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# Equal Citizenship, Self-Determination, and the U.S. Statehood Process: A Constitutional and Historical Analysis

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# Equal Citizenship, Self-Determination, and the U.S. Statehood Process: A Constitutional and Historical Analysis*

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## I. The Constitutional and Legal Foundation

THROUGHOUT THE LAST two centuries, five provisions have been incorporated into the United States Constitution which are fundamental to the process of admitting new States into the American federation.

As a summary, the first of these provisions empowers Congress to admit new members into the Union;[1] the second permits it to regulate, administer and dispose of the national territory;[2] the third compels that body to insure a republican form of government for the citizens of each state in the Nation;[3] and the fourth is a broad delineation of American Federalism and the limits of federal authority vis-á-vis the State's individual sovereignty;[4] and the fifth provides the basis for a right to statehood founded on the principles of equal citizenship and equal protection under the laws.[5] It is within this constitutional framework that an attempt will be made to review the legal parameters of the American statehood process and the historical guidelines traditionally followed by Congress when admitting a territory into the Union.

## II. The Power to Admit New States into the Union

The earliest provision pertaining to the admission of new States into the Union dates back to 1777 with the enactment of Article XI of the

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[1] U.S. Const. art. IV, § 3, cl. 1.

[2] U.S. Const. art. IV, § 3, cl. 2.

[3] U.S. Const. art. IV, § 4.

[4] U.S. Const. amend. X.

[5] U.S. Const. amend. XIV, § 1.

Articles of Confederation.[6] This article provided for the admission of other colonies if nine States supported the proposal.[7] However, the eventual establishment of new States (other than the British colonies) within the limits of the Confederation seems to have been overlooked by the framers of that instrument.[8] The Articles do not contain a clause authorizing the Continental Congress or any other body to admit new States or to govern territories. As a matter of fact, these omissions were regarded as serious defects by Madison, who felt that the Northwest Ordinances were illegal enactments by a Congress whose acts had extended far beyond its constitutional authority.[9]

Certainly, the decade of the 1780's evidenced the urgent need for an express constitutional mandate that would have vested Congress with ample authority to administer the new western territory and to accept new members into the sisterhood of States. The congressional *Resolution of 1780*,[10] which reflected a compromise between the small landless states and those having claims over large portions of western territories, virtually assured the inclusion of territorial and admission clauses as future amendments to the Articles, or subsequent Constitution:

> Some of the States most interested in the vacant and unpatented western territory at length yielded to the earnest solicitations of Congress on this subject. To induce them to make liberal cessions, Congress declared that the ceded territory should be disposed of for the common benefit of the Union, and formed into republican States, with the same rights of sovereignty, freedom, and independence, as the other States; to be of a suitable extent of territory, not less than one hundred, nor more than one hundred and fifty miles square . . . [11]

Although no express authority can be found, the power to admit new States into the Confederation was consistently reaffirmed by the Continental Congress through the passage of the Northwest Ordinances in 1784, 1785 and 1787.[12] These enactments have provided for the admission of those States which were carved out of the ceded northwest lands on "an equal footing with the original States."[13] For this reason the framers of the Constitution in 1787 immediately proceeded to legitimize this

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[6] Articles of Confederation, art. XI, *reprinted in* 1 Stat. 8 (1845).

[7] *Id.*

[8] THE FEDERALIST NOS. 38, 42, 43 (J. Madison).

[9] *Id.*

[10] *See* Resolve of Oct. 10, 1780, 3 JOURNALS OF THE AMERICAN CONGRESS 535 (Washington, 1823).

[11] 2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, 195-96 (1891).

[12] *See* 1 DOCUMENTS OF AMERICAN HISTORY, 121, 123, 128. (H. Commager ed. 1966) reprinting the Ordinances.

[13] Northwest Ordinance of 1787, *reprinted in* 1 Stat. 50, 51 n.(a) (1789).

extra-legal state of affairs by unequivocally affirming that "New States may be admitted by the Congress into this Union . . . ".[14]

Undoubtedly, Congress has the primary power to admit territories into the Union. The language of the State's admission clause is clear as to the breadth of discretion granted to Congress to accept new members into the Federation. The discretion to admit also encompasses the Congressional prerogative to delay admission for as long as deemed necessary, as well as the corollary power to reject or deny admission based on established constitutional limitations. Thus, the Federal Constitution vests in Congress the essential and discretionary authority to admit new states into the Union by whatever means it considers appropriate as long as such means are framed within its vested powers. Throughout the last two centuries Congress has positively exercised this power with 37 political entities beginning in 1791 with the admission of Vermont[15] and up until recently with the admission of Hawaii in 1959.[16] Conversely, Congress has also used its power in delaying, for various reasons, the admission of most States into the Union. However, we should point out that neither house of Congress has ever voted to reject or deny admission to the Union by any State which had petitioned it. If Congress had issued blanket denial, it would have been invalid because no Congress can bind a succeeding or future Congress. In 1850, congressional action approached such a denial when New Mexico's Tennessee Plan petition for admission was sidetracked with the passage of an unwarranted organic act.[17] This procedural maneuver may be viewed as a factor contributing to the ensuing 62 years of colonialism which undermined the efforts of the people in that region.[18] Despite the perceived tone of rejection in this one instance, Congress has never actually denied admission to the Union to any entity that has requested entrance.[19]

The early drafts of the clause pertaining to admission, which were submitted to the Constitutional Convention, varied in some respects from the present clause. This disparity is especially noticeable in the section

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[14] U.S. CONST. art. IV, § 3, cl. 1.

[15] Act of Feb. 18, 1791, ch. VII, 1 Stat. 191.

[16] Act of Mar. 18, 1959, Pub. L. No. 86-3, 73 Stat. 4.

[17] Act of Sept. 9, 1850, ch. XLIX, 9 Stat. 446.

[18] New Mexico's petiton ran on the coattails of California's swift and unprecedented admission, but still it reached Congress right after the Compromise Measures of 1850 had been signed. New Mexico, which had drawn a "State" constitution forbidding slavery, fell victim to the rancor coming from the slave States, which bitterly and successfully opposed its admission. *See* G. LEHLEITNER, THE TENNESSEE PLAN: HOW THE BOLD BECAME STATES, 11-12 (1956).

[19] However, it should be noted that the petitions of some territories (e.g., Hawaii) were repeatedly tabled or ignored by one or both Houses of Congress (by the Senate in the case of Hawaii in 1947, 1950, and 1953) before finally attaining assent.

which initially required the consent of two-thirds of the members present in each House for the admission of any new State. As we have seen, this two-thirds voting requirement was discarded by the delegates to the convention in favor of the present text which grants Congress almost unlimited discretion as to the terms upon which it may admit States.[20] Thus, since 1789, formal admission has required only the passage of enabling or admission legislation by a simple majority of the members present and voting in both Houses of Congress as well as the approval of the Executive, as is required by any other congressional enactment.[21]

## III. The Principle of Self-Determination

Although the power to admit new states into the Union has been expressly delegated to Congress, it is also true that the concomitant power to erect and create new states has been expressly reserved to the people by the language of the Tenth Amendment of the Federal Constitution. Hence, the creation of a State depends exclusively upon the will of the people. Congress does not have the power to compel the people of a given territory to come into the Union as a State, for to do so would be to violate the most basic constitutional principles of liberty and self-determination, along with the very nature of American republicanism. The Constitution very explicitly indicates that only Congress has the power to admit States. However, the power to create them resides exclusively in the people of the given territory: "It is by their sovereign will, alone, that the State comes into existence."[22] Therefore, it follows that the creation of a State has always preceded its admission into the federation because no geopolitical unit *less* than an organized State can enter the Union.

The constitutional nature of the principle of popular sovereignty as an expression of self-determination was precisely reaffirmed by the Supreme Court of the United States in the case of *Texas v. White*,[23] which defined the word "state" in a political and constitutional context:

> . . . A State, in the ordinary sense of the Constitution, is a political community of free citizens, occupying a territory of defined boundaries, and organized under a government sanctioned and limited by a written constitution, and established by the consent of the governed. It is the union

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[20] *See* 2 The Records of the Federal Convention of 1787, 446-47, 454-56 (M. Farrand ed. 1911).

[21] Andrew Johnson, in the cases of Nebraska and Colorado, and William H. Taft, in the cases of Arizona and New Mexico, were the only two Presidents who vetoed acts providing for the admission of a given territory into the Union. Executive approval came swiftly for all other states. Thus, the only denials of admission in history resulted from Presidential vetoes, not Congressional refusal.

[22] E. Joy, The Right of the Territories to Become States of the Union 7-8 (1892).

[23] 74 U.S. (7 Wall.) 700 (1868).

> of such states, under a common constitution, which forms the distinct and greater political unit, which that Constitution designates as the United States, and makes of the people and states which compose it one people and one country.[24]

The historical operation of this fundamental principle of popular sovereignty dates back to the birth of the first 13 States. The development of these states established the standard of creating fully operational and constitutional governments which displaced the existing British colonial structures, prior to 1776. The people in the territories of Missouri, Michigan, Oregon, Kansas, Minnesota and Nebraska had also created "de facto" state governments which operated parallel to the territorial organization. Similarly, the people in Vermont and West Virginia proceeded to erect fully operational "extra-legal state governments" as a challenge to the formal authorities of their mother States of New York and Virginia, respectively. Furthermore, the people of Texas also established a fully operational national government which enabled them to declare their independence from Mexico in 1836 and to survive as a sovereign republic until 1845, when they were formally granted statehood.[25] Thus, a total of 22 States were actually operational political units before their formal admission into the Union.

Conversely, in the case of the other 28 States, the State governmental structures were not fully operational until the moment they entered the Union. At that time, the new state government superseded the old structure of government; there were 25 States with territorial governments. Two other States, Kentucky and Maine, emerged from the control of their mother states of Virginia and Massachusetts, respectively, and a third, California, was created from a militarily controlled area.

Generally, the creation of each State was accomplished by the people themselves after the election of delegates to a popular convention entrusted with the task of drafting a constitution as the basic framework for the future State. As previously indicated, these constitutional conventions were usually called in either of two ways: (1) by direct popular initiative — the states which used the Tennessee Plan are the most successful examples of this method, or (2) by the passage of a congressional enabling act providing the mechanism for holding a congressional convention in response to a popular petition for admission. The latter was simply supplementary to the course pursued by the various people who demanded the termination of colonial bondage in their own territories. Again, it

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[24] *Id.* at 721. Before 1868, the Supreme Court of the United States had suggested by way of dicta that a "state" can exist within the limits of the Constitution prior to its formal admission. *See* Scott v. Jones, 46 U.S. (5 How.) 343 (1847) (action not cognizable under the Judiciary Act).

[25] Joint Resolution of Dec. 29, 1845, Res. 1, 9 Stat. 108.

should be stressed that in all 50 cases the very existence and sovereignty of the State emanated from the will of the people rather than from the whim of a particular Congress.[26]

## IV. Constitutional Limitations on the Power to Admit States

### A. *States Carved-Out from Other States*

The States' admission clause gives Congress ample discretion to admit a new State into the Union. Nevertheless, the language of this provision imposes upon Congress two basic constraints. First, no State can be formed or erected within the jurisdiction of any other State without the consent of the legislature of the "mother" State.[27] Second, no State can be formed by the junction of of two or more States, or parts of States without the consent of the legislatures of the States concerned.[28] Admission in these specific cases also requires the consent of a majority of members in both Houses of Congress and the approval of the Executive, as is necessary in any other congressional enactment. In practice, these limitations were relevant to the the admissions process used for Vermont, Kentucky, Maine and West Virginia, four States carved out of the territories of previously admitted States.

Vermont acquired its separation from New York, her mother State, in 1790, when both entities reached a compromise on the delineation of their boundaries and the settlement of private claims to the title of lands lying within the boundaries of the Green Mountain Region.[29] New York's consent to the division of its territory was expedited by a group of commissioners who had been given plenary power to represent that State in the negotiations for separation. Once New York voters assented, the admission of Vermont as the 14th State of the Union came swiftly in 1791; four years earlier, in Philadelphia the framers of the Federal Constitution had already envisioned Vermont's admission to statehood.[30]

One year later, Kentucky, a county of Virginia, was admitted as the 15th State of the Union.[31] Separation from its mother State ensued after Virginia's House of Burgesses passed three acts of separation. These acts provided for the holding of several regional constitutional conventions

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[26] *See* Texas v. White, 74 U.S. (7 Wall.) 700 (1868). *See also The Formation and Admission of New States into the Union* (C. Swackhamer ed.) 40 U.S. Democratic Rev. 413 (1857); 2D. Watson, The Constitution of the United States: Its History, Application and Construction 1250-51 (1910).

[27] U.S. Const. art. IV, § 3, cl. 1.

[28] *Id.*

[29] 2 Farrand, *supra* note 20, at 446-47, 454-56.

[30] 1 Farrand, *supra* note 20, at 188-89; 2 Farrand, *supra* note 20, at 94, 445-46, 462-63; 3 Farrand, *supra* note 20, at 226.

[31] Act of Feb. 4, 1791, ch. IV, 1 Stat. 189.

along with a set of deadlines imposed on Congress for the admission of the new State into the Union. Kentucky's statehood was not unexpected because, in 1787, the framers of the Federal Constitution also considered the admission of this area to the Union highly likely.[32]

In 1819, the Massachusetts legislature passed an act allowing for the separation of its District of Maine as an independent State, provided that a majority of the District's population assented by referendum to the proposal.[33] One year later, Maine became the 23rd State of the Union and the third State carved out from the territory of another State.[34]

By contrast to the seemingly routine admission of these three States, the admission of West Virginia in 1863 represents what many regard as the most controversial interpretation of the Federal Constitution in the 200 year process of American statehood.[35] The separation of West Virginia from Virginia occurred during the Civil War, a confrontation which jeopardized the nature of American Federalism and the very existence of the Union. The constitutional crisis over slavery had reached a crucial point by mid-1861 when all 11 States of the Confederacy, including the State of Virginia, had seceded from the Union.[36] This series of events posed a serious obstacle to the aspirations of the people living in the western counties of Virginia who wished to become citizens of an independent State. At that time it became apparent that the Virginia Legislature would not assent to the separation of the western parts of its own territory which remained loyal to the Northern cause.

The proponents of statehood in western Virginia were aware of the constitutional provision that required the consent of the legislature of the mother State before any part of its domain could become a separate State. Therefore, statehood leaders in western Virginia declared the secession of Virginia "void" and proceeded to reorganize the "government" of Virginia for the exclusive purpose of expediting the indispensable authorization for separation. This bold and unprecedented act was severely criticized by even the most objective observers for functioning as merely subterfuge which would enable the western counties to break away from the parent State. Opponents of statehood for West Virginia also argued that the true goal of the reorganization was the rehabilitation of the rebel State, rather than the dismemberment or division of it. In spite of these

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[32] 1 Farrand, *supra* note 20, at 188-89; 2 Farrand, *supra* note 20, at 94, 462-63; 3 Farrand, *supra* note 20, at 226, 559.

[33] Act of June 19, 1819, ch. CLXI, 1819 Mass. Acts 248.

[34] Act of Mar. 3, 1820, ch. XIX, 3 Stat. 544.

[35] Wiston, *Statehood for West Virginia an Illegal Act?*, 30 W. VA. HIST. 530, 531 (1969).

[36] Virginia formally seceded from the Union on April 17, 1861. The other Southern States which formed the Confederacy were South Carolina, North Carolina, Mississippi, Louisiana, Georgia, Alabama, Florida, Texas, Arkansas and Tennessee.

objections, Congress proceeded to legitimize the acts of the "reorganized government" of Virginia by admitting West Virginia, in 1863, as the 35th State of the Union.[37]

Today, 117 years later, the constitutionality of West Virginia's admission into the Union is still a controversial and much debated issue among historians and legal scholars.[38] Certainly, the Civil War and the imminent threat to the Federal Union were compelling factors in resolving that statehood drama. Still, one could objectively interpret the record to show that the admission of West Virginia was, at best, a congressional act that stretched the language of the Constitution to unprecedented limits. The circumstances surrounding West Virginia's statehood also demonstrate the congressional flexibility used to respond to the political, economic and social realities of the nation. At the very least, these events indicate that the exclusive power of Congress to admit new States into the Union is subject only to the limits imposed by the Federal Constitution, and that political considerations rather than legal niceties have often determined the process of admission.

### *B. Guarantee of a Republican Form of Government*

In part, Article IV, section 4 of the Federal Constitution states, "The United States shall guarantee to every State in this Union a Republican Form of Government. . . ."[39] The Founding Fathers apparently intended to impose upon the Federal Government the duty of guaranteeing a republican form of government to each new member of the Union. The basis for this type of government stems from the principle of "the consent of the governed," wherein the ultimate sovereignty resides in the people of each State.[40] Although there are many variations, the essence of this ideal form of government lies in the "republican election" and the principle of "fair representation".[41] As a result, this form excludes any kind of monarchical, authoritarian or despotic government.[42]

By judicial interpretation, dating back to 1849 in the case of *Luther v. Borden*,[43] Congress has the primary responsibility for overseeing the establishment of the republican form of government in each new State admitted to the Union. In *Luther*, Chief Justice Taney held that Congress must decide which government is the established one in a State and

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[37] Act of Dec. 31, 1862, ch. VI, 12 Stat. 633.

