"THE CONSTITUTIONAL LION IN THE PATH": THE RECONSTRUCTION CONSTITUTION AS A RESTRAINT ON EMPIRE

SAM ERMAN*

TABLE OF CONTENTS

INTRODUCTION

In 1897, a half-dozen great powers claimed sovereignty over nearly half the world's land and souls, and these empires were expanding.[1] The British Empire alone had grown by fifty million souls and two million square miles

*. Associate Professor of Law, University of Southern California Gould School of Law. I thank Susanna Blumenthal, Rebecca Brown, David Cruz, Sally Gordon, Ariela Gross, Pamela Haag, Mike Klarman, Grey Osterud, K-Sue Park, Reuel Schiller, and Franita Tolson; the editors of the *Southern California Law Review*; participants in law school workshops at Columbia University, the University of Wisconsin-Madison, and Yale University and in the Vanderbilt Legal History Colloquium; and my research assistants. I have the opportunity to thank many others in my book *Almost Citizens: Puerto Rico, the U.S. Constitution, and Empire* (forthcoming 2018), and because that assistance often also benefited this Article, I enthusiastically incorporate those acknowledgements here.

1. *Compare* THE WORLD ALMANAC 16, 232 (1891), *with* THE WORLD ALMANAC AND ENCYCLOPEDIA 51, 335 (1898).

since 1891.[2] The eminent naval strategist Alfred T. Mahan feared that the United States was dangerously secluded, in comparison, and sidelined in the global land rush underway. He also worried that the Atlantic Ocean no longer adequately protected the U.S. against European powers in an age of steamships.[3] Like his fellow Republicans Theodore Roosevelt and Massachusetts Senator Henry Cabot Lodge, Mahan influentially advocated U.S. expansionism.[4] He envisioned the United States ruling acquired lands as colonies. Their residents were as politically unfit for rule as children, criminals, women, and African Americans, he believed.[5] But the Constitution presented a problem.[6] Nearly three decades had passed since the last U.S. annexation. As Mahan complained, "any project of extending the sphere of the United States, by annexation or otherwise, is met by the constitutional lion in the path."[7]

Making sense of Mahan's claim that law forestalled his colonial vision requires excavating a forgotten understanding of the Constitution. Its roots lay in the constitutional transformations wrought by the Civil War and Thirteenth, Fourteenth, and Fifteenth Amendments. Those events produced the constitutional regime that I term the Reconstruction Constitution, which dramatically moved the racially heterogeneous United States towards rights, membership, and equality. Hotly debated from the outset, whatever the Reconstruction Constitution's original limits and protections were, they narrowed considerably in ensuing decades. The steepest declines were those for African Americans, a tragedy that has been thoroughly and skillfully told by other historians.[8] Less familiar is this Article's focus: the operation of the

2. *Compare* THE WORLD ALMANAC 16, 232 (1891), *with* THE WORLD ALMANAC AND ENCYCLOPEDIA 51, 335 (1898).

3. A.T. MAHAN, THE INTEREST OF AMERICA IN SEA POWER, PRESENT AND FUTURE 137–72, 224–25, 234, 256, 302–14 (1897).

4. Philip A. Crowl, *Alfred Thayer Mahan: The Naval Historian*, *in* MAKERS OF MODERN STRATEGY 447–48, 462–65, 471 (Peter Paret ed., 1986); SUZANNE GEISSLER, GOD AND POWER 99–133 (2015); ROBERT SEAGER, ALFRED THAYER MAHAN, at xi (1977); JON TETSURO SUMIDA, INVENTING GRAND STRATEGY AND TEACHING COMMAND 2 (1997); RICHARD W. TURK, THE AMBIGUOUS RELATIONSHIP (1987); Peter Karsten, *The Nature of "Influence": Roosevelt, Mahan and the Concept of Sea Power*, 23 AM. Q. 585 (1971).

5. Thomas Bender, *The American Way of Empire*, 23 WORLD POL'Y J. 46, 54 (2006). *See also* Walter LaFeber, Review, 64 J. AM. HIST. 744, 746 (1977).

6. Among many works on the Civil War and Reconstruction Amendments as a constitutional moment or second founding, see generally BRUCE ACKERMAN, WE THE PEOPLE (2000).

7. MAHAN, *supra* note 3, at 257.

8. Classic accounts of the promise and rollback of Reconstruction and of the fortunes of African Americans during the period include, *inter alia*: W. E. BURGHARDT DU BOIS, BLACK RECONSTRUCTION IN AMERICA (1935); ERIC FONER, RECONSTRUCTION (1988); and C. VANN WOODWARD, ORIGINS OF THE NEW SOUTH, 1877–1913 (rev. ed. 1999) (1951). *See also* RICHARD WHITE, THE REPUBLIC FOR WHICH IT STANDS (2017) (providing a synthesis of Reconstruction and the Gilded Age).

Reconstruction Constitution as a durable and consequential constraint on the kind of imperial expansion that Mahan proposed.

Before the Civil War, the United States was ever expanding, annexing lands and then killing, displacing, subordinating, or assimilating those already living there. By 1860, U.S. international borders spanned the continent. Then, following ratification of the Fourteenth Amendment, one strand of U.S. expansion vanished. The removal, domination, and integration of peoples within U.S. borders continued. Annexations of new lands, however, suddenly stopped.

The freeze continued into 1898, in part because it was widely understood that annexation would bring newly acquired lands and their populations into the Reconstruction Constitution's regime of near-universal citizenship, federally enforceable individual liberties, and eventual statehood. Specifically, all Americans other than Indians,[9] regardless of race, were citizens. All citizens present on lands over which the United States extended its sovereignty had full constitutional rights that for men potentially included voting rights. All U.S. lands other than the District of Columbia were or would become states.[10] Thus, to annex was to accept the fact that the resident population would one day wield potentially decisive votes in the Electoral College, Congress, and proposals to amend the Constitution.

Opponents and advocates of annexation recognized the dynamic, as did Democrats and Republicans. Republican expansionists of the 1860s touted the extension of citizenship, rights, and eventual statehood that accompanied annexation during their unsuccessful bid to acquire the Danish West Indies and the Dominican Republic. As they soon learned, the widespread racism of the day led most U.S. officials to prefer no annexation of lands that held overwhelmingly nonwhite populations over the potential participation by such additional people of color in national governance. In 1893, 1897, and 1898, Democratic anti-annexationists raised the specter of citizenship, rights, and statehood to counter attempts to annex Hawai'i. While pro-expansion Republicans now downplayed the applicability of the Reconstruction Constitution to new territory, they did not dispute or deny it.

Today, this prior meaning of the Reconstruction Constitution is largely

9. On the non-citizenship of American Indians, see *infra* notes 80–86. I use the term "Americans" to refer to all nationals of the United States, whether such nationals are citizens or not.

10. On Reconstruction, equality, and the peculiar status of Washington, D.C., see KATE MASUR, AN EXAMPLE FOR ALL THE LAND (2010). For ease of exposition, and because I have uncovered little use by those I study of the District of Columbia as a precedent for empire, I trust the reader to recall that the District of Columbia was an exception to the Reconstruction Constitution's rule that all U.S. lands would eventually become states. I do not expressly repeat the point.

unknown, as is the pitched battle that overthrew it. That early-twentieth-century effort culminated when the restraints that the Reconstruction Constitution imposed on imperial annexations were displaced by the doctrine of territorial nonincorporation. Unlike the Reconstruction Constitution, that doctrine has not guaranteed citizenship, full rights, or statehood to residents of annexed lands. My forthcoming book, *Almost Citizens: Puerto Rico, the U.S. Constitution, and Empire*, details the shift, which began with the 1898 war between Spain and the United States; accelerated with the U.S. annexations across 1898–1900 of Hawai‘i, Guam, Puerto Rico, the Philippines, and American Samoa; and reached fruition in a series of early-twentieth-century *Insular Cases* and federal policies.[11] The shift was hard fought because, as this Article relates, the Reconstruction Constitution had previously demanded otherwise, notwithstanding the Constitution's ample accommodation of many other late-nineteenth-century imperial and colonial practices.

The United States that returned to annexation in 1898 was decidedly imperial.[12] Women, Mormons, Catholics, African Americans, American Indians, individuals of Chinese descent, residents of a host of independent Caribbean and Pacific islands, and many others had long experience with the gap between the conduct of the United States and its ostensible legal, democratic, egalitarian, and anticolonial ideals. Relentless westward expansion powered by conquest, carnage, expropriation, dispossession, and subordination produced territories whose inhabitants were subject to the whims of a federal government in which they had no vote. The United States coerced and financially exploited neighbors as it competed with the world's other powers for predominance in the American hemisphere. In Asia, its officials exercised extraterritorial jurisdiction. Domestically, women and members of racial and religious minority groups faced widespread and largely unchecked discrimination that relegated them to second-class stations.

