Uti Possidetis: Is Possession Really Nine-Tenths of the Law - The Acquisition of Territory by the United States: Why, How, and Should We

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Uti Possidetis:* Is Possession Really Nine-Tenths of the Law? The Acquisition of Territory by the United States: Why, How, and Should We?

John Duncan**

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* Uti possidetis (Latin) means "as you possess, so may you continue to possess." The term currently refers to "the doctrine that colonial administrative boundaries will become international boundaries when a political subdivision or colony achieves independence." BLACK'S LAW DICTIONARY 1582 (8th ed. 2001). However, under Roman law it was an interdict ordering the parties to maintain possession of property until it was determined who owned the property. Because the United States may consider the possibility of acquiring new territory, should it also seek possession as support for acquisition? If it does possess and acquire territory, what are the rights of those individuals previously located in the territory? These questions are considered in this article.

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 Whatever [the federal government] acquires, it acquires for the benefit of the people of the several states who created it. It is their trustee acting for them, and charged with the duty of promoting the interests of the whole people of the Union in the exercise of the powers specifically granted.1

I. INTRODUCTION

The United States began as a small union of thirteen colonies that joined together to become part of a federal republic. Since that time, the United States has grown to encompass fifty states and a handful of territories. The citizens of the several states have been taught from an early age that the Constitution is the supreme law of our land and that it offers protections from our federal and state governments. We are taught that we are guaranteed to be free from unjust governments through our power to elect the people who govern us and that we are guaranteed a variety of personal rights and freedoms as set forth in the Bill of Rights and other constitutional provisions.

The residents of United States territories, however, may not accept these teachings as readily. Depending on the method by which a territory was acquired by the United States, citizens may not be granted any of the rights outlined above. An important question that arises is whether the inhabitants of United States territories actually have “rights” or simply revocable benefits disguised as such.

The purpose of this article is to identify the historical rationale for the United States’ acquisition of territory and to analyze the legal authority (or lack thereof) available to Congress and the executive branch to acquire territory. Of supreme importance in any study of the acquisition of territory are the rights of inhabitants of the territories as well as the rights of Congress under the Constitution and important court rulings; these topics are discussed below. Finally, this article considers the reasons the United States may wish to acquire more territory in the future and how that desire comports with our role as international citizens.

II. RATIONALES FOR PAST ACQUISITIONS

Perhaps more important than the question of how the United States can legally acquire territory is the question of why the United States would want to acquire territory. In many cases, there is little or no benefit to acquiring territory. This section provides an overview of the acquisition of past and present United States territories, offers insights into why land was acquired, and suggests potential reasons why the United States may want to acquire territory in the future.2

Although the reasons for past and present acquisitions vary greatly, some broad rationales for acquisitions obviously recur within the discussion. Many of the acquisitions related in some way to military action. For instance, some acquisitions came as a result of military victories over the holders of the land. Some acquisitions were made because the United States perceived that it was necessary to place military bases in the territory for security reasons. Similarly, many of the acquisitions were accomplished for economic reasons. One of the most notable economic reasons for acquisition was to facilitate access by United States developers to the natural resources in the area. Finally, acquisition appears to have been made to satisfy the citizens' desire to expand the boundaries of the nation and to permit the nation to fulfill its "Manifest Destiny."3

A. The Louisiana Purchase

The Louisiana Purchase covered a vast amount of territory. The first European power to lay claim to that land was France. France also possessed holdings in Canada. After the Seven Years' War (French and Indian War), France lost its Canadian holdings. As a result, the administrative costs of maintaining its North American colony quickly outstripped any benefits that the colony may have provided as a trade route to France's Canadian holdings.4 As a

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2. One of the most historically important acquisitions of territory by the United States federal government was executed in the Northwest Ordinance of 1787. This acquisition brought the first federally acquired land. I do not include a discussion of the Northwest Ordinance because in 1787 the Constitution of the United States, as we know it, had not been adopted. The federal Convention was hard at work drafting the document when the Northwest Ordinance was enacted by the Continental Congress in New York. For more on this and an in-depth look at the constitutional aspects of the Northwest Ordinance, see generally Dennis P. Duffey, *The Northwest Ordinance as a Constitutional Document*, 95 COLUM. L. REV. 929 (1995).

3. John L. O'Sullivan, *The Great Nation of Futurity*, 6 U.S. DEMOCRATIC REV. 426 (1839). O'Sullivan coined the phrase, but it was used primarily by politicians in the 1840s to explain continental expansion by the United States . . . . The people of the United States felt it was their mission to extend the 'boundaries of freedom' to others by imparting their idealism and belief in democratic institutions to those who were capable of self-government. It excluded those people who were perceived as being incapable of self-government, such as Native American people and those of non-European origin.


solution, France ceded all of its holdings west of the Mississippi River to Spain. Spain, in turn, ceded its West Florida territory to England, which had “won” the Seven Years’ War.\(^5\)

In the meantime, Americans had begun to travel westward. Settlers and entrepreneurs needed to be sure that they had access to a waterway to transport their goods. The United States began to look toward the idea of acquiring the Louisiana territory. The United States negotiated a “right of deposit” with the Spanish in the Treaty of San Lorenzo of 1796, whereby Americans could use the river and deposit goods at no charge from Spain. Americans were surprised to find that, one day, they no longer had the right to deposit: The Spanish had actually secretly re-ceded the Louisiana territory back to France.\(^6\)

The initial purpose for acquiring this territory was to appease traders and settlers who wanted to be assured that they could transport goods from the frontier to civilization.\(^7\) However, the Louisiana Purchase actually doubled the size of the United States. American negotiators purchased all of the French holdings in what is now the Continental United States, which included all or some of Louisiana, Arkansas, Missouri, Iowa, Minnesota, North Dakota, South Dakota, Nebraska, Kansas, Oklahoma, Colorado, Wyoming, and Montana.\(^8\) Clearly, that much territory was not necessary to access the Mississippi River and take advantage of the Port of New Orleans. Perhaps the Americans did not want to risk any more trouble with the other European nations. Maybe, by the turn of the century, they were ready to explore even further into the frontier.\(^9\) The means that the United States used to acquire the Louisiana Territory are more closely examined later in this article.\(^10\)

B. Alaska

A half century later, Congress again used its power to purchase territory when it acquired Alaska from Russia for $7.2 million. Russia was facing financial difficulties and saw the sale as a source of revenue. The United States was seen as a potential buyer because the United States Secretary of State, William Seward, was known to have an expansive vision of how far the American empire should extend. The Russian minister may have believed that he got the better end of the bargain, having convinced Seward that the purchase was

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5. *Id.* Spain retook that territory by force shortly thereafter.
6. GARY LAWSON & GUY SEIDMAN, THE CONSTITUTION OF EMPIRES 18-20 (2004). In the Treaty of Idelfonso between Spain and France, Spain agreed to return the territory to France if France would name a Spanish Prince as King of Tuscany. Spain maintained administrative control and denied ever having assumed ownership. *Id.*
7. *Id.*
8. *Id.* at 20.
10. See infra Part III.
beneficial to the United States and actually succeeding in procuring an additional $2.2 million above Seward's initial offer. Seward's Folly, as Alaska came to be known, has proven to be one of the best investments the United States has ever made, generating large amounts of gold and petroleum.

C. The Treaty of Guadalupe Hidalgo: Texas

By the mid 1800s, Americans wanted to expand even further into the western portion of the continent. The concept of Manifest Destiny had certainly gained in popularity.

In the first half of the nineteenth century, the land that is now named Texas belonged to Mexico. Nonetheless, Anglos began to settle thickly in the area. By the 1830s, there were only an estimated 4000 Mexicans remaining in Texas, as compared with the 25,000 Anglos. In 1845, the United States annexed Texas without the permission of Mexico. Angered, Mexico ceased relations with the United States. The United States then attempted to purchase additional land from Mexico in what is now the Southwestern United States. Mexico refused. In 1846, the tensions served as a basis for war after a dispute between Mexican and American border officials. War was declared, and the United States defeated Mexico. The Mexican American War ended in 1848 when both countries signed the Treaty of Guadalupe Hidalgo. In relevant part, the document ceded about half of Mexico's territory to the United States. The territory acquired by the United States included not only Texas but also what would become the states of California, Nevada, Utah, most of New Mexico and Arizona, and parts of Colorado and Wyoming.

11. Baron Stoeckl was the Russian Minister to the United States. He worked closely with Secretary Seward on the deal. William H. Seward, The Promise of Alaska, Essential Documents in American History, 1492-Present (on file with author).
12. Other not-so-affectionate nicknames for Alaska included "Seward's Ice Box" and "President Andrew Johnson's Polar Bear Garden" because many people believed it was ridiculous to spend money on such a remote outpost. Id.
14. See supra note 3 for a discussion of the concept of Manifest Destiny.
16. Id. Chanbonpin’s article offers a compelling look at how property law, as seen in Plume v. Seward, 4 Cal. 94 (1854), is as much the result of Anglo American racism as common law theory. Id. at 298.
17. Id. at 304.
18. Id. Although this acquisition seems far more straightforward than the Louisiana Purchase, the Texas acquisition is actually fraught with constitutional problems. Part III will address these problems thoroughly, but in relevant part the United States is not authorized to declare war for the purpose of acquiring territory. There seems to be little support for any other motivation for war in this case.
D. Oregon

In Texas, the United States annexed territory in which United States citizens had settled. The United States made a similar claim to Oregon. United States citizens had long resided in parts of Oregon, particularly the Willamette Valley. The Oregon settlers had established their own government and many people had expected the Oregon territory to evolve into its own republic.\(^{20}\)

England also had established settlements in the Northwestern portion of the continent. The United States, in the course of negotiations with England, lay claim to title under the doctrine of discovery, which has had a profound impact on Native Americans and their territories.\(^{21}\) The United States asserted that because its citizens had settled in Oregon first, the United States had discovered the territory. This argument naturally raises several questions, including whether the actions of private citizens are enough to establish "discovery" for the purposes of territorial sovereignty.