[38] *See, e.g.*, Wiston, *supra* note 35.

[39] U.S. CONST. art. IV, § 4.

[40] Address by George W. Wickersham, *New States and Constitutions*, Yale University Law School (June 19, 1911).

[41] *See In re* Duncan, 139 U.S. 449, 461 (1891).

[42] *See* 1 Farrand, *supra* note 20, at 206.

[43] 48 U.S. (7 How.) 1 (1849).

whether that government is republican. Such congressional decision was held to be binding on every other department of the government, and not questionable in a judicial proceeding.[44]

Twenty years later, in the landmark case of *Texas v. White*,[45] the Supreme Court held that Congress also had the duty to restore the republican form of governments to those States which seceded from the Union during the Civil War.[46] Furthermore, in that case the Court held that the action taken by the President to set up provisional governments at the end of the war was justified only as an exercise of his powers as Commander-in-Chief; such governments, however, were to be regarded merely as provisional structures whose life and powers were subject to pending action by Congress.[47] Consequently, when a new political entity is being considered for admission to the Union, Congress has the duty to examine the proposed State constitution to guarantee the Federal constitutional requirement of republicanism.

Congressional concern about the implementation of this specific form of government in the creation of States was often reflected in the passage of individual enabling acts for territories with aspirations of statehood. The practice of preparing detailed enabling acts started with Ohio's statehood process in 1802[48] and continued with the admission of 20 additional States.[49]

An enabling act has traditionally been optional legislation drawn up by Congress. Such an act contains individual provisions which have been derived from its constitutional power to admit territories into statehood, its immense power over the territories, and its power to guarantee a republican government as it applies to the specific provisions dealing with the future State's constitutional conventions. In general, a typical enabling act both summoned and provided the mechanisms for the assembly of delegates to draft a constitution and to frame a State government.[50] Usually, the act prescribed the qualifications for delegates, voting require-

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[44] *Id.* at 42.

[45] 74 U.S. (7 Wall.) 700 (1868).

[46] *Id.* at 727-29.

[47] *Id.* at 730.

[48] Act of April 30, 1802, ch. XL, 2 Stat. 173.

[49] Louisiana (1812), Indiana (1816), Mississippi (1817), Illinois (1818), Alabama (1819), Missouri (1821), Wisconsin (1848), Minnesota (1858), Kansas (1861), Nevada (1864), Nebraska (1867), Colorado (1876), South Dakota (1889), North Dakota (1889), Montana (1889), Washington (1889), Utah (1896), Oklahoma (1907), New Mexico (1912) and Arizona (1912). It is interesting to point out that in the case of Alabama, the enabling act was drafted and prepared by the territorial legislature and submitted to Congress for its approval and enactment. On the other hand, Texas, an independent constitutional republic prior to admission, was instructed by Congress through a Joint Resolution of Annexation to prepare its own state constitution. Joint Resolution of Mar. 1, 1845, Res. 8, 5 Stat. 797.

[50] *See, e.g.*, Act of April 30, 1802, ch. XL, 2 Stat. 173.

ments, the time, place and procedural details for the convention, the popular ratification process and the way in which the results of the referendum were to be transmitted to the Federal Government for its approval.[51] These specific guidelines were intended to supplement and expedite the decolonization process applicable to each issue while at the same time easing the transition from territory to State. The creation of the State and the specific content of each State constitution was left to the inhabitants of the state because the power to create a State is one exclusively reserved to its people by the principle of popular sovereignty or self-determination.

It should be noted that 15 States assumed the initiative and followed the path established by the original 13 colonies by assembling their own constitutional conventions without the benefit of congressional guidelines. Six of these areas, Tennessee, Michigan, Iowa, California, Oregon, and Alaska, drafted their own constitutions and elected complete congressional delegations before their formal admission to the Union. Five other territories, Arkansas, Florida, Idaho, Wyoming and Hawaii, drafted State constitutions without previous congressional authorization. Four additional areas were carved out from previously existing States: Vermont (1791), Kentucky (1792), Maine (1820), and West Virginia (1863) and were admitted as separate States by simple acts of admission. In short, a total of 28 States drafted their own constitutions without previous congressional intervention or authorization.[52]

Regardless of the procedure used to call a constitutional convention, once assembled, the delegates proceeded to organize the future State government by drafting a written constitution as their fundamental law. After completing this work, the constitutional document was usually submitted to the territorial inhabitants for ratification or rejection in accordance with the requirements of the acts and proclamations calling the convention, or by direction of the convention itself. Historical records show that in at least 26 territories the constitutions were submitted to the people for ratification or rejection.[53]

As a general rule, Congress, in the exercise of its constitutional duty to ensure a "republican form of government" in each State, included in most enabling acts (as well as in some admission acts) certain require-

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[51] *Id.*

[52] *See also* W. TANSILL, ADMISSION OF THE STATES INTO THE UNION: A BRIEF SUMMARY OF PROCEDURES 4-6 (rev. ed. 1970).

[53] This was the case in Maine (1819), Michigan (1835), Florida (1839), Texas (1845), Iowa (1846), Wisconsin (1848), California (1849), Minnesota (1857), Oregon (1857), Kansas (1859), West Virginia (1863), Nevada (1864), Nebraska (1866), Colorado (1876), North Dakota (1889), South Dakota (1889), Montana (1889), Washington (1889), Idaho (1889), Wyoming (1889), Utah (1895), Oklahoma (1907), Arizona (1911), New Mexico (1911), Hawaii (1950), and Alaska (1956).

ments relative to the specific nature of each new State government.[54] The most frequently recurring provisions appear to be the following: (1) an express clause stipulating that a republican form of government be established;[55] (2) a standard provision stating that the new state constitution must be consistent with the Federal constitution;[56] (3) a provision stating that the new constitution could not supercede the Ordinance of 1787;[57] (4) specific clauses guaranteeing the fundamental principles of civil and religious liberty;[58] (5) provisions requiring the new State constitution to be submitted to the people for ratification or rejection;[59] (6) a clause specifying that the constitution could make no distinction in civil or political rights based on race or color;[60] (7) another provision which stated that future State legislation could not restrict the right of suffrage on account of race, color or previous condition of servitude;[61] (8) similar sections proscribing slavery in a future State;[62] and (9) a standard clause presented in the enabling and admission enactments for most States, beginning with the admission of Nevada in 1864,[63] specifying that the future State constitutions could not violate the principles of the Declaration of Independence.[64]

Following ratification, the State constitutions and supporting documents were forwarded to Congress or to the Executive depending upon whether or not the enabling or admission act delegated to the President

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[54] *See* U.S. GENERAL ACCOUNTING OFFICE, EXPERIENCES OF PAST TERRITORIES CAN ASSIST PUERTO RICO STATUS DELIBERATIONS (1980) [hereinafter cited as EXPERIENCES OF PAST TERRITORIES].

[55] After the admission of Ohio, all enabling and admission enactments included this type of clause. *Id.* at *Table of Major Conditions Contained in Statehood Enabling and Admission Acts.*

[56] Such a provision can be found in the admission and enabling legislation of Louisiana, Wisconsin, Colorado, North Dakota, South Dakota, Montana, Washington, Idaho, Wyoming, Oklahoma, Arizona, New Mexico, Hawaii, and Alaska. *Id.*

[57] As found in the enabling acts of Ohio, Mississippi, Indiana, Illinois, Alabama and Missouri. *Id.*

[58] This type of clause can be found in the enabling acts of Louisiana, Nevada, Nebraska, Colorado, North Dakota, South Dakota, Washington, Montana, Utah, Oklahoma, Arizona and New Mexico. *Id.*

[59] Included in the enabling acts of Louisiana, Wisconsin, California, Minnesota, Oregon, Kansas, West Virginia, Colorado, Nevada, Nebraska, The Dakotas, Montana, Washington, Utah, Oklahoma, New Mexico and Arizona. *Id.*

[60] As found in the enabling acts of Colorado, The Dakotas, Montana, Washington, Utah, Oklahoma, New Mexico and Arizonas. *Id.*

[61] As found in the enabling acts of Oklahoma, New Mexico and Arizona. *Id.*

[62] Specifically included in the case of West Virginia and Nebraska. *Id.*

[63] Act of Mar. 21, 1864, ch. XXXVI, 13 Stat. 30.

[64] This specific requirement has its origins in the Civil War and the desire to abolish slavery from all American institutions. The requirement emphasizes the principle of equality of men before the law as expressed in the Declaration of Independence. *See Park, Admission of States and the Declaration of Independence,* 33 TEMP. L.Q. 403 (1960).

the duty of certifying the constitution to be "republican in form". Even though Congress may not delegate its power to determine whether or not a State shall be admitted to the Union, the President may act as the mere agent of the Congress to determine whether the state constitution is republican in form, makes no distinction in race or color, and not repugnant to the Constitution of the United States and the principles of the Declaration of Independence.[65]

History shows that there has been no uniform federal standard for evaluating and approving State constitutions. Consequently, in 19 cases the purposed constitutions were submitted directly to Congress for approval,[66] while in 15 instances these documents were forwarded to the President for his certification.[67] In the cases of Vermont and Kentucky there does not appear to be any evidence of either congressional or presidential approval of their new constitutions.[68] In addition, no such approval was given to Tennessee's constitution,[69] although its constitution had been forwarded to the Department of State by the Territorial Governor in February, 1796.

### C. *The Equal Footing Doctrine*

#### 1. Historical and Constitutional Base

The earliest notion of the equality of States originates in the egalitarian rhetoric of the American Revolution and finds its first formal expression in the *Resolve of 1780.*[70] In the *Resolve,* Congress urged the States to make liberal grants of their western lands to be used for the creation and admission of additional republican States as full members of the confederation enjoying the same rights of sovereignty, freedom and independence as the already member States.[71] Four years later, this principle of equality was reaffirmed by the Continental Congress in the *Northwest*

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[65] *See* Wickersham, *supra* note 40, at 31-34.

[66] Congress approved the following state constitutions: Ohio, Louisiana, Indiana, Mississippi, Illinois, Alabama, Maine, Missouri, Arkansas, Iowa, Wisconsin, California, Minnesota, Oregon, Kansas, Wyoming, Idaho, Alaska, and finally, Hawaii.

[67] The President approved the following state constitutions: Michigan, Texas, Florida, West Virginia, Nebraska, Nevada, Colorado, North Dakota, South Dakota, Montana, Washington, Utah, Oklahoma, New Mexico, and Arizona.

[68] *See* EXPERIENCES OF PAST TERRITORIES, *supra* note 54, at 8 (no enabling act passed to impose congressional or presidential approval on the constitutions drafted by Vermont and Kentucky).

[69] *See* EXPERIENCES OF PAST TERRITORIES, *supra* note 54, at 8 (no enabling act requiring congressional or presidential approval of Tennessee's constitution).

[70] Resolve of Oct. 10, 1780, 3 JOURNALS OF THE AMERICAN CONGRESS 535 (Washington 1823).

[71] *Id.*

*Ordinance of 1784*,[72] which provided for the admission of members into the Union "on an equal footing with the . . . original states."[73] The same expression was also included in the *Northwest Ordinance of 1787*,[74] which was re-enacted by the First Congress in 1789.[75] By passing these landmark enactments, Congress had willingly offered to convert the ceded western lands into equal States, using this plan as an inducement to the large States to undertake the much desired territorial divisions.

During the proceedings of the Constitutional Convention, the issue of State equality was seriously debated when certain factions recommended the admission of new States with proportionately less representation than that of the original States based upon the criteria of wealth and population.[76] These specific proposals were rejected by the Convention when it adopted the present system of equal representation in the Senate and by its express repudiation of the criterion of wealth as contradictory to the primary goals of American government and society.[77] Towards the end of the Convention, the opponents of equality for new States, having failed in an effort to discriminate against them on the basis of wealth and population, managed to strike from the proposed text of the Constitution a clause providing for admission of new members "on the same terms with the original states [sic]".[78] Framers of the Constitution deleted this phrase because they did not want to bind Congress to rigid requirements for State equality.[79]

Circumstances changed as a result of the re-enactment of the *Ordinance of 1787* under the new Constitution and by the adoption of the Tenth Amendment, in 1791. During the national Constitution's ratification process, Congress proceeded to re-enact "in toto" the *Northwest Ordinance of 1787* as the first comprehensive law on the issue of statehood.[80] The ratification of the *Northwest Ordinance* stressed, once again, Congress' commitment to the admission of States to the Union on an equal footing with the original States. However, it remained to be seen whether State equality was a principle primarily dependent on congressional legislation or whether it derived its force from the very nature of the federal system.

The basis for the enforcement of State equality can be traced back to the early sessions of the Constitutional Convention, when the faults and

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[72] 1 DOCUMENTS OF AMERICAN HISTORY, *supra* note 12, at 121.
[73] *Id.* at 122.
[74] Northwest Ordinance of 1787, 1 Stat. 50, 51 n.(a) (1789).
[75] Act of Aug. 7, 1789, ch. VIII, 1 Stat. 50.
[76] 1 Farrand, *supra* note 20, at 559-62.
[77] 1 Farrand, *supra* note 20, at 605-06.
[78] 2 Farrand, *supra* note 20, at 446-47, 454-56.
[79] 2 Farrand, *supra* note 20, at 454-56.
[80] Act of Aug. 7, 1789, ch. VIII, 1 Stat. 50.

merits of the Virginia and New Jersey plans were being debated. At that time, many delegates expressed their desire to keep the sovereignty of all States equal.[81] Similarly, other delegates claimed that the unification under a Federal Government necessarily required an equalization of States or their elimination as sovereign political entities.[82] This concern over States' equality and the integrity of State sovereignty prevailed even after the Framers had deleted the equality provision proposed in the original text of the state's admission clause.[83] As a result, Congress immediately addressed the issue by drafting the Tenth Amendment to the Federal Constitution, which was ratified along with the first Nine Amendments in late 1791, having the following text: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States repectively, or to the people."[84]

Primarily, the passage of this amendment confirmed the very essence of American Federalism and the Founding Fathers' understanding that the powers not granted to the national government were reserved to the States themselves. Even more importantly, the Tenth Amendment in distinguishing between national and state power provides a constitutional basis for the principle of State equality in so far as it makes no distinction between States. Hence, regardless of when admitted to the Union, each State can claim every right and power that is not delegated to the Federal Government or prohibited to the States. Therefore, at the moment a given community becomes entitled to bear the name "State," it assumes every power which may be exercised by any other community bearing that same title. Since all states have the same powers reserved in the Tenth Amendment, there can be no doubt about a constitutional doctrine of equal footing.[85] Following the admission of Tennessee in 1796, Congress has re-affirmed the principle of state equality by inserting a clause into the admission enactments of all States entering the Union providing for their admission "on equal footing with the original, and other States in all respects whatever."[86]

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[81] 1 Farrand, *supra* note 20, at 249-80.

[82] *See* 1 Farrand, *supra* note 20, 180-86.

[83] 1 Farrand, *supra* note 20, at 559-62.

[84] U.S. CONST. amend. X.

[85] *See* Patterson, *The Relation of the Federal Government to the Territories and the States in Landholding*, 28 TEX. L. REV. 43, 66 (1949).

[86] Prior to 1796, Vermont and Kentucky, two states carved out from the territory of other states, had been admitted individually "as a new and entire member of the United States of America." *See* Act of Feb. 18, 1791, ch. VIII, 1 Stat. 191 and Act of Feb. 4, 1791, ch. IV, 1 Stat. 189. Recently a commentator noted that the language used in both acts of admission "is so close to the equal footing terminology, although the phrase is not used explicitly." Note, *Statehood and the Equal Footing Doctrine: The Case of Pureto Rican Seabed Rights*, 88 YALE L.J. 825, 836 n.59 (1979). Also, "equal footing" has been referred to erroneously as a "requirement" for all States upon admission. Serrano-Geyls and Gorrín-

Despite this constitutional and legislative background, only recently has the full meaning and extent of the term "equal footing" come to be known. Based on an historical and legal analysis of the statehood experience, its relevant jurisprudence and related scholarly literature, it becomes clear at the outset that the concept of State equality is not a limitless or absolute principle. Throughout the last two centuries, the following questions have emerged in the process of defining this subject: (1) What are the limits of State and national sovereignty? (2) What is the extent to which full equality can be achieved? (3) What limits must Congress face when imposing conditions for admission to statehood in the Union? (4) Does the Constitution forbid all forms of inequality among States? (5) Is the principle of State equality applicable to the individual land grants made to the States as they entered the Union? (6) More specifically, is the principle of State equality applicable to economic or property concessions? Since the U.S. Supreme Court has addressed these and other questions while dealing with the subject of equality, the following pages will attempt to review the most relevant cases in conjunction with the development of an elaborate set of constitutional principles popularly known as the Equal Footing Doctrine.