In accepting much subordination and preventing some, the Reconstruction Constitution displayed a self-reinforcing duality. By

11. SAM ERMAN, ALMOST CITIZENS: PUERTO RICO, THE U.S. CONSTITUTION, AND EMPIRE (forthcoming 2018).

12. Of course, the imperial history of the United States long predated the Reconstruction Constitution. *See generally, e.g.*, JACK ERICSON EBLEN, THE FIRST AND SECOND UNITED STATES EMPIRES (1968). On the imperialism of the late-nineteenth-century United States, see, for example, JEFFREY OSTLER, THE PLAINS SIOUX AND U.S. COLONIALISM FROM LEWIS AND CLARK TO WOUNDED KNEE (2004); Thomas Bender, *The American Way of Empire*, WORLD POL'Y J. 45–61 (2006), and Paul A. Kramer, *Power and Connection: Imperial Histories of the United States in the World*, 116 AM. HIST. REV. 1348–91 (2011).

discouraging the archetypal mode of colonial-imperial aggrandizement—annexation—it encouraged U.S. leaders to pursue expansion and subordination by other means. Racism and law thus interacted to channel the United States' imperialistic impulses. Where the Reconstruction Constitution permitted domination of ostensibly inferior peoples, federal and state officials moved aggressively to do so. Where the Reconstruction Constitution made citizenship, rights, and political participation the price of governing populations of color, the United States stayed its hand.[13]

The effectiveness of the Reconstruction Constitution as an obstacle to formal expansion also helps explains why that role was later forgotten. Because annexations did not occur, litigation concerning the constitutional consequences of them did not reach courts. Judges had few occasions to analyze the questions such litigation would have presented. Though judicial opinions were crucial authorities underlying the Reconstruction Constitution, treatise writers found few post–Civil War precedents to cite concerning its application to newly annexed lands.[14] Largely absent from these mandarin legal authorities, the restraints that the Reconstruction Constitution imposed on empire received explication and determined outcomes in the political arena instead.[15] Lawmakers, presidents, and

13. This Article builds on and departs from Eric Love's groundbreaking RACE OVER EMPIRE (2004). Observing that race was always an argument against annexation throughout his period of study, Love posited an opposition between racism and empire. But elsewhere, as in the Jim Crow South, and at other times, as during the slave trade or after 1898, the United States opted for racial subjugation over disengagement. It was only racism, as constrained by the Reconstruction Constitution, which motivated the three-decade halt to annexations. On other causes of the hiatus, see *id.*, at 20–23, 153. *See also* ROBERT L. BEISNER, FROM THE OLD DIPLOMACY TO THE NEW, 1865–1900, at 14, 50, 106 (2d ed. 1986); CHARLES S. CAMPBELL, THE TRANSFORMATION OF AMERICAN FOREIGN RELATIONS, 1865–1900, at ch. 3, 10 (1976); ISAAC DOOKHAN, A HISTORY OF THE VIRGIN ISLANDS OF THE UNITED STATES 253–54 (Canoe Press 1994); THOMAS J. OSBORNE, EMPIRE CAN WAIT 107 (1981); ERIK OVERGAARD PEDERSEN, THE ATTEMPTED SALE OF THE DANISH WEST INDIES TO THE UNITED STATES OF AMERICA, 1865–1870, at 75–76, 80, 112, 170–72 (1992); CHARLES CALLAN TANSILL, THE PURCHASE OF THE DANISH WEST INDIES 146, 151 (1968); CYRUS VEESER, A WORLD SAFE FOR CAPITALISM 33 (2002); LOUIS A. PÉREZ, JR., CUBA BETWEEN EMPIRES, 1878–1902, at 59–65 (1983); Alfred L. Castle, *Tentative Empire: Walter Q. Gresham, U.S. Foreign Policy, and Hawai'i, 1893–1895*, 29 HAW. J. HIST. 83, 87–88 (1995); Tennant S. McWilliams, *James H. Blount, the South, and Hawaiian Annexation*, 57 PAC. HIST. REV. 25 (1988). The causes historians identify include party politics, turnover in office, corruption charges, competing domestic and budgetary concerns, militarism fatigue, fear of military vulnerability and hard-to-incorporate alien peoples, adequate existing markets, anti-colonialism and anti-imperialism, commitment to self-determination, reaction against Reconstruction, industrial and labor opposition, and no need to preempt other empires' annexationist designs.

14. *See* CARMAN F. RANDOLPH, THE LAW AND POLICY OF ANNEXATION WITH SPECIAL REFERENCE TO THE PHILIPPINES TOGETHER WITH OBSERVATIONS ON THE STATUS OF CUBA (1901); Simeon E. Baldwin, *The Constitutional Questions Incident to the Acquisition and Government by the United States of Island Territory*, 12 HARV. L. REV. 393 (1899).

15. The articulation and interpretation of constitutional meaning by presidents, lawmakers, and administrators are aspects of executive, legislative, and administrative constitutionalism. On presidents

executive branch officials described how the Reconstruction Constitution restrained empire. They felt bound by these constitutional strictures and shaped their policies accordingly. To recover this constitutional common sense[16] means turning to sources familiar to political historians: treaty negotiations, newspapers, diplomatic records, military files, presidential statements, congressional debates, and so on.

By examining the durability of the Reconstruction Constitution as a restraint on empire, this Article also joins a broader scholarly engagement with the long half-life of the post-Civil War settlement. Perhaps the most important aspect is the unceasing resistance of African Americans to the system of racial caste solidifying around them.[17] But even among whites, the commitments of Reconstruction did not fully unravel until after 1897. War with Spain in 1898 kindled racist and nationalist impulses that dampened northern opposition to southern white supremacy. Cross-sectional reconciliation among whites followed, to African Americans' detriment.[18]

shaping constitutional meaning, see KEITH E. WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY (2007). Judge Cornelia T.L. Pillard reviews theoretical defenses of executive constitutionalism in, *The Unfulfilled Promise of the Constitution in Executive Hands*, 103 MICH. L. REV. 676 (2005). The classic statement of presidential power as the power to persuade is, RICHARD NEUSTADT, PRESIDENTIAL POWER: THE POLITICS OF LEADERSHIP (1960). GEORGE C. EDWARDS, THE STRATEGIC PRESIDENCY: PERSUASION AND OPPORTUNITY IN PRESIDENTIAL LEADERSHIP (2009), argues that presidents succeed by spotting and exploiting opportunities. For a description and defense of one form of legislative constitutionalism, see Robert C. Post and Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943 (2003). Gillian E. Metzger provides an incisive introduction to administrative constitutionalism in her aptly named article, *Administrative Constitutionalism*, 91 TEX. L. REV. 1897 (2013). For further discussion, see Jeremy K. Kessler, *The Administrative Origins of Modern Civil Liberties Law*, 114 COLUM. L. REV. 1083 (2014); Sophia Z. Lee, *Race, Sex, and Rulemaking: Administrative Constitutionalism and the Workplace, 1960 to the Present*, 96 VA. L. REV. 801 (2010); Karen M. Tani, *Administrative Equal Protection: Federalism, the Fourteenth Amendment, and the Rights of the Poor*, 100 CORNELL L. REV. 825 (2015).

16. *See, e.g.*, Jack M. Balkin, *The Framework Model and Constitutional Interpretation*, *in* PHILOSOPHICAL FOUNDATIONS OF CONSTITUTIONAL LAW 241–64 (David Dyzenhaus & Malcom Thorburn eds., 2016) (reprising the argument that constitutional common sense changes in response to politics and suggesting that political actors' influence on constitutional common sense may be greater in the absence of judicial opinions). This Article joins Balkin in using constitutional common sense as a guide to what arguments were off-the-wall at particular moments. This Article switches to the term "conventional legal wisdom" when describing historical actors' shared beliefs that the Constitution imposed specific obligations.

17. Glenda Elizabeth Gilmore's groundbreaking text, *Gender and Jim Crow* (1996), describes early-twentieth-century activism by African American women.

18. Accounts of reconciliation that focus on politics include XI WANG, THE TRIAL OF DEMOCRACY 216–66 (1997) and WOODWARD, *supra* note 8, at 324–25. For examples from cultural history, see DAVID W. BLIGHT, RACE AND REUNION 291, 345 (2001) and NINA SILBER, THE ROMANCE OF REUNION 178–85 (1993). By conjoining constitutional histories of empire and Reconstruction, this Article takes up an approach whose promise has been expounded by Christina Duffy Burnett. *See* Christina Duffy Burnett [Ponsa-Kraus], *Untied States: American Expansion and Territorial Deannexation*, 72 U. CHI. L. REV.

Some legal doctrines that impeded discrimination survived a decade beyond the Supreme Court's approval of segregation in *Plessy v. Ferguson* in 1896.[19] Implementation of black disfranchisement and Jim Crow was not complete until the second decade of the twentieth century.[20] The most influential white-supremacist accounts of post–Civil War federal efforts to reconstruct the South appeared in fiction, film, monuments, and academic history long after the 1890s.[21] Similarly, the effort to disentangle imperial annexations from Reconstruction and set them on firm constitutional footing only began in earnest after 1897.[22] By then, as this Article recounts, U.S. law, policy, and thought on empire and Reconstruction had intertwined for thirty years.

This Article proceeds in four parts. The first recounts how the emancipatory promise of the Civil War and Reconstruction was followed by a white-supremacist counterassault that dramatically narrowed African Americans' horizons by 1898. By contrast, the freeze on annexations endured as the Reconstruction Constitution continued to make citizenship, rights, and eventual statehood the inevitable consequences of annexation. But that dynamic, which is the subject of Part II, was exceptional. As Part III describes, domination, expansion, aggrandizement, and inegalitarianism were defining traits of federal power throughout the late nineteenth century. By the century's end, doctrinal strands had also formed that were capable of being recombined into an alternative to the Reconstruction Constitution's restraints on empire. In 1898 and 1899, war and a string of associated annexations provided the impetus to undertake that recombination, as Part IV explains. The Conclusion peeks forward to the territorial nonincorporation doctrine, which replaced the Reconstruction Constitution as the dominant constitutional framework for empire.

797 (2005). *See also* Sanford Levinson, *Why the Canon Should be Expanded to Include the* Insular Cases *and the Saga of American Expansionism*, 17 CONST. COMM. 241, 241–66 (2000). *See generally* REBECCA J. SCOTT, DEGREES OF FREEDOM (2005); JUAN R. TORRUELLA, THE SUPREME COURT AND PUERTO RICO (1985).