The settlers who lived in Oregon had repeatedly asked Congress to pass legislation regarding the territory. Because of the vastness of the territory, it was difficult for the United States and England to establish the boundaries. Although the United States never said that it did not have the best title to the Oregon territory, Congress passed no legislation regarding Oregon until the United States and Britain signed the Oregon Treaty in 1846. The boundary line that resulted from this treaty is the now familiar forty-ninth parallel that separates the United States from Canada.\(^{22}\)

The reasons for the United States' acquisition of Oregon are many and reasonable. To begin with, many American residents already lived there. The settlers were of the same general race, religion, and culture as the rest of the United States. When coupled with the theory of Manifest Destiny, American acquisition of the Oregon territory was inevitable.\(^{23}\)

\(^{20}\) LAWSON & SEIDMAN, supra note 6, at 94-95.

\(^{21}\) The problems inherent in the discovery doctrine, such as the fact that there were already civilizations of people living in the territory at hand, may be clear to everyone today. In 1848, however, Anglos and other Christian Europeans did not accept the Native Americans as a real civilization. See LINDSAY G. ROBERTSON, CONQUEST BY LAW: HOW THE DISCOVERY OF AMERICA DISPOSSESSED INDIGENOUS PEOPLES OF THEIR LANDS xiii (2005).

\[^{22}\]There has been an occasional tendency in the historiography of Anglo-indigenous relations during the early republican period to characterize federal policy as consistently knowingly duplicitous. Without intending to suggest that this was never true, I do not believe [Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 589 (1823)] fits this model. Instead, I think the opinion offers an instructive picture of how intelligent people can sometimes unhinkingly create catastrophic problems they find themselves powerless to fix. Id. Robertson notes that in writing the Johnson opinion, which introduced the discovery doctrine, Justice Marshall was concerned not only with the disposition of the case but with a number of other issues, including the power of the Supreme Court. Id. at 77. Robertson further observes that in 1832 when Worcester v. Georgia, 31 U.S. 515 (1832), came before the Court Marshall "repudiated the discovery doctrine, but by then it was too late. Marshall's death in 1835 and the filling of the Court with Andrew Jackson's appointees prevented the securing of this repudiation . . . ." Id. at xii.

\(^{23}\) LAWSON & SEIDMAN, supra note 6, at 94-95.

\(^{23}\) O'Sullivan, supra note 3.
E. Guano Islands

Another set of acquisitions that has not factored greatly in our concept of what constitutes the United States but nonetheless sets forth an important reason to acquire territory involves the Guano Islands. The Guano Islands were first exploited by American developers who discovered that the volcanic islands were piled high with guano, a nutrient-rich fertilizer that is in fact bird droppings. Recognizing the potential for profit, the United States passed the Guano Islands Act of 1856, which laid claim to all islands containing the guano that had been and would be “discovered” by American developers, and further stated that there was no obligation on the part of the United States to continue to maintain the islands after the guano deposits had been depleted.

F. The Treaty of Peace of 1898: Puerto Rico, Guam, and the Philippine Islands

The United States declared war on Spain in 1898. The stated reason for the United States action was to secure independence for Cuba. The United States forces occupied Cuba and Puerto Rico and then defeated Spanish forces in Manila, the Philippines. As a result of the Treaty of Peace of 1898, the United States acquired Puerto Rico, Guam, and the Philippine Islands.

This acquisition was different from all previous acquisitions because there were no United States settlers in these areas. Additionally, there was no intent on the part of Americans to settle in any of these places. The islands were geographically remote, and the native peoples were of a different culture and spoke other languages. Acquisition of these territories did, nonetheless, serve a purpose. These territories could serve as strategic military outposts. They were convenient stops for the United States military on long voyages.


26. LAWSON & SEIDMAN, supra note 6, at 111.

27. Id.

28. Also not discussed in great detail here is the fact that United States chose to purchase the Virgin Islands from Denmark in 1917 to control entry into the Gulf of Mexico. The Virgin Islands stand apart as the only territory the United States purchased that has not become a state. American Samoa, on the other hand, was acquired when the United States, Germany, and England reached an agreement regarding their spheres of influence. The native chiefs of American Samoa also ceded their territory to the United States, making that particular acquisition less troublesome than many. Id. at 115-17.
Like the Guano Islands, the Hawaiian Islands initially attracted a group of American investors. In 1856, King Kamehameha III considered a proposal of annexation of Hawaii to the United States. When he died, the matter had not been resolved. In 1892, United States landowners, many of whom were sugar industry investors, were concerned about import tariffs and formed a group to advocate annexation. Eventually, the American bureaucrats and investors convinced the United States to take Hawaii by force. In addition to providing rich natural resources and the ideal climate to grow tropical produce, the Hawaiian Islands became important to the United States military in the periods before and during World War II.

**H. Panama Canal**

After the Spanish-American War, the United States was a power in both the Caribbean Sea and the Pacific Ocean. As a result, the United States saw the military advantage of a canal that, when needed, would allow a quick transfer of warships "from one ocean to the other." Additionally, the commercial advantages of a canal that could be used for sea trade were well recognized.

In 1903, Panama was a northern province of Colombia. When the Columbian Legislature failed to ratify a treaty giving the United States the right to build and manage a canal across Panama, Panamanians with the support of the United States Marines began a rebellion and declared Panamanian independence. The United States immediately recognized the new country. Under the terms of a treaty with Panama, effective February 26, 1904, and in return for a substantial investment and annual fees, the United States was granted a perpetual lease to a strip of land across the Isthmus of Panama to connect the Atlantic and the Pacific Oceans.
I. American Samoa

While Samoan raw materials did not draw the economic interest that Hawaii did, it had strong potential as a naval base. Nevertheless, the United States was not the only interested party. In 1878, the United States signed a treaty of commerce and friendship with the Samoan King Malietoa to obtain rights to build a harbor at Pago-Pago. Germany obtained harbor rights and an exemption from import duties in Samoa by treaty in 1879. That same year, Britain also signed a treaty obtaining harbor rights. Tensions over Samoa continued until Great Britain and Germany ceded American Samoa to the United States as part of the Tripartite Convention.

On March 4, 1925, by joint resolution, the United States Congress extended American Samoa by making Swains Island an administrative part of American Samoa and proclaiming United States sovereignty over the island, which had been claimed as a private possession by the Jennings family. The Joint Resolution stated that Swains Island was "included in the list of guano islands appertaining to the United States, which have been bonded under the Act of Congress approved August 18, 1856." Despite its listing as a guano island, the report accompanying the resolution noted that the status of Swains Island was complicated by "the fact that no guano has, at least for some years, been removed from the island;" however, the report also noted that Great Britain, the only other country with a potential claim, had recognized United States jurisdiction.

J. Virgin Islands of the United States

Like American Samoa, the appeal of the Virgin Islands to the United States was based, not on economics, but on its strategic military location. Due to the potential military benefits offered by the islands’ location, the United States, as

36. Id.
37. FOREIGN AFFAIRS MANUAL, supra, note 34. The ratification of the Tripartite Convention on February 16, 1900, is recorded at 31 Stat. 1878 (1900).
41. Sugarcane was the main economic crop of the Virgin Islands during the seventeenth century. Because slave labor produced the sugarcane, the islands were in economic decline after slavery was abolished in 1848. Despite this economic decline, the United States desired to acquire the islands for security reasons. U.S. Central Intelligence Agency, Virgin Islands, CIA World Factbook, https://www.cia.gov/cia/publications/factbook/ (last visited May 6, 2007) (on file with the McGeorge Law Review).
early as 1865, had expressed an interest in acquiring the islands.\textsuperscript{42} During World War I, fear that Germany might occupy the islands provided an additional impetus for the United States to purchase the islands from Denmark. Pursuant to a treaty ratified on January 17, 1917, The United States purchased the islands, formerly the Danish West Indies.\textsuperscript{43} The islands were placed under the control of the Department of the Navy until February 27, 1931, when an executive order placed them under the supervision of the Department of the Interior.\textsuperscript{44}

\section*{K. The Trust Territories}

After World War II, the United Nations was concerned that many of the territories that had been governed by Axis powers were unable to govern themselves. As a result, the United Nations established strategic trusts, which allowed the territories to operate under the protection of the United States and other allied countries.\textsuperscript{45}

As the trusteeship agreement was terminated, the United States developed differing relationships with the areas within the former Pacific Islands Trust Territory. However, United States interest in the areas was often similar. As expressed by the principal United States representative in negotiations regarding the future status of the trust territory, the key United States interest was ensuring military basing privileges so that third parties could not put the area to use for military-related purposes and so that the United States could fulfill its security responsibilities in the Pacific.\textsuperscript{46}