2. The Judicial Interpretations

The landmark case of *Pollard's Lessee v. Hagan*[87] established the first parameters that helped define the Doctrine of Equal Footing for the States. The Court held that since the original States owned their inland navigable waters and the soil under these waters, new States which were subsequently admitted had the same rights of ownership.[88]

The United States Supreme Court took this case, regarding it as a distinct opportunity to define the standards separating the sovereignty and jurisdiction of the Federal and State Governments. Affirming the decisions of the State courts, the Supreme Court held that: first, the shores of inland navigable waters, and the soil under them, were not constitutionally granted to the United States, but were reserved to the States respectively; second, the Court emphasized that new States have the same rights, sovereignty, and jurisdiction over this subject as the original States; and, third, the right of the United States to the public lands, and the power of Congress to make all necessary rules and regulations for the sale and disposition of such lands, did not support the grant to the plain-

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Peralta, *Puerto Rico y La Estadidad: Problemas Construcionales*, 40 REV. C. ABO. P.R. 521, 532 (1979) As we shall see, equal footing is not a requirement imposed on States but rather a constitutional principle applicable to Congress.

[87] 44 U.S. (3 How.) 212 (1845).

[88] *Id.* at 230.

tiff of the land in controversy which was below usual high water marks at the time Alabama was admitted into the Union.[89]

Furthermore, the Court also stated that the Enabling Act,[90] in trying to maintain free navigable waters, was nothing more than the valid exercise of a constitutional power to regulate commerce which was already vested in Congress.[91] The exercise of this power would have been binding on the people of the new State whether or not they consented to be bound. Thus, although the Enabling Act was a valid exercise of constitutional power, it fell short of granting title over the lands to the Federal Government.

Essentially, this case held that each new State is to be admitted into the Union with all of the powers and sovereignty that pertain to the original States. In addition, such powers may not be constitutionally diminished or impaired by Congress through compacts, conditions or stipulations embraced in the admission enactment. By holding that property rights in the beds of inland waters are conferred exclusively to the States, the Supreme Court gave impetus to one of the most bitter debates on the issue of equal standing, whether the States have equality with respect to landholding.

During the same period as the *Pollard* decision, the Supreme Court considered *Permoli v. New Orleans.*[92] *Permoli* involved a controversy over the religious liberties of the inhabitants of the State of Louisiana. Most importantly, however, this case clarified the result that the laws, norms and legal dispositions in force during a land's territorial period cease to have an effect after the admission of a State into the Union.[93]

In *Permoli,* the Catholic Church challenged a city ordinance[94] as violating Louisiana's Enabling Act.[95] The third section of the Act provided that the new State constitution should "contain the fundamental principles of civil and religious liberty."[96] Also, the Act of 1812 (State Admission Act) provided "that all the conditions and terms contained in said third section should be considered, deemed and taken as fundamental conditions and terms, upon which the said State is incorporated in the Union."[97] Furthermore, the plaintiffs argued that the city's regulation vi-

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[89] *Id.*

[90] Act of Mar. 2, 1819, ch. XLVI, 3 Stat. 488.

[91] 44 U.S. (3 How.) 230 (1845).

[92] 44 U.S. (3 How.) 589 (1845).

[93] *Id.* at 610.

[94] *See, id.* at 590, for text of the ordinance promulgated by the governing body of New Orleans prohibiting, for health reasons, the celebration of mass for the dead in the city's Roman Catholic Cathedral.

[95] Act of Feb. 20, 1811, ch. XXI, 2 Stat. 641.

[96] *Id.* at § 3.

[97] Act of April 8, 1812, ch. L, 2 Stat. 701, 703.

olated those religious liberty provisions found in the *Ordinance of 1787* which were applicable to the Territory of Orleans.

Conversely, representatives of the city of New Orleans argued that the *Ordinance of 1787* was not in effect in the State of Louisiana. The State constitution did not provide for religious liberties, nor did the Federal Constitution's First Amendment provisions apply to the States at that time.[98] Therefore, they argued that Congress was not constitutionally authorized to extend the religious liberty provision contained in the *Northwest Ordinance of 1787* to the newly admitted State.

The Supreme Court held that it had no jurisdiction over the issue,[99] but in so holding it strongly suggested that Congress also lacked the constitutional power to impose a similar standard.[100] Since Congress had accepted the state constitution and admitted the state to the Union, it was precluded from assuming that the state legislature had not complied with the Act of 1811. Congress could not, then, add any fundamental principles by way of amendment, since this would constitute drafting the state constitution itself.[101]

Two years later, the Supreme Court reached a similar decision in the case of *Scott v. Jones*[102] in which the powers of Michigan's state *de facto* legislature were challenged on the grounds that it had passed legislation prior to the State's admission. The enactment was declared valid by Michigan's Supreme Court and the decision was then taken on appeal to the U.S. Supreme Court. Although, seven of the nine U.S. Supreme Court justices concurred in the opinion that the action was not cognizable, the majority, by way of dicta, strongly suggested that a State could exist as a political entity prior to its admission.[103] Furthermore, the Court held that once a State is admitted into the Union, the Federal Government and the courts must regard its statutes "as they would the statutes of any other State" under the Constitution and laws of the United States.[104]

The issue of State equality lay dormant for the next 30 years as the Nation became immersed in the turbulent era of the Civil War and Reconstruction. The outcome of that conflict was responsible for destroying the established theory of States rights, as well as dispelling the notion of an association of friendly States bound by a compact which could be uni-

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[98] We should note that the right to due process of law and its concomitant protection of civil liberties was not made applicable to the States until at least 1868 with the passage of the 14th Amendment. *See* Murdock v. Pennsylvania, 319 U.S. 105 (1943) (holding that the 1st Amendment applies to the states through the 14th).

[99] 44 U.S. (3 How.) at 610.

[100] *Id.*

[101] *Id.* at 609-10.

[102] 46 U.S. (5 How.) 343 (1847).

[103] *Id.* at 374.

[104] *Id.* at 378.

laterally abrogated. On this subject Edmund Steele Joy explained:

> The conflict of opinion regarding the nature of the American Union was settled by the Civil War. Many held before that time, that the Nation was the result of a compact entered into by free and independent States, which, while recognizing the Constitution as a common bond of union, yet left to each State as a part of an inherent sovereignty, the right either to nullify a national obligation or to withdraw without the circle of national influence and power.
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> This conception of the Union, which is known as the states-rights doctrine, was adopted by the Southern States, and their deliberate acts of secession were the immediate cause of the Civil War and all its attending disasters.
>
> But with the defeat of the South the dogma of state-rights perished. Henceforth the Constitution is to be viewed, not as a compact between sovereign States, but as the fundamental law of the whole land—as the expression of the will of the entire Nation—and arguments relating to it must be based upon that fundamental conception.[105]

In many respects, the Civil War had served to strengthen the structure of American federalism. The Civil War resulted in a definition of the limits of State sovereignty and an emphasis on the permanency of the Union. Yet, the issue of State equality and the precise delineation of the reserved powers were still subjects of litigation.

In *U.S. v. McBratney*[106] the defendant, a white man, had been convicted of murdering another man within the boundaries of the Ute Reservation, an Indian territory located within the State of Colorado. The Supreme Court reduced the issue to whether the Federal courts had jurisdiction over a case involving a crime committed "within the geographical limits of the State of Colorado."[107] The Act made no reference to the Ute Reservation or to the State's jurisdiction over it. The Supreme Court held that Congress may decide to exclude an Indian reservation from a State being admitted to the Union or retain jurisdiction over it. However, such a congressional decision must be expressed rather than inferred.[108] Furthermore, the Court concluded that the State of Colorado, by its admission to the Union, had acquired criminal jurisdiction over its own citizens, including the Ute Reservation. The courts of the United States, therefore, had no jurisdiction to punish crimes within that reservation, except to the extent necessary to carry out the provisions of the treaty with the Ute Indians.[109] Therefore, upon the admission of any

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[105] E. Joy, *supra* note 22, at 5.
[106] 104 U.S. 621 (1881).
[107] *Id.* at 624.
[108] *Id.* at 623-24.
[109] *Id.* at 624.

State, Congress has the authority to include those conditions which it has the constitutional power to implement, provided that the conditions be expressly and clearly verbalized.

In an additional case, *Escanaba Company v. Chicago,*[110] the Supreme Court opinion interprets the parameters of state sovereignty and equality. This case involved a petition to enjoin the City of Chicago from enforcing a municipal ordinance that prevented, for a few hours daily, the passage of vessels under numerous bridges built along the course of the Chicago River.

By affirming the lower court's judgment in favor of the City of Chicago, the Supreme Court further supported the standards for equal footing first considered in the case of *Pollard's Lessee v. Hagan.*[111] The Court explained that the exercise of government power to regulate interstate commerce as involved "the control of the waters of the United States which are navigable in fact . . . when by themselves or their connection with other waters they form a continuous channel for commerce among the States or with foreign countries."[112] Recognizing police power as one of the major attributes of State sovereignty, the Court went on to clarify that the State may exercise its plenary police powers so long as its actions do not conflict with congressional legislation on the matter.[113] Thus, as long as the subject is not preempted by federal legislation, the States can exercise the police powers inherent in their individual sovereignty.

The Court also rejected the plaintiff's contention that the Federal Government had pre-empted the issue with the provisions of the *Northwest Ordinance* which stipulated that no tax, impost or duty was to be imposed upon the navigable waters leading into the Mississippi River,[114] of which the Chicago River was a tributary. The Court answered this argument by stating that the limitation upon the State's powers as a government, whether from the Ordinance of 1787 or congressional legislation, ceased, upon admission to the Union, to have any force except as voluntarily adopted. The State was held to have been admitted on an equal footing with the original 13 States "in all respects whatever."[115] Here, as in *Pollard's Lessee,* the Supreme Court suggested that equal footing implied parity in proprietary interests and rights of dominion "in all respects whatever."[116]

At this point it is appropriate to mention the decision rendered in

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[110] 107 U.S. 678 (1882).
[111] 44 U.S. (3 How.) 212 (1845).
[112] 107 U.S. 678, 682 (1882).
[113] *Id.* at 683.
[114] *Id.* at 688-90.
[115] *Id.* at 688-89.
[116] *Id.* at 689.

*Case v. Toftus*,[117] a Federal Circuit Court case, which appears to have played a significant role in modifying the Supreme Court's position on the subject of equality of States and proprietary interests. In that case, a suit was brought enjoining the defendant from constructing a tramway on the tidelands in Oregon's Pacific Coast.

The Circuit Court overruled the defendant's[118] demurrer which challenged plaintiff's title to the lands, but still held that the tidelands belonged to the State Government from which the plaintiff had acquired title.[119] On reaching its conclusion, the Court reasoned that equal footing does not entail equality of rights in the soil.[120] Furthermore, the Court stated that, as a general rule, Congress holds title to all lands lying in the territories unless it has disposed of them by appropriate legislation.[121] On this issue the opinion reads:

> The doctrine that new states must be admitted into the Union on an equal footing with the old ones . . . does not require that the new state shall be admitted to any right in the soil thereof considered as property. The ante-Revolution states acquired no property in the soil thereof by entering into the Union. The lands that had not passed into private hands they already owned and held, as the political successors of the British crown.
>
> The true constitutional equality between the states only extends to the right of each, under the constitution, to have and enjoy the same measure of local or self government, and to be admitted to an equal participation in the maintenance, administration, and conduct of the common or national government.
>
> The soil of Oregon was acquired by the national government by means of the discoveries, explorations, and occupation of the citizens of the United States; and it was so acquired for the benefit of all, and not a part.
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> . . .
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> In the territories the national government is both the sovereign and proprietor. Congress has the power to govern them, and in so doing exercises the combined power of the nation and state governments . . . And as such sovereign and proprietor it may dispose absolutely of all the public land in the territory, whether high or low, wet or dry. For the time being, as sovereign, it has the 'jus publicum' or right of jurisdiction and *control*, of the shores for the benefit of the public, as in the case of a public highway over private land; while as proprietor it has the 'jus privatum', or right of private property, subject to the 'jus publicum' . . . . This 'jus publicum', whether held by the national government during the territo-

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[117] 39 F. 730 (C.C.D. Ore. 1889).
[118] *Id.* at 734.
[119] *Id.* at 733-34.
[120] *Id.* at 732.
[121] *Id.* at 733.

rial period or the state thereafter, may be sold or disposed of by the legislature of either, who represent the public.[121.1]

Contrary to the opinion rendered by the United States Supreme Court in the cases of *Pollard's Lessee* and *Permoli*, in *Case* a Federal Circuit Court held that equal footing does not refer to proprietary nor economic equality.[122] This decision challenged, for the first time, the concept of state equality in "all respects whatever," as previously developed by the Supreme Court.[123] It is interesting that the Court never mentioned the fact that Oregon's Act of Admission, when establishing the boundaries of the new State, recognized a single maritime league jurisdiction from the coastline including all islands within that limit. Therefore, Congress had actually disposed of its property up to the aforementioned distance by vesting it in the State upon the State's admission into the Union.[124] It should be noted, however, that additional attention will be focused on this decision during the discussion of the development of the Equal Footing Doctrine at the national level.

In another area of discussion, in *Ward v. Race Horse*,[125] the Supreme Court considered whether the Federal Government can limit the attributes of State sovereignty by the terms of a treaty made prior to the admission of the affected State. The appellee, a member of the Bannock Tribe of Indians, had been arrested for hunting in violation of an act passed by the Wyoming State Legislature severely curtailing the killing of game within the State. Wyoming's Admission Act[126] contained no exception or reservation in favor of or for the benefit of Indians. Therefore, the State argued that the treaty was no longer applicable because it violated the State law passed as an exercise of its municipal authority. The lower court disregarded the State's claim that admission as a State of the Union on an equal footing with the rest of the States gave it power to control hunting within its boundaries, and released the appellee from custody in a federal habeas corpus proceeding. On appeal, the Supreme Court reversed the decision and held that Congress could not impair or diminish the police powers of the State without violating the equal footing requirements.[127]

Four years later, in the case of *Stearns v. Minnesota*,[128] the U.S. Supreme Court followed the lead established by the U.S. Circuit Court in

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[121.1] *Id.*

[122] *Id.* at 732.

[123] *See, e.g.*, Escanaba Co. v. Chicago, 107 U.S. 678, 689.

[124] Act of Feb. 14, 1859, ch. XXXIII, 11 Stat, 383.

[125] 163 U.S. 504 (1896).

[126] Act of July 10, 1890, ch. 664, 26 Stat. 222.

[127] 163 U.S. at 314-15.

[128] 179 U.S. 223 (1900).

*Case v. Toftus*,[129] and fully endorsed the position that equal footing refers to political rights rather than to property and economic rights.[130] The federal question dealt with in *Stearns* was whether a statute approved by Minnesota's State Legislature in 1895[131] impaired a contract previously supported by the State and certain railroad companies to the effect that the latter should pay a fixed percent of their gross earnings in lieu of taxes on all their property including State lands obtained from the Federal Government upon Minnesota's admission into the Union. A new statute replaced the basis for taxation from gross earnings to that of the cash value of such properties. The companies questioned the power of the State to adopt such legislation because one of Minnesota's enabling act provisions prohibited the State from interfering with the primary disposal of the soil within its boundaries, or with any regulations which Congress might pass to secure title from *bona fide* purchasers; and, in addition, exempted such lands from State taxes. The State, on the other hand, claimed that the restrictions violated its inherent power to tax lands within its boundaries, thus infringing upon its basic sovereignty as an equal member of the Union.

In addressing the issues, the Supreme Court held that the Minnesota Legislature had the power to pass property tax laws affecting its citizens so long as they did not deprive the claimants of their proprietary rights gained through contract without due process of law.[132] When the Supreme Court examined the nature and validity of the congressional enabling act it made a distinction between the purely political and proprietary provisions found in such types of congressional enactments.

> That these provisions of the enabling act and the constitution, in form at least, made a compact between the United States and the State, is evident. In an inquiry as to the validity of such a compact this distinction must at the outset be noticed. There may be agreements or compacts attempted to be entered into beween two States, or between a State and the nation, in reference to political rights and obligations, and there may be those solely in reference to property belonging to one or the other. That different considerations may underlie the question as to the validity of these two kinds of compacts or agreements is obvious. It has often been said that a State admitted into the Union enters therein in full equality with all the others, and such equality may forbid any agreement or compact limiting or qualifying political rights and obligations; whereas, on the other hand, a mere agreement in reference to property involves no question of equality of status, but only of the power of a State to deal with the nation or with any other State in reference to such

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[129] 39 F. 730 (C.C.D. Ore. 1889).
[130] 179 U.S. at 245.
[131] Act of Mar. 19, 1895, ch. 168, 1895 Minn. Laws 378.
[132] 179 U.S. at 238-40.

> property. The case before us is one involving simply an agreement as to property between a State and the nation.[133]

Therefore, the conditions imposed by Congress in the admission or enabling act of a new State are valid as long as they do not deprive the new State of political equality with other States. These conditions are not binding upon the State unless they constitute a recognition of the limitations upon State power under the national Constitution. However, if the conditions refer to proprietary agreements or settlements, they would generally be valid as a contract between two sovereign entities, *i.e.*, the State and the Federal Government, which have power and standing to enter into agreements. Hence, Congress can be generous or exacting in the process of transferring federal property to the new State upon its admission to the Union. In addition, Congress may grant to each State different amounts and values of public lands and property, without violating the constitutional principle of State equality.[134]

The leading case in the field of equal footing is *Coyle v. Oklahoma*,[135] an unprecedented opinion in which the U.S. Supreme Court upheld the constitutionality of a State statute which expressly violated a specific condition of admission imposed by Congress in that State's enabling act.[136] In *Coyle*, the Act of 1906, which empowered the inhabitants of Oklahoma to form a State government, contained a clause designating the City of Guthrie as the provisional site of the new State government and proscribed any change of site of the capital city until the year 1913.[137] Even though the State constitution did not contain any provision relating to the location of the city, Oklahoma's constitutional convention was forced to adopt a separate ordinance irrevocably accepting the terms and conditions stated in the enabling act. Subsequently, yet within the proscribed period, the State of Oklahoma, through a legislative action, relocated its capital from Guthrie to Oklahoma City and appropriated public funds to erect new State buildings in the new location.[138]

Such a change in the State capital was in clear violation of the conditions imposed by Congress upon the admission of the State.[139] As a result, a group of business and property interests from the City of Guthrie challenged the constitutionality of the Removal Act as being in violation of

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[133] *Id.* at 244-45.