19. *See generally* PAMELA BRANDWEIN, RETHINKING THE JUDICIAL SETTLEMENT OF RECONSTRUCTION (2011); Richard H. Pildes, *Democracy, Anti-Democracy, and the Canon*, 17 CONST. COMM. 295 (2000).

20. *See generally* MICHAEL PERMAN, STRUGGLE FOR MASTERY (2001); C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW (comm. ed. 2002).

21. On white southerners' post-1898 cultural productions, see W. FITZHUGH BRUNDAGE, THE SOUTHERN PAST (2005). On post-1898 Civil War remembrance, see, for example, Thomas J. Brown, *Civil War Remembrance as Reconstruction*, *in* RECONSTRUCTIONS 207, 218 (Thomas J. Brown ed., 2006). The academic consensus against Reconstruction was known as the "Dunning school" after its leading figure, William Archibald Dunning, the author of RECONSTRUCTION, POLITICAL AND ECONOMIC 1865–1877 (1907).

22. *See* ERMAN, *supra* note 11.

I. THE POST–CIVIL WAR UNITED STATES

In 1898, the United States was still struggling with the legacy of its Civil War, which had ended thirty-three years earlier. The conflict had abolished slavery and spawned a more powerful and centralized federal government.[23] Initially, the Republican majority in Congress pursued a policy of Reconstruction aimed at recasting the nation as a republic with formal equality among self-governing male citizens.[24] Their far-reaching statutory and constitutional innovations could credibly be argued to guarantee former slaves a full, permanent citizenship with expansive "privileges" and "immunities," and equal civil and political rights.[25] Disfranchisement, even if achieved, would cost states federal representation.[26] Radical Republicans were committed to expanding and enforcing the new guarantees.[27]

The emancipatory promise of the Civil War and Reconstruction buckled under counterassaults during and after the 1870s. The Supreme Court articulated increasingly cramped interpretations of the Reconstruction Constitution. Of perhaps greatest interest to federal lawmakers, the Court moved quickly to limit federal racial antidiscrimination enforcement to voting and cases where state officials interfered with civil or political rights or systematically failed to punish private interference with them.[28] As Republicans' commitment to African Americans' rights waned in Washington, Southern white-supremacist Democrats unleashed unprecedented domestic terror and voter fraud. This caused the remaining electorates in formerly Confederate states to "vote" uniformly Democratic in presidential elections after 1876.[29] Republicans' lack of political will to defend equal rights reached a new low from 1889 to 1891, when the party won control of the White House and Congress but failed to enact new federal election protections. Republicans also never enforced the constitutional mandate to reduce federal representation for southern states that disfranchised African American voters. When Democrats assumed control

23. FONER, *supra* note 8. *See generally* IRA BERLIN ET AL., SLAVES NO MORE (1992); WALTER DEAN BURNHAM, CRITICAL ELECTIONS AND THE MAINSPRINGS OF AMERICAN POLITICS (1970).

24. CHARLES W. CALHOUN, CONCEIVING A NEW REPUBLIC (2006).

25. U.S. CONST. amend. XIV, § 1. *See also* BRANDWEIN, *supra* note 19, at 30; FONER, *supra* note 8, at xxv, 602–03; SCOTT, *supra* note 18, at 8, 43–45, 265–67.

26. U.S. CONST. amend. XIV, § 2.

27. FONER, *supra* note 8, at 251–61. *See also* CALHOUN, *supra* note 24; Wang, *supra* note 18.

28. CALHOUN, *supra* note 24, at 10, 12–13, 22, 25. *See generally* Wang, *supra* note 18.

29. BRANDWEIN, *supra* note 19, at 9–10, 126, 143, 153. *See also* CALHOUN, *supra* note 24, at 207; FONER, *supra* note 8, at 279, 342–43, 425–44; SCOTT, *supra* note 18, at 47–48, 53; Wang, *supra* note 18, at 49, 79, 82, 92, 94, 96, 105, 113–14, 188, 227, 254, 267–300; WOODWARD, *supra* note 8, at 289.

of the political branches in 1893, they repealed Reconstruction-era election protection statutes en masse. With some distinct exceptions, national elected Republicans had all but abandoned African Americans.[30]

To consolidate the gains of the white-supremacist onslaught, Southern Democrats denigrated Reconstruction, removed African Americans from political life, and enfeebled the Fourteenth and Fifteenth Amendments. They also propounded a false history in which tyrannical northern radicals imposed upon the South governments of incompetent and barbaric blacks, corrupt Northern carpetbaggers, and opportunistic Southern scalawags.[31] The resultant misrule emptied state coffers and unleashed black men's sexual violence against white women until white Democrats "redeemed" their states with the help of the Ku Klux Klan, or so the story went. "Redemption," the myth concluded, had restored the constitutional balance between the state and federal governments and returned the South to clean government and its proper racial order under white men's rule.[32] In reality, Redemption was unstable—and challenged from 1892 to 1896 by the Populist Party's uneasy coalition of black and white farmers and workers. Only renewed violence and fraud preserved Democratic dominance.[33]

In the 1890s Southern Democrats sought permanent power via Jim Crow and African American disfranchisement. This constitutionally dubious scheme required Supreme Court acquiescence. To secure it, Louisiana's "Separate Car Act" (1890) thinly veiled the racial domination and segregation with a requirement of "equal but separate" facilities.[34] Likewise, rather than explicitly disfranchise African Americans, Mississippi granted discretion to registrars, who then found African Americans wanting.[35] The Supreme Court upheld both schemes.[36]

30. CALHOUN, *supra* note 24, at 4, 226–67. *See also* MARK ELLIOTT, COLOR BLIND JUSTICE 248 (2008); J. MORGAN KOUSSER, THE SHAPING OF SOUTHERN POLITICS 31 (1974); SCOTT, *supra* note 23, at 87; WOODWARD, *supra* note 8, at 322; Wang, *supra* note 18, at 216–66, 300.

31. BLIGHT, *supra* note 18, at 111–12, 138–39, 394–97. *See also* FONER, *supra* note 8, at xix, 582, 609–10; WOODWARD, *supra* note 8, at 51–74; WOODWARD, *supra* note 20, at 56–61.

32. BLIGHT, *supra* note 18, at 4–5, 102, 110–112, 394–397. *See also* WILLIAM ARCHIBALD DUNNING, ESSAYS ON THE CIVIL WAR AND RECONSTRUCTION AND RELATED TOPICS, at vii–viii (2d ed. 1904) (1897); DUNNING, *supra* note 21, at 205–10; FONER, *supra* note 8, at xix, 582, 609–10; WOODWARD, *supra* note 8, 51–74; WOODWARD, *supra* note 20, 56–61.

33. Pildes, *supra* note 19, at 301. *See also* EDWARD L. AYERS, THE PROMISE OF THE NEW SOUTH 214–309 (1992); KOUSSER, *supra* note 30, at 3, 11, 243–44; JOSEPH GERTEIS, CLASS AND THE COLOR LINE 23, 33–34, 127–28, 146–47 (2007); MATTHEW HILD, GREENBACKERS, KNIGHTS OF LABOR, AND POPULISTS 1, 3–4, 150–51, 174–75, 201 (2007).

34. Plessy v. Ferguson, 163 U.S. 537, 540 (1896). *See also* Gerald J. Postema, *Introduction: The Sins of Segregation*, 16 LAW & PHIL. 241–42 (1997); SCOTT, *supra* note 18, at 88.

35. PERMAN, *supra* note 20, at 83–90.

36. *See Plessy*, 163 U.S. at 550–51; Williams v. Mississippi, 170 U.S. 213, 222, 221 (1898). *See*

By this time, a significant body of academic and popular literature reinforced white supremacist distortions of Reconstruction.[37] British historian James Bryce's acclaimed text, *The American Commonwealth* (1888), and Columbia historian William Dunning's collected essays (1897) laid the groundwork for an academic consensus that condemned Reconstruction.[38] A popular school of southern historical fiction romanticized slavery and the Confederacy, memorializing the "Lost Cause" and justifying white supremacy.[39] As the United States lingered at empire's edge, southern white supremacists targeted Reconstruction's remnants.

II. THE RECONSTRUCTION CONSTITUTION AS A RESTRAINT ON EMPIRE

Clearly, by early 1898, the Reconstruction Constitution was vulnerable; but its specific restraints on imperial annexation remained fearsome even as the rest of the Reconstruction project crumbled. The Constitution required statehood for all annexed lands and citizenship with accompanying rights for their populations. Those results were an application of the more general principle that all Americans, except American Indians, held full constitutional rights as citizens of the United States and as citizens of their respective states or states-in-waiting.[40] That principle was still intact largely because it was an irrelevant part of the constitutional menagerie for white Southern Democrats, who were focused on depriving African Americans of the benefits of Reconstruction.[41]

Somewhat protected by the indifference of white Southern Democrats, the Reconstruction Constitution commitment to inclusive citizenship and eventual statehood was also bolstered by a longer, unbroken, and still influential tradition that all inhabited U.S. lands would eventually become

also PERMAN, *supra* note 20, at 117–21; WOODWARD, *supra* note 8, at 321–22.

37. Contrary voices had not yet left the field. *See* SILBER, *supra* note 18; Mark Elliott, *Race, Color Blindness, and the Democratic Public: Albion W. Tourgée's Radical Principles in* Plessy v. Ferguson, 67 J. SOUTHERN HIST. 287, 309–12 (2001). *See generally* BARBARA A. GANNON, THE WON CAUSE (2011).