Despite the similar United States interest, the various areas within the trust territory foresaw differing relationships. Some desired a “looser, more autonomous relationship of ‘free association,’” while the Northern Mariana Islands desired a “closer and more permanent political relationship with the United States.”\textsuperscript{47} Under the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States, the Northern Marianas became a “self-governing Commonwealth,” that is “in political union with and under the sovereignty of the United States of America.”\textsuperscript{48}

\begin{thebibliography}{99}
\item\textsuperscript{42} U.S. \textsc{Census Bureau}, \textit{Puerto Rico and the Outlying Areas: Geographic Areas Reference Manual} 7-38 (2005).
\item\textsuperscript{43} \textsc{Foreign Affairs Manual}, supra note 34.
\item\textsuperscript{44} U.S. \textsc{Census Bureau}, supra note 42. Despite Department of Interior administration, the Virgin Islanders have participated in the election of a governor since 1970 and been represented by a nonvoting delegate to the United States House of Representatives since 1973. \textit{Id.}
\item\textsuperscript{45} \textsc{Lawson \\& Seidman}, supra note 6, at 117.
\item\textsuperscript{46} Roger S. Clark, \textit{Self Determination and Free Association - Should the United Nations Terminate the Pacific Island Trust?}, 21 \textsc{Harv. Int’l L.J.}, 1, 4 (1980) (citing \textsc{Office of Micronesian Status Negotiations, the Future Political Status of the Trust Territory of the Pacific Islands} (Official Records of the Fourth Round of Micronesian Status Negotiations, Koror, Palau, Apr. 2-13, 1972)).
\end{thebibliography}
III. ACQUISITION OF TERRITORY

There is certainly no power given by the Constitution to the Federal Government to establish or maintain colonies bordering on the United States or at a distance, to be ruled and governed at its own pleasure; nor to enlarge its territorial limits in any way, except by the admission of new States.  

The Constitution provides no direct grant of power to acquire territory. Indeed, the Constitution is silent on the issue. Judicial opinions, such as Downes v. Bidwell and Scott v. Sandford, discussed below, have struggled to define the constitutional grant of power to acquire territory beyond the original thirteen states. This indirect grant of power to acquire territory has been the subject of judicial interpretation for most of the history of our nation.

A. Purchase

The proposed annexation of the Louisiana Territory sparked the first serious discussion of how to acquire territory. Two issues were the source of heated debate. One issue was the source of governmental power to acquire territory. The second, and perhaps more fundamental question, was whether such power existed.

"History seems to provide support for the sentiment that the United States must carefully exercise any power it might have to acquire territory. President Thomas Jefferson, among others, was concerned that the United States might follow the footsteps of the European nations and colonize other countries as a

50. See Downes v. Bidwell, 182 U.S. 244, 249 (1901). Justice Brown quotes Thomas Jefferson to exemplify the fundamental Constitutional problem of territorial acquisition faced by the government for the first time when the United States sought to purchase Louisiana from France. Mr. Jefferson stated:

I suppose [Congress] must then appeal to the nation for an additional article to the Constitution approving and confirming an act which the nation had not previously authorized. The Constitution has made no provision for holding foreign territory, still less for incorporating foreign nations into our Union. The Executive, in seizing the fugitive occurrence which so much advances the good of their country, has done an act beyond the Constitution.

Id. at 253. Mr. Jefferson prepared two amendments to the Constitution to incorporate Louisiana into the Union and to confer citizenship upon its white inhabitants, but he later gave the entire problem over to Congress, which ultimately found that the treaty power gave the United States the right to acquire territory.

51. Authors Lawson and Seidman provide fascinating insight into the constitutionality of the acquisition of power. According to them, the power to acquire land through treaty, as with the power to acquire by war and the "sweeping" power, is a strictly implementational power. Thus, any of those powers may be invoked, but on the condition that they are invoked to carry out an enumerated power duty, for example, to admit states, to provide military bases, etc. The authors use this two-part test to legitimize almost all acquisitions of land made by the United States because almost all of the acquired territories were either admitted as states or made useful as military outposts. LAWSON & SEIDMAN, supra note 6, at 17-77.
means of acquisition. Furthermore, the United States Supreme Court declared that war could not legally be waged for the purposes of acquiring territory, nor could the President control an enemy’s territory. The Supreme Court, however, left Congress with other means through which it might legally acquire territory.

The Supreme Court first stated its rationale for territorial acquisition in Johnson v. M’Intosh. This rationale was refined in an 1828 decision concerning federal jurisdiction in the Florida territory in which Chief Justice John Marshall concluded that the power to acquire territory comes from the powers of making war and making treaties in Article I of the Constitution. The Court reasoned that conquering territory as part of a military occupation is sometimes necessary in war but, when the war is over, the conquered territory must either be ceded back to the nation from which it came or become part of the nation that conquered the territory. The territory must be ruled according to the terms of the treaty that led to its acquisition or on such terms as “its new master shall impose.”

In two early instances of territory acquisition, including the purchases of Louisiana from France and Florida from Spain, the fates of the territories and their inhabitants were part of the treaty, or, more likely, the contract for consideration the rulers reached. In its agreement with France, the United States agreed that the territory it would acquire would be incorporated into the rest of the United States and admitted to the Union as soon as possible. The United States also agreed to protect certain civil rights enjoyed by the people of Louisiana until such time as they were officially admitted to the Union. The Supreme Court, concerned that although Congress’s power to acquire territory arose from its treaty-making power, there was no requirement that such acquired

54. 21 U.S. (8 Wheat.) 543, 589 (1823). The Court stated:
   The title by conquest is acquired and maintained by force. The conqueror prescribes its limits.
   Humanity, however, acting on public opinion, has established, as a general rule, that the conquered
   shall not be wantonly oppressed, and that their condition shall remain as eligible as is compatible
   with the objects of the conquest. Most usually, they are incorporated with the victorious nation, and
   become subjects or citizens of the government with which they are connected.
   Id.
55. Article I, section 8, clause 11 grants Congress the power to declare war and make rules on the
   capture of land and water. Article II, section 2, clause 2 gives the President the power to make treaties provided
   that two-thirds of the senators who are present to vote concur.
57. Article III of the treaty states:
The inhabitants of the ceded territory shall be incorporated in the Union of the United States, and
admitted as soon as possible, according to the principles of the Federal Constitution, to the
enjoyment of all rights, advantages, and immunities of citizens of the United States; and in the
meantime they shall be maintained and protected in the free enjoyment of their liberty, property, and
the religion which they profess.
territory immediately become a state, held that the territory must eventually become a state.\textsuperscript{58}

B. Westward Expansion

In spite of the fact that the Constitution is silent on territorial acquisition, the Constitution does provide for the incorporation of states into the Union.\textsuperscript{59} The interpretation of the war and treaty-making powers to include the right to acquire territory has resulted in the expansion of the Union from the original thirteen colonies to fifty states. The travels of Lewis and Clark, along with other influences, gave the country a vision of its Manifest Destiny.\textsuperscript{60} Despite the misgivings expressed by the Founding Fathers, including Thomas Jefferson, that colonial expansion might cause undesirable consequences, the United States expanded westward to the Pacific Ocean and as far south as the Rio Grande.\textsuperscript{61}

The Northwest Ordinance of 1787 set forth the Founding Fathers’ image that territorial acquisition would eventually lead to statehood.\textsuperscript{62} Congress considered several criteria in determining when and if a territory ought to be incorporated as a state: 1) an inclination of the populace toward the principles of democracy; 2) an expressed desire by a majority of the territory’s citizens to become a state; and 3) a determination that the proposed state had sufficient resources so that it could provide its share of costs to the federal government.\textsuperscript{63}

C. Conquest

The limitations the Supreme Court prescribed in regard to land acquired by conquest seemed to disappear by the time the Treaty of 1898 was signed. The Treaty of 1898 was an agreement designed to end the war between Spain and the United States. The Supreme Court, which held that territories acquired by the United States government must inevitably be incorporated into the Union as states, extracted the principle from the treaty documents and not the Constitution.\textsuperscript{64} Neither statehood nor the rights of citizenship were granted to the people of the Philippines and Guam in the Treaty of 1898. Rather, their civil

\textsuperscript{58} Id.

\textsuperscript{59} Article IV, section 3, clause 1 allows for the admittance of new states to the Union, but prohibits the formation of states within an existing state.

\textsuperscript{60} For an in-depth discussion of Lewis and Clark expeditions, and the circumstances surrounding western expansion, see generally STEPHEN A. AMBROSE, UNDAUNTED COURAGE: MERIWETHER LEWIS, THOMAS JEFFERSON, AND THE OPENING OF THE AMERICAN WEST, chs. 4-5 (1996).

\textsuperscript{61} Interestingly, Ambrose wrote of Jefferson, “[i]n the age of imperialism, he was the greatest empire builder of all. His mind encompassed the continent. From the beginning of the revolution, he thought of the United States as a nation stretching from sea to sea. More than any other man, he made that happen.” Id. at 56.

\textsuperscript{62} LEIBOWITZ, supra note 52, at 6.

\textsuperscript{63} Id. at 70.

