Peña Martínez v. U.S. Dep't of Health & Hum. Serv., 478 F. Supp. 3d 155, 162 (D.P.R. 2020); Schaller v. U.S. Social Security Administration, Civil Case No. 18-00044, 1–2 (D. Guam June 19, 2020); United States v. Vaello-Madero, 956 F.3d 12, 14 (1st Cir. 2020).

provides an additional, complementary cause of action for challenging the territories' unequal treatment.

1. Cause of Action

Because the equal sovereignty doctrine is a relatively new judicial invention, it is useful to examine its contemporary origins to define the scope of an equal-sovereignty cause of action.

In April 2010, Shelby County, Alabama sued then–Attorney General Eric Holder, seeking to invalidate Sections 4(b) and 5 of the Voting Rights Act (VRA).[367] Although the County made similar arguments against both sections, it only raised an equal-sovereignty argument in its challenge to Section 4(b)—the VRA's "coverage formula" that determines which jurisdictions are subject to Section 5; in fact, Shelby County made two identifiably distinct arguments against Section 4(b), and only one of them relied on the principle of "equal sovereignty."[368] Although the lower courts barely acknowledged the equal-sovereignty argument,[369] the Supreme Court ultimately ruled on equal sovereignty grounds and largely disregarded the lower courts' analyses of the other argument.[370]

The courts' disparate reasoning makes it difficult to delineate the scope of the equal-sovereignty cause of action without first disentangling Shelby County's two separate arguments, which I will attempt to do here. First, Shelby County argued that Congress failed to establish that the VRA's coverage formula "remain[ed] constitutionally justified under its Fourteenth and Fifteenth Amendment enforcement authority" when it reauthorized the section in 2006, and that Section 4(b) was neither "congruent" nor "proportional" to the problem Congress sought to fix.[371] Second, the County argued that because the coverage formula "differentiate[d] between the States, despite our historic tradition that all the States enjoy 'equal sovereignty,'" and was not "'sufficiently related to the problem that it

367. The VRA made the Attorney General responsible for its enforcement. *See* 52 U.S.C. §§ 10304, 10305, 10308, *formerly codified at* 42 U.S.C. §§ 1973c, 1973j. Section 5 requires "covered" jurisdictions to seek preclearance from the Attorney General or the U.S. District Court for the District of Columbia before making certain changes to their electoral procedures. Voting Rights Act of 1965, § 5, 79 Stat. at 439, 52 U.S.C. § 10304, *formerly codified at* 42 U.S.C. § 1973c. Section 4(b) gave the coverage formula that defined the covered jurisdictions. *See* 52 U.S.C. § 10303(b), *formerly codified at* 42 U.S.C. § 1973b(b).

368. Compl. at ¶¶ 42–43, Shelby Cnty. v. Holder, 570 U.S. 529 (2013).

369. *See* Shelby Cnty., Ala. v. Holder, 811 F. Supp. 2d 424, 503–07 (D.D.C. 2011); Shelby County v. Holder, 679 F.3d 848, 858, 873–83 (D.C. Cir. 2012).

370. Shelby Cnty. v. Holder, 570 U.S. 529, 556–57 (2013).

371. Compl. at ¶¶ 42(b), 42(c), 38(d), *Shelby County*, 570 U.S. 529 (2013).

target[ed]' it violate[d] the principle of equal sovereignty embodied in the Tenth Amendment and Article IV of the Constitution."[372]

This first argument is a relatively straightforward—albeit distorted—attack on legislation enacted under the Fourteenth Amendment that invokes the "congruence and proportionality" standard of *City of Boerne v. Flores*.[373] This standard requires reviewing courts to determine whether laws enacted under Section 5 of the Fourteenth Amendment are characterized by "a congruence between the means used and the ends to be achieved."[374] *Boerne* applied this standard to invalidate a law that represented "a considerable congressional intrusion into the States' traditional prerogatives and general authority to regulate for the health and welfare of their citizens."[375] By arguing that the VRA was neither congruent nor proportional, Shelby County argued that Congress had exceeded its enforcement power under the Fourteenth and Fifteenth Amendments when it enacted Sections 4(b) and 5.[376]

Shelby County's second argument was its equal sovereignty argument. The complaint invokes *NAMUDNO*'s holding that the United States' "historic tradition" of "equal sovereignty" requires departures from this "fundamental principle"—that is, a statute's "disparate geographic coverage [be] sufficiently related to the problem that it targets."[377] In effect, Shelby County argued that Congress's choice to discriminate among the states was unwarranted in light of the problem it sought to remedy.

In some ways, the two arguments are two sides of the same coin. Both arguments challenge unconstitutional congressional action. But whereas the *Boerne* argument focuses on congressional authority to enact legislation, the equal-sovereignty argument targets congressional action that results in a disparate geographic impact—that is, a disparate impact on geographically distinct sovereigns. Theoretically, Congress could legislate within the bounds of its Fourteenth and Fifteenth Amendment authorities but nevertheless violate the equal sovereignty principle.[378] This analytic distinction between

372. *Id.* at 43(a), 43(c) (quoting *NAMUDNO*, 129 S. Ct. at 2512, and *Katzenbach*, 383 U.S. at 328–29).

373. 521 U.S. 507, 520 (1997).

374. *Id.* Specifically, "[t]he appropriateness of remedial measures must be considered in light of the evil presented." *Id.* at 530 (citing South Carolina v. Katzenbach, 383 U.S. at 308).

375. *Id.* at 534.

376. This is ironic given that *Boerne* expressly distinguished the VRA from the RFRA challenged in *Boerne*. *Id.* at 530–35.

377. 557 U.S. 193, 203 (2009).

378. *Boerne*, of course, provides a converse example of congressional legislation that

congressional authority and sovereign infringement is crucial in considering what an independent equal-sovereignty cause of action might look like.

Equal sovereignty's focus on the treatment of geographic areas means that equal sovereignty analysis is relevant to all congressional action that distinguishes on the basis of geography.[379] Of course, this does not mean that all statutory geographic distinctions are unconstitutional: according to the Court, the principle of equal sovereignty only prohibits congressional acts that infringe on sovereignty without being "sufficiently related to the problem" they target.[380] But by situating equal sovereignty's operative locus on geographic variation in congressional treatment, the Supreme Court made all *kinds* of congressional action susceptible to an equal sovereignty challenge, including legislation enacted under the Commerce Clause,[381] and, I argue, failure to act. In this way, the equal sovereignty principle represents a potentially broad-reaching tool for challenging discriminatory congressional legislation.

2. Applications

This Section provides an overview of recent individual-rights-based litigation in which residents of the territories have sought to invalidate their exclusion from federal benefits programs and nationwide representative democracy. After describing the relevant cases and claims, I discuss how an equal-sovereignty litigation strategy would interact with and complement these efforts.

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didn't offend the equal sovereignty principle but exceeded Congress's authority under the Fourteenth Amendment. 521 U.S. at 536.

379. This is unlike *Boerne*'s congruence and proportionality test, which courts use to determine whether Congress exceeded its enforcement powers under § 5 of the Fourteenth Amendment. The D.C. Circuit concluded that *Boerne*'s test applied to legislation enacted under § 2 of the Fifteenth Amendment, as well. Shelby Cnty. v. Holder, 679 F.3d 848, 865 (D.C. Cir. 2012).

380. Shelby Cnty. v. Holder, 570 U.S. 529, 542 (2013) (citing *NAMUDNO*, 557 U.S. at 203); *see supra* Section I.A (discussing the "sufficiently related" standard) and Part III (discussing sovereign interests and the degree to which infringements of those interests are (un)constitutional).