[134] *See also* Beecher v. Wetherby, 95 U.S. 517 (1877) and Minnesota v. Bachelder, 68 U.S. (1 Wall.) 109 (1863).

[135] 221 U.S. 559 (1911).

[136] *Id.* at 574-80.

[137] Act of June 16, 1906, ch. 3335, 34 Stat. 267.

[138] Removal Act, ch. 5, 1910 Okla. Sess. Laws 4.

[139] Oklahoma was admitted on November 16, 1907 pursuant to a Presidential Proclamation, Pres. Proc. of Nov. 16, 1907, 35 Stat. 2160, which was authorized by the enabling act passed in 1906, Act of June 16, 1906, ch. 3335, 34 Stat. 267.

Oklahoma's terms of admission. The Oklahoma Supreme Court upheld the constitutionality of the Capital Removal Act[140] and the plaintiffs appealed through a writ of error.

The appellants argued that the powers of Congress to admit new States and to determine whether or not their constitutions are republican in form were political powers and as such uncontrollable by the courts. Hence, Congress, in the exercise of such powers, could impose terms and conditions that would constitutionally restrict the State's authority even if those same powers were otherwise enjoyed by the other members of the Union.[141] Conversely, the State argued that the condition imposed by Congress had no legal effect because the Federal Government had no constitutional authority to locate the State's seat of government. Furthermore, the State claimed that the supposedly "irrevocable ordinance" passed by the convention did not constitute a surrender of State sovereignty because the power to locate the capital lay in the people themselves and their chosen representatives. Since the State legislature was not bound by precedent, the Removal Act constituted a legitimate exercise of the State's reserved power. Thus, once Oklahoma had been admitted as an equal member of the Union, the enabling act's restrictive clause ceased to have effect.[142]

The U.S. Supreme Court was presented with the issue of whether the provision in the enabling act was a valid limitation upon the powers of the State after its admission. By affirming the lower court's judgment and upholding the constitutionality of the State law, the Court impliedly answered the question in the negative by declaring void the enabling act's restriction as an *ultra vires* congressional enactment.[143]

Justice Lurton, writing for the majority, reasoned that the power to determine its own seat of government is essentially a State power and one which could not be removed from the original 13 States.[144] The Court held that Congress, when admitting new States into the Union, can impose only those conditions which it may have the constitutional power to enforce directly or which are incidental to the Federal Government's own sovereignty.[145] In its analysis of the congressional power to admit new States into the Union and the concept of equality of States, the Court stated that the admission of new States into the Union is not mandatory, but rather it is discretionary with Congress. Thus, Congress may require

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[140] Coyle v. Smith, 28 Okla. 121, 113 P. 944 (1911).

[141] 221 U.S. at 565.

[142] The merits of the case were amply discussed in a legal periodical six months before the U.S. Supreme Court heard oral argument. Monnet, *Violation by a State of the Conditions of Its Enabling Act*, 10 COLUM. L. REV. 591 (1910).

[143] 221 U.S. at 574-80.

[144] *Id.* at 565.

[145] *Id.* at 565-66.

that the organic laws of the new State meet its approval before granting admission to the Union. The constitution, however, would be the constitution of a State, not an act of Congress[146] and as such it would remain subject to alteration or amendment.

Thereafter, the Court reviewed its own previous pronouncements on the issue of equality and concluded that restrictions involving rights of property, navigation title and disposition of public lands, navigable waters, regulation of commerce, Indian affairs, and the power to tax were all valid limitations imposed within the sphere of congressional power. Thus, "whatever force such provisions have after the admission of the State may be attributed to the power of Congress over the subjects, derived from other provisions of the constitution, rather than from any consent by or compact with the State."[147] However, if the Federal Government lacks the power over the subject matter, that authority has been reserved to the States and Congress cannot impair State sovereignty by reason of the terms of admission:

> When a new State is admitted into the Union, it is so admitted with all of the powers of sovereignty and jurisdiction which pertain to the original States, and that such powers may not be constitutionally deminished [sic], impaired or shorn away by any conditions, compacts or stipulations embraced in the act under which the new State came into the Union, which would not be valid and effectual if the subject of congressional legislation after admission.[148]

Finally, the Court ended its opinion by stressing the constitutional nature of the principle of State equality and placing its roots within the structure of American federalism by stating that "[w]hen that [State] equality disappears we may remain a free people, but the Union will not be the Union of the Constitution."[149]

The practical effects of the constitutional parameters set by *Coyle* became evident immediately after the opinion had been released in May, 1911, with the emergence of a controversy stemming from Arizona's bid for statehood. The admission of that Territory had been delayed for months because of objections raised in Congress and in the executive branch against a clause in the state's proposed constitution which provided for the popular recall of judges. The constitution, with this controversial provision, had been overwhelmingly ratified by the citizens of Arizona on February 9, 1911.[150] Congress was immediately petitioned to pass

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[146] *Id.* at 566-68.

[147] *Id.* at 570.

[148] *Id.* at 573.

[149] *Id.* at 580.

[150] The constitution was approved by a vote of 12,584 to 3,920. *See* 1 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 301 (W. Swindler ed. 1973).

a joint resolution for the admission of Arizona and New Mexico (which had also adopted a constitution) as States of the Union. Such a resolution was passed on August 10th of the same year[151] but President Taft, a former judge himself, vetoed the measure claiming that the recall of judges provision in Arizona's constitution was not compatible with the requirement of a "republican form of government," specified in the federal Constitution.[152]

On August 21, 1911, three months after the *Coyle* opinion had been rendered, Congress passed another joint resolution by which it tried to impose the Federal Government's will.[153] The resolution required that before Arizona could be admitted its citizens had to vote upon and ratify an amendment to the constitution exempting members of the judiciary from the recall provision.[154] Four months later, the citizens of Arizona complied with the burdensome condition imposed by ratifying the change exempting the judges from popular recall.[155] This alteration in the constitution did not last for, in a referendum approximately one year after Arizona had been admitted as a State, its people reinstated the recall clause in the constitution in defiance of the congressional condition set forth in the Joint Resolution of Admission.[156] In so doing, Arizona had joined Oklahoma as the only two States to have clearly violated unconstitutional conditions set by Congress after their admission as full and equal members of the Union. Arizona's voters had refused to surrender one of the State's inherent powers, claiming that the appointment and election of judges is one of the vital and essential attributes of State sovereignty solely reserved to Arizona in its capacity as an equal member of the Union. Since Congress had overstepped its constitutional authority, it became powerless to act against the State's rejection of one of the conditions of admission. The Equal Footing Doctrine had just been tested to its limits as an effective check on congressional actions in admitting new member States into the Union.

### 3. Equal Footing and the Submerged Lands Issue

Despite this extensive legal background, the controversy over the exact nature of States' equality did not end with *Coyle* and its aftermath. During the late 1940's, the U.S. Supreme Court considered a series of

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[151] H.R.J. Res. 14, 62d Cong., 1st Sess. (1911).

[152] President's Veto Message of Aug. 11, 1911, 47 CONG. REC. 3964 (1911), *reprinted in* 1 Swindler, *supra* note 150, at 301.

[153] Resolution of Aug. 21, 1911, 37 Stat. 39.

[154] *Id.* at 42.

[155] The citizens of Arizona voted to repeal the judicial recall provision by a vote of 14,963 to 1,980. *See* 1 Swindler, *supra* note 150, at 301.

[156] *See* 1 Swindler, *supra* note 150, at 301.

cases, commonly known as *The Tidelands Oil Cases,* which dealt with the question of ownership of marginal sea and other maritime resources underlying certain coastal States on the mainland. Throughout the decade, States including California, Texas and Louisiana had negotiated and executed leases with persons and corporations authorizing them to extract oil, gas, and mineral deposits from the submerged land. The Federal Government instituted suits against these States following the policy set by the *Truman Proclamation of September 8, 1945,*[157] which declared that the "Government of the United States regards the natural resources of the subsoil of the sea bed of the continental shelf beneath the high seas but contiguous to the coast of the United States as appertaining to the United States, subject to its jurisdiction and control."[158] The proclamation was complemented by an Executive order which directed that the submerged lands be placed under the jurisdiction of the Department of the Interior pending the enactment of appropriate Federal legislation and the resolution of any future judicial controversy between the States and the central government regarding ownership and control over these areas.[159] In these suits, the Federal Government claimed title and "paramount rights" over all submerged lands lying seaward of the ordinary low water mark on the coasts and outside the inland waters. In all cases, the States claimed that like the original thirteen colonies, subsequent to admission into the Union on an equal footing with the other States, they had acquired ownership over these areas.

In the first case of the Tideland's triolgy, *United States v. California,*[160] decided on June 23, 1947, the Court held that since the Thirteen Original Colonies had never acquired ownership of the lands under the marginal sea, no State has sovereignty rights over such lands.[161] The Supreme Court read *Pollard's Lessee* as determining only that State sovereignty on an equal footing covered ownership and control over submerged lands underlying inland navigable waters. However, the submerged lands and natural resources beneath the oceans fell within the control and jurisdiction of the Federal Government, which had paramount rights over them. Thus, the Court apparently attributed proprietary significance to the Equal Footing Doctrine exclusively in terms of land underlying inland navigable waters.

Three years later, in the second case of the Tidelands triad, *United States v. Louisiana,*[162] the Court reaffirmed the California rationale while

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[157] Pres. Proc. 2667, 10 Fed. Reg. 12,303 (1945).

[158] *Id.*

[159] Exec. Order No. 9633, 10 Fed. Reg. 12,305 (1945).

[160] 332 U.S. 19 (1947).

[161] *Id.* at 31-34.

[162] 339 U.S. 699 (1950).

rejecting Louisiana's bid to obtain recognition of her historic claim over its marginal sea and resources.[163]

The Tidelands trilogy was completed with *United States v. Texas*,[164] a case in which the State of Texas tried to distinguish its situation from that of California and Louisiana. In brief, representatives for the State argued that its previous status as an independent republic had conferred upon it title and control over the submerged lands under its coast of up to a distance of three marine leagues. Hence, when admitted into the Union, Texas argued that the State had retained its proprietary rights over those areas while at the same time it had transferred the power to regulate and control to the Federal Government. Additionally, the state claimed that Congress had recognized this legal reality and the Texas seaward boundary by admitting the state on an equal footing with the other states. Since the United States never held Texas as a territory and since the Republic allowed the vacant and unappropriated lands within its boundaries to remain part of the state, Texas reasoned that, through the Joint Resolution annexing it to the Union,[165] Congress had fully recognized its property rights over the area in dispute.

These arguments were all rejected in an opinion written by a four member plurality of the Supreme Court. The Court found that the equal footing clause of the Joint Resolution of Admission was dispositive of the controversy. The Court reasoned:

> The 'equal footing' clause has long been held to refer to political rights and to sovereignty. See *Stearns v. Minnesota* . . . It does not, of course, include economic stature or standing. There has never been equality among the States in that sense. Some States when they entered the Union had within their boundaries tracts of land belonging to the Federal Government; others were sovereigns of their soil. Some had special agreements with the Federal Government governing property within their borders. See *Stearns v. Minnesota*, supra, . . . Area, location, geology and latitude have created great diversity in the economic aspects of the several States. The requirement of equal footing was designed not to wipe out those diversities but to create parity as respects political standing and sovereignty.
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> Yet the 'equal footing' clause has long been held to have a direct effect on certain property rights. Thus the question early arose in controversies between the Federal Government and the States as to the ownership of the shores of navigable waters and the soils under them. It was consistently held that to deny the States, admitted subsequent to the formation of the Union, ownership of this property would deny them admission on an equal footing with the original States, since the original

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[163] *Id.* at 704-05.

[164] 339 U.S. 707 (1950).

[165] Joint Resolution of Dec. 29, 1845, Res. 1, 9 Stat. 108.

States did not grant these properties to the United States but reserved them to themselves. See *Pollard's Lessee v. Hagan* . . .

. . . .

The 'equal footing' clause, we hold, works the same way in the converse situation presented by this case. It negatives an implied, special limitation of any of the paramount powers of the United States in favor of a State.

. . . We hold that as an incident to the transfer of that sovereignty any claim that Texas may have had to the marginal sea was relinquished to the United States.

. . . .

It is said that there is no necessity for it—that the sovereignty of the sea can be complete and unimpaired no matter if Texas owns the oil underlying it. Yet, as pointed out in *United States v. California*, once low-water mark is passed the international domain is reached. Property rights must then be so subordinated to political rights as in substance to coalesce and unite in the national sovereign. Today the controversy is over oil. Tomorrow it may be over some other substance or mineral or perhaps the bed of the ocean itself. If the property, whatever it may be, lies seaward of low-water mark, its use, disposition, management, and control involve national interests and national responsibilities. That is the source of national rights in it. Such is the rationale of the California decision, which we have applied to Louisiana's case. The same result must be reached here if 'equal footing' with the various States is to be achieved. Unless any claim or title which the Republic of Texas had to the marginal sea is subordinated to this full paramount power of the United States on admission, there is or may be in practical effect a subtraction in favor of Texas from the national sovereignty of the United States. Yet neither the original thirteen States . . . nor California nor Louisiana enjoys such an advantage. The 'equal footing' clause prevents extension of the sovereignty of a State into a domain of political and sovereign power of the United States from which the other States have been excluded, just as it prevents a contraction of sovereignty (*Pollard's Lessee v. Hagan* . . .) which would produce inequality among the States. For equality of States means that they are not 'less or greater, or different in dignity of power.' See *Coyle v. Smith* . . . There is no need to take evidence to establish that meaning of 'equal footing.'"[166]

The Court once again emphasized that equal footing does not imply equality in economic stature or standing. The Court recognized the historical fact that most states have entered the Union with disparate economic arrangements and with dissimilar economic situations when compared with the other members of the Union. Similarly, the plurality opinion once again indicated that the proprietary effects of equal footing apply exclusively to inland submerged lands. Hence, as a general rule,

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[166] 339 U.S. at 716-20.

this constitutional doctrine only applies the principle of equality to political rights and sovereignty.[167]

According to the plurality opinion, the Equal Footing Doctrine, in addition to operating as a constitutional deterrent on congressional power, can also operate as a legal barrier which prevents the extension of the sovereignty of a state into the sovereign domain of the nation.[168] Furthermore, the wording used by the Court seems to suggest that control and proprietary rights over submerged coastal lands were inherent attributes of national sovereignty which could not be ceded, relinquished, or given away, even with the consent of the Federal Government.[169] In fact, this stringent position taken by the Court overlooked Congress constitutional powers to administer and dispose of all federal property and territory. Thus, the question arose as to whether Congress could legislate and transfer to the individual states its property rights over the coastal submerged lands without surrendering its national sovereignty and other paramount rights, in violation of the principles of equal footing. The Texas reasoning resurfaced a few years later as an argument against the constitutionality of federal legislation dealing with seabed rights and maritime jurisdiction.[170]

The *Submerged Lands Act*[171] provided an opportunity for a judicial reaffirmation of the basic principles of State and National sovereignty and for the expeditious resolution of the questions raised by the Tidelands triad. By means of this Act, the Federal Government reaffirmed its claim over the nation's coastal resources, while at the same time vesting title of the marginal sea and submerged lands in the coastal States, up to a distance of three geographical miles from their shores. The Act allowed the courts to ascertain whether particular Gulf States could prove through historical evidence their claims to title or jurisdiction beyond the three mile belt, without exceeding a distance of three marine leagues. In practical terms, by relinquishing at least some property and sovereignty rights over coastal submerged lands, this congressional enactment created three different categories of states with regard to their maritime rights: (1) coastal states with a three mile geographical seaward boundary (constituting a majority of States); (2) Gulf of Mexico States which could successfully prove in court their rights over an extended jurisdiction up to a distance of three marine leagues from their shores (subsequently only Texas and Florida could prove their claims in court); and (3) those states having no access to an ocean, sea or Great Lake, thus lacking seaward

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[167] *Id.* at 716.
[168] *Id.* at 719.
[169] *Id.* at 717-20.
[170] *See* Alabama v. Texas, 347 U.S. 272 (1954).
[171] 43 U.S.C. §§ 1301-43 (1976).

jurisdiction of their own. Hence, the *Submerged Lands Act* resulted in an unequal distribution of land which the Supreme Court had declared to be under the exclusive jurisdiction and control of the Federal Government in the Tidelands controversy.[172]

The constitutionality of the *Submerged Lands Act* was immediately challenged in the case of *Alabama v. Texas*.[173] Alabama claimed that the resources under the marginal sea did not constitute national "property" as such, but resources to which the United States had exclusive paramount rights under the Tidelands rulings. Specifically, the petitioners argued that the paramount rights over these lands were held in trust for all of the States as a federal responsibility and that "to cede them to individual states would take away the 'equal footing' among states by extending state power into the domain of national responsibility".[174] In a brief *per curiam* decision, without directly referring to equal footing issue, the Supreme Court denied the motion to file a complaint. The Court with only three remaining members of the majority in the Tidelands trilogy, summarily upheld the constitutionality of the *Submerged Lands Act* on the ground that Congress has unlimited power, under the property clause of the Federal Constitution, to dispose of any kind of property belonging to the United States. Furthermore, the Court stated, "the power over the public lands thus entrusted to Congress is without limitations. And it is not for the courts to say how that trust shall be administered."[175] Thus, the Supreme Court of the United States had placed the seaward submerged lands of the Nation beyond the Equal Footing Doctrine, and in so doing it tacitly overturned the *Texas* ruling in so far as that case seemed to forbid in any cession of submerged lands to the individual states. Consequently, the country's coastal submerged lands were to be considered national domain subject to the will of Congress which could segregate, cede and transfer title and property rights to the individual states in the way and extent that it might deem most appropriate.[176]

By 1960, following the procedure established by the *Submerged Lands Act,* certain Gulf States, including Florida and Texas, had again brought separate actions against the Federal Government seeking to prove their maritime jurisdiction beyond the three mile limit imposed by that Act. In the parallel cases of *United States v. Louisiana*[177] and

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[172] The Act constituted a legislative recall intended to remedy certain controversial effects of the *Tidelands* trilogy. *See* S. REP. No. 133, 83d Cong., 1st Sess. 8, *reprinted in* [1953] U.S. CODE CONG. & AD. NEWS 1474, 1481.