\textsuperscript{64} Id.
rights were restricted to those rights Congress chose to grant, and their status, present and future, was not ascertainable.\(^6^5\)

Even in the modern era, native inhabitants of United States territories linked to the mainland through neither kin nor culture have complained of their status. In the early 1990s, for example, former Governor Ada of Guam pleaded with Washington, D.C. in at least two impassioned speeches. In the first, he emphasized to Congress that, "[e]ven today, we do not have rights, only benefits."\(^6^6\) Later, he spoke more harshly, stating, "Guam is a colony of America, with all that the term implies. We are a colony, one of the last, in a world which for the most part has turned away from the idea that colonies should exist."\(^6^7\) It seems clear that these are the problems that will arise when a territory is held for nearly one hundred years with no promise of either statehood or independence. Perhaps Thomas Jefferson's anticipation of these types of problems were what led him to express concern regarding the Louisiana Purchase.

IV. CONGRESSIONAL POWER TO GOVERN TERRITORIES

\[T\]he United States has the power to acquire territory as a necessary and proper adjunct of sovereignty and of the power to declare and carry on war and to make treaties.\(^6^8\)

Because the courts and Congress have taken the constitutional war and treaty clauses to mean that the United States may acquire territory, the issue then arises of how a territory is to be governed.

A. Constitutional Grants of Power

The Constitution speaks on the issue of governance of territories in only one clause. It grants Congress the "power to dispose of and make all needful Rules

\(^6^5\) Downes v. Bidwell, 182 U.S. 244, 339-40 (1901). Article IX of the Treaty of 1898 reads: Spanish subjects, natives of the peninsula residing in the territory over which Spain by the present treaty relinquishes or cedes her sovereignty, may remain in such territory or may remove therefrom, retaining in either event all rights of property or of its proceeds; and they shall have the right to carry on their industry, commerce, and professions, being subject in such respect to such laws as are applicable to other foreigners. In case they remain in the territory they may preserve their allegiance to the Crown of Spain by making, before a court of record, within a year from the date of the exchange of ratifications of this treaty, a declaration of their decision to preserve such allegiance; in default of which declaration they shall be held to have renounced it and to have adopted the nationality of the territory in which they may reside. The civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by Congress.

\(^6^6\) Jeremiah O'Leary, Guam's Status Yearning, WASH. TIMES, Aug. 21, 1990, at G3.


\(^6^8\) Cabebe v. Acheson, 183 F.2d 795, 800 (9th Cir. 1950).
and Regulations respecting the Territory or other Property belonging to the United States.\textsuperscript{69} Because the first territories were acquired after the founding of the Union, the Supreme Court has been asked to decide the limits of congressional power over the territories. Once the country moved past its "Manifest Destiny" borders, difficulties arose in determining how to apply the Constitution to the new territories.

From debates leading up to the addition of the Territories Clause, it can be inferred that the Founding Fathers did not contemplate the expansion of the Union beyond the territory already possessed.\textsuperscript{70} Even then, it was anticipated that this territory would eventually become a state or states.\textsuperscript{71} As the federal government acquired more territory, however, it became increasingly difficult for Congress and the Supreme Court to decide how the territories should be governed. Should the Constitution apply uniformly to the territories and states?

In one of the first cases delineating the applicability of the Constitution to non-states, \textit{Loughborough v. Blake},\textsuperscript{72} Justice Marshall concluded that Article I, section 8 of the Constitution should apply with equal force in the District of Columbia as it does to the states. Justice Marshall concluded that because the Constitution, and not Congress, was supreme, the Constitution applied without limitation to wherever the government extends. His ruling included territories:

Does this term [Article I, section 8] designate the whole, or any particular portion of the American empire? Certainly this question can admit of but one answer. It is the name given to our great republic, which is composed of States and territories. The district of Columbia, or the territory west of the Missouri, is not less within the United States, than Maryland or Pennsylvania; and it is not less necessary, on the principles of our constitution, that uniformity in the imposition of imposts, duties and excises, should be observed in the one, than in the other.\textsuperscript{73}

While it would appear that this opinion would be sufficient to settle the matter, it was not applied to the later territorial acquisitions because, at the time of the opinion, the country believed that the territories acquired were either advancing

\textsuperscript{69} U.S. CONST. art. IV, § 3, cl. 2.
\textsuperscript{70} LEIBOWITZ, \textit{supra} note 52, at 11.
\textsuperscript{71} By resolution of the Congress of Confederation in 1780, the lands then held as territories would be formed into states and become members of the Union, having the same rights of sovereignty as other states. Scott v. Sandford, 60 U.S. 393, 433 (1857).
\textsuperscript{72} 18 U.S. (5 Wheat.) 317, 318 (1820). The first case to deal with the power of the United States to govern territories came in 1810 regarding the territory of Orleans. See Siere v. Pitot, 10 U.S. (6 Cranch) 332 (1810). Justice Marshall stated that "the power of governing and legislating for a territory is the inevitable consequence of the right to acquire and hold territory." Id. at 336.
\textsuperscript{73} Article I, section 8 of the Constitution grants Congress the power to lay and collect taxes, duties, imposts, and excises. The \textit{Loughborough} Court held that the grant was general and therefore applied to all places over which the government extended. \textit{Id.} at 318-19.
to statehood or else had relinquished control to Congress, as had the District of Columbia.\textsuperscript{74}

\textbf{B. Constitutional Limitations on Congressional Power}

Early court rulings held that the right to govern followed the constitutional grant of power to acquire territory, either through the government's power to make war or make treaties.\textsuperscript{75} The next question to be addressed then is whether the territories have the same right to protections guaranteed to American citizens in the Constitution.

The early case of \textit{American Insurance Co. v. 356 Bales of Cotton}, unlike the Court in \textit{Loughborough}, held that because Florida was acquired by an act of Congress, the rights of the people in the new territory were to be enumerated by Congress.\textsuperscript{76} The position of the Court changed again, however, in \textit{Dred Scott v. Sandford}.\textsuperscript{77}

\textit{Dred Scott v. Sandford} is often thought of as one of the most lamentable cases in American history. In that case, the ostensibly freed slave Dred Scott was refused citizenship because the Founding Fathers could not have conceived of extending freedom or citizenship to people of African descent.\textsuperscript{78} Such flagrant racism is shocking to the modern reader and can detract from the less emotional issue of Congress's authority to govern territory.

\textsuperscript{74} \textit{Id.} at 324. This mindset once more typifies the American ideal of a land that stretches from sea to shining sea in the manner of Manifest Destiny. It is interesting to note that much like the inhabitants of other United States territories, the residents of the District of Columbia have limited voting rights. It was only with the passage of the Twenty-third Amendment in 1961 that District of Columbia residents gained the right to participate in presidential and vice-presidential elections through the appointment of electors. U.S. CONST. amend. XXIII. Although further amendment of the Constitution was proposed in 1978 to allow District of Columbia residents to be represented by voting members of Congress, this amendment was not ratified by thirty-two states within a seven year period; thus, it did not become effective. However, this issue continues to be of interest. For a discussion of the representation of residents of the District of Columbia, including an excellent list of bibliographic resources on the subject, see Steve Young, \textit{Congressional Representation for the District of Columbia}, \textsc{Law Library Lights}, Winter 2004, at 3-4, available at http://www.llsdc.org/lights/pdf/47_2.pdf (on file with the McGeorge Law Review).

\textsuperscript{75} \textit{Am. Ins. Co. v. 356 Bales of Cotton (Canter)}, 26 U.S. 511, 542 (1828).

\textsuperscript{76} \textit{Id.}

\textsuperscript{77} 60 U.S. 393, 449 (1857).

\textsuperscript{78} \textit{Id.} at 406. It is worth taking a moment to recap the facts of the case. Dred Scott was a slave who had married another slave, Harriet. They had two children who were both born north of Missouri where there was no slavery. When the Scotts' "master" sold them to another person, who beat the Scotts and imprisoned them (which would have been acceptable if they were slaves), the Scotts sued, alleging that they were freed by going to (or being born in) free states. Rather than looking simply at the issue of the Scotts' status, the Court considered whether the circuit court of the United States had jurisdiction to hear the case. The Court determined that the circuit court did not have jurisdiction because Scott, as a slave, could not exercise the rights of a United States citizen to sue in federal court. \textit{Id.} at 404, 427.
C. Dred Scott v. Sanford

Justice Taney first opined that the constitutional provision granting Congress the power “to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States”79 is limited in applicability. The opinion states:

It is the judgment of the court, that . . . the power there given, whatever it may be, is confined, and was intended to be confined, to the territory which at that time belonged to, or was claimed by, the United States and was within their boundaries . . . and can have no influence upon a territory afterward acquired from a foreign Government. It was a special provision for a known and particular territory, and to meet a present emergency, and nothing more.80

Justice Taney further argued that congressional power to control the territories is limited just as its power to govern the states is limited.81 Thus, Congress could not, constitutionally, by means of the Missouri Compromise, deprive a citizen of his right to take his property (i.e., slaves) into a territory of the United States.82

Justice Taney stressed the importance of limiting Congress’s power to control the territories to the same degree as to control the states. At the time of the Dred Scott decision, however, the general understanding that the United States may only acquire territory to prepare the territory for admittance to the Union was still dominant83 and, therefore, is not easily applied to those territories that are unlikely to ever become states.

From these cases and the cases that followed until the late 1800s, it can be inferred that the Court has ruled in favor of the credo, “the Constitution follows

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79. U.S. CONST. art IV, § 3, cl. 2.