381. *See* Welsh, *supra* note 212, at 1027 (arguing that by its terms equal sovereignty applies to all legislation that discriminates among states). Indeed, Welsh argues that Commerce Clause legislation is *more* vulnerable to equal sovereignty challenges than legislation enacted under the Reconstruction Amendments. Welsh argued, and I agree, that the Third Circuit wrongly interpreted *Shelby County* when it suggested that Commerce Clause legislation should be *less* susceptible to an equal sovereignty challenge than legislation enforcing the Fourteenth and Fifteenth Amendments. *Compare id.* at 1027–35, *with* NCAA v. Governor of New Jersey, 730 F.3d 210, 238 (3d Cir. 2013).

a. Public Healthcare and Federal Benefits

Federal entitlement programs discriminate against U.S. citizens who reside in the territories.[382] Although the extent and manner of this discrimination varies by territory and program, the economic and welfare impacts are quantifiably severe.[383] The Supplemental Security Income (SSI) program largely excludes U.S. citizens who reside in territories.[384] SNAP excludes residents of Puerto Rico, American Samoa, and the CNMI, but includes the USVI and Guam.[385] Disabled veterans in some territories are unable to receive adequate care through the VA without traveling "off island."[386] Residents of territories are ineligible for the Medicare Part D Low Income Subsidy (LIS).[387] As discussed *supra*, Medicaid's low match rate and arbitrary allocates less federal funding to the territories on a per capita basis than to similar states.[388]

Recent and ongoing litigation has challenged discrimination against territorial residents in many of these programs.[389] Although the facts of the cases are unique to the individual plaintiffs,[390] the cases share certain commonalities. In particular, the plaintiffs are all individuals challenging their exclusion from entitlement programs administered by the federal government, which provide benefits directly to individuals.[391] Each plaintiff has an individual interest in

382. Weare, Hayes & Carroll, *supra* note 127.

383. Hammond, *supra* note 236, at 1666–70, 1672–77 (quantifying the discrepancy in federal funding for Medicaid, SNAP, and SSI between the mainland and the territories); Simmons-Duffin, *supra* note 11; SHADOW CITIZENS, *supra* note 12, at 18, 35–36.

384. 42 U.S.C. §§ 1382, 1382c; *see also* United States v. Vaello-Madero, 956 F.3d 12, 14 (1st Cir. 2020), *rev'd*, 142 S. Ct. at 1539. Residents of the CNMI are eligible for SSI. *Id.*

385. 7 U.S.C. §§ 2013(a), 2012(r).

386. SHADOW CITIZENS, *supra* note 12, at 29, 49.

387. 42 U.S.C. § 1395w-114(a)(3)(F); *see also* Peña Martínez v. U.S. Dep't of Health & Hum. Serv., 478 F. Supp. 3d 155, 167 (D.P.R. 2020), *vacated*, Dkt. No. 20-1946 (1st Cir. May 16, 2022).

388. *See supra* notes 238–42.

389. *E.g.*, *Peña Martínez*, 478 F. Supp. 3d at 162 (granting declaratory judgment on plaintiffs' claims that excluding Puerto Ricans from SSI, SNAP, and LIS is unconstitutional); Schaller v. U.S. Social Security Administration, Civil Case No. 18-00044 at 1–2 (D. Guam June 19, 2020) (denying United States' motion to dismiss in case challenging exclusion of residents of Guam from SSI); United States v. Vaello-Madero, 956 F.3d 12, 32 (1st Cir. 2020) (holding that excluding residents of Puerto Rico from the SSI program violated the Equal Protection Clause), *rev'd*, 142 S. Ct. at 1539.

390. *See* Hammond, *supra* note 236, at 1641 for a more detailed description of the plaintiff in United States v. Vaello-Madero, 956 F.3d 12, 15 (1st Cir. 2020).

391. Specifically, José Luis Vaello-Madero challenged his exclusion from SSI—a program administered by the Social Security Administration via satellite offices throughout the country. *Vaello-Madero*, 956 F.3d at 14–15. Similarly, Katrina and Leslie Schaller—twins who reside in Guam and Pennsylvania and whose reunion in Guam is thwarted by the exclusion of Guam from the SSI program—have also sued the Social Security

their equal-opportunity entitlement to SSI, SNAP, or LIS benefits.[392] Their claims arise under the constitutional provisions that create and safeguard individual rights: the due process clause and equal protection clauses.[393] Many of the plaintiffs in these individual-rights-based lawsuits are eligible for Medicaid[394]—or would be eligible, if Medicaid eligibility in their home territory was determined as it is in states.[395]

A territorial equal-sovereignty cause of action that challenges the discriminatory treatment of the territories under the Medicaid statute would complement the efforts of the individual plaintiffs who are currently litigating their exclusion from federal benefits programs. The population of individuals who would receive benefits under a nondiscriminatory Medicaid statute and the population who would receive benefits through nondiscriminatory federal programs—SSI, SNAP, and LIS—are similar. A successful equal-sovereignty challenge would benefit the individual plaintiffs and similarly situated residents of territories, as well as the litigating territories themselves. Likewise, success in the individual lawsuits would benefit more than just the individual plaintiffs: by securing equal treatment for low-income and disabled residents of territories, the individual-rights lawsuits would mitigate the territories' economic burden in providing care for their most vulnerable citizens.

Administration. Schaller v. United States Soc. Sec. Admin., 844 F. App'x 566, 568–69 (3d Cir. 2021); *Schaller*, Civil Case No. 18-00044, at 2–4. The plaintiffs in Peña Martínez v. Azar, 376 F. Supp. 3d 191, 197 (D.P.R. 2019), have brought a more wide-ranging challenge, seeking to make SSI, SNAP, and LIS available to residents of Puerto Rico.

392. The plaintiffs are not the only parties with an interest in their welfare entitlement; the territories in which the plaintiffs reside have a sovereign interest in their residents' entitlement to benefits. *See* Alfred L. Snapp & Sons v. Puerto Rico, 458 U.S. 592, 601–03 (1982); Massachusetts v. E.P.A., 549 U.S. 497, 520 n.17 (2007).

393. *See, e.g.*, *Peña Martínez*, 478 F. Supp. 3d at 162; *Schaller*, Civil Case No. 18-00044, at 1–2; *Vaello-Madero*, 956 F.3d at 14.

394. *E.g.*, *Peña Martínez*, 376 F. Supp. 3d at 199–200; *see also id.* at 198 (discussing overlapping eligibility for SSI and Medicaid).

395. Because of the arbitrary aggregate cap and lower match rate for federal Medicaid funds, the territories are unable to be as generous with their Medicaid eligibility threshold as they would be if they received matching federal funds at the same rate as states with similar per-capita income. *Interview with Michal Rhymer-Browne*, *supra* note 228. Thus, for example, the eligibility cutoff for Medicaid in the USVI is $1,305 per year for a single adult. *United States Virgin Islands*, MEDICAID.GOV, https://www.medicaid.gov/state-overviews/usvi.html [https://perma.cc/W4DK-YQXZ]. In West Virginia, the cutoff for a single adult is $18,075 per year. *West Virginia Medicaid*, BENEFITS.GOV, https://www.benefits.gov/benefit/1645 [https://perma.cc/5WNA-BSXS]. Yet per capita income in the USVI is significantly lower than per capita income in West Virginia. *Compare U.S. Virgin Islands Annual Economic Indicators*, U.S.V.I. BUREAU ECON. RSCH. (June 30, 2018), http://www.usviber.org/wp-content/uploads/2016/11/ECON17july.pdf [https://perma.cc/7RRS-G5W5], *with Per Capita Personal Income in West Virginia*, FED. RESERVE BANK ST. LOUIS (Mar. 24, 2020), https://fred.stlouisfed.org/series/WVPCPI [https://perma.cc/KN22-TSPV].

As an entirely different cause of action, the elements of an equal-sovereignty challenge to territorial discrimination differ from the key elements in the individual-plaintiff cases. To prevail on an equal-sovereignty challenge to territorial discrimination in the Medicaid statute, a territory must establish (1) a federal intrusion into a sovereign interest that (2) is not "sufficiently related to the problem" Congress sought to remedy when it enacted the Medicaid statute.[396] As I describe below, this cause of action is well-suited to the territories' unfortunate and inequitable situation with respect to Medicaid.