[173] 347 U.S. 272 (1954).

[174] *Id.* at 274.

[175] *Id.* at 273.

[176] Affirmed in United States v. Maine, 420 U.S. 515 (1975).

[177] 363 U.S. 1 (1960).

*United States v. Florida*,[178] the Supreme Court held that a State's preadmission of maritime boundaries, standing alone, does not suffice to establish a State's rights to offshore submerged lands.[179] As a result, the Court added a test beyond a State's preadmission boundaries and focused on whether subsequent congressional approval of a State boundary, in excess of three geographical miles, served to validate such a claim.[180]

In the first of these cases, the Court held, pursuant to the joint resolution of Congress for annexation of Texas, that the State's boundaries were not defined, but were left for Congress to settle at a time after admission to the Union and as questions of boundaries might arise with other countries.[181] Notwithstanding, the Supreme Court found that the Senate had acknowledged Texas' jurisdiction when it ratified the *Treaty of Guadalupe Hildalgo*,[182] in 1848, in which Article V fixed the boundary as extending into the gulf three leagues from the coast.[183] Texas, therefore, had proven that Congress, in 1848, had vested upon the State the rights to seaward resources not previously granted to any other State.

In the second of these two cases, Florida's claim was based upon its assertion that subsequent to its secession at the time of the Civil War, as a confederate rebel state, it framed a constitution which established a three league boundary along its Gulf Coast. Florida argued that this boundary was ratified when Congress approved the State's constitution and readmitted it to the Union. Therefore, Florida claimed to have fulfilled the requirements of the *Submerged Lands Act* by having a three league limit at the time of admission, as well as the previous congressional approval of such a boundary.

The *Reconstruction Acts of 1867*[184] had purported to "provide for the more efficient Government of the Rebel States,"[185] language which was quoted in the preamble to Florida's "Admission Act" of 1868.[186] Thus, since Florida's act of readmission was directly linked to Congress stated intent to incorporate and approve the laws of the former Confederate States under the Reconstruction Acts, Congress' approval of Florida's

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[178] 363 U.S. 121 (1960).

[179] 363 U.S. at 30.

[180] *Id* at 35-36.

[181] *Id.* at 50.

[182] Treaty of Guadalupe Hidalgo, Feb. 2, 1848, United States-Mexico, 9 Stat. 922, T.S. No. 207.

[183] *See* 363 U.S. at 58-65 for the text of art. V and the Court's discussion of its effect on the case.

[184] Act of Mar. 2, 1867, ch. 153, 14 Stat. 428; Act of Mar. 23, 1867, ch. 6, 15 Stat. 2; Act of July 19, 1867, ch. 30, 15 Stat. 14.

[185] The full title of the Act of Mar. 2, 1867 is "An Act to provide for the more efficient government of the Rebel States."

[186] Act of June 25, 1868, ch. LXX, 15 Stat. 73.

Constitution in 1868 included the three league boundary. The Court supported this argument by holding that the congressional approval of the State's new constitution upon its readmission into the Union constituted precisely the type of consent which the *Submerged Lands Act* contemplated.[187] Florida then became the second State to acquire a Gulf of Mexico jurisdiction in excess of the usual three mile limit.

Even though the equal footing issue was not directly addressed in either of these two cases, in practical terms the Court had not only reaffirmed the validity of the *Submerged Lands Act*, but once again it had also placed the maritime submerged lands of the Nation beyond the equal footing requirement. In addition, the Court reaffirmed the power of Congress to dispose of the national property, without any restrictions, along with its power to grant extensive and unequal economic concessions, including the cession of coastal submerged lands, in the admission process of new States entering the Union.

4. The Doctrinal Component

For many decades, the Equal Footing Doctrine has been a troublesome and confusing constitutional concept, baffling students of the political sciences and legal scholars alike. To a significant degree, the lack of a clear understanding of this elemental principle stems from the absence of express constitutional wording which would clearly require equality among the States. The fact that the Framers of the Federal Constitution deliberately omitted words to that effect, when viewed in contrast to the passage of the Tenth Amendment and the recurring congressional practice of including the equal footing requirement in the admission legislation of all states since 1796, must have contributed to this confusion. In addition, the United States Supreme Court's pronouncements on the issue have not been consistently clear, a situation which led to the intertwining of the principle with the submerged lands issue during the 1940's and 1950's.

Furthermore, the lack of an adequate historical perspective stemming from an ignorance of the mechanics of the statehood process has inexorably led to a somewhat nebulous description of the equal footing requirement, both in political and scholarly circles. When considering the nature of this constitutional principle, most scholars have failed to acknowledge the two-pronged vision of our particular concept of equality. Thus, most people have been inclined to evaluate equality of States in absolute terms without realizing a paradox unique to the American experience; although the American people have shown a remarkable passion for social and political equality for each individual, they have also demonstrated an

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[187] 363 U.S. at 127-28.

equally strong desire for individualism, free entreprenurial activity, technological ingenuity, and an ever improving standard of living which inevitably has resulted in economic inequality. The interaction between these ideals and the libertarian principles embodied in the Federal Constitution have often brought conflicting results and a necessity to choose between the principles of liberty and equality. In this sense, the historical bifurcation of equality, as a socio-political goal to be attained immediately and as a long term economic ideal to be reached gradually as the Nation's standard of living is improved, can be viewed as a legitimate and uniquely American effort to reconcile the principles of liberty with the principles of equality and justice for all. Traditionally, this phenomenon has reflected itself in the statehood experience of each individual State and more specifically in the development of the Equal Footing Doctrine.

Having reviewed the applicable cases and supportive reasoning, the following set of principles emerge as the basic components of the Equal footing Doctrine. Equal footing is a constitutional principle which deals with the political attributes of the individual States admitted to the Union. It is rooted in the Tenth Amendment of the Federal Constitution and requires full equality in sovereignty and political power of each and every member of the Union. Therefore, when a new State is admitted to the Union, it enters with all the powers of sovereignty and political jurisdiction which pertained to the original and already established States. Such power cannot be constitutionally diminished, impaired or taken away by any conditions, compacts, irrevocable ordinances, clauses or stipulations embraced in the congressional act under which the new States enter the Union.[188]

The Equal Footing Doctrine works not only as a constitutional limitation on the power of Congress to set terms for admission into the Union, but also as an effective legal deterrent to the statehood leadership of each aspiring State against any attempt to sell, give away or bargain the inherent powers of the future member of the Union. Thus, the Equal Footing Doctrine prevents the negotiation of the vital and essential attributes of State sovereignty by the greed of state politicians who would dare to accept humiliating conditions in exchange for prompt congressional admission. Hence, the Federal Government cannot impose the site of a State's capital city,[189] nor can it set restrictions upon the election of local judges.[190] Likewise, Congress could not create a State against the will of its people, nor could it tamper with a State's educational system, or its laws regulating estates and family relations. Furthermore, Congress

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[188] Coyle v. Oklahoma, 221 U.S. 559 (1911).

[189] *See* notes 135-45 *supra* and accompanying text.

[190] *See* notes 150-56 *supra* and accompanying text.

cannot impose cultural patterns or a uniform language[191] on any State entering the Union. Any congressional limitation concerning these subjects would be constitutionally void since these areas, along with many others, have been left to the State's jurisdiction by the Tenth Amendment of the Federal Constitution.

Conversely, Congress can impose upon admission any terms and conditions it may deem appropriate as long as they are framed within its general constitutional authority and as long as they remain a legitimate exercise of the power delegated to it by the Constitution. A distinction between State and congressional powers may be clarified by the following description:

> To move Congressional discretion a state may agree to insert provisions in its organic act which may or may not be binding after admission. Conditions which the state may have to fulfill to get into the Union, but which are thereafter subject to the state's discretion, belong in a different category from those which are intended to be controlling on the state after admission. The latter conditions are themselves divided into two groups, the first being those within the conceded power of Congress in the subject, the second those that are intended to restrict the state within the sphere of state power. An act of admission is merely an act of Congress. Congress has certain constitutional legislative powers. Congress cannot enlarge these powers simply by including its enactment as a part of the conditions of the admission of a state. If what Congress provided as a condition for the admission of a state would stand until repealed as independent legislation within the authority of Congress, it will be binding upon the state affected. If Congress does not have such power, the condition is not binding upon the state. Speaking broadly, conditions designed to restrict the states in the area alotted to the states exclusively by the Constitution may be disregarded by the states after admission.[192]

It follows then that any condition imposed upon admission is only a congressional mandate the validity of which depends on the constitutional authority to enforce it, regardless of the form required, *i.e.* enabling act, admission act, irrevocable ordinance passed by the authorities of the State, or a clause to be inserted in the constitution. Hence, Congress has the power to impose restrictions dealing with the following State's power: taxation of Federal lands,[193] regulation of Indian affairs,[194] impairment of

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[191] N. JIMENEZ-VALAZQUEZ, CULTURAL IDENTITY AND PUERTO RICAN STATEHOOD: AN HISTORICAL AND CONSTITUTIONAL APPROACH 1777 (1981) (unpublished manuscript on file at the Case Western Reserve Journal of International Law).

[192] Hanna, *Equal Footing in the Admission of States,* 3 BAYLOR L. REV. 519, 526 (1951).

[193] *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

[194] Ward v. Race Horse, 163 U.S. 604 (1916), and United States v. Sandoval, 231 U.S. 29 (1914).

contractual obligations,[195] guarantee of civil and religious liberties as protected by the Bill of Rights,[196] regulation of interstate commerce,[197] and specific provisions requiring the new State constitution to be republican in form.[198]

The Equal Footing Doctrine permits neither an unequal application of State sovereignty from one State to another, nor a haphazard encroachment by the Federal Government into the realm of issues determined by State sovereignty.[199] Hence, a State cannot raise armies, wage war, conduct foreign relations, issue currency, admit other States into the Union, regulate interstate commerce or conduct any other business of government exclusively reserved to one of the three branches of the Federal Government.[200]

Finally, the Equal Footing Doctrine deals primarily with political rights and attributes of sovereignty. It does not include equality of States in pure economic terms nor does it apply to land grants or the the economic aid and concessions made to a State by Congress as part of its terms of admission. In fact, a review of history clearly demonstrates that at no time since the formation of the Union have all of the States experienced economic equality. In fact, many States entered the Union with only incipient, undeveloped economies which were highly dependent upon the Federal Government,[201] while others entered with fairly strong and independent economies.[202] Legal scholars have commented on this historical economic reality in the following terms: "such equality referred in no way to the size and resources of the States, since obviously no States had natural equality in this respect."[203] In addition, another legal commentator has stated that:

> [E]qual footing referred primarily to political rights and sovereignty. It could have no significance as to economic resources. Just as individuals by the Declaration of Independence are regarded as free and equal with-

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[195] Stearns v. Minnesota, 179 U.S. 223 (1901).

[196] *See* Murdock v. Pennsylvania, 319 U.S. 105 (1943). *But see* Permoli v. New Orleans, 4 U.S. (3 How.) 589 (1945).

[197] Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212 (1854).

[198] *See* Park *supra* note 64 and Monnet, *supra* note 142.

[199] United States v. Texas, 339 U.S. 707 (1950).

[200] Naturally, we should recognize that there are certain areas where both Congress and the States have power to act. The traditional constitutional Preemption Doctrine establishes that in such a case, the State has authority to act until Congress pre-empts or occupies the field and thereby displaces the power of the State to deal with the subject. *See* Florida Lime and Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963); *see also* Spooner v. McConnell, 22 F. Cas. 939 (C.C.D. Ohio 1838).

[201] Such was the case with Alaska, Florida, Indiana and the Southwestern States.

[202] Hawaii and Texas constitute a case in point.

[203] Hardwicke, Illig & Patterson, *The Constitution and the Continental Shelf*, 26 TEX. L. REV. 398, 426 (1948).

> out signifying that they are equal in personal qualities, so the political party of the States does not prevent an immense diversity as to property.[204]

Throughout history Congress has recognized this fact by handling the economic aid and concessions accorded each State on an individual, yet unequal, basis while according it the same political rights as the other members of the Federation.[205]

### *D. The Principle of a Permanent Union*

Three constitutional restrictions which limit the power of Congress to deal with new States have been presented: (1) a State cannot be carved out of another State without permission of the mother State,[206] (2) a State cannot be admitted to the Union without a guarantee of a republican form of government,[207] and (3) the existence of the Equal Footing Doctrine.[208] These tenents were founded in the Principle of Permanent Union established by the U.S. Supreme Court in the leading case of *Texas v. White*.[209] This fourth constitutional restriction, which exclusively applies to States of the Union, postulates that American federalism is composed of equal members sharing a common democratic experience and politically united by an indissoluble bond in perpetuity.[210] Thus, once Congress admits a new State into the Union it cannot reverse, repeal, revoke, suspend or annul its own act of admission. A State remains a permanent member of the Union unless all of the States, including the one at issue, unanimously agree to dissolve it. Congress only has the power to admit States; it lacks the constitutional authority to expel them from the Federation. Immediately following the Civil War, the Supreme Court made the following comments concerning the secession of the State of Texas and the permanence of the Federation:

> . . . Under the Constitution, though the powers of the States were much restricted, still, all powers not delegated to the United States, nor prohibited to the States, are reserved to the States respectively, or to the people. . . . Not only, therefore, can there be no loss of separate and

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[204] *See* Hanna, *supra* note 192.

[205] Recent political studies have erroneously suggested that equal footing is a "condition" imposed upon the admission of *all* states which prevents Congress from granting different economic concessions and terms of admission. This is one more anti-statehood myth with which lacks any legal, constitutional or historical base. *See* Serrano-Geyls and Gorrín-Peralta, *supra* note 86.

[206] U.S. Const. art. IV, § 3, cl. 1.

[207] U.S. Const. art. IV, § 4.

[208] *See e.g.*, Coyle v. Oklahoma, 221 U.S. 559 (1911).

[209] 74 U.S. (7 Wall.) 700 (1868).

[210] *Id.* at 725.

> independent autonomy to the States through their union under the Constitution, but it may be not unreasonably said that the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.
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> . . . .
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> Considered therefore as transactions under the Constitution, the ordinance of secession, adopted by the convention and ratified by a majority of the citizens of Texas, and all the acts of her legislature intended to give effect to that ordinance, were absolutely null. They were utterly without operation in law.
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> . . . .
>
> Our conclusion therefore is, that Texas continued to be a State, and a State of the Union, notwithstanding the transactions to which we have referred. And this conclusion, in our judgment, is not in conflict with any act or declaration, of any department of the National government, but entirely in accordance with the whole series of such acts and declarations since the first outbreak of the rebellion.[211]

Statehood, however, is a perpetual commitment on the part of the citizens of the new entity in which they pledge their allegiance to the Federal Constitution; it binds them to obey the laws of the Nation, to adhere strictly to a republican form of government, and to contribute to the general well-being of the Nation in democratic, political, cultural, socio-economic and moral terms. Hence, statehood, like independence, constitutes the ultimate exercise of "self-determination" for a colonial people because it consists of a definite political integration as an equal member of the United States of America. In this sense the statehood experience contrasts sharply with that of territories, trusts, commonwealths and similar non-self-governing entities which as non-permanent colonial possessions have a nationally and internationally recognized right to self-determination. Consequently, the notion of "permanent union" as a concept inherent in any colonial relationship must be considered a contradiction in terms.