38. DUNNING, ESSAYS ON THE CIVIL WAR AND RECONSTRUCTION AND RELATED TOPICS, *supra* note 32. *See also* MARILYN LAKE & HENRY REYNOLDS, DRAWING THE GLOBAL COLOUR LINE 49–74 (2008); WOODWARD, *supra* note 8, at 440–43.

39. BLIGHT, *supra* note 18, at 216. *See also* CECILIA ELIZABETH O'LEARY, TO DIE FOR 121–28 (1999); SILBER, *supra* note 18, at 185–95; WOODWARD, *supra* note 8, at 431–34.

40. The classic overview of American Indian history remains FRANCIS PAUL PRUCHA, THE GREAT FATHER (1995).

41. When annexation of the Philippines in 1899 caused Southern Democrats to focus on the Reconstruction Constitution as a constraint on empire, they were of two minds. Initially, they valued doctrines that limited federal power. But as Reconstruction grew more distant and Democrats' stranglehold on Southern politics tightened, many welcomed empire as a new field for white-supremacist governance. *See* ERMAN, *supra* note 11.

states. The Northwest Ordinance (1787), which predated the Constitution, had influentially promised statehood for the territories it governed.[42] In 1857 the Supreme Court's infamous *Dred Scott v. Sandford* decision crystallized that norm into doctrine by declaring that the Constitution only permitted territories to be acquired as future states, not as perpetual colonies.[43] The Union victory against Southern secession established on the battlefield the proposition of once in, never out. That prohibition clearly applied to states seeking to depart unilaterally, but conceivably also bound the federal government and applied to territories. Those two rules would bar any acquired land from later becoming independent through a grant of national sovereignty. So eventual statehood would become the inevitable consequence of annexation.[44] As one senator explained in 1871, because "divorce is impossible," annexation was an "irrevocable" promise that territory "be admitted in due time as a State."[45]

The other key component of this constitutional regime was the guarantee of rights-rich citizenship for all Americans other than American Indians. After the Thirteenth Amendment ended legal slavery within the United States, the Fourteenth Amendment provided the first constitutional definition of U.S. citizenship:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.[46]

Together, these constitutional provisions and interpretations obliterated *Dred Scott*'s notorious deprivation of African American citizenship—but they did not obliterate *Dred Scott*'s bar on perpetual colonies, and could be reconciled with it easily enough.

The declaration in the *Slaughter-House Cases*, that birth within territories was birth within the United States, clarified that all Americans other than American Indians were citizens with associated privileges and immunities.[47] However, the rights attached to such citizenship had long been

42. ORDINANCE OF 1787: THE NORTHWEST TERRITORIAL GOVERNMENT, *reprinted in* 1 U.S.C., at LVII–LIX (2012). *See also* EBLEN, *supra* note 12, at 1–51; DON E. FEHRENBACHER, THE DRED SCOTT CASE 74–77, 142 (1978).

43. Dred Scott v. Sandford, 60 U.S. 393, 446 (1857).

44. Burnett, *supra* note 18, at 802–03. On U.S. authority over uninhabited guano islands as a precursor to empire, see Christina Duffy Burnett [Ponsa-Kraus], *The Edges of Empire and the Limits of Sovereignty: American Guano Islands*, 57 AM. Q. 772, 779–803 (2005).

45. CONG. GLOBE, 42nd Cong., 524 (1871).

46. U.S. CONST. amend XIV, § 1.

47. Slaughter-House Cases, 83 U.S. 36, 72–73 (1872). *See also* Sarah H. Cleveland, *Powers*

subject to competing lines of authority. One view was that citizenship was highly consequential. *Dred Scott* argued as much when it declared citizenship so substantive and so linked to voting that its extension to African Americans was unthinkable.[48] The Fifteenth Amendment (1870) could be read to work from the same premise, but to opposite ends; it potentially associated citizenship with suffrage when it barred racial discrimination in voting. The other view was that citizenship conferred few rights inherently. The *Slaughter-House Cases* took this approach in all but nullifying judicially enforceable privileges and immunities of U.S. citizenship in cases not involving race discrimination.[49] In rejecting a woman's suffrage test suit, the Court in *Minor v. Happersett* (1875)[50] added that U.S. citizenship did not provide voting rights specifically. Conversely, some rights existed independently of citizenship. *Wong Wing v. United States* (1896)[51] and *Yick Wo v. Hopkins* (1886)[52] respectively protected the jury rights and anti–racial discrimination rights of noncitizens of Chinese descent.[53] Though the two views of citizenship existed in considerable tension, officials and jurists generally just held both simultaneously. They judged citizenship too valuable to be extended via annexation to people of color and understood that it brought those who already held it little advantage in court.

The Reconstruction Constitution—fortified by these earlier constitutional interpretations—had occasioned an unprecedented hiatus in annexation. Presidents had repeatedly contemplated annexation, confronted resistance to its constitutional consequences, and stopped short. Before ratification of the Fourteenth Amendment, a U.S. annexation had occurred at least every fifteen years; in 1897 more than thirty years had passed since

Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs, 81 TEX. L. REV. 1, 197 *(*2002).

48. *Dred Scott*, 60 U.S. at 393. In a reflection of how jurists often held inconsistent visions of citizenship without acknowledging the tension, the justices were also well aware that women and children held U.S. citizenship and yet lacked voting rights. *Id.*

49. *See Slaughter-House Cases*, 83 U.S. at 36. *See also id*. at 119 (Bradley, J., dissenting); LEO S. ROWE, THE UNITED STATES AND PORTO RICO 87–89 (1904). *But cf. Slaughter-House Cases*, 83 U.S. at 111–24 (Bradley, J., dissenting).

50. Minor v. Happersett, 88 U.S. 162 (1875). *See also* AUSTIN ALLEN, ORIGINS OF THE DRED SCOTT CASE 168, 179, 217–219 (2006); FEHRENBACHER, *supra* note 42, chs. 6, 15. Chief Justice Roger Taney's lead opinion in *Dred Scott* rested on several additional premises: states could not grant U.S. citizenship; Congress had not naturalized African Americans; and citizenship in a state and in the United States must generally coincide. For an example of antebellum jurists' competing accounts of who held citizenship and what it meant, see State v. Manuel, 20 N.C. 144 (1838), and Rights of Free Virginia Negroes, 1 OP. ATTY. GEN. 506 (1821).

51. Wong Wing v. United States 163 U.S. 228 (1896).

52. Yick Wo v. Hopkins, 118 U.S. 356 (1886).

53. *See* BRANDWEIN, *supra* note 19, at 28–31, 57, 98–104.

Alaska was annexed in 1867.[54] Republican President Ulysses S. Grant (1869–1877) promoted the benefits of annexation within the Reconstruction Constitution framework when he sought ratification of treaties to annex the Danish West Indies and the Dominican Republic. Though the West Indians were overwhelmingly of African descent,[55] Secretary of State William Seward pressed for ratification of a treaty that would provide islanders all "liberties and rights of American citizens" and place the islands among lands "preparing to be States."[56] Under the Dominican treaty, Dominicans, most of whom were of mixed race, would be immediately protected as U.S. citizens. Their nation would join the Union, perhaps even within a decade.[57] The unspoken corollary was that statehood would bring new privileges such as full participation in U.S. governance, including senators, representatives, presidential electors, and a say on constitutional amendments. Though citizenship, eventual statehood, and rights each derived from a distinct mix of pre–Civil War precedents, Civil War transformations, and Reconstruction Amendment prescriptions, U.S. officials envisioned all three as a legal bundle that instantly accompanied annexation.

Debates about annexation at this time focused not on whether rights of citizenship would be extended to alien peoples—that was assumed to be true—but on the desirability of that prospect. For his part, President Grant happily envisioned 150,000 citizens of color dominating a State of Dominica that would reinforce and bolster Reconstruction.[58] But as the London *Spectator* observed, many U.S. senators balked at a further "increase of the dark electorate;" the prospect of a Dominican vote that would "cancel that of a million whites in the House of Representatives" aroused many senators'

54. DAVID HEALY, US EXPANSIONISM: THE IMPERIALIST URGE IN THE 1890S, at 50–52 (1970). *See also* BEISNER, *supra* note 13, at 46–47. Both sources identify the hiatus in annexations as a problem. The annexation of Alaska demonstrated that the contiguity of the territories to be acquired did not distinguish the two periods. As Matthew Karp elaborates in THIS VAST SOUTHERN EMPIRE (2016), antebellum U.S. expansion had a pro-slavery flavor that did not survive the Civil War. The Alaska treaty extended citizenship to all inhabitants who remained except members of "uncivilized native tribes." Treaty with Russia, art. 3, 15 Stat. 539, 542 (Mar. 30, 1867). Population counts of 1863 and 1890, respectively, both reported Alaska's population to be overwhelmingly indigenous. *See* IVAN PETROFF, POPULATION AND RESOURCES OF ALASKA 40 (1882); PETROFF, REPORT ON POPULATION AND RECOURSES OF ALASKA AT THE ELEVENTH CENSUS: 1890, at 3 (1893).

55. PEDERSEN, *supra* note 14, at vii, 162–67. *See also* Nicholas Guyatt, *America's Conservatory: Race, Reconstruction, and the Santo Domingo Debate*, 133 J. AM. HIST. 974, 981 (2011). *See generally* FRANK MOYA PONS, THE DOMINICAN REPUBLIC (1998); WILLIAM JAVIER NELSON, ALMOST A TERRITORY (1990).