Establishing the first element of the equal-sovereignty claim is straightforward. As discussed *supra* Section III.A.1, federal Medicaid funding comprises a significant portion of all states' and territories' budgets, and shapes decisions in both local healthcare administration *and* state and territorial administration more broadly.[397] The territories and states have a significant sovereign interest in administering their Medicaid programs and setting health policy. And, critically, Medicaid funding affects more than just the Medicaid-eligible population; both states and territories rely on federal Medicaid funds to make long-term investments in their healthcare infrastructure.[398]

Low federal contributions to Medicaid leave the territories to shoulder a greater share of the burden of significant infrastructure investment projects than in other states.[399] This has dire consequences for routine, chronic, and emergency care. For example, USVI residents of means routinely go "off island" to receive cancer treatment.[400] The hospital in St. Croix, USVI had one working operating room at the outbreak of the COVID-19 pandemic,[401] and patients with emergent conditions—such as heart attacks—routinely take air ambulances to Puerto Rico or Miami.[402] Underinvestment in infrastructure driven by Medicaid discrimination can also exacerbate existing wealth inequality in the territories.[403] For example, whereas wealthy pregnant women in the USVI plan ahead to fly off island to deliver, low-income women remain on-island.[404] And insufficient federal matching has left the USVI without sufficient funds to maintain

396. *See supra* notes 196–98 and accompanying text.
397. *See supra* notes 225–31.
398. *See United States Virgin Islands*, *supra* note 395.
399. *See* SHADOW CITIZENS, *supra* note 12, at 21–22.
400. Interview with Masserae Webster, CEO of Frederiksted Health Care, Inc., in St. Croix, USVI (Mar. 12, 2020) [hereinafter Interview with Masserae Webster].
401. *Id.*
402. *Id.*
403. *See* CONG. RSCH. SERV., ECONOMIC AND FISCAL CONDITION IN THE U.S. VIRGIN ISLANDS 4 (2020).
404. Interview with Masserae Webster, *supra* note 400.

any skilled nursing facilities certified by the Center for Medicare and Medicaid Services,[405] which also disproportionately impacts low-income residents without private long-term care insurance.

By limiting the amount of Medicaid funding available to territories—via the arbitrarily depressed match rate and aggregate cap—Congress has impeded the territories' ability to effectively administer their health systems. The consequences of this Medicaid discrimination extend beyond the individuals who receive Medicaid, and infringe on territorial sovereignty. And this territorial discrimination in the Medicaid statute is clearly unwarranted, which is the second element a territory must establish to prevail on its equal-sovereignty claim.

The purpose of Medicaid and the current situation of the territories makes it easy to establish the second element of the claim as well. Congress enacted Medicaid "for the purpose of providing federal financial assistance to States that choose to reimburse certain costs of medical treatment for needy persons."[406] Excluding certain geographic areas from the equal operation of the statute does not advance Congress's purpose of ensuring the medical needs of the country's poorest citizens are met.[407] Although some geographic variation in the implementation of Medicaid is permissible—for instance, geographic variation in federal match rates based on geographic variation in per capita income—geographic variation for no purpose other than territorial discrimination is not sufficiently related to any problem that Medicaid seeks to correct. Consequently, discrimination against the territories in the Medicaid statute appears vulnerable to a territorial equal-sovereignty challenge.

b. Democratic Participation and Voting Rights

For decades, a group of U.S. citizens who reside in Puerto Rico have sought to challenge their total exclusion from the majoritarian democratic processes of the mainland.[408] Between 1991 and 2005,

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405. Judi Shimel, *Sea View Nursing Home Closes After 17 Years*, ST. THOMAS SOURCE (Feb. 2, 2020), https://stthomassource.com/content/2020/02/02/sea-view-nursing-home-closes-after-17-years [https://perma.cc/2QCP-XSKK].

406. Harris v. McRae, 448 U.S. 297, 301 (1980).

407. Upon its initial enactment, the Medicaid statute required states to provide medical assistance to "'categorically needy'" individuals who received federal benefits through other programs, including the precursor to SSI. Schweiker v. Gray Panthers, 453 U.S. 34, 37 (1981). The Act also permitted states to provide assistance to "'medically needy'—persons lacking the ability to pay for medical expenses, but with incomes too large to qualify for categorical assistance." *Id.*

408. I focus on the Igartúa litigation because it has gone on for so long and continues. But at least the Ninth Circuit has reached a conclusion similar to that of the First

the plaintiffs filed three lawsuits challenging their inability to vote in presidential elections,[409] arguing that both constitutional text and the International Covenant on Civil and Political Rights (ICCPR) prohibited their exclusion from the franchise.[410]

In 2005, the third of these cases made its way to the en banc First Circuit, which held that the text of the Constitution excludes Puerto Rico, and the other territories, from voting for the President and Vice President.[411] The en banc court also noted that "[t]here are a host of problems with the [ICCPR] claim, including personal standing, redressability, the existence of a cause of action, and the merits of the treaty interpretations offered," but "th[ought] it unnecessary to plumb these questions . . . because none of these treaties comprises domestic law of the United States and so their *status* furnishes the clearest ground for denying declaratory relief."[412] Three years later, the *Igartúa* plaintiffs filed a new complaint. Instead of arguing that the Constitution and the ICCPR guaranteed their right to vote for

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Circuit in upholding the exclusion of territorial residents from participating in nationwide elections. *E.g.*, Attorney General of Guam v. United States, 738 F.2d 1017, 1020 (9th Cir. 1984).

409. Igartua de la Rosa v. United States, 842 F. Supp. 607, 608 (D.P.R.), *aff'd*, Igartua de la Rosa v. United States, 32 F.3d 8, 11 (1st Cir. 1994) (Igartúa I); Igartua de la Rosa v. United States, 113 F. Supp. 2d 228, 229–30 (D.P.R. 2000), *rev'd*, Igartua de la Rosa v. United States, 229 F.3d 80 (1st Cir. 2000) (Igartúa II); Igartua de la Rosa v. United States, 331 F. Supp. 2d 76, 76 (D.P.R.), *aff'd*, Igartua de la Rosa v. United States, 386 F.3d 313 (1st Cir. 2004), *vacated and reh'g granted*, 404 F.3d 1 (1st Cir. 2005), *granted reh'g en banc*, 407 F.3d. 30 (1st Cir. 2005).

410. The ICCPR recognizes that "[a]ll peoples have the right of self-determination" and "[b]y virtue of that right they freely determine their political status." International Covenant on Civil and Political Rights, art. 1(1), *adopted* Dec. 19, 1976, 999 U.N.T.S. 171 (entered into by United States June 8, 1992) [hereinafter ICCPR]; *see also* Torruella, *supra* note 320, at 334. The ICCPR guarantees citizens the right "[t]o take part in the conduct of public affairs, directly or through freely chosen representatives" and "[t]o vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage." ICCPR, *supra*, art. 25.

411. Igartua de la Rosa v. United States, 417 F.3d 145, 147–48 (1st Cir. 2005) (Igartúa III). Despite expressly declining to "plumb" the plaintiffs' second question, the court devoted a significant quantity of text to musing on the foreign affairs power and the political nature of the plaintiffs' claim. *Id.* at 151.

412. *Igartúa III*, 417 F.3d at 149. The majority's approach to the case before it was sharply criticized by Judge Torruella, the only Puerto Rican member of the First Circuit. *Id.* at 158–59 (Torruella, J., dissenting) ("In its haste to 'put [plaintiffs-appellants'] constitutional claim fully at rest,' the majority has chosen to overlook the issues actually before this en banc court as framed by the order of the rehearing panel . . . . In doing so, the majority fails to give any weight to the fundamental nature of the right to vote, and the legal consequences of this cardinal principal. Under the combined guise of alleged political, [sic] question doctrine, its admitted desire to avoid 'embarrassment' to the United States, and its pious lecturing on what it deems to be the nature of the judicial function, the majority seeks to avoid what I believe is its paramount duty over and above these stated goals: to do justice to the civil rights of the four million United States citizens who reside in Puerto Rico.").

president, they alleged something similar with respect to voting for *congresspeople*: that the ICCPR requires Congress to apportion *voting* congressional representatives to Puerto Rico.[413] This claim again made its way up to the First Circuit, where a divided panel held that the Circuit's en banc decision in *Igartúa III* precluded the plaintiffs' new claims.[414] However, only one member of the panel concluded that *Igartúa III* was correctly decided,[415] and the other two panel members urged the First Circuit to convene en banc to reconsider *Igartúa III*,[416] to no avail.[417] In 2017, the plaintiffs' fifth complaint met a similar fate.[418]

The significance of the distinction between the question presented in the first series of *Igartúa* lawsuits (whether territorial residents may vote for president) and the question in the second series (whether they may vote for congressional representatives) has been obfuscated by the First Circuit's apparent exasperation with the effectively pro se litigants and its hasty invocation of *Igartúa III* to preclude further interrogation of the plaintiffs' more recent claims.[419] But the distinction is crucial. Whereas the Constitution expressly prescribes the election of the President and Vice President—they are chosen by electors, who are chosen by "states"[420]—the Constitution does not limit "the *right* to select voting Representatives to the House of Representatives" to *states*.[421] And, although the text of the Constitution

413. *See, e.g.*, Igartúa v. Trump, 868 F. 3d 24, 25 (2017) (Igartúa VI). Currently, Puerto Rico is represented in Congress by a non-voting "Resident Commissioner." Jenniffer González-Colón, *What is a Resident Commissioner?*, U.S. H.R., https://gonzalez-colon.house.gov/about/what-resident-commissioner [https://perma.cc/L657-M9LL].