## V. The Right to Statehood

### A. *The Debate*

During Hawaii and Alaska's battles for admission to the Union, two of the most actively debated issues centered on whether the people in those territories had an inherent right to statehood, and whether Con-

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[211] *Id.* at 725-26.

gress could postpone indefinitely their admission even against the will of the vast majority of the citizens living in those two areas. The debate over these questions goes back to the early days of the Republic touching upon the very essence of the American Federalist democracy. Traditionally, two conflicting theories on the subject have prevailed: the Jeffersonian viewpoint and the Hamiltonian or Imperialist perspective. Although both theories depart from colonialism as a necessary foundation for American development, they do so from widely different vantage points and for distinctly different reasons.[212]

The first of these theories originates in Thomas Jefferson's 1784 blueprint for a territorial system, which regards the territories as vast areas of land to be settled by rugged individualists who would transform them into autonomous politicical communities with an ingrained democratic tradition.[213] Having achieved the adoption of the guidelines of Jefferson's Ordinances of 1784[214] and 1785[215] (the first did not go into effect although adopted by Congress) and the Ordinance of 1787[216] (which was not introduced by Jefferson—he was serving abroad at the time), the Jeffersonians viewed the territorial system as a scheme of colonization that would operate temporarily in a given area only until it had reached a minimum population and after its inhabitants had experienced a brief tutelage in self-government. During this transitory status, Congress would organize the government. Once the citizens of that area had learned the ways of democracy, the territory would then be admitted as a full and equal member of the Union. Hence, the advocates of this theory visualized the territories as a national trust (rather than national domain) to whose population Congress had the obligation of granting self-government or statehood as a matter of right. The readiness for the admission of each territory into the Union would be evidenced by three factors: reaching a minimum population; having attained experience in democracy; and the desire for statehood.[217] For these territories, the colonial system served as a nursery for rearing future members of the Union and as an expeditious means of expanding America's democratic ideals to the extent that the nation's expanding boundaries permitted. Jeffersonian theory vest in all the citizens of the growing Union the rights of self-government, liberty, equality and the opportunity to contribute to the general welfare

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[212] H.N. SMITH, VIRGIN LAND 12 (1950).

[213] Davila and Jimenez, The American Statehood Process and Its Relevance to Puerto Rico's Colonial Reality, (April, 1980) (paper submitted to the Smithsonian Institution's Woodrow Wilson Center for Scholars Conference: The United States and Puerto Rico, to be published in a collection of articles by Yale University Press).

[214] 1 DOCUMENTS OF AMERICAN HISTORY, *supra* note 12, at 121.

[215] DOCUMENTS OF AMERICAN HISTORY, *supra* note 12, at 123.

[216] 1 Stat. 50, 51 n.(a) (1789).

[217] *Id.*

of the Federation.[218]

In sharp contrast, the second theory finds its roots in Alexander Hamilton's uncompromising merchantilist vision of a powerful American empire. The Hamiltonians saw the nation's territorial expansion as the means for advancing American commercial interests and political influence on a worldwide basis, placing very little importance on the creation and admission of new States. As a result, the advocates of Hamiltonian expansionism stressed Congress' unlimited hegemony over the colonies, which were considered more as national real estate than as developing communities of citizens reared in the ways of democracy. Thus, Congress had absolute power over these territories which were to be settled, exploited and used exclusively in the national interest. In the exercise of that unlimited power, Congress could grant or indefinitely withhold the degree of autonomy or self-government that it might deem appropriate as an incident of the political organization.[219]

### *B. The Jeffersonian Tradition*

Undoubtedly, the Jeffersonian view, with its recognition of the right to self-government and statehood, prevailed with the adoption of the Northwest Ordinances and throughout the nineteenth century.[220] As previously mentioned, the Ordinance of 1787 provided the basic pattern for the organization of all American territories into three stages of political development, culminating in their admission as equal states of the Union once they reached 60,000 free inhabitants and had framed a republican constitution. The Supreme Court of the United States clearly adopted this model when it held in the case of *American Insurance Co. v. Canter,*[221] that the power of the United States to acquire new territory is derived by implication from the express power to admit new States from the authority of the government to enter into treaties and to declare or make peace.[222]

Ironically, the Supreme Court's clearest pronouncement on the transitory nature of American colonialism and of its inevitable denouement—the admission of new members to the Union—came in the ignominious case of *Dred Scott v. Sanford,*[223] which excluded Black Americans from the meaning of the term "citizen" and instead labeled

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[218] Neil, *The American Territorial System Since the Civil War: A Summary Analysis,* 60 IND. MAGAZINE HIST. 219, 226 (1964); Alden, *The Evolution of the American System of Forming and Admitting New States into the Union,* 18 ANNALS 469, 476 (1901).

[219] H.N. SMITH, *supra* note 177; Neil, *supra* note 218.

[220] *See* Patterson, *supra* note 85.

[221] 26 U.S. (1 Pet.) 511 (1828).

[222] *Id.* at 542.

[223] 60 U.S. (19 How.) 383 (1857).

them as simple "property."[224] Speaking for the Court on the limits congressional power over its territories, Chief Justice Taney summarized the Jeffersonian tradition in the following way:

> 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. That power is plainly given; and if a new State is admitted it needs no further legislation by Congress, because the Constitution itself defines the relative rights and powers, and duties of the State, and the citizens of the State, and the Federal Government. But no power is given to acquire a Territory to be held and governed permanently in that character.
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> . . . The power to expand the territory of the United States by the admission of new States is plainly given; and in the construction of this power by all the departments of the Government, it has been held to authorize the acquisition of territory, not fit for admission at the time, but to be admitted as soon as its population and situation would entitle it to admission. It is acquired to become a State, and not to be held as a colony and governed by Congress with absolute authority.[225]

Still more perplexing is the fact that while the status of citizenship was denied to a laage segment of the population, the Supreme Court recognized, for the first time in history, that citizenship is a source of rights under the Federal Constitution.[226] According to the Court's opinion, the constitutional terms "people of the United States" and "citizens" are synonymous and represent a political community of persons with rights, privileges, sovereignty and the power to conduct the government of the Nation.[227] Furthermore, the Court held that the Constitution and the rights it accorded to its citizens extended to all of the territories under congressional trust.[228] As a result, the rights of U.S. citizens residing in any colonial possession were fully protected against any encroachment by the Federal Government just as the rights of the citizens residing in any of the States of the Union were protected against similar intrusions by the federal authorities.[229]

Even though the *Dred Scott* case, like the Constitution, failed to define "citizenship" or to explain its specific content in terms of rights and privileges, the Court clearly maintained that the citizens of the United

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[224] *Id.* at 404-05.
[225] *Id.* at 446-47.
[226] *See* Bickel, *Citizenship in the American Constitution*, 15 ARIZ. L. REV. 369 (1973).
[227] 60 U.S. (19 How.) at 404.
[228] *Id.* at 448.
[229] *Id.* at 449.

States residing in a territory were on the same footing with the citizens of the States[230] as far as those rights were concerned. Unfortunately, this important equalization of the rights of citizens living in the States with those of the citizens living in the colonies was inevitably lost by the degrading and dehumanizing aspects of the opinion and its devastating effects upon the Black American's struggle for equality. It required; a Civil War; the approval of the Thirteenth[231] and Fourteenth Amendments;[232] the passage of multiple congressional Civil Rights Acts;[233] 100 years of court litigation;[234] and an active equal rights movement to reverse and erase the ominous legacy of the *Dred Scott* decision and of Jim Crow legislation. Still, this opinion is relevant in so far as it reflects a liberal historical attitude towards the territories, the American citizens residing there, and their unremitting efforts to attain statehood.

During the last century the Jeffersonian viewpoint permeated not only the contemporary legal thinking, but also the statehood process and the congressional policy towards admission. Between the years of 1791 and 1890 a total of 31 states were admitted by Congress into the Union,[235] with an average experience of slightly less than 13 years under colonial tutelage in their pre-admission history.[236] Furthermore, our study reveals that in the battle for admission of the States of Tennessee, Ohio, Louisiana,[237] Missouri, Arkansas, Michigan, Florida, Iowa, California, Oregon,

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[230] *Id.* at 450-51.

[231] U.S. CONST. amend. XIII.

[232] U.S. CONST. amend. XIV.

[233] *E.g.*, Civil Rights Act of 1866, ch. 31, 14 Stat. 27; Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241. *See* U.S.C. § 241 *et. seq.* for current status of civil rights legislation in the United States.

[234] *See, e.g.*, Brown v. Bd. of Educ., 347 U.S. 483 (1954) and authorities collected in G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 754-88 (10th ed. 1980).

[235] These were: Vermont (1791), Kentucky (1792), Tennessee (1796), Ohio (1803), Louisiana (1812), Indiana (1816), Mississippi (1817), Illinois (1818), Alabama (1819), Maine (1820), Missouri (1821), Arkansas (1836), Michigan (1837), Florida (1845), Texas (1845), Iowa (1846), Wisconsin (1848), California (1850), Minnesota (1858), Oregon (1859), Kansas (1861), West Virginia (1863), Nevada (1864), Nebraska (1867), Colorado (1876), North Dakota (1889), South Dakota (1889), Montana (1889), Washington (1889), Idaho (1890), and Wyoming (1890). *See* EXPERIENCES OF PAST TERRITORIES, *supra* note 54, at 8.

[236] The following States experienced the so-called "tutelage in democracy" as organized Territories (number of years in parentheses): Washington (36), Michigan (32), North Dakota (28), South Dakota (28), Idaho (27), Montana (25), Florida (23), Wyoming (22), Mississippi (19), Arkansas (17), Indiana (16), Ohio (16), Colorado (15), Nebraska (13), Wisconsin (12), Oregon (11), Missouri (9), Illinois (9), Minnesota (9), Iowa (8), Louisiana (8), Kansas (7), Tennessee (6), Nevada (3), and Alabama (2). *See* EXPERIENCES OF PAST TERRITORIES, *supra* note 54, at 8.

The States of Vermont, Kentucky, Maine and West Virginia were formed from already existing States while the States of California and Texas were acquired from foreign governments just prior to their admission and consequently escaped territorial organization.

[237] The people of Louisiana based their demands for admission upon Article III of the

Kansas, Nevada and the Dakotas, the citizens of those areas successfully demanded admission as a right granted to them by the provisions of the *Northwest Ordinance* or as a right inherent in their national citizenship along with the privileges and immunites consistent with such status.[238]

### C. *The Three Jeffersonian Guidelines for Statehood*

Meanwhile, as the statehood process evolved, Congress began to consider three fundamental guidelines for the admission of an aspiring political entity into the Union. First, in order to consider statehood for any given area, Congress required that a majority of eligible voters living in the proposed new State earnestly desire statehood.[239] This specific guideline was parallel to the principles of the consent of the governed and self-determination inherent in the statehood process itself. Usually, in most of the aspiring states, the formal movement towards admission was initiated by the presentation to Congress of various testamonials demanding admission as a matter of right. These petitions generally originated in a statehood referendum where a majority of the voters favored admission, in legislative resolutions sent to Congress by the popularly elected territorial assemblies, in citizens' conventions, or in a special mandate received by the territorial delegates and governors who served as conduits from the people to offer the petition to that national body.

A second traditional guideline for admission has stressed that the citizens of the aspiring State be inbued with and devoted to the principles of democracy and self-government as exemplified by the American form of government and the Federal Constitution.[240] The inhabitants of the future state must have demonstrated a common democratic heritage, however limited by colonialism itself, and must have adopted American principles, traditions, aspirations and institutions of democratic government. This specific principle reflected the Jeffersonian objective of American territorialism and its justification for a transitory tutelage in democ-

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Cession Treaty of 1803, which stated: "The *inhabitants* of the ceded territory *shall be incorporated* into the Union . . . and admitted as soon as possible, according to the principles of the Federal Constitution, *to the enjoyment of all rights, advantages and immunities of American citizens of the United States.* . . . " Cession Treaty of 1803, United States-France, art. III, 8 Stat. 200, T.S. No. 86 (emphasis added). This is probably the *first congressional* recognition, by way of treaty, of American citizenship as the source for a right to statehood. This claim is important for three basic reasons: 1) Louisiana was the first non-contiguous territory to enter the Union; 2) it was ceded by treaty; and 3) it had a different culture.

[238] Davila and Jimenez, *supra* note 213.

[239] G. CURTIS, ADMISSION OF UTAH: LIMITATION OF STATE SOVEREIGNTY BY COMPACT WITH THE UNITED STATES 9 (1887); Huddle, *Admission of New States*, 1 EDITORIAL RESEARCH REP. 185, 190 (1946).

[240] E. JOY, *supra* note 22, at 43.

racy. Of course, this guideline was somewhat ignored with the admission of California, a political entity never formally organized by Congress before its admission, and the admission of Alabama, Nevada, Tennessee, Kansas, along with a few other States which experienced brief periods of territoriality.[241] Therefore, democratic heritage and loyalty to America's institutions were not exclusively measured by the specific period of bondage, but also by the particular circumstances surrounding each community's development, by their intense desire for self-government as exemplified by specific actions directed toward their quest for statehood and by their previous contribution to the Nation's prosperity.

The final historical guideline for admission stressed that the proposed new state have sufficient population and resources to support a state government. The criteria for population follows the *Northwest Ordinance of 1787,* which established the standard of 60,000 freemen as an adequate requirement to claim admission as a matter of right.[242] No legal or historical limitation has ever been established as to the maximum number of inhabitants any given area might have in order to qualify for statehood. The resources which were thought to be necessary to sustain a State government included: human, natural, individual, commercial and agricultural elements that would contribute to the efficient operation of organized life in each particular political community. The standard size of population and quantity of resources never meant a particular degree of wealth nor a minimum monetary contribution to the Federal treasury. Instead, the concept of wealth as an indispensable condition for admission was specifically rejected by the Framers of the Constitution as being undemocratic, elitist and contrary to the postulates of the American Revolution.[243] Thus, membership in the nation was to be open to wealthy, middle class and underprivileged communities alike, irrespective of their capacity to contribute to the national treasury. Such was the case because the Founding Fathers saw statehood as an issue of political equality and self-determination which could not be measured in strictly monetary terms.

Furthermore, the statehood experience itself proves that there has never been equality among the states in economic stature, degree of economic self-reliance, ownership of land, natural resources, population and general economic development, or even their monetary contribution to

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[241] *See* note 236 *supra* for a list of states which experienced a "tutelage in democracy."

[242] Before 1787, the Northwest Ordinance of 1784 provided: "whensoever any of the said states shall have, of free inhabitants, as many as shall then be in any one the least numerous of the thirteen Original States, such state shall be admitted by its delegates into the Congress of the United States on an equal footing with the said original states. . . ." *See* 1 DOCUMENTS OF AMERICAN HISTORY, *supra* note 12, at 122.

[243] 1 Farrand, *supra* note 20, at 605-06.

the Federal Government. Hence, there has been great diversity among the states as far as their relative wealth is concerned. More importantly, at the time of admission most territories had fairly underdeveloped economies when compared to the older and more progressive states.[244] As a result, in the vast majority of the cases, statehood opposition at a local or national level was based upon the "negative" and "disastrous" impact that statehood would have upon the "fragile" colonial economies and specifically upon the capacity to sustain an efficient State government.

Following this line of reasoning, a few typical "doomsday" predictions emerged against the admission of many states: additional expenses and taxes would bring the economic collapse of the new state;[245] the state could not sustain itself for lack of natural resources;[246] the aspiring territory did not qualify for admission because of its underdeveloped economy;[247] widespread poverty in the territory impeded its admission;[248] and, finally statehood would be too costly for American taxpayers because as a territory the area's costs were defrayed largely by Federal funds.[249]

In recent years, the criteria used to determine the state's necessary "wealth" and "economic capacity to pay its proportionate share to help sustain the cost of the Federal Government" have been incorrectly cited by certain congressional documents and studies as "traditional" or "historic" requirements for admission.[250] This so called "traditional requirement" dates back to Article IV of the *Ordinance of 1787* which stated in part:

> The inhabitants and settlers in the said territory shall be subject to pay a part of the Federal debts, contracted or to be contracted, and a *proportional part* of the expenses of government to be apportioned on them by Congress, according to the same common rule and measure by which apportionments thereof shall be made on the other States.[251]

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[244] Davila and Jimenez, *supra* note 213.

[245] This argument was raised in the statehood battles of Ohio, Indiana, Illinois, Wisconsin, Iowa, Oregon, Nevada, Nebraska, Montana, Washington, the Dekotas, New Mexico, Alaska and Hawaii.

[246] This was asserted in the statehood struggles of Maine, Florida, New Mexico and Arizona.

[247] Critics raised this argument against Arkansas, Michigan, Florida, New Mexico, Arizona, Alabama and Alaska.

[248] This was argued against Florida and Michigan.

[249] This was asserted against Alaska.

[250] *See, e.g.*, S. REP. No. 1929, 81st Cong., 2d Sess. 7 (1949); Tansill, Statehood for Hawaii and Alaska (1954) (Legislative Reference Service Report); Sheridan, Policy Issues in The Admission of Certain States into the Union: A Brief Analysis (March 31, 1978) (Congressional Research Service Report); and more recently, EXPERIENCES OF PAST TERRITORIES, *supra* note 54.