80. Scott, 60 U.S. at 432. The purpose of the clause was to transfer to the new United States government property held in common by the states in order that it could be disposed of and the profits split appropriately so that all states could deal with their debt. Id. at 433. However, at least one scholar finds it “difficult to take this passage seriously,” stating that general application of such an interpretation “would have made the Constitution useless long ago.” DON E. FEHRENBACKER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS 367-68 (1978).

81. Scott, 60 U.S. at 449. The Court’s opinion, as drafted by Taney, stated:

But the power of Congress over the person or property of a citizen can never be a mere discretionary power under our Constitution and form of government. 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 into possession in the character impressed upon it by those who created it. It enters upon it with its powers over the citizen strictly defined, and limited by the Constitution . . . . It has no power of any kind beyond it; and it cannot, when it enters a territory of the United States, put off its character, and assume discretionary or despotic powers which the Constitution has denied to it.

Id.

82. Id. at 452.

83. The Scott opinion itself evidences the prevalence of this view. The Court opined that a territory “must be held and governed in a like manner until it is fitted to be a state.” Id. at 449.
the flag.\footnote{See, e.g., Marybeth Herald, Does the Constitution Follow the Flag into United States Territories or Can it be Separately Purchased and Sold?, 22 Hastings Const. L.Q. 707 (1995) (discussing the constitutionality of the Ninth Circuit's decision in Wabol v. Villacrusis, 958 F.2d 1450 (1992), and how and if the United States Constitution applies to the Commonwealth of the Northern Mariana Islands).} The Canter decision, discussed above, appears to be an exception, although not an accidental one. Instead, the Court's rationale for what degree of power Congress could exercise depended largely on what type of territory was at issue and how that territory was acquired. In Canter, the territory of Florida was at issue. Florida was a well-defined territory of Spain before it became a United States territory and, in the Supreme Court's view, this made it unique from other territories, like those in the northwest and Missouri.\footnote{Am. Ins. Co. v. 356 Bales of Cotton, 26 U.S. 542 (1828).}

Even in the Florida case, however, it is apparent that the Court anticipated that any territory held by the United States would ultimately become a state, entitled to all constitutional protections specifically enumerated for the states of the Union. However, as the "American Empire"\footnote{Justice Marshall first coined the term "American Empire" in Loughborough v. Blake. 18 U.S. (5 Wheat) 317, 319 (1820).} expanded beyond the continental United States to lands occupied by fairly well established populations with distinct languages and cultures, the previous assumptions of governance in territories seemed to fade and new doctrines emerged.

Until the end of the nineteenth century, the Supreme Court seemed to consistently hold that the Constitution was in full effect in the territories. This holding was first shaken in 1890 in Church of Jesus Christ of Latter-Day Saints v. United States.\footnote{136 U.S. 1 (1890).} The territory of Utah was acquired by treaty from Mexico. In an appeal from the territory's Supreme Court, the Court ruled that Congress had the power to revoke the charter of the Church of Jesus Christ of Latter-Day Saints and that the federal government could seize the property incident to the Church. First, the Court stated that the power to govern the territory was incident to the power of the government to acquire territory. This was similar to past rulings on the source of government power in the new territories; however, just how the Constitution constrains Congress in the new territories is somewhat unclear in Latter-Day Saints. In what appears to be nothing more than dicta, the Court stated that constitutional limitations on congressional exercises of power concerning the territories exist by inference and the "general spirit of the Constitution from which Congress derives all its powers" and are not an express or direct application of any constitutional provision.\footnote{Id. at 44.} In the same paragraph, the Court subjects congressional power to constitutional limitations that are fundamental in favor of personal rights.\footnote{Id.}
After suggesting that only fundamental limitations within the Constitution may apply in the territories, the Court stated that the supreme power of Congress in the territories is established by the passing of organic acts that establish the governments within the territories and that Congress’s legislative power shall be “consistent” with the Constitution. This seems to contradict the previous statement of the Court in favor of extending only fundamental constitutional rights to the territories. In *Latter-Day Saints*, this dichotomy does not weaken the opinion of the Court because the holding is ultimately that the act of Congress was consistent with the laws of the United States and was constitutional. Perhaps the Court was unable to predict the result of its words, but the seeds of change had been planted.

By the late 1800s, the possibility that a territory could be acquired without advancing to statehood had become a probability. While Justice Marshall had envisioned territories joining the Union soon after coming under the control of the United States, a number of new factors had emerged to make that solution unlikely. Florida, Puerto Rico, Guam, and the Philippines had all been acquired by treaty of cessation from Spain. The territories, with the exception of Florida, were all relatively small islands with a well-established population of Spanish-speaking people. While there were some Spanish enclaves in Florida, much of the territory was uninhabited or inhabited by other non-Spanish peoples, some native to the area. These facts were a very real concern to the Court at that time, as became apparent in the decisions reached in the turn-of-the-century Insular Cases. These cases made clear that the Supreme Court shared Congress’s fear that incorporating people of distinct racial and cultural backgrounds that differed from the majority of those in the rest of the United States, may be unacceptable.

When the Union was expanding west within the continental United States, it was perhaps easier to view the rights of citizens of the states as extending to those western territories that were sparsely populated and ripe for settlement by Anglos. Perhaps at the turn of the century, the view of the Court reflected a growing sensitivity to the “Original Sin” against Native American Indians. Specifically, during the time that Puerto Rico and Guam were acquired, it was no

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90. As discussed below, the Organic Acts are very important to United States territories.

91. *Latter-Day Saints*, 136 U.S. at 44.

92. The Court held that polygamy is forbidden throughout the United States and thus any incorporated charitable organization (in this instance the Church) that practices and condones polygamy can be unincorporated by an Act of Congress and their property seized. *Id.* at 46-48. The Court also stated that, “it was the intention of Congress that the system of common law and equity which generally prevails in this country should be operative in the territory of Utah, except as might be altered by legislation.” *Id.* at 62.

93. *Nota Bene:* Many escaped African slaves did not go to the North, but escaped south to Florida. Many of them joined with Native Americans and became known as Runaways or Seminoles.

94. The most important of the Insular Cases include *Downes v. Bidwell*, 182 U.S. 244 (1901), which held that the Revenue Clauses of the Constitution were inapplicable to Puerto Rico as an unincorporated territory, and *De Lima v. Bidwell*, 182 U.S. 1 (1901), which held that Puerto Rico was not a foreign country and therefore the import duties levied on sugar were illegal.

longer acceptable to obliterate native people for the purpose of Anglo settlement. Despite this recognition, however, there was no sentiment that the natives, absent naturalization, were entitled to all the same protections guaranteed to Americans who lived in states.\textsuperscript{96}

The Supreme Court, in its famous decision in \textit{Downes v. Bidwell}, stated that:

\begin{quote}
It is obvious that in the annexation of outlying and distant possessions grave questions will arise from differences of race, habits, laws and customs of the people, and from differences in soil, climate, and production, which may require action on the part of Congress that would be quite unnecessary in the annexation of contiguous territory inhabited only by people of the same race, or by scattered bodies of Indians.\textsuperscript{97}
\end{quote}

In \textit{Downes}, the Court was confronted with the question of how the Constitution applied to the territory of Puerto Rico. Specifically, the issue was whether territories enjoyed the same protection pursuant to Article I, section 8 of the Constitution as did the states. This provision of the Constitution, known as the Uniformity Clause, grants Congress the power to tax, but provides that duties, imposts, and excises should be consistent throughout the United States.

In the \textit{Downes} opinion, Justice Brown relied on the specific language of the Constitution to overturn \textit{Loughborough}.\textsuperscript{98} Justice Brown disagreed with Justice Marshall's assertion in \textit{Loughborough} that all of the laws that apply to states also apply to the District of Columbia and the territories. Justice Brown distinguished the District of Columbia from other territories by reasoning that since the District of Columbia was once part of Maryland and Virginia, it had been included in Congress's Article I powers and thus remained under Congressional power when it was ceded directly to the federal government.\textsuperscript{99} Justice Brown also distinguished the \textit{Dred Scott} decision, arguing that the questions presented for consideration by the Court in the two cases were different. He reasoned that the

\textsuperscript{96} As early as 1857, in the \textit{Scott} decision, the Court stated:

\begin{quote}
[T]hese Indian political communities have always been treated as foreigners not living under our Government. It is true that the course of events has brought the Indian tribes within the limits of the United States under subjection to the white race, and it has been found necessary, for their sake as well as our own, to regard them as in a state of pupilage, and to legislate to a certain extent over them and the territory they occupy. But they may, without doubt, like the subjects of any other foreign Government, be naturalized by the authority of Congress, and become citizens of a State, and of the United States, and if an individual should leave his nation or tribe and take up his abode among the white population, he would be entitled to all the rights and privileges which would belong to an emigrant from any other foreign people.
\end{quote}


\textsuperscript{97} \textit{Bidwell}, 182 U.S. at 282.

\textsuperscript{98} \textit{Id.} at 261.