414. Igartua v. United States, 626 F.3d 592, 594 (1st Cir. 2010) (Igartúa IV).

415. *Id.* ("Chief Judge Lynch and Judge Lipez conclude that this panel is bound by *Igartúa III's* [constitutional] holding . . . Chief Judge Lynch independently concludes that this holding in *Igartúa III* is correct. Judge Lipez considers the panel bound by this holding in *Igartúa III*, but he does not express a view of his own on its merit. Chief Judge Lynch and Judge Lipez agree that *Igartúa III* requires dismissal of plaintiffs' claims based on treaties and international law . . . . Judge Torruella dissents . . . .").

416. *See* Igartúa v. United States, 654 F.3d 99, 101, 111, 115 (1st Cir. 2011) (opinions of Torruella, Lipez, and Thompson JJ., dissenting from denial of en banc review), *denying reh'g en banc Igartúa IV*, 626 F.3d 592.

417. Three judges voted against and three judges voted for en banc review. Under the First Circuit rules, however, a tie requires denial of en banc review. *Id.* at 101 (opinion of Torruella, J. concerning the denial of en banc consideration).

418. Igartua v. Obama, 842 F.3d 149, 149 (1st Cir. 2016) (Igartúa V) (holding res judicata and Igartúa III and IV barred the plaintiffs' claims), *reh'g en banc denied*, Igartúa VI, 868 F.3d 24 (1st Cir. 2017); *see also id.* at 25 (opinions of Torruella, Lipez, and Thompson, JJ., dissenting from the denial of en banc review).

419. *E.g.*, *Igartua IV*, 626 F.3d at 594; Igartua de la Rosa v. United States, 417 F.3d 145, 148, 151–54 (1st Cir. 2005) (Igartúa III).

420. U.S. CONST. art. II, § 1, cl. 2.

421. *Igartúa*, 654 F.3d at 107–08 (opinion of Torruella, J., dissenting from the denial of en banc review) (emphasis removed).

does not require a congressional apportionment to the territories, it also does not prohibit Congress from doing so or from otherwise extending the *congressional* franchise to territorial residents.[422]

The heart of the second series of *Igartúa* lawsuits has been a mandatory-discretionary apportionment theory that seeks to exploit the distinction between presidential and congressional electoral procedures with reference to the United States' treaty obligations[423]: specifically, the plaintiffs have argued that even though the extension of congressional apportionment to the territories is *discretionary* under the Constitution, U.S. ratification of the ICCPR nevertheless rendered this exercise of congressional discretion *mandatory*.[424] The theory works because the territories' nonapportionment is implemented by legislative enactment and executive branch action.[425] By statute, the Secretary of Commerce "takes the census 'in such form and content as [s]he may determine,'"[426] and the President then submits a statement to Congress, which contains the results of the census and "the number of Representatives to which each State would be entitled under an apportionment of the then existing number of Representatives by the method known as the method of equal proportions."[427] The statutory language allows for the possibility of apportioning voting seats to territories as well as states. Moreover, the Supreme Court has held that "Constitutional challenges to apportionment are justiciable."[428] For a variety of procedural reasons, however, the First Circuit has not considered the argument on its merits.[429]

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422. *Igartúa IV*, 626 F.3d at 616 (Torruella, J., concurring and dissenting in part).

423. *E.g.*, Igartúa v. Trump, 868 F. 3d 24, 25 (2017) (Igartúa VI); *Igartúa IV*, 626 F. 3d at 598 n.6; *see also* Torruella, *supra* note 23, at 99.

424. *Igartúa IV*, 626 F.3d at 605–06.

425. The Constitution simply requires that Representatives "be apportioned among the several States . . . according to their respective numbers . . . ." U.S. CONST. art. I, § 2, cl. 3. In contrast to constitutional provisions that refer to "the States" or "a State," references to "the several States" and "the United States" have been understood to refer to the entire country, the United States of America, including both state and non-state members.

426. Franklin v. Massachusetts, 505 U.S. 788, 792 (1992) (quoting 13 U.S.C. § 141(a)).

427. *Id.* (quoting 2 U.S.C. § 2a(a)).

428. *Id.* at 801.

429. When they first raised this argument, the plaintiffs sought to adjudicate their claim under 28 U.S.C. § 2284(a), which allows a three-judge court to hear claims that "challeng[e] the constitutionality of the apportionment of congressional districts" and present "a substantial federal question." 28 U.S.C. § 2284(a) (2018); Igartúa v. Trump, 868 F.3d 24, 24 (2017). But, in a footnote, a First Circuit panel rejected the plaintiffs' argument that the availability of rights under the ICCPR was a "constitutional claim," and thus refused the plaintiffs' request for a three-judge court. *Igartúa IV*, 626 F.3d 592, 598 n.6 (2010). The panel then concluded that the en banc decision in *Igartúa III* precluded the plaintiffs' claim, without delving into the plaintiffs' argument about the critical distinction between presidential elections and congressional apportionment. *Id.*

Equal territorial sovereignty offers an alternative route to challenging the territories' non-congressional-apportionment. As discussed *supra* Section III.A.2, the territories themselves have a sovereign interest in their residents' democratic representation in the federal legislative body. The territorial nonapportionment claim would be that Congress's failure to exercise its constitutionally discretionary apportionment authority violates the principle of equal sovereignty because, in failing to apportion congressional representatives to the territories, the United States is not fully compliant with its ICCPR obligation, and is noncompliant in a way that discriminates based on geography: only states receive the benefits supposedly guaranteed to all U.S. citizens under the ICCPR. In effect, equal territorial sovereignty provides a cause of action to challenge the territories' nonapportionment under the discretionary-apportionment theory articulated by the *Igartúa* plaintiffs, on a *sovereign* rather than *individual* basis.

Testing the *Igartúa* plaintiffs' mandatory-discretionary apportionment theory via an equal-sovereignty cause of action brought by territorial (governmental) plaintiffs offers several advantages relative to the individual-plaintiff model in which the theory has been tested so far. Whereas "personal standing, redressability, [and] the existence of a cause of action" were potential obstacles to the individual plaintiffs' congressional nonapportionment claims,[430] these issues do not present the same obstacles to a territorial challenge. First, litigating congressional nonapportionment as an equal sovereignty violation clearly satisfies the "constitutional claim" prerequisite of Section 2284(a),[431] and equal sovereignty provides the constitutional

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at 594. In the years since this initial cursory rejection of the discretionary apportionment theory, multiple First Circuit judges have expressed skepticism of the correctness of the now-controlling footnote. *E.g.*, Igartua v. Obama, 842 F.3d 149, 151 (1st Cir. 2016) ("[W]e now doubt the correctness of the brief, yet controlling, footnote in Igartúa IV rejecting the call for a three-judge court. Moreover, if our court were now to conclude, in an en banc proceeding, that a three-judge panel should have been convened to hear the constitutional claims addressed in Igartúa IV, the merits ruling in Igartúa IV would be void. Hence, though we as a panel must follow Igartúa IV, the three-judge-court issue is one of substantial importance that should be reconsidered by the full court in an en banc rehearing of this case.").