[251] Northwest Ordinance of 1787, *reprinted in* 1 Stat. 50, 51 n.(a.) (1789). This wording could have inspired a *dictum* found 114 years later in the infamous case of Downes v. Bid-

However, in spite of its ancient statutory origin, this specific clause or similar wording stressing a minimum contribution to the Federal Government has never been required of any state upon its admission to the Union. Research has failed to produce a single instance or congressional debate in which this additional economic "criteria" was raised or required in the statehood process of any aspiring entity. On the other hand, many debates over statehood concerned a territory's economic capability to sustain an efficient and operational State government.

Inquiries as to whether a state has sufficient population and resources were never directed towards its capacity to pay a share of the cost of the Federal Government nor did they indicate a particular degree of wealth or a required minimum contribution to the Federal Treasury. Consequently, it is inaccurate and misleading to refer to this criteria as a "historic" or "traditional" requirement since it was never "required" as such.[252] Ironically, the reverse has been the norm because financial matters and the pressing needs of most aspiring states have been considered by Congress, not to deny admission, but rather to determine the need for traditional economic measures to bolster their social development at a pace comparable to that of the other states.[253] It should be reiterated, again, that there are no historic, constitutional or traditional factors to

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well, 182 U.S. 244 (1901), where the Supreme Court of the United States, in an effort to judicially curtail any possible and future aspirations to statehood by the citizens of the newly acquired, impoverished Spanish possessions (Puerto Rico, The Philippines and Guam), makes reference to the United States as a geographical unit, composed of States, and continguous territories populated by "all the native white inhabitants being endowed with citizenship, protected by pledges of a common union . . . all being under the obligation to contribute their proportionate share for the liquidation of the debt and future expenses of the general government." *Id.* at 319 (White, J., concurring). Many years later during Alaska's battle for statehood this burdensome obligation was reproduced in various documents and publications of Congress as a generally recognized "traditional requirement for statehood." *See* authorities cited in note 250 *supra*.

[252] If applied in the future to new petitions for admission, this burdensome and historically unsound criteria would provide ammunition for the opponents of statehood for the present territories and it would constitute a basis for future congressional discrimination against poor and underprivileged peoples who aspire to statehood as the only dignified alternative to colonialism within the present American constitutional framework. *But see* U.S. Dep't of the Interior, Interagency Territorial Policy Review Task Force Report 8 (Sept. 1979).

Even if judged by the strict standard of financial capability, Puerto Rico, when compared to the economies of the present 50 States (which have enjoyed the full economic benefits of statehood for at least 20 years), would still have the population and resources to contribute its fair share not only to the economic well-being of the Nation, but also to the national defense. Furthermore, one could reasonably argue that the Island's present distressed economic situation is a direct consequence of its inherent colonial status, proving once more that such an arrangement does not serve the best interests of the citizens of Puerto Rico or their counterparts on the mainland.

[253] *See* EXPERIENCES OF PAST TERRITORIES, *supra* note 54.

support the validity of this so called economic "requirement."

To place these traditional guidelines in perspective, it should be noted that they developed informally during the first 100 years of the statehood experience, as part of the Jeffersonian tradition to expedite the admission of new member states into the Union. Thus, the three standards are based strictly on custom and upon the spirit of the Ordinance of 1787, not upon legal or constitutional criteria to be followed to the letter. Furthermore, the specific experiences shows that all three guidelines have been applied in a liberal and flexible manner. At times, Congress may have totally disregarded these standards when the dictates of policy, expedience, political necessity and equality before the law so required.[254] Consequently, Ohio, Illinois, Florida, Nebraska and Nevada were admitted into the Union with populations of less than the desired minimum of 60,000 inhabitants and with some States having dubious economic potential.[255] Similarly, and in total disregard of the second traditional requirement, Kansas was admitted amidst widespread violence and bloodshed over the slavery controversy; California was admitted with no previous territorial titelage; West Virginia entered the Union in spite of the dubious constitutionality of its separation from her mother State; Michigan and Idaho were admitted admist claims of serious irregularities in their respective constitutional conventions. Likewise, the first requirement that the population demonstrate a great interest in statehood was blatantly ignored when the States of Vermont, Kentucky, Ohio, Louisiana, Alabama and Missouri were admitted without the benefit of a single statehood referendum, public opinion poll or constitutional ratification process that would tend to show widespread popular support for admission.[256] Moreover, the State of Nebraska was admitted after the minimum majority of voters (51%) had ratified the proposed State constitution. In fact, the results of the only statehood referendum, held six years before, showed that a 53% majority opposed admission.[257]

### *D. The Legacy of Imperialism: The Hamiltonian Vision*

Towards the end of the nineteenth century, as the United States began its overseas expansionist adventures, the predominantly Jeffersonian territorial policy was abandoned in favor of the Hamiltonian vision of a permanent American colonial empire.[258] This shift in policy produced a

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[254] *See* EXPERIENCES OF PAST TERRITORIES, *supra* note 54.

[255] *See* EXPERIENCES OF PAST TERRITORIES, *supra* note 54.

[256] Davila and Jimenez, *supra* note 213.

[257] *See* Davila and Jimenez, *supra* note 213.

[258] The age of American imperialism began around this time with the Spanish-American War of 1898 (which brought the Phillippine Islands, Guam and Puerto Rico under American hegemony), the annexation of Hawaii, the imposition in 1901 of the nefarious

radical departure from the original design of transient colonialism geared towards the admission of states to an essentially imperialist scheme based on the then existing European model of permanent colonial administration for the economic benefit of the metropolis. Imperialist or Hamiltonian thought, with its basic denial of the right to statehood,[259] has been described in the following terms:

> The counterarguments of the Imperialists were presented energetically and skillfully. Their basic assumption countered the views of Chief Justice Taney with those of Chief Justice John Marshall on the question of territorial expansion. Marshall had stated that the United States might acquire such territory as it saw fit. The imperialists insisted that this power to acquire obviously implied the power to govern and that in the case of the territories the power to govern was given solely to Congress. This view, which they pointed out went back as far as the debates over the Louisiana Purchase, had been in the long run overwhelmingly sustained by the consistent opinions of the Supreme Court.
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> Even those who held to the view that territories are automatically embryo states admitted that while Congress could not create the population, resources, and institutions necessary to the development of a state, the timing and manner of admission were political questions only Congress could determine. The right to become a state, the Imperialists argued, was not inherent in a community; organic and enabling laws were 'powerful creative acts of Congress, not mere formalities' following assertion by a territory of the right to statehood. The exigencies of the situation fully accounted for those instances where a territory anticipated the action of Congress and seemingly asserted a prior right. However, only a popular assumption, substantiated by the lax and informal procedures as well as by the precedent of the large number of territories becoming states, gave the semblance of verity to a right that actually did not exist as as such. According to this argument, enough historical evidence was available in an examination of the terms which Congress had laid down as conditions of entry to justify the assertion that the right to admit states was the exclusive prerogative of the Federal Government acting through Congress.[260]

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Platt Amendment upon the Sovereignty of Cuba, the implementation of the China "Open Door" policy, Rooseveltian "gunboat" and "Big Stick" diplomacy in the Caribbean, the acquisition of the Panama Canal enclave in 1903 and the development of an imperial navy following Alfred Mahan's blueprint. For a comprehensive analysis of America's imperial experiment, *see* J. PRATT, AMERICAN'S COLONIAL EXPERIMENT (1950).

[259] E. JOY, *supra* note 22; *see also* Lowell, *The Status of Our New Possessions*, 13 HARV. L. REV. 155 (1899); Coudert, *Our New Peoples: Citizens, Subjects, Nationals, or Aliens*, 3 COLUM. L. REV. 13 (1903).

[260] Neil, *supra* note 218.

The U.S. Supreme Court would not explicitly recognize the political attitudes contained in its decisions. The result was "judicial legislation"[261] commonly referred to as the *Insular Cases*.[262] In essence, these cases delineated the differences between "incorporated" and "non-incorporated" territories. Incorporated territories were areas with an inherent right to statehood in which the Federal Constitution is applied in its entirety as a restriction on Congressional powers over the territories.[263] Nonincorporated territories were merely geographical possessions inhabited by "alien people" where only certain "natural" or "fundamental" constitutional provisions applied, giving Congress greater flexibility to legislate either in favor of or against the residents of these unincorporated areas.[264] Moreover, in tracing a distinction between the incorporated and nonincorporated territories, Justice White in *Downes v. Bidwell* stated that the areas encompassed by *Northwest Ordinances* belonged to the former category as integral parts of the United States, populated by "native white inhabitants" who as citizens of the Federation were endowed with the rights and privileges of their citizenship and with an ultimate promise of statehood.[265] Five elements emerged in Justice White's opinon which distinguished the citizens of the previously incorporated territories from the inhabitants of the unincorporated overseas possessions: (1) their origin and color (native white vis-á-vis aliens of hispanic or oriental descent); (2) the contiguity of the mainland territory (locality); (3) their personal status (citizens vis-á-vis non-citizens); (4) their capacity to contribute to the Federal Government (tax paying vis-á-vis tax exempted residents); and (5) their ultimate destiny as a political community (the former having a right to statehood, the latter being subject to the will and whim of Congress).[266] In addition, the overt racial undertones and the

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[261] See opinion of Justice Brown in De Lima v. Bidwell, 182 U.S. 1 (1901). Brown, although a staunch supporter of the imperialist view, stated that to hold that Congress could indefinitely maintain a territory in a state of colonial bondage would have been tantamount to "pure judicial legislation." *Id.* at 198. Ironically, this is precisely what the *Insular Cases* did.

[262] De Lima v. Bidwell, 182 U.S. 1 (1901); Downes v. Bidwell, 182 U.S. 244 (1901); Dooley v. United States, 183 U.S. 151 (1901); Pepke v. United States, 183 U.S. 176 (1901); Hawaii v. Mankichi, 190 U.S. 197 (1903); González v. Williams, 192 U.S. 1 (1904); Dorr v. United States, 195 U.S. 138 (1904); Rassmussen v. United States, 197 U.S. 516 (1905); Kopel v. Bingham, 211 U.S. 468 (1909); and most recently *see* Harris v. Rosario, 446 U.S. 651 (1980).

[263] *See, e.g.*, Downes v. Bidwell, 182 U.S. 244, 279-83.

[264] *Id.*

[265] *Id.* at 319 (White, J., concurring).

[266] Ironically, Hawaii and Alaska, two overseas territories, were found subsequently to be incorporated entities, while Puerto Rico, the Philippines and Guam were deemed not to have been "integral parts" of the United States. Thus, in time, the validity of these five characteristics became highly questionable in view of Hawaii's noncontiguity and its

strong emphasis on the criteria of locality clearly indicated that the new colonies and their native inhabitants were merely national real estate subject to a congressional determination. Although slavery and inequality violated American principles, these beliefs did not appear to withstand the territorial expansion of the United States which paralleled Europe in its imperialism.[267]

Beyond these judicial pronouncements, the annexation of overseas colonies inhabited by non-Anglo and nonassimilated peoples presented a fundamental dilemma in the political area which would haunt American policymakers for the next eight decades. The crux of the issue focused on whether the United States would remain an imperial power or whether it would live up to its principles and rhetoric of equality for all of its peoples including those persons living in the nonincorporated dependencies. A prominent scholar has described this American predicament in the following terms:

> The expansion of American power and influence precipitated a great national debate on imperialism, a debate that moved the nation for several years before and after the Spanish-American War and dominated the presidential election campaign of 1900. The electoral victory of President William McKinley settled the controversy in favor of imperial expansion, but the issue that remained was whether racially and culturally distinct peoples brought under American sovereignty without the promise of citizenship or statehood could be held indefinitely without doing violence to American values-that is, whether certain peoples could be permanently excluded from the American political community and deprived of equal rights.[268]

Congressional response towards the territories during the next two decades followed an ambivalent route between the incorporated and nonincorporated territories as a result of the *Insular Cases*. Thus, the incorporated mainland Territories of New Mexico and Arizona were admitted into the Union while, at the same time, the nonincorporated and loosely organized Indian territory was joined and admitted with the incorporated Territory of Oklahoma as a sovereign unitary State. Furthermore, after both colonies had been formally organized, the Phillippines and Puerto Rico were directed in politically opposite directions: the *Jones Act of 1916* pledged eventual independence to the Filipinos;[269] however, the *Jones Act of 1917*[270] conferred American citizenship on all of the re-

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predominantly oriental population, composed mainly of tax-paying American citizens.

[267] Cabranes, *Citizenship and the American Empire*, 127 U. PA. L. REV. 391, 492 (1978).

[268] *Id.* at 395.

[269] Jones Act (Philippine Islands), ch. 416, 39 Stat. 545 (1916).

[270] Jones Act (Puerto Rico), ch. 145, 39 Stat. 951 (1917).

sidents of Puerto Rico "as a token of the permanence of the island's political relationship to the United States".[271]

Scarcely four months after the *Jones Act of 1917* became effective, the issue of whether or not the United States citizenship conferred upon the inhabitants of Puerto Rico automatically converted the island into an incorporated Territory was brought before the Supreme Court of Puerto Rico in the case of *Muratti v. Foote*.[272] In that case, the court held that Puerto Rico had been incorporated by the *Jones Act* as an organized community of American citizens possessing all of the rights and immunities of that citizenship.[273] On review, the Supreme Court of the United States reversed the judgment rendered by Puerto Rico's high court without expressing a single argument in rebuttal.[274]

Four years later, in *Balzac v. People of Puerto Rico*,[275] the Supreme Court of the United States addressed the issues of citizenship and incorporation squarely, by holding that the *Jones Act of 1917* did not incorporate the island into the Union.[276] Furthermore, in assessing the meaning of the newly acquired citizenship, the Court restricted its constitutional content in so far as the unincorporated territories were concerned.[277] Thus, the U.S. Supreme Court legitimzed a second class citizenship which was morally equivalent to the racist "separate but equal" doctrine consecrated by that same Court 24 years earlier in the nefarious case of *Plessy v. Ferguson*.[278] The main thrust of the *Balzac* Court's argument was:

> [The Jones Act of 1917] enabled the [Puerto Ricans] to move into the continental United States and [become] residents of any State there to enjoy every right of any other citizen of the United States, civil, social and political. A citizen of the Phillippines must be naturalized before he can settle and vote in this country . . . Not so the Porto Rican under the Organic Act of 1917.
>
> In Porto Rico, however, the Porto Rican can not insist upon the right of trial by jury, except as his own representative in his legislature shall confer it on him. The citizen of the United States living in Porto Rico can not there enjoy a right of trial by jury under the Federal Constitution, any more than the Porto Rican. It is locality that is determinative of the application of the Constitution, in such matters as judicial proce-

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[271] Cabranes, *supra* note 267, at 403, 406.

[272] 25 P.R.R. 527 (1917).

[273] *Id.* at 537-38.

[274] People of Puerto Rico v. Carlos Tapja, 245 U.S. 639 (1918), *rev'g* Muratti v. Foote, 25 P.R.R. 527 (1917).

[275] 258 U.S. 298 (1922).

[276] *Id.* at 306.

[277] *Id.* at 308-09.

[278] 163 U.S. 537 (1896).

dure, and not the status of the people who live in it.[279]

According to the Court, the residents of Puerto Rico along with those of other colonies could enjoy the full protection of the Federal Constitution and all of the privileges and immunities of citizenship only if they permanently moved to the continental United States.[280] In the meantime, as residents of an overseas possession they could only claim their "fundamental" rights and a right to move to the mainland.[281] Thus, the essential link that binds the American citizens of the unincorporated colonies to the national community and government had been serverely curtailed by political expediency, the weak excuse of locality, and last but not least by a strong ethnic and racial prejudice which permeated each of these opinions. In this sense, the *Insular Cases* and *Balzac* have been described as "the constitutional high-water mark for American imperialism"[282] based upon an "incoherent logic of imperialism rather than the logic of law."[283] Still more relevant to our thesis, these cases constituted a rejection of the right to statehood principle and an attempt to permanently exclude United States citizens in unincorporated colonies from directly participating in the American political community and the enjoyment of the full equal protection of the laws.[284]

For the next five decades, the Imperialist viewpoint, the *Insular Cases* and "benign neglect" dominated Federal policymaking towards the unincorporated possessions. Meanwhile, during the 1940's and 1950's Alaska and Hawaii, two incorporated areas, had intensified their long struggle for statehood. Each demanded admission as a matter of right but each based its claim on different constitutional sources.

Alaskans demanded statehood primarily as a right inherent in their American citizenship which had been conferred on them in 1867 through the *Treaty of Cession* with Russia.[285] National citizenship, they argued,

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[279] 258 U.S. at 308-09.

[280] *Id.* at 309.

[281] *Id.* at 311.

[282] Neil, *supra* note 218, at 229.

[283] Womuth, *The Constitution and the Territories*, 29 CURRENT HIST. 337, 339 (1955).

[284] Chief Justice Taft's opinion in *Balzac* illustrates this point:

> We need not dwell on another consideration which requires us not lightly to infer, from acts thus easily explained on other grounds, an intention to incorporate in the Union these distance ocean communities of a different origin and language from those of our continental people. Incorporation has always been a step, and an important one, leading to statehood. Without, in the slightest degree, intimating an opinion as to the wisdom of such a policy, for that is not our province, it is reasonable to assume that when such a step is taken, it will be begun and taken by Congress deliberately and with a clear declaration of purpose, and not left a matter of mere inference or construction.