\textsuperscript{99} Interestingly, Justice Brown went so far as to say that Justice Marshall's opinion in \textit{Loughborough} had "occasion[ed] some embarrassment in other cases." \textit{Id.}
power to prohibit slavery and the power to impose duties upon products are of such a vastly different nature that they cannot be held to be analogous.\(^\text{100}\)

Closely examining the language of the Constitution, Justice Brown argued that the United States government was created for states alone and that territories are not a part of the United States.\(^\text{101}\) To support his argument, Justice Brown cited language in Article I that refers to states; he contrasted this language with the language of the Thirteenth Amendment that explicitly abolished slavery in the United States and in its territories. He then pointed to the Fourteenth Amendment, which is silent in regard to territories.\(^\text{102}\) He reasoned that Congress must act to extend the Constitution to territories in all but the most fundamental principles; the Constitution does not extend \textit{ex proprio vigore} (on its own strength).\(^\text{103}\)

\textit{D. Downes, Incorporation, and the Constitution}

Justice White, in his concurring opinion, also gave Congress broad powers in extending the Constitution to the territories. His approach, however, was decidedly different. In what appears to be a judicial attempt to create greater congressional control over Puerto Rico, the \textit{Downes} concurrence creates the concept of “incorporation” that is still in existence today.\(^\text{104}\) In White’s view, Congress must extend the protections of the Constitution to their full extent to \textit{incorporated} territories. Congress has greater power to decide how the Constitution applies to a territory that is \textit{unincorporated}.

Justice White’s approach was a recharacterization of the issue. White questioned at what point a territory is incorporated into the United States and whether that determination is a congressional one. \textit{Downes} addressed whether Puerto Rico had been incorporated into the United States at the time Congress passed the act of cession from Spain. The Court was effective in establishing what has become a basic tenet of incorporation, in that the incorporated or unincorporated status of a territory is largely determined at the time of its acquisition rather than by attitudes taking effect after the territory has passed from one government to another. The Court determined that Puerto Rico had not been incorporated at the time that Congress passed the act under which the United States acquired Puerto Rico as a territory.\(^\text{105}\) Therefore, because Congress

\(^{100}\) Id. at 271-74.

\(^{101}\) \textit{See} Neuman, \textit{supra} note 95, at 909, 960 (discussing Justice Brown’s reliance on the “state membership” approach).

\(^{102}\) \textit{Downes}, 182 U.S at 251.

\(^{103}\) Justice Brown's opinion states: “The liberality of Congress in legislating the Constitution into all our contiguous territories has undoubtedly fostered the impression that it went there by its own force, but there is nothing in the Constitution itself, and little in the interpretation put upon it, to confirm that impression.” Id. at 286.

\(^{104}\) Id. at 299 (White, J., concurring).

\(^{105}\) Id. at 248 (majority opinion).
acquired the territory under its powers to make treaties and wars, and these powers were extended to include the power to govern the acquisitions, Congress had greater control in regulating the territories. The Court went on to say that the treaty making powers of the United States stopped short of incorporation; therefore, the act of incorporation must be a separate act of Congress. The final conclusion of the White concurrence was that, until Congress acts to incorporate a territory, it remains unincorporated and subject to broad congressional control.

There are some limits to Congress’s power to govern territories, which are recognized by Justice Brown and the concurring Justices. The distinction is made between “fundamental” constitutional rights, such as the protection of life, liberty, and property, and “remedial” rights, such as rights to citizenship and suffrage. Brown acknowledged that distinguishing between these types of rights may cause some difficulty; however, it accomplishes the tasks of delegating these decisions to a congressional exercise of what he termed “certain principles of natural justice inherent in the Anglo-Saxon character . . . .” Obviously, this solution was of little consolation to those Americans and inhabitants of territories who were not Anglo-Saxon.

The Court in Downes justified this broad power of incorporation in two different ways. The first justification was that incorporation can act as a means of protecting the United States’ interests. One hypothetical the Court offered supposed that if a territory were invaded and occupied through a just war, there would be much danger inherent in incorporating a territory that was hostile to the United States. Similarly, if the territory were to be incorporated immediately, the United States would abandon all hope of recouping losses suffered.

The second justification offered was of the most benefit to citizens of the territories. The Court distinguished territories that were sparsely settled and ripe for settlement by white citizens of European origin from those that had established populations with unique languages and races. Justice Brown wrote that, in some cases, the cultural barriers may be too great for the United States to

106. Id. at 280.
107. Id. at 319 (White, J., concurring).
108. Id.
109. The Downes Court equated the status of the people living in unincorporated territories with that of Chinese people living in the United States because Chinese people were not citizens but were afforded constitutional guarantees regarding life, liberty, and property. Id. at 283. See, e.g., Lem Moon Sing v. United States, 158 U.S. 538 (1895); Fong Yue Ting v. United States, 149 U.S. 698 (1893); Yick Wo v. Hopkins, 118 U.S. 356 (1886).
110. More recent Supreme Court cases have done little to shed light on how to define a “fundamental” right apart from Anglo-Saxon bias. In Griswold v. Connecticut, 381 U.S. 479 (1965), for example, the concurring Justices stated that in determining which rights were fundamental, judges must look to the traditions and collective conscience of our people to determine if the right is fundamental. Id. at 493. This of course begs the question: Who are our people?
111. Downes, 182 U.S. at 308.
112. Id.
overcome and that some rights may be restricted for a time. Like many Justices before him, he retained the belief that ideally a territory would become a state, as evidenced by his statement that "the question at once arises whether large concessions ought not to be made for a time, that ultimately our own theories may be carried out, and the blessings of free government under the Constitution extended to them."

*Downes* justifications have been applied in later cases as well. In 1922, for example, in *Balzac v. Porto Rico*, the Court compared the difference in relative population between Alaska and Puerto Rico. On the one hand, the Court noted that the sparsely populated lands in Alaska were ripe for settlement and the settlers, who presumably would come from other states, would be amiable to the full force of the Constitution. On the other hand, Puerto Rico was recognized as a well-established, well-populated land and, because of these factors, would present difficulties in incorporation.

In creating the doctrine of incorporation, the Supreme Court extended Congress's unilateral powers over territories acquired by treaty and by conquest beyond those that are evident from the face of the Constitution. The *Insular Cases* have confirmed the doctrine, which was used not only in questions regarding Alaska and Puerto Rico, but also Hawaii, the Philippines, and even 1990s cases involving the Northern Mariana Islands. Another important case involving incorporation came from the United States Virgin Islands and held that once incorporated, the citizens of a United States territory enjoy the protections of the United States Constitution and the Bill of Rights.

113. Id. at 287.
115. See Efren Rivera Ramos, *The Legal Construction of American Colonialism: The Insular Cases (1901-1922)*, 65 REV. JUR. U.P.R. 225 (1996) (providing a detailed discussion of the Insular cases). As Ramos points out, the term "normally" refers to a series of nine decisions issued in 1901. However, other decisions that were rendered after 1901 may be categorized as Insular Cases. Id. at 240. Additionally, some scholars limit the number of Insular Cases to six: *De Lima v. Bidwell*, 182 U.S. 1 (1901); *Goetze v. United States*, 182 U.S. 221 (1901); *Dooley v. United States*, 182 U.S. 222 (1901); *Armstrong v. United States*, 182 U.S. 243 (1901); *Downes v. Bidwell*, 182 U.S. 244 (1901); and *Huus v. N.Y. & Porto Rico Steamship Co.* , 182 U.S. 392 (1901). Lisa Napoli, *The Legal Recognition of the National Identity of a Colonized People: The Case of Puerto Rico*, 18 B.C. THIRD WORLD L.J. 159, 171 n.46 (1998). "As formulated finally by the Court, the issues in the Insular Cases could be summarized in the following questions: What was the status of the new territories? How much power did Congress enjoy in their governance? And what were the rights of their inhabitants?" Id. at 242. Justice White, in his concurring opinion in one of the Insular Cases, *Downes v. Bidell*, is credited with first espousing the incorporation doctrine. Ramos, *supra* at 247.
116. See, e.g., *Dorr v. United States*, 195 U.S. 138 (1904); Hawaii v. Mankichi, 190 U.S. 197 (1903); *Wabol v. Villacrusis*, 958 F.2d 1450 (9th Cir. 1992). These are only a handful of the incorporation cases following the *Downes* opinion, but they do reflect the geographic variety and timespan of the other cases.
In an opinion that nearly mirrors the one in *Downes*, the Court ruled that only "fundamental" parts of the Constitution were in full effect in Hawaii until an act of incorporation was passed by Congress\(^{118}\) even though the resolution that annexed the territory clearly stated:

The municipal legislation of the Hawaiian Islands, not enacted for the fulfillment of the treaties so extinguished, and not inconsistent with this joint resolution nor contrary to the Constitution of the United States . . . shall remain in force until the Congress of the United States shall otherwise determine.\(^{119}\)

The resolution left provisions of the Fifth and Sixth Amendments previously in place to remain in effect, apart from what the Court considered "fundamental" Constitutional rights that would automatically extend to territories and allowing the municipal legislation.\(^{120}\)

**E. The Organic Acts**

Once a territory is admitted to the Union as a state, it is governed by the United States Constitution. States have the power of self-governance and are sovereign. Citizens of the several states may also elect representatives in the federal government. Unincorporated territories, however, have no power of self-governance. Congress has the power to govern the people and the territories, though the people have no right to participate in politics.\(^{121}\) However, Congress may grant territories the authority to govern themselves locally.\(^{122}\) In such cases, local government is established through organic law.

Organic law is legislation enacted by Congress that gives territories the power of local self-government, subject only to Congress's power to enact, repeal, or amend laws that local territorial legislatures enact. The organic act of a territory defines the boundaries of its scope, just as the Constitution defines the scope of the federal government in relation to states.\(^{123}\) In Guam, for example, the

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\(^{118}\) *Mankichi*, 190 U.S. at 217-18.