But the First Circuit has refused to consider the question en banc. *See* Igartúa v. Trump, 868 F. 3d 24, 25 (2017) (Igartúa VI) (denying en banc review); *id.* at 25 (opinions of Torruella, Lipez, and Thompson, JJ., dissenting from the denial of en banc review).

430. *See supra* note 412.

431. The substantiality component of Section 2284(a) is also clearly satisfied. It should go without saying that the disenfranchisement of nearly four million American citizens is a "substantial" federal question. *Igartúa VI*, 868 F. 3d at 25–26 (Torruella, J., dissenting) ("At the heart of this controversy lies the total national disenfranchisement and lack of national political clout of the community of 3.5 million United States citizens who reside

cause of action. Second, a territory has *parens patriae* standing to enforce its residents' interest in democratic representation.[432] Third, the remedy for congressional nonapportionment differs from the remedy for territorial residents' exclusion from presidential elections.[433] Whereas the Constitution imposes a bright-line rule about the presidential election process, federal law empowers the Commerce Department to "take the steps necessary to conform the apportionment process to the law."[434] Consequently, whereas the individual plaintiffs' challenge to their exclusion from the presidential franchise might have been nonredressable, the same does not apply to a territorial challenge to congressional nonapportionment.

As with an equal-sovereignty challenge to territorial discrimination in Medicaid, the key elements that a plaintiff territory would have to establish are (1) an infringement of sovereignty that (2) is not sufficiently related to the problem the federal government sought to remedy when taking the challenged action.[435] As I have argued, the territories' exclusion from congressional apportionment infringes on their sovereign interest in federal representation. Moreover, this intrusion is not sufficiently justified by the problem the federal government seeks to address through the reapportionment process. The purpose of reapportionment is to ensure jurisdictions are equally represented in the federal government,[436] and that the votes of residents of one jurisdiction are "weighted equally" to the votes of residents of other states.[437] Depriving territories of congressional apportionment ensures that the votes of nearly four million U.S. citizens have no weight in nationwide political decisionmaking. In light of the centrality of democratic participation to American identity, history, and contemporary life,[438] it cannot reasonably be argued that excluding U.S. citizens from democratic participation is "sufficiently related" to the legislative purpose of ensuring equal representation.

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in Puerto Rico, a condition which has lasted for the 119 years of U.S. sovereignty over the people who inhabit this territory, and even more significantly, throughout the 100 years since they were granted citizenship in 1917."); *id.* at 30 (Lipez, J., dissenting) ("There could be no more compelling circumstances for en banc review."); *id.* at 31 (Thompson, J., dissenting) ("The right to vote is perhaps the most precious enjoyed by America's citizens.").

432. *See supra* notes 207–09.

433. *See Igartúa IV*, 626 F.3d at 609 (Lipez, J., concurring in the judgment) (distinguishing the nonredressability of the Plaintiffs' presidential franchise claim from the potential redressability of their congressional nonapportionment claim).

434. *Id.*

435. *See supra* note 380.

436. Franklin v. Massachusetts, 505 U.S. 788, 791 (1992).

437. *Id.* at 806.

438. *See supra* text accompanying note 245.

B. Challenging Unequal Footing

In addition to providing a means to challenge discriminatory federal legislation and regulation, equal territorial sovereignty also illuminates an avenue for challenging congressional inertia with respect to the territories' status. Building on the framework articulated in Section III.B that conceives of the territories' persistent unincorporation as an ongoing violation of the equal footing doctrine, this Section sketches the outline of an affirmative equal-footing claim.

The structure of this claim is largely the same as the structure of the claims outlined in the preceding section. To prevail, the litigating territory must demonstrate that federal action—in this case, federal inaction—has impaired a sovereign interest without sufficient justification. In the following paragraphs, I map out the contours of the sovereign interest at stake and describe the federal acts and omissions that arguably have infringed on this interest, thereby creating the foundation for an equal-sovereignty claim.

As described in Section I.B.2, equal footing protects a territory's right to enter the Union as a state of equal status to the other states. Equal footing thus guarantees to incoming states a certain kind of status within the Union—a status in which both states and territories possess a sovereign interest.[439] A corollary of this guarantee is that equal footing protects against federal action that would cause a territory to enter the Union as a second-class state or substate.[440] Section III.B argued that this corollary creates a sovereign interest—possessed by U.S. territories alone—in their treatment during the entry process.[441] For purposes of an affirmative equal-footing claim, the relevant sovereign interest is thus the territories' treatment—including their legal status within the United States and their treatment by the federal government—during their territorial tenure.[442]

On this front, the circumstances of the modern U.S. territories represent a historically unprecedented infringement of the sovereign rights guaranteed by the equal footing doctrine.[443] By describing the history of similarly situated territories that eventually became states,

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439. *See supra* notes 206–07 and accompanying text (identifying recognition of sovereignty and status within the union as quasi-sovereign interests). Territories possess this interest because they are, in effect, incoming states.

440. *See supra* notes 102–03.

441. Only territories possess a sovereign interest in their treatment during the entry process because states have already been admitted and cannot possess an interest in a status they no longer possess. Even if a state could articulate a violation of this sovereign interest during its entry process, such a claim would be mooted upon admission.

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

443. *See supra* notes 303–04.

Section III.B.3 makes clear that the contemporary U.S. territories have not been treated at all like as their predecessors.[444] That the ongoing equal footing violation perpetuated against the territories arose from deliberate neglect rather than affirmative federal action does not impair a potential equal-sovereignty cause of action to this treatment. The intrusions into the territories' sovereignty cause by this inaction are as concrete as sovereign encroachments caused by affirmative acts.[445] Moreover, this federal infringement of territorial sovereignty has been wholly unwarranted.

As I and others have argued, the geographic variation in the federal government's treatment of the twentieth-century U.S. territories was driven by racism and stereotypes about the non-white or Spanish-speaking inhabitants of the remaining U.S. territories.[446] These rationales cannot justify the discriminatory manner in which the federal government has overseen the process of the territories' incorporation.[447] And even allowing for the possibility that racism was not the sole driver of this geographic discrimination, alternative explanations are either implausible or deficient. To the extent that any of the original differential treatment of the formerly Spanish territories could have been justified by their history within the Spanish empire and its civil law system—a debatable proposition—their twelve decades under U.S. dominion and legal system obsolesce these justifications. And, as I argue *infra* Section V.A, explanations based on "status questions" or self-determination are similarly untenable justifications for the ongoing discriminatory treatment to which the federal government subjects the territories.[448]

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444. *See* Sections III.B.3.a and III.B.3.b (contrasting the experiences of Alaska and Hawai'i with the experiences of the modern-day territories).

445. For example, the territories' "unincorporated status" is routinely cited by the federal government as a justification for denying vulnerable U.S. citizens who reside in the territories equal access to federal benefits, including SSI. *See, e.g.*, Opening Brief, *supra* note 145, at 30–31. At the same time, Congress's discriminatory treatment of the territories within the Medicaid statute impairs their ability to care for their most vulnerable residents. *See supra* notes 225–31, 397–407 and accompanying text.

446. *See* Sections III.B.3.a and III.B.3.b.

447. *See* United States v. Vaello-Madero, 142 S. Ct. 1539, 1552 (2022) (Gorsuch, J., concurring) ("A century ago in the Insular Cases, this Court held that the federal government could rule Puerto Rico and other Territories largely without regard to the Constitution. It is past time to acknowledge the gravity of this error and admit what we know to be true: The Insular Cases have no foundation in the Constitution and rest instead on racial stereotypes. They deserve no place in our law.").

448. Although status questions and self-determination are reasonable explanations for why the United States *today* cannot simply bestow statehood or independence on its territories, they are orthogonal to questions about the constitutionality of territorial discrimination in congressional apportionment and Medicaid funding while the territories remain part of the United States. *See infra* Section V.A.