56. SENATE COMM. ON FOREIGN RELATIONS, 1ST TO 56TH CONG., CLAIMS OF CITIZENS OF THE UNITED STATES AGAINST FOREIGN GOVERNMENTS, S. DOC. NO. 231, at 218 (Comm. Print 1901).

57. LOVE, *supra* note 13, at 41; ALLISON L. SNEIDER, SUFFRAGISTS IN AN IMPERIAL AGE 47 (2008).

58. Guyatt, *supra* note 55, at 976–81.

"dread of the negro."[59] Equating "American-ness" and whiteness, one senator objected to any eventual "share in governing us" for Dominicans "wholly incapable to governing themselves."[60] Republican Senator Carl Schurz of Missouri feared annexations begetting annexations. He foresaw the addition of "ten or twelve tropical States" whose "ten or twelve millions" of "people of the Latin race mixed with Indian and African blood" would elect senators and representatives capable of tipping "the scale of the destinies of this Republic."[61] The treaties to annex the Danish West Indies and the Dominican Republic never won ratification.

Subsequent attempts to assert U.S. control abroad met with the same kind of resistance from those who feared that annexation would trigger eventual statehood for acquired lands and immediate citizenship for the inferior peoples resident there. In 1893, a group of American businessmen and planters overthrew the Hawaiian government and sought U.S. annexation.[62] Stateside opponents complained that such acquisition was irreversible—a "step into the abyss" that could "never be retraced."[63] The "interference of the Fourteenth Amendment" would pollute citizenship by bringing it to Hawaiians who were "incompetent," "incapable of self control," "ignorant, vicious," "degraded," "incongruous," and lacking in "education," "ability," and "mental and moral faculties."[64] If further annexations followed, the result would be a "polyglot House" whose speaker might "recognize 'the gentleman from Patagonia,'" Cuba, Santo Domingo, Korea, Hong Kong, Fiji, Greenland, or, "with fear and trembling, 'the gentleman from the Cannibal Islands,' who will gaze upon you with watering mouth and gleaming teeth."[65]

59. *St. Domingo and the United States*, SPECTATOR (Jan. 29, 1870), *in* LITTELL'S LIVING AGE 635–36 (1870).

60. CONG. GLOBE, 42nd Cong., 526 (1871).

61. *Id.* app'x 30 (1871). *See also* LOVE, *supra* note 13, at 59.

62. Castle, *supra* note 14, at 83.

63. 31 CONG. REC., H5,936.

64. 26 CONG. REC., at app'x 481–82; 31 CONG. REC., S5,842, S5,921, S5,938, S5,998; George S. Boutwell, Hawaiian Annexation, Address Before Boot and Shoe Club of Boston (Dec. 22, 1897), *in* 60 ADVOCATE OF PEACE 19 (1898); James Bryce, *The Policy of Annexation for America*, FORUM Dec. 1897, at 385; LOVE, *supra* note 13, at 103, 150; Stephen M. White, *The Proposed Annexation of Hawaii*, FORUM, Aug. 1897, at 731; Carl Schurz, *Manifest Destiny*, HARPER'S MAG., Oct. 1893, at 737. Although residents of Japanese and Chinese descent formed a substantial minority of the population, they were overwhelmingly foreign born and thus potentially excludable from citizenship upon annexation. *See* REPORT OF THE GENERAL SUPERINTENDENT OF THE CENSUS, 1896, at 31, 34 (1897).

65. 31 CONG. REC., H5,790, H5,792, H5,777–78, H5,903, H5,921, H5,937. *See also* 26 CONG. REC., H1,821–22; Thomas M. Cooley, *Grave Obstacles to Hawaiian Annexation*, FORUM, June 1893, at 399; *Why Should We Annex Hawaii*, N.Y. HERALD (Feb. 23, 1893); E.L. Godkin, *How Are We to Govern Hawaii?*, NATION, Dec., 2, 1897, at 432–33; LOVE, *supra* note 13, at 104, 129–30; Eric Love, *White Is the Color of Empire: The Annexation of Hawai'i, in 1898*, *in* RACE, NATION, AND EMPIRE IN AMERICAN

Proponents of annexation changed tactics. Rather than celebrate the extension of the Reconstruction Constitution to new territories and the peoples present there, they downplayed it. But they did not dispute or deny the consequences of annexation.[66] To suggest that the Constitution permitted the United States to hold overseas colonies came perilously close to condoning the re-imposition of racial caste in the U.S. South. As the Democratic Senator from Louisiana, Donelson Caffery, would put it years later when Republicans sought to annex lands without extending them the Reconstruction Constitution, such attempts "most amply vindicated the South" by laying so "outside of the spirit of the fourteenth and fifteenth amendments to the Constitution."[67] For now, proposed treaties remained silent on citizenship, voting rights, and future statehood.[68] Executive-branch advocates of expansion punted these matters to Congress. Pro-annexation lawmakers argued that Hawai'i's small population could be safely naturalized and that the prospect of such a small state gaining two senators could be averted by admitting the polity as a new county of California instead.[69] But other lawmakers were not assuaged or reassured. And Hawai'i remained outside U.S. borders. In 1896 leading Republicans eyed the Danish West Indies, Hawai'i, and "all the English speaking parts" of the Americas.[70] They renewed their contention that the benefits from expansion would outweigh its costs, but were stymied once again.[71]

HISTORY 84 (James T. Campbell et al. eds., 2007); Schurz, *supra* note 64; *Hawaii*, NATION, Feb. 9, 1893, at 96.

66. Love, *supra* note 65, at 95. For express acknowledgements of consequences of annexation, see *Statement of Gen. Schofield*, N.Y. TRIB., Mar. 15, 1893, at 2, *in* LORRIN A. THURSTON, A HAND-BOOK ON THE ANNEXATION OF HAWAII 72 (1897); 31 CONG. REC., at app'x. 612; *More American Talk: Senator Morgan's Speech in Honolulu – Strong Utterances*, L.A. TIMES, Oct. 11, 1897, at 5.

67. 32 CONG. REC., S639 (1899).

68. FOREIGN RELATIONS OF THE UNITED STATES 1894: AFFAIRS IN HAWAII 201 (1895); William McKinley, *The President's Message*, *in* EVENING STAR ALMANAC AND HAND-BOOK 1898, at 436–37 (1898).

69. *A Voice from Hawaii*, SEATTLE POST-INTELLIGENCER, July 28, 1897, at 8; ANNEXATION OF THE HAWAIIAN ISLANDS, H.R. Rep. No. 1355, 55th Cong., 2d sess., pt. 1, at 61 (May 17, 1898); 31 CONG. REC., H5,788, H5,998.

70. *Republican Party Platform of 1896*, AM. PRESIDENCY PROJECT, http://www.presidency.ucsb.edu/ws/?pid=29629 (last visited Sept. 10, 2018).

71. Osborne, *supra* note 13, at 84, 104–05; LOVE, *supra* note 13, at xvii, 106, 146, 154. Several dynamics contributed to the renewed pressure for expansion. *See* HEALY, *supra* note 54, at 12 (noting that expanding territorial empires dominated the broader world); BEISNER, *supra* note 13, at 14 (citing rising tariff walls); WALTER LAFEBER, THE NEW EMPIRE (35th anniv. ed. 1998) (building on work by William Appleman Williams to emphasize the desire to access foreign markets). On growing U.S. investment in naval capacity, see JEDIDIAH J. KRONCKE, THE FUTILITY OF LAW AND DEVELOPMENT (2016); HEALY, *supra* note 54, at 43–44; and MAHAN, *supra* note 3. Kristin L. Hoganson perceives a martial spirit haunting 1890s officialdom. *See* FIGHTING FOR MANHOOD 3–4, 10, 24, 81 (1998). Trade and international relations are treated in BEISNER, *supra* note 13, at 4–5, 14, 19, 23–24, 78, 81, 87–89,

III. BEYOND THE RECONSTRUCTION CONSTITUTION: AMERICAN INDIANS, TERRITORIES, AND ALIEN LANDS AND PEOPLE

Lack of annexations, however, did not make the United States an anti-imperial paragon. Between 1868 and 1898, U.S. officials projected power abroad, consolidated power at home, and subordinated peoples on both sides of the border. Their actions followed the Reconstruction Constitution, but also circumscribed and limited its reach. Doing so paved the way for more direct challenges to it at century's end.

Internationally, the United States traded, defended, postured, and wielded as much influence as before. Only annexations had disappeared from the nation's quiver. In lieu of annexation, the United States deployed workarounds to extend U.S. economic and military interests that left foreign sovereignty in place. For instance, the United States negotiated a uniquely favorable trade agreement with the Dominican Republic and gained significant control over its finances after a U.S. syndicate purchased its outstanding debt.[72] In the Danish West Indies, the United States took advantage of the free port, enjoying access to the valuable coaling and naval harbor there on terms equal to those of other great powers.[73] Hawai'i gave the United States preferential access to its ports, trade, and territory. In the words of a U.S. secretary of state, the islands were "practically members of the American zollverein" (a form of customs union without political unification that bound together north German states) and "an outlying district of the State of California." Internationally, the United States claimed the Hawaiian islands within its sphere of influence. Yet formally the kingdom was as "remote from our control as China."[74]

In other cases, U.S. officials rejected the annexation option in favor of other forms of control. Rather than accept a proposal that Germany, Britain,

95, 98–131; KRONCKE, *supra* note 71, at 73; GEORGE HERBERT RYDEN, THE FOREIGN POLICY OF THE UNITED STATES IN RELATION TO SAMOA 519, 555 (1933); and VEESER, *supra* note 13, at 4–5, 33. On preemptive annexation as a Monroe Doctrine response to other empires' designs, see BEISNER, *supra* note 13, at 4, 10–12, 79, 99, 102–03, 108–14, 123, 131; HEALY, *supra* note 54, at 26–27; KRONCKE, *supra*, at 73; LOVE, *supra* note 13, at 153; and TANSILL, *supra* note 13, at 200.