\(^{119}\) Joint Resolution to Provide for Annexing the Hawaiian Islands to the United States, 30 Stat. 750-751 (1898).

\(^{120}\) *Mankichi*, 190 U.S. at 217-18. In *Mankichi*, the Supreme Court found that the manslaughter conviction of a defendant who was not indicted by a grand jury and convicted by only nine of twelve jurors, was lawful in the Republic of Hawaii, was valid even though not in compliance with the Fifth and Sixth Amendments. Id.

\(^{121}\) *Dorr*, 195 U.S. at 148.

\(^{122}\) See *Simms v. Simms*, 175 U.S. 162, 168 (1899) (holding that Congress has the power to delegate legislative authority to a territory).

\(^{123}\) *Bordenelli v. United States*, 233 F.2d 120, 122 (9th Cir. 1956).
The enactment of organic law in a territory does not, however, abrogate congressional control over the territories. In fact, even after the enactment of organic law, Congress maintains full and complete legislative authority over the people of the territories, including the right to validate or void any act passed by the local government or implement any law it sees fit without the consent of the territory.\footnote{125} As a result, the passage of organic acts does not ensure that the citizens of a territory have a full measure of self-government, unless that territory becomes incorporated or a state.

Another kind of territorial status, commonwealth status, has emerged as one that extends greater autonomy to territorial people under the control of the United States. Two United States territories, Puerto Rico and the Northern Mariana Islands, have been part of the territorial movement toward autonomy via commonwealth status. In these territories, as a concession to their status, Congress ceded some of its broad powers. This cessation has been cause for concern.

\section*{V. WHO WANTS TO BE A COMMONWEALTH?}

Some territories will likely never become states. The reasons vary. For example, the United States may rationalize that the territories would not “fit” well within the United States. Alternatively, the territories may believe that incorporation into the United States would be detrimental to their own sense of identity. Statehood may not be the answer for all of these nations, but they may want to be associated with the United States and the protection that the United States can offer—not only from other countries but, using constitutional protections, also from their own governments. Remember that all of the “fundamental” rights follow the American flag—whatever the status of the territory.

The term “commonwealth” is not easily defined.\footnote{126} Indeed, that subject itself is enough to be the subject of another lengthy article. There is clearly an indication that commonwealth status indicates a bilateral relationship between the United States and the territory. For example, Puerto Rico became a commonwealth pursuant to a 1950 compact between Puerto Rico and the United States. Puerto Rico is free to enact its own laws and follow its own constitution.
as long as those terms do not violate the United States Constitution or the compact. The Commonwealth of the Northern Mariana Islands was formed as a result of the covenant reached between the United States and the Northern Mariana Islands. The Philippines were a commonwealth prior to gaining independence in 1946.  

A. What About Statehood?

Although they are commonwealths, the current United States flag islands are not incorporated. Today, a territory is considered to be incorporated if it was intended to be admitted to the Union as a state from the time it was acquired.

Apart from a reluctance to lose their senses of identity separate and apart from the United States, there are two main trade-offs between becoming states and maintaining the status quo, from the perspective of the islands. These are, in the true American fashion, taxation and representation.

The commonwealths do not pay income tax to the United States federal government. They are free to collect their own income tax and do. In this way, they are better able to govern themselves by deciding, for example, how much Puerto Rico should tax and how much it should spend. The United States probably also prefers that Puerto Rico retain its independent tax status because, as a state, the costs of providing all federal services to Puerto Rico could be up to three billion dollars. Given that the per capita income of the average Puerto Rican is just over six thousand dollars, it may be that the two economic systems are too far apart to be of a benefit to the United States, and additional income tax can be of little benefit to a modest economic system like that in Puerto Rico. This benefit does not come free. In Hawaii v. Mankichi, the Court ruled that only the fundamental parts of the Constitution were extended to unincorporated territories. For citizens of the territories, this may be just fine. After all, if the fundamental rights are protected, then it is not unfeasible that the territory is perfectly capable of finding its own means of enforcing laws that protect those fundamental rights.

128. Northern Mariana Islands v. Atilig, 723 F.2d 682, 688 (9th Cir. 1984).
129. ROBERT POSADA, THE HERITAGE FOUNDATION, EXECUTIVE MEMORANDUM #495, CAUTION NEEDED ON PUERTO RICO STATEHOOD: THE COSTLY, CONFUSING AND CONTENTIOUS REPERCUSSIONS OF H.R. 856 (1992), available at http://www.heritage.org/Research/LatinAmerica/EM495.cfm (on file with the McGeorge Law Review). These figures are quite old, but aside from inflation, little of significance has changed that would lead this author to believe the numbers are misleading as to the proportionate nature of the costs.
130. 190 U.S. 197 (1903). In this case, the United States Supreme Court found the manslaughter conviction of a defendant who was not indicted by a grand jury and convicted by only nine of twelve jurors (which was legal in the territory of Hawaii) was valid, even though it was not in compliance with the Fifth and Sixth amendments. Id. at 217-18.
131. Id.
B. Why Would the United States Acquire More Territory?

Given the current issues facing the United States regarding international terrorism and security, the United States is probably not going to acquire any more territory in the near future. With different levels of willingness to cooperate, the United States has access, albeit not exclusive access, to many military bases all over the world. Even nations that may not be entirely sympathetic to the United States will allow a certain level of United States involvement on their soil to avoid open hostility or, worse yet, embargoes. It is preferable to work within a system that is known to the United States than it is to work in a new one. For example, if the United States were to attempt to acquire an island base nearer to the Middle East for the purposes of monitoring military activity with rapid naval and air response times, the risk of a negative reaction from the rest of the world may be more than the United States can endure in terms of public relations. Along the same lines, if there is no established order within the country, it may be difficult to tell which inhabitants are sympathetic to the United States and which are not. This is particularly true in situations where inhabitants consider themselves more closely affiliated with a Mediterranean, Muslim, or Arab group than a European or Anglo group, with which the world most closely links the United States. Again, race and ethnicity are likely to enter the picture.

With that in mind, the only reason the United States might want to acquire more territory lies in facts similar to those in the Guano islands. It is more likely in 2007, that people will be in search of cheaper, lighter, cleaner fuel rather than fertilizer, but it is this type of "goldmine" that could prompt the United States to acquire more territory. Americans have been looking for a way to decrease their dependence on foreign oil, and an acquisition may be the best way to go about it. It appears that drilling in Alaska may also further postpone that rationale.

132. U.S. Dep’t of State, Current Issues: Terrorism, http://www.usembassy.org.uk/terror.html (last visited May 6, 2007) (on file with the McGeorge Law Review) (providing an excellent sample of current events outlining issues facing the United States). For example, the recent release of detainees previously suspected of terrorist activities, the continued involvement of the United States in Iraq to support the drafting of a Constitution, and the popular reaction to approval of the extension of hotly debated provisions of the Patriot Act are all issues requiring continued governmental attention.

133. Justin Gillis & Dina Elboghdady, Supply Uncertainty Propels Gas Prices, WASH. POST, Sept. 4, 2005, at A29 (noting that gas prices in some areas had risen to six dollars per gallon). This is but one example of the many news stories regarding rising oil and gas prices. Further, acquisition of territory and utilization of the territory’s natural resources, specifically petroleum resources, would not be an unprecedented act in United States history. In the late nineteenth century, with the discovery of oil, white culture intruded on Native American land and made full use of the oil resources located on the land. See TERRY P. WILSON, THE UNDERGROUND RESERVATION ix (1985) (“[B]ecause of the presence of petroleum . . . the [white] intruders were especially numerous and included many who ruthlessly sought to separate the tribe from its wealth by any means possible.”).

C. The United Nations and Other International Law Obligations

Free association should be the result of a free and voluntary choice by the peoples of the territory concerned expressed through informed and democratic processes.  

Globalization has led to an increase in the entire world’s participation in areas that historically may have been viewed as sovereign affairs. In the case of acquisition of territory, the United Nations has been particularly involved in creating an international voice for territories across the world that have been without voices for so long.

1. The United Nations Mandate for Self-Determination

According to the Charter of the United Nations, members must assume responsibility for the administration of non-self-governing territories. The members also must regularly submit statistical information relating to the social, economic, and educational conditions of those territories. The member nations are obligated “to develop self-government in territories, to take due account of the political aspirations of the peoples in the territories, and to assist them in the progressive development of their free political institutions.”

The United Nations General Assembly enacted several resolutions to guide the member nations in preparing a territory for self-government. Resolution 648, for example, defines three separate paths to self-government. They are 1) independence, 2) other separate systems of self-government, and 3) free association.