Because the ongoing equal footing violation experienced by the contemporary U.S. territories is unwarranted and unjustifiable, their situation violates the principle of equal sovereignty, and equal sovereignty provides a route to relief. Although this conception of an equal-footing violation represents a significant expansion of the equal footing doctrine,[449] at least two structural factors suggest that the benefits of a bold equal-footing litigation strategy could outweigh its risks. First, the equal footing doctrine has lain mostly dormant since the early twentieth century.[450] Removed from the (geographic) expansionist mindset of that era, the circumstances that precipitate future invocations of the doctrine will look quite different from the circumstances that gave rise to current equal footing precedent.[451] Expanding the equal footing doctrine to encompass a territorial cause of action is thus in line with the doctrine's other, possible applications. Second, the benefits of a successful equal footing challenge—the mitigation of significant economic, political, and civil subordination of existing territories and their residents—would be significant.

V. DECOLONIZING EQUAL SOVEREIGNTY

For over a century, U.S. citizens who reside in U.S. territories have been deprived of the right to vote in national elections, among many other indignities, solely on the basis of their residence.[452] The territories' persistent legal "unincorporation" facilitates their subordination, despite the inconsistency of this status with the original understanding of U.S. territorial acquisition and administration. Over the same period, the territories have developed the attributes of sovereignty at the heart of the equal sovereignty doctrine. Recognizing a principle of equal sovereignty for the territories is more than just an academic exercise. Equal territorial sovereignty would both

449. Most previously adjudicated equal footing claims have arisen in the context of title to submerged lands and the preservation of Indian treaty rights after statehood. *See* cases cited *supra* note 100; Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 175 (1999) (usufructuary rights in Minnesota); Utah Div. of State Lands v. United States, 482 U.S. 193, 195 (1987) (title to Lake Utah); *see also* Sonia Sotomayor de Noonan, Note, *Statehood and the Equal Footing Doctrine: The Case for Puerto Rican Seabed Rights*, 88 YALE L.J. 825, 829, 835 (1979).

450. *See infra* Section I.B.2.

451. For example, many of the more recent equal footing challenges have involved disputes over scarce resources, such as water, seabed, and land. *E.g.*, Herrera v. Wyoming, 139 S. Ct. 1686, 1693 (2019) (Indian treaty rights to land); Alaska v. United States, 545 U.S. 75, 79 (2005) (seabed rights upon admission); Idaho v. United States, 533 U.S. 262, 272–74 (2001) (navigable waters). Climate change is likely to significantly affect the nature of these disputes in the future.

452. *See* Valeria M. Pelet del Toro, *Beyond the Critique of Rights: The Puerto Rico Legal Project and Civil Rights Litigation in America's Colony*, 128 YALE L.J. 792, 810–11 (2019).

acknowledge the de facto sovereignty that the territories already exert and provide a new path towards achieving equality for territorial residents.

In addition to the substantive benefits that could be realized by judicial recognition of equal territorial sovereignty, the principle also possesses desirable ancillary benefits that should counsel towards such recognition. This Part addresses three of these benefits in turn. Section A discusses the broader practical implications of equal territorial sovereignty for the United States–U.S. territories relationship. I explain how equal territorial sovereignty will neither preclude nor require particular resolutions to the outstanding questions regarding the territories' ultimate status within and in relation to the United States. Next, abstracting from these practical, legal questions, Section B evaluates the place of equal territorial sovereignty within the rights/power dichotomy framework as developed in the critical legal studies and critical race theory movements. I suggest that equal territorial sovereignty can be both power-reinforcing and rights-creating, and may thus provide a viable route to securing equality for residents of U.S. territories. Finally, Section C supplies a macroscopic perspective on the morality of equal territorial sovereignty, and argues that recognizing equal territorial sovereignty is a moral imperative in light of the history and present circumstances of U.S. colonial administration.

A. Status Questions

Just as equal territorial sovereignty possesses benefits at the practical level of litigation, it also entails normatively desirable consequences for the broader legal questions surrounding the United States' relationship with its territories. This is significant because, with the exception of Puerto Rico,[453] the United Nations classifies the U.S. territories as "[n]on-[s]elf-[g]overning [t]erritories"—that is, "territories whose people have not yet attained a full measure of self-government."[454]

The territories' status under international law imposes special obligations on the United States as their administering nation. Chapter XI of the U.N. Charter obligates U.N. member nations who

453. Puerto Rico was removed from the U.N. list of non-self-governing territories in 1953. *See Developments in the Law*, *supra* note 19, at 1657. *See infra* note 458 for a discussion of the contemporary debate over Puerto Rico's absence from this list and its status as a "self-governing" territory.

454. *Non-Self-Governing Territories*, UNITED NATIONS (Sept. 22, 2020), https://www.un.org/dppa/decolonization/en/nsgt [https://perma.cc/G4DC-HELQ].

administer non-self-governing territories to, among other things, "to ensure, with due respect for the culture of the peoples concerned, their political, economic, social, and educational advancement, their just treatment, and their protection against abuses."[455] Moreover, the U.N. Declaration on the Granting of Independence to Colonial Countries and Peoples, which the General Assembly adopted in 1960, guarantees to the residents of non-self-governing territories "the right to self-determination; by virtue of that right they . . . freely pursue their economic, social and cultural development."[456]

Amidst the wave of mid-twentieth-century decolonization, the United States took certain steps towards increasing territorial autonomy, ostensibly to fulfill its international legal obligations.[457] Contemporary assessments of the degree to which these new laws actually fulfilled the United States' international legal obligations were mixed. The United Nations removed Puerto Rico from the list of non-self-governing territories in part due to the passage of Public Law 600, which granted Puerto Rico "commonwealth" status.[458] But, even in the 1950s, scholars argued that the mid-century laws passed by Congress to support territorial autonomy fell short of the standard required by international law.[459]

By 2022, any initial optimism advocates may have felt that Puerto Rico's initial transition off the list of non-self-governing territories has largely vanished. The Supreme Court has steadily walked back the legal significance of Public Law 600,[460] to the extent that Puerto Rico's absence from the U.N. list of non-self-governing territories is misleading.[461] And, of course, the Virgin Islands, Guam, and American Samoa continue to be defined as "Non-Self-Governing Territories" under international law.[462] Although international law

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455. U.N. Charter art. 73(a).

456. G.A. Res. 1514 (XV), at 67, Declaration on the Granting of Independence to Colonial Countries and Peoples (Dec. 14, 1960). Self-determination is the fundamental right of colonized people to determine their sovereignty and political status. International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171, art 1(1) (entered into force Mar. 23, 1976).

457. *See supra* notes 285–94 and accompanying text.

458. *See Developments in the Law*, *supra* note 19, at 1657. One justification for Puerto Rico's removal from the list was the passage of Public Law 600 in 1950, which granted Puerto Rico "commonwealth" status. *Id.*

459. *E.g.*, Gordon K. Lewis, *Puerto Rico: A New Constitution in American Government*, 15 J. POL. 42, 64 (1953); Peter J. Fliess, *Puerto Rico's Status Under Its New Constitution*, 5 W. POL. Q. 635, 655–56 (1952).

460. *See, e.g.*, Puerto Rico v. Sánchez Valle, 136 S. Ct. 1863, 1871, 1873–75 (2016).

461. *See, e.g.*, Dorian A. Shaw, Note, *The Status of Puerto Rico Revisited: Does the Current U.S.–Puerto Rico Relationship Uphold International Law?*, 17 FORDHAM INT'L L.J. 1006, 1036, 1039 (1994).

462. *See* UNITED NATIONS, *supra* note 454.

obligates the United States to guarantee certain rights of the residents of territories under its jurisdiction, and promises the residents of the U.S. territories the right of self-determination,[463] the current status of the territories falls short of these requirements.

Until the United States is prepared to support the process of self-determination for its territories,[464] the delicate and political nature of the issue, as well as its fundamentality to the United States–Territorial relationship, suggest that the federal judiciary is unlikely to make pronouncements on the international or political status of the territories. In this context, judicial recognition of equal territorial sovereignty could provide a meaningful mechanism for enforcing the United States' other international legal obligations to its dependent territories[465] without constraining political decisions on the status of the territories under international law. Critically, applying the doctrine of equal sovereignty to the territories preserves their right to self-determination[466] and is consistent with a range of status options, including statehood, independence, free association, and constitutionally compatible territorial status.[467]

Applying equal sovereignty to the territories recognizes the sovereignty that the territories presently exercise, and offers as much protection to that exercise of sovereignty as accrues to states' exercise of equivalent sovereignty.[468] Consequently, equal territorial sovereignty does not require overturning (or not overturning) the *Insular Cases*[469] and will not necessarily result in the territories' incorporation or permanent binding to the United States,[470] preserving the

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463. Ediberto Roman, *Empire Forgotten: The United States's Colonization of Puerto Rico*, 42 VILL. L. REV. 1119, 1135–37 (1997) (discussing the United States' recognition of the international legal right of self-determination); *see also* Shaw, *supra* note 461, at 1021–22.