72. VEESER, *supra* note 13, at 30–42.

73. CLAIMS OF CITIZENS, *supra* note 56, at 309–12. *See also* W.D. Boyce, *Advantages of Making the Canal Zone a Free City and Free Port*, 5 J. RACE DEV. 68, 81 (1914); Isaac Dookhan, *Changing Patterns of Local Reaction to the United States Acquisition of the Virgin Islands, 1865–1917*, 15 CARIBBEAN STUD. 50, 50 (1975); Gordon K. Lewis, *An Introductory Note to the Study of the Virgin Islands*, 8 CARIBBEAN STUD. 5, 12 (1968).

74. SYLVESTER K. STEVENS, AMERICAN EXPANSION IN HAWAII, 1842–1898, at 157–58, 126–27, 170 (1945). *See also* Schurz, *supra* note 64.

and the United States each annex different portions of Samoa, the United States insisted on a fractious co-supervision arrangement.[75] The United States protected its citizens' interests in parts of Asia through extraterritoriality agreements, which let citizens facing prosecution or civil suits abroad receive adjudication by U.S. officials who applied U.S. law.[76]

In the Western Hemisphere, the United States used trade to assert predominance. A reciprocal United States–Spanish agreement underlay the U.S. role as the leading market for the Spanish colonies of Puerto Rico and Cuba. The United States also aggressively asserted its Monroe Doctrine rule that no European power would be allowed to expand its footprint in the Americas. Doing so was another way for the United States to broaden control without extending U.S. borders.[77] In 1895, the United States declared itself "practically sovereign" in the Americas and insisted that Great Britain submit a border dispute with Venezuela to arbitration. This "twenty-inch gun," as the demand became known, signaled a willingness to resort to arms if Britain refused. The British pointed out the inconsistency of asserting "interests" in a country for which a nation "assumes no responsibility," but acceded to U.S. demands all the same.[78]

Through most of the late nineteenth century, then, the United States pursued a variation of imperialism in the American hemisphere unlike many European models insofar as it involved no formal extension of borders. U.S. supremacy and control in the Americas grew, but U.S. territory and sovereignty did not. The United States stood down only where the tripwire of the Reconstruction Constitution might get triggered.

Domestically, the military pursued large-scale warfare to defeat autonomous native nations and expropriate their land. The Reconstruction Constitution accommodated such violence, but at the cost of sacrificing theoretical coherence. Recall that the Fourteenth Amendment extended citizenship to those "born . . . in the United States, and subject to the jurisdiction thereof."[79] A major function of the "jurisdiction" requirement was to exclude American Indians from citizenship. The clause analogized

75. NICHOLAS THOMAS, ISLANDERS 272–81 (2010); RYDEN, *supra* note 71, at xii–xvii, 555, 574–75.

76. Teemu Ruskola, *Canton is Not Boston: The Invention of American Imperial Sovereignty*, 57 AM. Q. 889, 860–61, 870–72, 876–77 (2005).

77. VEESER, *supra* note 13, at 30–32; PÉREZ, *supra* note 13, at 66–67, 171–86.

78. R.A. Humphreys, *Presidential Address: Anglo-American Rivalries and the Venezuela Crisis of 1895*, 17 TRANS. OF ROYAL HIST. SOC. 131, 150, 153 (1967). *See also* BEISNER, *supra* note 13, at 12; Jennie A. Sloan, *Anglo-American Relations and the Venezuelan Boundary Dispute*, 18 HISP. AM. HIST. REV. 486, 494 (1938).

79. U.S. CONST. amend. XIV, § 1.

tribes to foreign nations. An Indian who owed primary loyalty to a tribe at birth was homologous to a foreign ambassador's child whose primary loyalty at birth was to the ambassador's home country. The analogy might have been somewhat apt in 1868, but not after 1871, when the United States abandoned treaty relations with American Indians in favor of direct congressional rule by statute.[80] *United States v. Kagama* (1886)[81] recognized inherent and plenary federal power over American Indians.[82] By the time of the U.S. Army massacre of Lakota Indians at Wounded Knee in 1890, American Indians' military power no longer posed a credible threat to U.S. dominance.[83] Nonetheless, the Court held in *Elk v. Wilkins* (1884)[84] that the Constitution did not extend citizenship to American Indians who forswore tribal allegiance in favor of U.S. jurisdiction. This ruling left many American Indians with citizenship neither in the United States nor in a foreign country. If those who disassociated from their tribes did not become U.S. citizens, then they would have no nationality.[85]

Beginning in the 1880s, the United States swapped one betrayal for another. Rather than withhold citizenship to deny rights to American Indians, they imposed it to compel the assimilation of Native peoples. U.S. officials dissolved tribal governments, alienated collectively held tribal lands, implemented coercive education programs to extinguish Native American cultures, naturalized Indians en masse, and expanded states' jurisdiction over Indians.[86] Often envisioned as a shield for individuals against governmental overreach, citizenship had become its sword.

The Reconstruction Constitution did not prevent the expansion of U.S. power and control, domestically or internationally. Nor did it prevent federal officials from establishing broad latitude to act within territories. Quite the opposite: A strong national government grew stronger. Southern white-supremacist Democrats abided such aggrandizement of federal power because they had the least to fear from the federal behemoth when it exercised its powers beyond state borders. In Utah Territory, the Constitution hardly hindered the federal campaign against Mormon polygamy, which was

80. PRUCHA, *supra* note 40, at 676.

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

82. PRUCHA, *supra* note 40, at 679; Cleveland, *supra* note 47, at 61–63.

83. PRUCHA, *supra* note 40, at 560–61; HEATHER COX RICHARDSON, WOUNDED KNEE (2010).

84. Elk v. Wilkins, 112 U.S. 94 (1884).

85. *Id.* at 121–22 (Harlan, J., dissenting). *See also* Cleveland, *supra* note 47, at 58.

86. DAVID WALLACE ADAMS, EDUCATION FOR EXTINCTION 22–24 (1995); JACQUELINE FEAR-SEGAL, WHITE MAN'S CLUB, at xi–xii (2007); FREDERICK E. HOXIE, A FINAL PROMISE, at x, 42, 44, 50, 52, 70–71, 74–75, 79–80, 152–54 (2001); PRUCHA, *supra* note 40, at 609–758; Cleveland, *supra* note 47, at 63.

often condemned as another form of slavery.[87] Before the Civil War, by contrast, *Dred Scott* protected slaveholders in the territories from federal interference. The promise of eventual statehood also did little to impede federal power. As overwhelmingly Catholic New Mexico passed the half-century mark as a territory, federal lawmakers routinely cited residents' race and monolingual Spanish when they rejected statehood measures.[88] Inevitable statehood, they realized, could be indefinitely delayed.

Federal officials' freedom to act was unrestrained by the Reconstruction Constitution in particular kinds of lands and territories, as these examples show. It was also unrestrained in cases that involved particular groups of people: namely, aliens within U.S. borders, or U.S. citizens living abroad. Officials enjoyed all but unreviewable discretion if they could convince a court that an action targeted foreign lands or actors. *In re Ross* (1891),[89] for example, involved the trial of a U.S.-citizen defendant accused of committing crimes abroad. The U.S. official who conducted the overseas trial had applied U.S. law and yet denied him jury rights. The Supreme Court upheld the resultant conviction.[90] The Reconstruction Constitution drew high-stakes lines between citizens and aliens. This was evident in two Supreme Court decisions, *Chae Chan Ping v. United States* (1889)[91] and *Fong Yue Ting v. United States* (1893).[92] Both cases involved virulently anti-Chinese federal statutes that flatly forbade naturalization of

87. SARAH BARRINGER GORDON, THE MORMON QUESTION 1, 47, 77, 81, 85, 90, 98, 114–16, 120, 129, 219 (2002). *See also* Gerald L Neuman, *Constitutionalism and Individual Rights in the Territories*, *in* FOREIGN IN A DOMESTIC SENSE 184–87 (Christina Duffy Burnett [Ponsa-Kraus] & Burke Marshall eds., 2001). Full constitutional rights did not stop the bureaucratically weak federal government from regulating organized and active workers via criminal prosecutions, anti-labor injunctions, and violence. *See* CHRISTOPHER L. TOMLINS, LAW, LABOR, AND IDEOLOGY IN THE EARLY AMERICAN REPUBLIC 44–51, 61–63 (1993). *See also* JOSIAH BARTLETT LAMBERT, IF THE WORKERS TOOK A NOTION 10, 13, 22, 44–51, 56, 58, 65 (2005); WILLIAM E. FORBATH, LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT 61–65, 77–78, 83, 108, 111, 125–26 (1991); DAVID RAY PAPKE, THE PULLMAN CASE, at xiii, 33–35, 38, 41, 49, 75–76, 98 (1999); Richard Schneirov et al., *Introduction*, *in* THE PULLMAN STRIKE AND THE CRISIS OF THE 1890S, at 1 (Richard Schneirov et al. eds., 1999); Melvyn Dubofsky, *The Federal Judiciary, Free Labor, and Equal Rights*, *in* PULLMAN STRIKE, *supra* note 87, at 162–65; David Montgomery, *Epilogue*," *in* PULLMAN STRIKE, *supra* note 87, at 238. Sarah Barringer Gordon describes how federal anti-polygamy laws imposed shared state norms on territories. *See* GORDON, *supra* note 87, at 5, 134, 219, 225. In *Public Vows* (2000), Nancy F. Cott observes the racial associations opponents drew between polygamy and racial degradation.