While the second category, or “other” provision, has not been more adequately defined, Resolution 742 has shed light on factors helpful in

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136. In 1960, the United Nations passed the Declaration on the Granting of Independence to Colonial Countries and Peoples, GA Res. 1514 (XV), para. 4, UN GAOR, 15th Sess., Supp. No. 16, at 66, 67, UN Doc. A/4684 (1960) This document set the tone the international community was to take and emphasized that people should not be subjugated by those alien to their land. By 1994, the United Nations Security Council was able to terminate the Trusteeship Agreement for the last of the original eleven territories that it had overseen because all had become autonomous, independent, or voluntarily affiliated. Department of Public Information, U.N. Trusteeship Council, http://www.un.org/documents/tc.htm (last visited June 6, 2007) (on file with the McGeorge Law Review).
137. U.N. Charter art. 73.
139. Id. at 1025.
140. Id. (citing G.A. Res. 648, U.N. GAOR, 7th Sess., Supp. No. 20 at 34, U.N. Doc. A/2361 (Dec. 10, 1952)). These terms are very vague, possibly as a way to allow the United Nations to keep the larger nations in check. Perhaps this grants the United Nations some leeway to regulate, regardless of what the member nation claims. In the alternative, maybe the vagueness renders this provision useless.
determining if a territory has attained self-government through free association or other separate systems. These factors are divided into three categories titled general, international status, and internal self-government.\textsuperscript{141} In the category of general factors, one of the primary factors listed is whether the population of the territory that has voluntarily limited its sovereignty may "modify at any time this status through the expression of their will by democratic means."\textsuperscript{142} Under the category of international status, one of the listed considerations is the "extent to which the Territory exercises the power to enter freely into direct relations of every kind with other governments."\textsuperscript{143} The internal self-government category includes factors that judge the amount of interference with the legislative, executive, and judicial functions of the government.\textsuperscript{144} Some factors include:

(i) whether constitutional guarantees extend equally to the associated territory; (ii) whether there are powers that are constitutionally reserved to the territory or to the central authority; and (iii) whether there is a provision for the equal participation of the territory in any changes in the constitutional system of the State. Resolution 742 further noted that citizenship should be provided without discrimination on the same basis as other inhabitants of the central authority. Finally, Resolution 742 stated that the territory should be free to modify its associated status through the expression of the associated will of the people by democratic means.\textsuperscript{145}

It is unclear whether the United States has acted in accordance with the United Nations resolutions. While several territories have advanced to the level of "commonwealth," and have rights they had not possessed before now, the question of whether their status is in fact modifiable through the will of the people or if that is mere legal fiction intended to placate the United Nations, is a legitimate question. For example, the covenant between Northern Mariana and the United States has been the "high-water mark" of territorial provisions. The covenant guarantees the Northern Mariana Islands the right of local self-government and provides that the right to self-government cannot be modified unilaterally by the United States. Rather, any modification must be consented to by the government of the Northern Mariana Islands. However, as noted by one author, "the extent of that right . . . has been the subject of much debate and some litigation."\textsuperscript{146} Further, under the provisions of the covenant, United States

\textsuperscript{142} Id. at 22.
\textsuperscript{143} Id.
\textsuperscript{144} Id. at 22-23.
\textsuperscript{145} Shaw, supra note 138, at 1026.
\textsuperscript{146} Daniel H. Macmeekin, The Overseas Territories and Commonwealths of the United States of America, http://www.macmeekin.com/Library/terr+commonw2.htm (last visited June 6, 2007) (on file with the McGeorge Law Review). It should be noted at the time of the writing, Mr. Macmeekin was representing the
approval is required if the Mariana residents determine that it is in their interest to become independent "by democratic means and through constitutional processes."\textsuperscript{147}

2. *International Covenant on Civil and Political Rights and International Covenant on Economic, Social, and Political Rights*

In addition to the concerns raised by the self-determination provisions of the Charter of the United Nations, the relationships between the United States and its "territories" also call into question the human rights obligations of the United States. The United States is a signatory of both the United Nations' covenants on Civil and Political Rights and Economic, Social, and Cultural Rights.\textsuperscript{148} Both of these documents contain identical provisions requiring signatories to respect the rights of all peoples to dispose of their natural resources and to ensure "that a people [not] be deprived of its own means of subsistence."\textsuperscript{149} Once again, the United States relationship with the Northern Mariana Islands may call into question the commitment of the United States to these provisions.

On February 24, 2005, the United States Court of Appeals for the Ninth Circuit issued an opinion in an action brought against the United States by the Commonwealth of the Northern Mariana Islands to quiet title to the submerged lands adjacent to the Commonwealth.\textsuperscript{150} Applying the paramountcy doctrine,\textsuperscript{151} the Court stated that "[a]bsent express indication to the contrary, the ownership of seaward submerged lands accompanies United States sovereignty. The Covenant lacks such an expression."\textsuperscript{152} As has been noted by others, islanders are surrounded by the ocean and often depend on it for their livelihood.\textsuperscript{153} The issue is then whether the holding in the Commonwealth of Northern Mariana Islands cases indicates that the United States is interfering with the rights of the

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\textsuperscript{147} Clark, supra note 46, at 75-76.


\textsuperscript{149} See supra note 148.

\textsuperscript{150} Northern Mariana Islands v. United States, 399 F.3d 1057 (9th Cir. 2005).

\textsuperscript{151} The paramountcy doctrine was expressed in the cases of United States v. California, 332 U.S. 19 (1947), and United States v. Texas, 339 U.S. 707 (1950). Through broad language, the Court held that the federal government must have the "paramount power" to regulate the seabed and ocean to allow the federal government to fulfill its defense and commerce regulation responsibilities. For an in-depth discussion of the paramountcy doctrine as well as the discovery doctrine, discussed in this article, see generally Andrew P. Richards, Aboriginal Title or the Paramountcy Doctrine? Johnson v. McIntosh Flounders in Federal Waters Off Alaska in Native Village of Eyak v. Trawler Diane Marie, Inc., 78 WASH. L. REV. 939 (2003).

\textsuperscript{152} Northern Mariana Islands, 399 F.3d at 1064.

\textsuperscript{153} Clark, supra note 46, at 75-76.
Commonwealth's residents to dispose of their natural resources and to use these natural resources as a means of subsistence.

VI. CONCLUSION

As nations break into smaller nations or restructure themselves, they may find that to protect their natural resources or unite cultural groups of people, lines between nations need to be redrawn. Furthermore, gaps between the assets of rich nations and poor nations may lead to agreements between the poorer nations to form a connection that may be less than an acquisition, but more than a mere alliance. The success or failure of the European Union may be the guiding beacon in whether more developments like it ensue.

As far as the United States is concerned, there are a substantial number of reasons that the modern day citizen should be concerned with the problems of acquisition of territory. The questions outlined in this article include issues of constitutionality and our collective morality. Our Founding Fathers believed that America did not possess the right to take over a territory with no intention that it should ever become a state, but today the United States possesses several territories that remain unincorporated. The federal government of the United States has extended citizenship to the people in some territories and has granted the inhabitants of all territories the right to protection from their own governments under the Fourteenth Amendment. Although courts have continued to hold that only “fundamental” constitutional rights are guaranteed to

154. Nations that have experienced difficulties because of the diverse cultural and ethnic populations included within a single nation include Yugoslavia, Canada, Belgium, India, and numerous African nations formed along colonial boundaries that ignored travel routes and language differences. China also has experienced difficulties because of its diverse population. See Randall Peerenboom, Assessing Human Rights in China: Why the Double Standard?, 38 CORNELL INT’L L.J. 71, 134 (2005) (discussing the ethnic diversity in China). Additionally, the formation of the government of Iraq evidences the difficulties that inclusion of multicultural groups into one large nation may cause. Contra Paul A. Clark, Taking Self-determination Seriously: When Can Cultural and Political Minorities Control Their Own Fate, 5 CHI. J. INT’L L. 737, 746 (2005) (citing incidents in Turkey and the Soviet Union, and the historic struggle between the British and the Irish, the author suggests that permitting self-determination based on ethnic, religious, or cultural difference might increase the incidence of ethnic and religious “cleansing”).

155. Ask anyone on the street if they believe the United States should be in the business of “colonization.”

156. The people of Puerto Rico and Guam are United States citizens, as are United States Virgin Islanders. People in American Samoa are United States nationals, but not citizens. FOREIGN AFFAIRS MANUAL, supra note 34, at 7 app. A4.

157. Sagana v. Tenorio, 384 F.3d 731, 740 (9th Cir. 2004). This case held that the Fourteenth Amendment applies to the Commonwealth of the Northern Mariana Islands as if it were one of the several states. Although this decision noted that the decision involved the covenant between the United Stated and the Northern Mariana Islands, the Commonwealth is bound by the Fourteenth Amendment of the United States Constitution. Rayphand v. Sablan, 95 F. Supp. 2d 1133, 1139 (D. N. Mar. I. 1999); Puerto Rico Pub. Hous. Admin. v. U.S. Dep’t of Hous. & Urban Dev., 59 F. Supp. 2d 310 (D.P.R. 1999). The case held that even though Puerto Rico is not a state, it is bound by the Fourteenth Amendment of the United States Constitution.
inhabitants of unincorporated territories, at least the rights to religious freedom, freedom of speech, and due process are preserved.

It is therefore evident that the United States finds itself in a position that is difficult to reconcile with agreements made with the territories and the United Nations. There must be a better justification for the continued practice of "appeasing" the inhabitants of United States territories with rights granted a few at a time, when they should in fact either become states or else break with the United States and become independent, or reach an agreement in which self-government is truly accomplished but association provides benefits for both parties. This approach would likely help the United States be perceived as a more responsible player in the global arena. While the United States may maintain a self-image that it is the well-intentioned "policeman of the world," this perception is not necessarily shared by other nations. Similarly, from the viewpoint of the global community, an approach that provides for self-governance of territories would help combat the perception that the United States continues to be interested in pursuing "colonization." Even when allowing territories to become states or to achieve self-governance, however, can the United States acquire a territory? Perhaps that question remains.