464. *See* Roman, *supra* note 463, at 1158–61, for a summary of how the United States thwarted efforts to provide Puerto Ricans with the opportunity to exercise their right of self-determination in the years between the passage of Public Law 600 and 1997.

465. *See* U.N. Charter art. 73.

466. *See* Roman, *supra* note 463, at 1129–30 (discussing self-determination in the context of Puerto Rico); *see also* Joseph Blocher & Mitu Gulati, *Forced Secessions*, 80 L. & CONTEMP. PROB. 215, 225, 231, 234 (2017) (arguing that self-determination encompasses the right of colonies to veto their cession).

467. *See* Lawson & Sloane, *supra* note 99, at 1178–80 (discussing the statuses consistent with the U.S. Constitution).

468. *See infra* Part I.

469. *See* James T. Campbell, Aurelius*'s Article III Revisionism: Reimagining Judicial Engagement with the* Insular Cases *and "The Law of the Territories"*, 131 YALE L.J. 2542, 2542,2559–60 (2022) and Christina Duffy Ponsa-Kraus, *The* Insular Cases *Run Amok: Against Constitutional Exceptionalism in the Territories*, 131 YALE L.J. 2449, 2450, 2458 (2022) for recent scholarship addressing the necessity, challenges, and implications of overruling the *Insular Cases*.

470. *See* Riley E. Kane, *Straining Territorial Incorporation: Unintended Consequences*

status options available to the territories.[471] By centering the inquiry on the territories' de facto sovereignty, equal territorial sovereignty simply levels up the appurtenances of sovereign rights available to the territories, without curtailing their access to rights uniquely accessible to colonized entities. This framing defers the larger constitutional questions—such as the compatibility of the contemplated status options with both domestic constitutional law and customary international law—until the territories are able to exercise their right to self-determination.[472]

At the same time, equal sovereignty preserves the territories' rights—and does not destroy the United States' obligation to ensure those rights—to self-determination.[473] Although the federal government has argued that certain territories have already exercised their rights of self-determination by entering or modifying their territorial relationship with the United States,[474] the question of self-determination is not for the colonizer to decide[475] and the United Nations has recognized that United States is in violation of its international legal obligations.[476] Recognizing the application of equal sovereignty to the territories on the basis of their de facto status will not alter the United States' obligation under international law to assure a self-determined de jure resolution.

Apart from the questions of formal status and self-determination, equal territorial sovereignty is likely to be consistent with alternative conceptions of the present U.S.-territorial relationship. As Camila Bustos has pointed out, "Sovereignty is more complicated than the question of political status."[477] Building on the work of Kevin

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from Judicially Extending Constitutional Citizenship, 80 OHIO ST. L.J. 1230, 1232–33 (2019) (arguing that overturning the *Insular Cases* will "instantly incorporate[] and permanently b[i]nd" the territories to the United States).

471. Scholars have discussed a variety of domestic and international legal constraints on the territories' future status. *See, e.g.*, Blocher & Gulati, *supra* note 3, at 235–36; Declet, Jr., *supra* note 285, at 20; McCall, *supra* note 38, at 1371–72.

472. *See* Lawson & Sloane, *supra* note 99, at 1124–25 (discussing how the status of Puerto Rico represents a collision between U.S. constitutional law and international law).

473. The United States is obligated to recognize this right under both customary international law and treaty law. Roman, *supra* note 463, at 1136.

474. *E.g.*, Van Dyke, *supra* note 166, at 514 ("The United States argues that the people of the Northern Marianas exercised their right to self-determination in 1975 by voting to be affiliated in permanent union with the United States in a status in which Congress can impose laws upon them under the Territory Clause, without their consent or meaningful representation in the legislative process."); *see* Roman, *supra* note 463, at 1154, 1161 (discussing Puerto Rico).

475. *See* Van Dyke, *supra* note 166, at 504.

476. *See, e.g.*, Roman, *supra* note 463, at 1159–61.

477. Camila Bustos, Note, *The Third Space of Puerto Rican Sovereignty: Reimagining Self-Determination Beyond State Sovereignty*, 32 YALE J. L. & FEMINISM 73, 87 (2020).

Bruyneel,[478] Bustos has argued that Puerto Ricans have developed a "third space" of sovereignty that transcends traditional notions of state sovereignty.[479] Although the assumption that Puerto Rico lacks aspects of traditional state sovereignty underlies Bustos's critique,[480] the presence of certain aspects of traditional state sovereignty does not vitiate Bustos's argument that Puerto Rico, as well as other territories, possess aspects of sovereignty that states do not.[481] Nor does equal territorial sovereignty require that territories exercise *all* traditional attributes of state sovereignty: instead, the territorial application of equal sovereignty requires simply that territories exercise those aspects of sovereignty that implicate the core of equal sovereignty's purpose.[482]

B. Equalizing Power

A significant ancillary benefit of equal territorial sovereignty lies in its focus on recognizing, respecting, and reinforcing powers inherent to sovereignty as a method of minority empowerment.[483] In this way, a territorial application of the equal sovereignty principle creates a power-based framework for protecting territories and their residents similar to how the Court's federalism jurisprudence protects, via its reservation of power, the states and their residents, or the way in which federal Indian law recognizes the inherent sovereignty of Indian tribes.

As defined in this Article to incorporate finality of decision-making and insulation from federal second-guessing in areas of local

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478. In the context of Indian law, Bruyneel argues that "the imposition of American colonial rule and the indigenous struggle against it constitute a conflict over boundaries . . . that has defined U.S.-indigenous relations since the time of the American Civil War." KEVIN BRUYNEEL, THE THIRD SPACE OF SOVEREIGNTY xvii (2007). U.S. colonial rule "narrowly bound[s] indigenous political status in space and time, seeking to limit the ability of indigenous people to define their own identity and to develop economically and politically on their own terms." *Id.* Indigenous resistance to this rule—"demanding rights and resources from the liberal democratic settler-state while also challenging the imposition of colonial rule on their lives"—creates a "'third space of sovereignty' that resides neither simply inside nor outside the American political system but rather exists on these . . . boundaries." *Id.* The third space of sovereignty "expos[es] both the practices and contingencies of American colonial rule" and is "inassimilable to the institutions and discourse of the modern liberal democratic settler-state and nation." *Id.*

479. Bustos, *supra* note 477, at 87–88.

480. *Id.* at 76–77, 88.

481. As explained in *supra* notes 151–52, territories lack one significant aspect of sovereignty: independent prosecutorial authority.

482. *See infra* Part I.

483. Maggie Blackhawk, *Federal Indian Law as Paradigm Within Public Law*, 132 HARV. L. REV. 1787, 1856 (2019).

administration,[484] sovereignty enables sovereigns—both states and territories—to operate autonomously in the spheres that the Constitution does not control.[485] Equal sovereignty prohibits legislative enactments and executive enforcement that impermissibly intrude into "sensitive areas of state and local policymaking."[486] The requirement that infringements of sovereignty be both justified in light of "current conditions"[487] and "sufficiently related"[488] to their valid legislative purpose reflects both constitutional respect for sovereignty and prudential solicitude for localized expertise.

Equal territorial sovereignty represents a legal mechanism for reinforcing the power of territorial governments and peoples. The mechanism achieves this result through direct and indirect operation. First, recognizing equal territorial sovereignty would directly insulate territorial governments' exercise of their internal sovereignty from congressional interference by requiring heightened review of congressional enactments that purport to infringe on this sovereignty. This additional scrutiny should result in fewer unwarranted infringements on territorial sovereignty, resulting in the accumulation rather than decumulation of power. Second, extending equal sovereignty to territories will reinforce territorial governments' capacities to govern according to their own expertise and knowledge of their needs.[489] The freer exercise of internal sovereignty, with fewer impositions of federal ideology or convictions, should result in a more optimal allocation of legislative power while also reinforcing territorial power.[490]

At the same time, equal territorial sovereignty remains consistent with existing rights-based frameworks for territorial empowerment[491] and might even reinforce the general benefits of such frameworks for the territories.[492] Especially in light of particularized territorial concerns—for example, the tension between cultural preservation in the territories and the extension of constitutional rights to the

484. *See infra* Section I.C.