88. John Nieto-Phillips, *Citizenship and Empire: Race, Language, and Self-Government in New Mexico and Puerto Rico, 1898–1917*, 11 J. CTR. P.R. STUD. 51, 53–56 (1991). *See generally* DAVID VAN HOLTBY, FORTY-SEVENTH STAR (2012) (explaining that anti-Catholic sentiment impeded statehood for New Mexico into the 1890s).

89. *In re* Ross, 140 U.S. 453 (1891).

90. Cleveland, *supra* note 47, at 206.

91. Chae Chan Ping v. United States, 130 U.S. 581 (1889).

92. Fong Yue Ting v. United States, 149 U.S. 698 (1893).

Chinese individuals and sharply limited their entry, reentry, and residence in the United States. Decisions in the two cases established an absolute, inherent federal power to bar aliens' entry into the United States and to deport them after they arrived.[93] These rulings contrast with *United States v. Wong Kim Ark* (1898),[94] which declared the United States-born ethnic Chinese Wong Kim Ark to be a citizen with the right to reenter the United States. The Court rejected the race-based claim that Wong's birth to Chinese parents was birth not subject to U.S. jurisdiction. Such judicial unwillingness to bend the Reconstruction Constitution to the dictates of racism was just what many opponents of annexation feared and predicted. The crux of the matter was the decision's emphasis on Wong's subjection to federal power regardless of his ties to China: "Jurisdiction of the nation within its own territory is necessarily exclusive and absolute."[95]

By 1898 all of these shifts in federal power had weakened individual rights and strengthened those of the states. This had occurred across thirty years of official interactions with African Americans, American Indians, people of Chinese descent, and members of other disfavored communities. It occurred through matters concerning national borders, irregular locales, territories, and U.S. consular courts abroad. Simultaneously, the Court had sharply delimited the reach of the Reconstruction Constitution. Constitutional rights could abruptly vanish upon crossing U.S. borders, as in *In re Ross*, or where an alien rather than a citizen was concerned, as in *Fong Yue Ting*. Though the restraints that the Reconstruction Constitution imposed on empire were still standing, the elements of a doctrinal alternative had been fulminating for thirty years. Specifically, federal power was getting defined—and transformed—by distinctions between foreign and domestic; alien and citizen. Later events would demonstrate the malleability of these distinctions.[96] What was missing before 1898 was the impetus to synthesize and then deploy the alternative doctrine.

93. Page Act of 1875, ch. 141, 18 Stat. 477; Chinese Exclusion Act of 1882, ch. 126, 22 Stat. 58; Chinese Exclusion Act of 1884, ch. 220, 23 Stat. 115; Scott Act of 1888, ch. 1064, 25 Stat. 504; Geary Act, ch. 60, 27 Stat. 25 (1892); ANDREW GYORY, CLOSING THE GATE 1 (1998); Cleveland, *supra* note 47, at 129–34, 149.

94. United States v. Wong Kim Ark, 169 U.S. 649 (1898).

95. Lucy E. Salyer, Wong Kim Ark*: The Contest over Birthright Citizenship*, *in* IMMIGRATION STORIES 51–85 (David A. Martin & Peter H. Schuck eds., 2005). Erika Lee identifies Chinese exclusion with U.S. transformation into a self-defined racial "gatekeeping" nation in AT AMERICA'S GATES 6 (2003).

96. *See generally* ERMAN, *supra* note 11.

IV. THE U.S. IMPERIAL TURN

Despite having weakened as a broad restraint on governmental power, the Reconstruction Constitution remained a fearsome obstacle to territorial annexation at century's end. Another demonstration came after April 1898, when years of tensions between Spain and the United States over the future of the Spanish colony of Cuba finally boiled over into open conflict.[97] The ensuing war between the two countries provided advocates of acquiring new lands with fresh ammunition. They needed it. The constitutional rule attaching citizenship, rights, and statehood to annexation, which still shaped U.S. officials' actions, remained a strong argument against renewed expansion.[98]

Active naval warfare permitted long-thwarted expansionists finally to gain a victory in Hawai'i . Facing constitutional objections that they could not convincingly rebut, they cited Hawai'i's naval value instead: "I should like to know whether these fine, silken, glossy arguments about the Constitution" are to "obstruct the war" and "put to peril the troops."[99] The implication was that Hawai'i was worth the constitutional price, whether it be adherence to the Reconstruction Constitution or its violation.[100] In early July 1898, annexation of the Pacific islands was complete.[101]

The United States made a similar calculation to stomach the constitutional consequences of acquiring Spain's small island colony of Puerto Rico, which lay at a key access point to the Caribbean Sea and to potential sites for a trans-Isthmian canal.[102] With it clear that the war with Spain would soon end decisively in the United States' favor, U.S. forces invaded Puerto Rico in late July 1898. U.S. officials declared their intent to annex the island[103] and began governing there in anticipation of the impending applicability of the Reconstruction Constitution. In words calculated to evoke rights and membership, the general at the head of the

97. *See generally* PÉREZ, *supra* note 13.

98. Republicans could not renounce the rule without facing potent charges of hypocrisy. For an example, see Lauren L. Basson, *Fit for Annexation but Unfit to Vote? Debating Hawaiian Suffrage Qualifications at the Turn of the Twentieth Century*, 29 SOC'L SCI. HIST. 575, 583, 589–90 (2005).

99. 31 CONG. REC., S6,344 (statement of Sen. Morgan).

100. ANNEXATION OF THE HAWAIIAN ISLANDS, H.R. REP. NO.1355, at pt. 2 (1898); TOM COFFMAN, NATION WITHIN: THE HISTORY OF THE AMERICAN OCCUPATION OF HAWAI'I 308 (rev. ed., 2009).

101. Newlands Resolution, J. Res. 55, 55th Cong., 30 Stat. 750 (1898). Mary Dudziak addresses the relative lack of restraint on federal power during wartime in WAR TIME: AN IDEA, ITS HISTORY, ITS CONSEQUENCES (2012). Thomas Osborne deemphasizes the war as a driver of the annexation. *See supra* note 13, at 121–26.

102. For a contemporary example of the case for taking a strategically located Caribbean island, see Mahan, *supra* note 3, at 302–14.

103. A.D. HALL, PORTO RICO 98 (1898).

invasion, Nelson A. Miles, promised "the liberal institutions of our government" to islanders.[104] Future military governor Guy Henry then declared: "The forty-five States . . . unite in vouchsafing to you prosperity and protection as citizens of the American union."[105] Henry's successor in office, George Davis, declared his purpose to be to prepare Puerto Ricans for "American Citizenship"[106] and "state-hood."[107] Officials within the State Department opined that naturalization inevitably followed annexation under international law.[108]

The impetus to alter the application of the Reconstruction Constitution to new territories, rather than simply to avoid or accept its application, finally arrived in late 1899. Shortly after active fighting with Spain ended, President McKinley exercised his prerogative as the military victor and sought annexation of the Philippines. With other imperial powers ready to fill any vacuum that the United States might leave behind, McKinley asserted that any course of action short of annexation would entail "more serious complications."[109] Like most white mainlanders, he judged neither Filipinos fit for rights-bearing U.S. citizenship nor the Philippines fit for eventual statehood. As one lawmaker expressed the nearly universal anti-Filipino racism within official Washington, the Philippines housed a uniquely large, ill-led, "utterly alien," and racially inferior population of "Malays, Tagals, Filipinos, Chinese, Japanese, Negritos, and various more or less barbarous tribes . . . ."[110] McKinley argued that Filipinos could neither govern themselves nor assimilate into U.S. society.[111] He also subscribed to the widely-held view that tropical climates were unsuitable to white settlers, which alone could make colonies eligible for self-government.[112]

Though McKinley little relished extending the Reconstruction Constitution to Filipinos, he could offer no clear constitutional alternative.

104. ANNUAL REPORTS OF THE WAR DEPARTMENT FOR THE FISCAL YEAR ENDED JUNE 30, 1898: REPORT OF THE SECRETARY OF WAR, MISCELLANEOUS REPORTS 41 (1898).

105. *General Henry's Words of Wisdom*, S.F. CALL, Oct. 19, 1898, at 1.

106. *Headquarters Department of Porto Rico, Circular No. 15*, MD NARA 350/5A/81–12 (June 17, 1899).

107. *Headquarters Department of Porto Rico, Circular (Corrected)*, MD NARA 350/5A/168–16 (Aug. 15, 1899).

108. *Citizenship of the Porto Ricans*, S.F. CALL, Oct. 19, 1898, at 1.

109. *Mr. Hay to Mr. Day (Oct. 26, 28, 1898)*, *in* PAPERS RELATING TO THE TREATY WITH SPAIN, S. Doc. No. 148, 56th Cong., 2d sess., at 35, 37 (1901). *See also* LOVE, *supra* note 13, at 159–78.

110. PAUL A. KRAMER, THE BLOOD OF GOVERNMENT 117 (2006) (quoting Carl Schurz, *American Imperialism: An Address Opposing Annexation of the Philippines, January 4, 1899*, *in* AMERICAN IMPERIALISM IN 1898, at 77–84 (Theodore P. Greene ed. 1955)).