258 U.S. at 311.

[285] Treaty of Cession of Alaska, Mar. 30, 1867, United States-Russia, 15 Stat. 539, T.S.

embodied rights of full political participation, self-determination, equal treatment under the laws and the dignity of belonging as an equal member of the national community. Likewise, they claimed that citizenship gave them the right to create the "State" of Alaska because the ultimate sovereignty resided not in Congress, but in their collective will as members of an organized political entity. Consequently, Alaskans proceeded to implement a "Tennessee Plan" strategy which bore the fruit of their admission less than three years after it was first initiated.[286]

Hawaii demanded admission primarily as a right inherent in its political status as an incorporated territory which had been reared in the ways of democracy with a pledge of ultimate statehood. Hawaiians failed to implement a Tennessee Plan strategy; thus, their admission as a State came nine years after they had approved their state constitution.[287] In spite of their claimed right to statehood, the admission of both States was delayed by at least 12 years in Congress as a result of the dictates of partisan politics, the outbreak of the Korean War, a national conservative mood and a prevailing insensitivity on the part of the policymakers to the needs and aspirations of the citizens living in these two Territories. Ironically, the legacy of colonial realpolitik had even affected the people of the last two incorporated Territories in their long struggle towards equality.

### *E. The Principle of Equal Citizenship: Towards a New Future*

The continuing validity of the Imperialist viewpoint and the legacy of discrimination left by the *Insular Cases* was challenged during the decades of the sixties and seventies by international and domestic events.[288] The history of the last 20 years left permanent and significant changes in America's socio-political fabric which discredited the fundamental premises upon which these postures were predicated. The premises at issue were primarily: American hegemony in world affairs, colonialism and territoriality, second class citizenship, the ethnocentric melting pot syndrome, the dominance in Federal politics by the northeastern (WASP) establishment, and the belief that internal autonomy alone could solve the problems of the overseas territories.

Consequently, on the international front, some of these premises were left inoperative by such developments as: the debacle of the traditional American foreign policy tenets in Vietnam and Iran; the dilution of United States power and influence on a worldwide basis; the proliferation of third world republics mostly hostile to American thought and interest;

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No. 301.

[286] *See generally*, 1 Swindler, *supra* note 150, at 161-62, 208.

[287] *See generally*, 3 Swindler, *supra* note 150, at 120.

[288] Harris v. Rosario, 446 U.S. 651 (1980).

the irreversible tide towards decolonization and, finally, Jimmy Carter's human rights policy. Similarly, on the domestic front, the underlying premises of discrimination and colonialism were finally voided by slow but drastic changes in America's socio-political texture as exemplified by: the emergence of a powerful, effective and influential black civil rights movement; the end of the WASP monopoly over national politics and the resurgence of the Republican Party; the acceptance of ethnicity, bilingualism along with racial and cultural plurality; the women's liberation movement; the demise of the Imperial presidency; the renaissance of the sun-belt States; the end of unlimited affluence; the emergence of new groups clamoring for recognition, equality and participation in national politics; the collapse of "commonwealth status" in Puerto Rico as the American showcase of economic and social prosperity in Latin America; and finally, the development of an equal citizenship principle with a substantive content predicated upon the letter and spirit of the Fourteenth Amendment of the Federal Constitution. It is precisely toward this last development and its relevance to the continuing evolution of the right to statehood that we shall direct our attention.

The meaning of the concept of "citizen" varies according to the constitutional or historical framework of each country within the world community. According to the precepts of international law, "the citizen or subject body of a State . . . constitutes one homogeneous body, all the members of which have the same status, the same rights and duties."[289] The Constitution of the United States as originally adopted uses the word "citizen" several times throughout its text, yet it lacks a specific definition of this concept.[290] It was not until 1868, when the Fourteenth Amendment was duly adopted and ratified, that the Nation's primary law impressed a meaning upon the term "citizenship."

The Fourteenth Amendment of the Constitution expresses in the relevant part that "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and to the State wherein they reside."[291] The Amendment further contemplates that:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law;

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[289] 1 W. WILLOUGHBY, THE CONSTITUTIONAL LAW OF THE UNITED STATES 335 (2d ed. 1929).

[290] U.S. CONST. art. I, § 2, cl. 2; U.S. CONST. art. I, § 3, cl. 3; U.S. CONST. art. II, § 1, cl. 4.

[291] U.S. CONST. amend. XIV, § 1. This includes those persons born in Puerto Rico, the U.S. Virgin Islands, Guam, and the Canal Zone, who become American citizens through the authority of congressional statutes. *See* 3 AM. JUR. 2d *Aliens and Citizens* § 116 (1962).

> nor deny to any person within its jurisdiction the equal protection of the laws.[292]

As previously stated, the first attempt to define national citizenship as a source of rights was made in the *Dred Scott* case.[293] In that case, Chief Justice Taney's opinion equated the terms "people of the United States" and "citizens" as a single community of persons entitled to equal rights, privileges, and immunities.[294] This constitutional expansion of citizenship was adopted by Congress in the *Civil Rights Act of 1866*,[295] which provided that "All persons born in the United States and not subject to any foreign power . . . are hereby declared to be citizens of the United States; and such citizens, of every race and color, shall have the same right, in every State and Territory in the United States . . ."[296] Although its adoption was a direct aftermath of the constitutional abolition of slavery in 1865,[297] its use of the terms "every race and color" and "in every State and Territory" substantiates the position that it covers a much wider amalgam of subjects irrespective of locality. The Fourteenth Amendment expanded its coverage in a manner that "went well beyond prohibiting racial discrimination."[298] However, the legacy of the *Insular Cases* had demonstrated that its full constitutional context has not been extended to the American citizens residing in the present day United States colonies which still remain in a state of political limbo. In spite of this unfortunate situation, the scope and content of national citizenship as a constitutional source of rights has been slowly expanded by the legal thinking of the last three decades. Consequently, in view of these historic and legal developments the principle of equal citizenship, as a constitutional source of rights, assumes special relevance in relation to the unfranchised second class citizens of these colonies. First, it serves as an expeditious means of overcoming the unwarranted legacy of colonialism.

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[292] U.S. CONST. amend. XIV, § 1.

[293] 60 U.S. (19 How.) 393 (1857).

[294] *Id.* at 404.

[295] 14 Stat. 27 (1866). This was "the first authoritative definition of citizenship in American Law." Bickel, *supra* note 226, at 372.

[296] 14 Stat. 27, § 1. Professor Bickel argues:

> The *Dred Scott* decision itself gave no definition of citizenship, or of its rights and privileges. It invested the concept with no affirmative meaning. It used the idea negatively, in exclusionary fashion, to indicate who was not under the umbrella of rights and privileges and status, and thus to entrench the subjection of the Negro in the Constitution.

Bickel, *supra* note 226, at 373. While this interpretation is fairly accurate, Professor Bickel failed to realize the equalization of citizenship as it concerned the citizens living in the Territories and their counterparts in the States.

[297] U.S. CONST. amend. XIII.

[298] Karst, *The Supreme Court, 1976 Term — Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 14 (1977).

Second, it provides the substantive foundation for new and future claims to statehood as a right inherent in the principles embodied in the Fifth and Fourteenth Amendments to the Federal Constitution.

In his brilliant analysis of contemporary legal developments under the Fourteenth Amendment, Professor Kenneth L. Karst has cogently argued that the guiding principle behind the relevant clauses of that constitutional change lies not in equality as an abstraction but in the principle of equal citizenship which safeguards each American's right to be treated by the organized society as a respected, responsible, and participating member of the national community.[299] Furthermore, Professor Karst contends that the essence of equal citizenship stems from the dignity of full membership in the society. "Thus the principle not only demands a measure of equality of legal status, but also promotes a greater equality of the other kind of status which is a social fact, namely one's rank on a scale defined by degrees of deference or regard."[300] Therefore, in order to achieve full equality for all members of the American society, the following indispensable values must be pursued: the elimination of castes and demeaning stigmas; full participation in the Nation's decisionmaking processes; and the opportunity to contribute to the well-being of the society as a needed, productive, and responsible member.[301]

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[299] *Id.* at 4.

[300] *Id.* at 5.

[301] Professor Karst explains the content of these values as follows:

> The principle of equal citizenship presumptively insists that the organized society treat each individual as a person, one who is worthy of respect, one who 'belongs'.
>
> Stated negatively, the principle presumptively forbids the organized society to treat an individual either as amember of an inferior or dependent caste or as a non-participant. Accordingly, the principle guards against degradation or the imposition of stigma. The inverse relationship between stigma and recognition as a person is evident. 'By definition, . . . we believe that the person with a stigma is not quite human.' The relationship between stigma and inequality is also clear: while not all inequalities stigmatize, the essence of any stigma lies in the fact that the affected individual is regarded as an unequal in some respect. A society devoted to the idea of equal citizenship, then, will repudiate those inequalities that impose the stigma of caste and thus 'belie the principle that people are of equal ultimate worth'.
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> . . .
>
> In its most typical application, the principle of equal citizenship will operate to prohibit the society from inflicting a 'status-harm' on members of a group because of their group membership. But even in these applications, the main energies released by the equal citizenship principle are individualistic. When one is freed from stigma, her sense of individual identity is strengthened precisely because she is no longer defined by others in terms of the stigma: she is regarded as a full human being, worthy of respect and dignity, rather than merely as a specimen of the stigmatized

Following these postulates, we place ourselves beyond the colonialist

category.

While respect for each individual's basic humanity is the primary value in the principle of equal citizenship, the principle also encompasses two related and overlapping values: participation and responsibility. A citizen is a participant, a member of a moral community who counts for something in the community's decision-making processes. No less importantly a citizen is a responsible member of the society, one who owes obligations to his fellow members. Both these values contribute to self-respect, but they also have independent significance.

The earliest writings in the Western political tradition define citizenship as a right to participate in the society's formal processes of decision. Aristotle, who more than anyone else set the terms of our discussion of such matters, said that a citzien is one 'who has the power to take part in the deliberative or judicial administration of any state. . . .' But citizenship takes on a broader meaning when we enlarge our vision of society and community beyond the political arena. Once we recognize that citizenship is more than the 'simple idea' of legal status, the value of participation can be seen to embrace a fuller range of sharing the public life of the society.

Equal citizenship, by offering the opportunity of full participation in the society, fosters the sense of community that is indispensable to one's sense of individuality. At the same time, the opportunity to participate promotes the 'sense of wholeness' function. The principle of equal citizenship, nourished to fruition, offers all of the opportunity to belong to a national community while continuing to identify ourselves with smaller groupings of diverse and even conflicting values. Equal citizenship, then, is one institutional response to the tension between autonomy and community.

To be a citizen is not merely to be a consumer of rights, but to be responsible to other members of the community. Indeed, the definition (by law and otherwise) of members' responsibilities to each other is one of the chief indicia that a community exists. Among the responsibilities of citizenship, of course, is the duty to obey the law. But in ideal conception, citizenship also implies some active contribution to community well-being. In the Greek city-state, as Aristotle's remark shows, citizens were expected to be at least part-time public servants. Participation in the community's political life was not only a right but an obligation.

As our sense of what it means to be a participant in the society has enlarged, our definition of the citizen's responsibility has expanded to include the notion that each of us is responsible for taking care of himself and his family. In one perspective, this view of responsibility implies a claim to respect, which the individual can legitimately make against the society. One aspect of the relationship between a citizen's responsibilities and the value of respect is manifested in our philosophy of the criminal process, the process of adjudging someone responsible. As Sanford Kadish has remarked, the constitutional limitations on the criminal process are influenced importantly by our conceptions of the dignity or respect that is owed to each individual. And Herbert Morris has eloquently shown how punishment is part of the right to be treated as a person, rather than an object to be manipulated through 'therapy.' The close linkage of responsibility and respect also implies that full citizenship is incompatible with the dependency of caste. To be a fully respected member of the society, one must be treated

based Jeffersonian viewpoint and the more recent legacy of Hamiltonian Imperialism, to suggest that the principle of equal citizenship provides a break from past policies of territorialism, while at the same time offering a commitment to the future well-being of neglected peoples living in the United States' insular possessions. Furthermore, we contend that the logical, natural, and inevitable denouement of equal citizenship within the American constitutional framework must necessarily culminate in the eventual admission of these citizens into organized and sovereign states of our democratic Federation, unless they choose otherwise. Consequently, statehood for our insular citizens becomes not only a right inherent in their national citizenship, but also a pragmatic solution to the problems of colonialism and inequality which our Constitution does not tolerate. Moreover, we further contend that the right to equality and national citizenship constitute reasonable demands which have been traditionally raised throughout the history of American statehood by the peoples subjected to a burdensome and demeaning colonial experience. As we have

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as capable of taking responsibility. Conversely, the symbolism of dependency is a primary target of the principle of equal citizenship.

From another angle, however, a citizen's responsibility to contribute to society by caring for herself is seen to be the basis not for a claim against society, but for an obligation to her fellow citizens. The ethic of self-reliance is deeply ingrained in American values. Thus, the idea of responsibility does not uniformly support claims of the right to have society act to equalize conditions. As we shall see in examining the problem of economic inequalities, there are many cases in which the responsibilities of citizenship weigh on the other side of the constitutional balance.

The idea of equal citizenship is not incompatible with all forms of inequality. Indeed, hierarchy itself can be a source of self-respect. In any case, most hierarchies in our socieity are difficult for the law to reach. Furthermore, the very existence of law necessarily implies inequalities of some kinds, since the enforecment of norms requires a body of enforcers, who stand in a relation of dominance over others, at least within the confines of the enforcement system. What the principle of equal citizenship offers is not the end of hierarchy, but increased individual mobility within and between hierarchies and a heightened sense that some inequalities are tolerable precisely because they do not 'belie the principle that people are of equal ultimate worth.' The principles' main targets are distinctions of caste, not class.

More specifically, the principle of equal citizenship is not a charter for sweeping economic leveling. While it is surely true that poverty and its results, in some extreme forms, deny the self-respect that is the core of equal citizenship, many equalities are consistent with the notion that each of us is entitled to respect as a person, a participating member of the society. Simone de Beavoir expressed this aspect of equal citizenship-alas, more an ideal than a fact-with her characteristic grace: '[T]he rich American has no grandeur the poor man no servility; human relations in daily life are on a footing of equality. . . .'

*Id.* at 6-11 (footnotes omitted).

seen, equality has served as the foundation for a right to statehood consistently ever since the admission of Vermont, 200 years ago, and has emerged as the pervading issue behind the statehood movement of almost every other community that has entered the Union. In a like manner, the right to national citizenship and the privileges and immunities, which adhere to it were vehemently in support of demands for admission on the part of the citizens of Louisiana, Florida, California, Nevada, the Dakotas, Alaska and Hawaii. In all cases, citizenship was exalted as the direct source of the right to admission or as the basis of a congressional pledge for statehood. The admission of 37 states clearly suggests that Congress has respected this right (at least implicitly) once the constitutional and traditional guidelines for admission have been satisfied.

The admission of each state into the Union heralded, of course, the end of colonial rule and the fulfillment of equal citizenship for the members of each new political community. This new reality has been indicated by several factors: the development of local government capabilities based upon the principles of self-determination and popular sovereignty; and full participation of the citizens of the new state in the decisionmaking process of the Nation. With statehood came new political rights which included voting representation in both Houses of Congress, the right to vote for the President and Vice President of the United States, the right to a voice and vote in the amendment process of the Federal Constitution, full congressional voting representation in the war and treaty making processes, and the right to vote in the selection of Federal judges and officials. The new reality has also indicated the end of all discrimination against residents of the state in the application of Federal laws and programs, the transfer of vital public lands and natural resources to the people of the new State to help them in their economic and social development towards becoming a self-sufficient sovereign entity and, finally the shedding of a collective stigma of inferiority and the birth of a new era of self-confidence and collective pride. Paraphrasing the words of a keen observer, the path to equal citizenship has been slowly blazed by the continuous flow of the self-assured rather than by the anguished tremor of the colonized!

## VI. Conclusion

Today it remains to be seen whether statehood, as a right inherent in the concept of equal citizenship, will be recognized by Congress, the courts, the legal community, the Federal bureaucracy, and, more importantly, by the American public in general. Future areas of debate will be concerned with whether the congressional power to admit new members into the Union is limited or constrained by this constitutional right, once the citizens of a given colony decide to demand statehood. In all

probability, due to the eminently political nature of this issue, the question of statehood will never be fully adjudicated by a court of law even though the fundamental civil rights of the citizens of such an area might be involved. Furthermore, it is plausible that once the irreversible tide of decolonization begins to sweep the American territorial system, the forces of history, the demands of the colonial masses, national public opinion, international pressures, moral arguments, and political considerations will expedite a solution to America's colonial problem and the *end* to the existence of second class citizenship before the end of this century.

However, once the principle of equal citizenship and the plight of our colonial peoples have been fully understood, there becomes no way to deny admission to the citizens of Puerto Rico when and if they exercise their right to self-determination by choosing to demand that status. After all, the concept of statehood, like American democracy, is not static. As the Nation undergoes change, inching towards a more pluralistic, just and egalitarian society, the right of membership in the national community must necessarily expand to include all American citizens living in the overseas possessions. In this context, statehood, as a legitimate source of equal rights, could be the wave of the future and a "quantum leap" in a peoples' long road to freedom!