485. Shelby Cnty. v. Holder, 570 U.S. 529, 543 (2013).

486. *Id.* at 545.

487. *Id.* at 553.

488. Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 203 (2009).

489. *See* Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.–C.L. L. REV. 401, 412–13 (1987); Yazzie, *supra* note 95, at 47 (discussing the significance of internal sovereignty for Indigenous peoples); *cf.* Lani Guinier, *No Two Seats, The Elusive Quest for Political Equality*, *in* THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY 71, 103 (1994).

490. Yazzie, *supra* note 95, at 47 (identifying the exercise of internal sovereignty by colonized peoples as a critical and power-reinforcing step on the path to postcolonial status).

491. *E.g.*, Torruella, *supra* note 23, at 99, 103; Declet, Jr., *supra* note 285, at 36.

492. *See* Pelet del Toro, *supra* note 452, at 804–06, 808–09, 832–36 (2019) (discussing the benefits of the rights framework for Puerto Rico).

territories[493]—equal territorial sovereignty could represent an important mediating principle in territories jurisprudence.[494] Invoking the equal sovereignty doctrine in the territorial context would cause courts to apply the same balancing test they apply in the state context: a balancing of the legitimacy of federal purpose against the burden created by federal intrusion into territorial sovereignty, measured by current conditions.[495] Only infringements of territorial sovereignty that are sufficiently related to the problem targeted by a valid exercise of federal authority would survive this analysis.

Finally, by protecting against unwarranted federal infringement on territories' sovereignty, equal territorial sovereignty would also heed the admonition that subordination of minorities has often arisen "from the failure of those in power to conform to their own legal rules, rather than the oppressive structure of the law itself."[496] One of equal territorial sovereignty's innovations is its principled elaboration of existing doctrine to encompass a broader application. Equal territorial sovereignty does not require the judiciary to invent a new "'territorial federalism'" doctrine to accommodate the contemporary situation of the territories in a federalist system that does not contemplate their indefinite existence.[497] To recognize a principle of equal territorial sovereignty, the judiciary need only recognize that the current circumstances of the territories implicate the principles of sovereignty at the heart of the equal sovereignty doctrine. There is no need for "further experimentation" that risks "substituting one unequal framework for another."[498] Equal territorial sovereignty is simply equal sovereignty, properly applied to all sovereign entities under United States sovereignty. In this way, recognizing equal territorial sovereignty is normatively desirable because it does not require the creation of new judge-made law, but rather extends existing doctrine to the full extent contemplated by constitutional principles.

C. Moral Obligation

Daniel Immerwahr has described the constitutional questions of the early twentieth century as, "[i]n essence . . . an argument

493. *See, e.g.*, Kane, *supra* note 470, at 1250; Stanley K. Laughlin, Jr., *Cultural Preservation in Pacific Islands: Still a Good Idea—and Constitutional*, 27 U. HAW. L. REV. 331, 343 (2004); Arnold Leibowitz, *The Commonwealth of Puerto Rico: Trying to Gain Dignity and Maintain Culture*, GEO. J. INT'L & COMP. L. 211, 281 (1981).

494. *Cf.* Blackhawk, *supra* note 483, at 1862.

495. *See, e.g.*, *id.* at 1869.

496. Blackhawk, *supra* note 483, at 1856.

497. *See Developments in the Law*, *supra* note 19, at 1632; *supra* notes 19–25 and accompanying text; Torruella, *supra* note 23, at 97–98.

498. Torruella, *supra* note 23, at 68.

about a trilemma. Republicanism, white supremacy, and overseas expansion—the country could have at most two."[499] The *Insular Cases* condoned expansionism and accommodated white supremacy at the expense of American constitutional republicanism: by distinguishing between incorporated and unincorporated territories and confining the former Spanish possessions into the latter category, the Supreme Court sanctioned a separate and unequal form of republicanism, motivated and justified by white supremacist ideology.[500]

Equal territorial sovereignty has both nothing and everything to do with the *Insular Cases*. As noted in Section V.A, recognizing a principle of equal sovereignty for the territories does not require overturning the *Insular Cases*—though plenty of scholars, activists, elected officials,[501] and even judges[502] have (rightly) called for them to be overturned due to their moral repugnance and constitutional baselessness. Nevertheless, by allowing the territories to avail themselves of the same legal rights to which other sub-federal sovereign entities are entitled, equal territorial sovereignty would begin to repair the real, tangible and intangible harms that the *Insular Cases* have caused.

In the century since the *Insular Cases* were decided, the territories have fought to achieve the level of sovereignty they currently wield *despite* Supreme Court precedent sanctioning their total de jure subjugation by the federal government.[503] In that time, the Court has recognized that constitutional developments have allowed the territories to accrue autonomy and to behave in a manner similar to the states.[504] The Court has also walked back the expansive potential of the *Insular Cases*,[505] even if it has repeatedly failed to repudiate either their legal reasoning or their racist justifications.[506]

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499. DANIEL IMMERWAHR, *Empire State of Mind*, *in* HOW TO HIDE AN EMPIRE 73, 80 (2019).

500. *See* sources cited *supra* notes 129–32 and accompanying text.

501. *E.g.*, Brief of Amici Curiae Members of Congress, Former Members of Congress, and Former Governors of Guam, the Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands, Fitisemanu v. United States, No. 20-4017, at 11 (10th Cir. 2020).

502. *See, e.g.*, Brief of Former Federal and Local Judges as *Amici Curiae* Supporting the First Circuit's Ruling on the Appointments Clause at 10, Financial Oversight & Mgmt. Bd. v. Aurelius Investments, 140 S. Ct. 1649, at 10 (2020).

503. *See infra* Section II.B.

504. *See supra* note 152 and accompanying text.

505. *E.g.*, Examining Bd. of Engineers, Architects & Surveyors v. Flores De Otero, 426 U.S. 572, 600 n.31 (1976) ("The announcement in those cases that the Constitution applied with full force only in the States composing the Union and in incorporated Territories was overruled, however, only a year later when the Court granted petitions for rehearing, arrived at the opposite result, and withdrew the earlier opinions." (citing *Reid v. Covert*, 354 U.S. 1 (1957)).

506. *E.g.*, Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC, 140 S. Ct. 1649, 1665 (2020).

Recognizing a territorial application of the equal sovereignty principle is consistent with the Court's trend toward recognizing the territories' de facto sovereignty and minimizing the relevance and expansiveness of the *Insular Cases*.

The principle of equal sovereignty that the Court has identified as arising from the structure of the Constitution and judge-made law protects the sovereign function and dignity of sovereign entities. Extending equal sovereignty to the territories follows immediately from the recognition that the territories exercise most of the same sovereign functions as states, and relate to their citizens in much the same way that residents of states relate to their citizens. To exclude the territories from the reach of the equal sovereignty principle would require overlooking the realities of their situation vis-à-vis the states, the federal government, and the U.S. citizens over whom they exercise and from whom they derive sovereignty. This outcome would be not only doctrinally insincere, but also morally unacceptable: deeming equal sovereignty inapplicable to the territories would create a contemporary echo of the *Insular Cases*, whereby rights most Americans deem fundamental were held inapplicable to the unincorporated territories.

CONCLUSION

For over a century, U.S. citizens who reside in territories have been deprived of their right to vote in national elections, among many other indignities. This Article has argued that the equal sovereignty principle applies to U.S. territories as well as states, and has outlined how a territorial application of equal sovereignty could provide a constitutional cause of action for challenging the territories' perpetual second-class status. Although equal territorial sovereignty will not resolve the ultimate question regarding the permanent status of the territories, it will recognize their current status as sovereign entities within the United States and provide a mechanism for achieving equal rights for their U.S. citizen-residents within the current paradigm.