111. LOVE, *supra* note 13, at 181.

112. *Id.*

Instead, he groped for and improvised solutions. McKinley's initial instinct was to honor the Reconstruction Constitution, while minimizing its impact. He proposed provisions to deny U.S. citizenship to "uncivilized" tribal people and to "Mongolians and others not actually subjects of Spain."[113] The first exclusion had appeared in the treaty annexing Alaska, which provided that "uncivilized native tribes" there would have the same status as other Indians;[114] the second had roots in Chinese exclusion, a variant of which formed part of the resolution annexing Hawai'i.[115] Spain recognized the *jus soli* citizenship rule—that birth within its territory generally made one a Spaniard[116]—so these exceptions meshed with the Fourteenth Amendment. That amendment permitted denials of U.S. citizenship to members of Indian tribes and also to people neither born nor naturalized within the nation.

Ultimately, McKinley ducked questions about the political status of residents of the ceded islands. He negotiated a peace treaty with Spain that handed off these issues to Congress, with the Constitution only as a backstop.[117] McKinley did not declare the Reconstruction Constitution inapplicable to the Philippines, but he seemed to sense its vulnerability and maintained the prerogative to make such an argument in the future.

When McKinley submitted the treaty to annex the Philippines to the Senate for ratification, opponents howled at what they depicted as the extension of the Reconstruction Constitution there.[118] Drawing on deep wells of white-supremacist ideology, they protested that the treaty would bring Filipinos U.S. citizenship, full constitutional rights, and eventual statehood.[119] Jurists stressed that nontribal people born within the United States were citizens by virtue of the Fourteenth Amendment.[120] Citizens enjoyed such rights as freedom of movement, equal franchise to whites, opportunities to compete for stateside jobs, and free trade with the

113. PAPERS RELATING TO THE TREATY WITH SPAIN, *supra* note 109, at 61.

114. Treaty with Russia, art. 3, 15 Stat. 539, 542 (Mar. 30, 1867).

115. Newlands Resolution, J. Res. 55, 55th Cong., 30 Stat. 750, 751 (1898).

116. *Constitution of the Spanish Monarch—Madrid, June 30, 1876*, *in* 67 BRITISH AND FOREIGN STATE PAPERS 118 (1883).

117. PAPERS RELATING TO THE TREATY WITH SPAIN, *supra* note 109, at 8–9.

118. On the Senate debates, see generally MICHAEL CULLINANE, LIBERTY AND AMERICAN ANTI-IMPERIALISM (2012); LOVE, *supra* note 13.

119. *See, e.g.*, 32 CONG. REC., S436, S438, S639, S641, S837; CULLINANE, *supra* note 118, at 35, 58.

120. *See* Baldwin, *supra* note 14, at 406–07; Carman F. Randolph, *Constitutional Aspects of Annexation*, 12 HARV. L. REV. 291, 299–301, 309–10 (1898). That tribal Filipinos might be denied U.S. citizenship, Randolph wrote, did not solve the problem, for millions of other racially inferior Filipinos would still become U.S. citizens. *See* Randolph, *supra* note 120, at 305, 309–10.

mainland.[121] The spirit of the Fourteenth Amendment required universal manhood suffrage.[122] Portions of the *Dred Scott* decision not repudiated by the Reconstruction amendments—together with other precedents—established that the Bill of Rights operated in U.S. territories and that statehood would follow.[123] Anti-imperialist Senate Democrats thundered against any plan to annex the Philippines as a permanent dependency. To deny citizenship and statehood would violate the Constitution, which Democrats interpreted as a bulwark against tyrannical federal overreach.[124] A federal government that could rule its islands as colonies was perilously close to one that could re-impose Reconstruction on the South.

As the vote to approve the treaty with Spain neared, a bipartisan majority of senators united behind a plan to ratify without annexing. Democrat Augustus Bacon of Georgia proposed that the Senate treat the Philippines like Cuba and disclaim any purpose to hold the archipelago permanently or to naturalize its inhabitants.[125] Foraker agreed that there was no support for permanently holding the Philippines.[126] In early February 1899, all but two voting Republicans and a sizeable minority of Democrats approved the treaty, a decision the Senate explicitly stated was "not intended to incorporate the inhabitants of the Philippine Islands into citizenship of the United States, nor . . . to permanently annex said islands as an integral part of the territory of the United States."[127] But the treaty explicitly ceded the Philippines to the United States,[128] regardless of how the Senate sought to spin it. If the Senate's proviso was to have any operation, it would be as a call to arms against the constitutional lion whose slumber was soon to be disturbed.

CONCLUSION

With the extension of U.S. sovereignty over the Philippines, the U.S. imperial turn entered full swing. Events now vindicated naval strategist Alfred Mahan's prediction that if annexations were hazarded, the Constitution would be changed to accommodate them: "As sentiment

121. *See* Baldwin, *supra* note 14, at 407–09; Randolph, *supra* note 120, at 308, 310.
122. *See* Baldwin, *supra* note 14, at 407–09; Randolph, *supra* note 120, at 310.
123. *See* Baldwin, *supra* note 14, at 400–04; Randolph, *supra* note 120, at 292–93, 297–98.
124. 32 CONG. REC., S93–96, S432–36 (1899).
125. *Id.* at S561.
126. *Id.* at S571.
127. *Id.* at S1,845–48. *See also* CULLINANE, *supra* note 118, at 32; LOVE, *supra* note 13, at 187–88, 194–95; *How the Vote Was Taken*, N.Y. TIMES, Feb. 7, 1899, at 1.
128. Treaty of Paris, 30 Stat. 1754, 1755 (1899).

strengthens, it undermines obstacles, and they crumble before it."[129]

At some point between 1898 and 1901, the contingent survival of the constraints imposed by the Reconstruction Constitution on empire yielded to their inevitable decline. For the thirty prior years, nonjudicial officials had understood the Reconstruction Constitution to make citizenship, rights, and statehood the inevitable consequences of annexation. This conventional legal wisdom hindered empire builders and empowered anti-expansionists. The international borders of the United States remained frozen, notwithstanding expansionists' political clout and constitutional shifts that strengthened governmental power and weakened individual rights. Then the Reconstruction Constitution's increasingly brittle restraints did indeed begin to crumble under the strain of revitalized expansionist sentiment. Erosion was not necessarily collapse, however. Whether and in what form the Reconstruction Constitution would continue to influence empire was to be another generation in the settling.[130]

Across the first quarter of the twentieth century, a new conventional legal wisdom of empire crystallized.[131] Like its predecessor, it formed within and beyond courts. Across a series of decisions in the *Insular Cases* of 1901 to 1925 concerning recently acquired lands, the Supreme Court pivoted away from the Reconstruction Constitution and toward a new doctrine of "territorial nonincorporation." Administrators, lawmakers, and presidents seized leading roles in formulating, driving, clarifying, and implementing the new approach. Its core tenets remain highly influential today. The United States may annex lands without incorporating them into the nation.[132] Those present in such unincorporated territories receive less than full constitutional rights.[133] Such lands need neither become states nor remain permanently within U.S. sovereignty.[134] Citizenship may be withheld from Americans

129. MAHAN, *supra* note 3, at 257.

130. On the autonomy of law, short–and medium-term regularities in understandings and applications of legal rules, and the fundamental unpredictability of the long-term path legal change will take, see Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57 (1984). On the post-1897 U.S. turn toward long-term, non-settler colonialism, see LANNY THOMPSON, IMPERIAL ARCHIPELAGO 22–25 (2010), and CHARLES R. VENATOR-SANTIAGO, PUERTO RICO AND THE ORIGINS OF U.S. GLOBAL EMPIRE *passim* (2015).

131. The material in this paragraph is drawn from ERMAN, *supra* note 11. *See also* Sam Erman, *Citizens of Empire: Puerto Rico, Status, and Constitutional Change*, 102 CALIF. L. REV. 1181 (2014); BARTHOLOMEW H. SPARROW, THE *INSULAR CASES* AND THE EMERGENCE OF AMERICAN EMPIRE (2006); RECONSIDERING THE INSULAR CASES (Gerald L. Neuman & Tomiko Brown-Nagin eds., 2015); FOREIGN IN A DOMESTIC SENSE, *supra* note 87.

132. *See generally* Balzac v. Porto Rico, 258 U.S. 298 (1922).

133. *Id.*

134. The granting of independence to the Philippines in 1946 established the points.

born in unincorporated territories.[135] Together, the innovations were crucial to accommodating the Constitution to early-twentieth-century imperial realities.

By contrast to those early-twentieth-century constitutional innovations, which receive careful treatment in my forthcoming book, *Almost Citizens*, the Reconstruction Constitution embodied more inclusive ideals in its application to formal expansion. This Article has recovered how—for three decades—it stood as a constitutional lion barring the path of imperial annexation. When the acquisition of new colonies did occur, remnants of the former regime stalked their governance for decades more.[136] Then largely forgotten, the constitutional lion was never quite slain.[137] What was sacrificed to the U.S. imperial turn was its former glory: wide acceptance that the Constitution commanded rights and citizenship for all wholly allegiant Americans and eventual statehood for all U.S. lands other than the nation's capital.

135. The federal political branches hold this view, and though no express Supreme Court holding confirms the point, justices have strongly signaled their acquiescence. *See* Toyota v. United States, 268 U.S. 402 (1925); Rabang v. Boyd, 353 U.S. 427, 430–31 (1957); Barber v. Gonzales, 347 U.S. 637, 639 n.1 (1954); Brief of Citizenship Scholars as Amici Curiae in Support of Appellants and Urging Reversal, Tuaua v. United States, 788 F.3d 300 (2015) (No. 13–5272); Sean Morrison, *Foreign in a Domestic Sense: American Samoa and the Last U.S. Nationals*, 41 HASTINGS CONST. L.Q. 71 (2013).

136. ERMAN, *supra* note 11.

137. *Id.*