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BOOK REVIEW

A MORE PERFECT UNION FOR WHOM?

The People's Constitution: 200 Years, 27 Amendments, and the Promise of a More Perfect Union
By John F. Kowal & Wilfred U. Codrington III.
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Amending the federal Constitution has been instrumental in creating and developing the North American constitutional project. The difficult process embedded in Article V has been used by "The People" to expand rights and democracy, fix procedural deficiencies, and even overturn Supreme Court precedent. Yet, it is no secret that the amendment process has fallen to the wayside and that a constitutional amendment in our present age of extreme political polarization feels impossible.

Our nation's history suggests otherwise. In John F. Kowal and Wilfred U. Codrington III's exciting and inspirational new book, they explain that interest in constitutional amendments has coincided with periods of discontent, transformational social change, and even extreme political polarization. This Piece tracks the authors' historical and jurisprudential arguments, focusing on their claim that The People have used the Constitution to welcome marginalized groups into the nation's political community despite their exclusion at the Founding. Although that historical claim is accurate, the campaign for a fully inclusive democracy remains unfulfilled for many. One of those groups is the people of the unincorporated territories of the United States. This Piece examines how and why the people of the unincorporated territories were never meant to be a part of our nation. It then takes the lessons from Kowal and Codrington's book and interrogates what a constitutional

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amendment fully welcoming the unincorporated territories into our political fold would look like.

INTRODUCTION

Few processes are more central to the existence and persistence of the North American democratic project than amending the U.S. Constitution.[1] Since the ratification of the U.S. Constitution in 1788,[2] "The People" have made twenty-seven distinct modifications. Some of those amendments were aimed at curing procedural deficiencies, while others acknowledged the humanity of an entire segment of the North American population, which had been consciously denied by the Constitution's Founders, text, and judicial interpretations of the same.[3] As the number of amendments suggests, these changes did not occur all at once; rather, each passing generation of North Americans breathed new life into the foundational text. The possibility of ongoing improvement, after all, was one of the central purposes of embedding an amendment mechanism into the Constitution in the first place.[4] As time revealed deficiencies in the Constitution's structure and rights protections, Article V vested The People with the right and authority to mend, expand, and bolster the original doctrine as they saw fit.

Today, a constitutional amendment seems like a long shot at best. The present political polarization paints a bleak picture in which three-fourths of the states (a whopping thirty-eight of them) are unlikely to agree on any issue of national importance. This is not the first time, however, that this country has found itself possessed by divisiveness and disagreement. Constitutional amendments have come about both during times of nationwide consensus and, perhaps surprisingly, even in times of political polarization.[5] With that historical lesson in mind, our country should take heart in the promise of achieving a more perfect union through constitutional amendments stewarded by our citizenry. This, at least, is one of the main contentions of a vibrant and inspirational new book by John F. Kowal and Professor Wilfred U. Codrington III, *The People's Constitution:*

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1. See John F. Kowal & Wilfred U. Codrington III, The People's Constitution: 200 Years, 27 Amendments, and the Promise of a More Perfect Union 32–40 (2021). Article V of the federal Constitution provides two avenues for amendment: The first contemplates amendments proposed by Congress through a joint resolution passed by a two-thirds vote. U.S. Const. art V. The second path authorizes two-thirds of the state legislatures to call a convention. Id. Both avenues require ratification of the eventual amendment by three-fourths of the states. Id.

2. Kowal & Codrington, supra note 1, at 38.

3. Id. at 23–26.

4. See id. at 27 (quoting Massachusetts delegate Elbridge Gerry as saying, "The novelty and difficulty of the experiment requires periodical revision").

5. See id. at 5–7.

200 Years, 27 Amendments, and the Promise of a More Perfect Union—a public legal history of all twenty-seven amendments.[6]

The People's Constitution tells an incisive and honest history of how the Constitution did not remain a historical artifact following the Philadelphia Convention of 1787, but rather, was slowly molded to reflect evolving understandings of humanity. Indeed, "much of what we consider the very heart of our national charter . . . derive[s] not from the 4,543 words in the Framers' beta version of our national charter, but rather from the 3,000 words added in periodic upgrades."[7] This story is one of extreme jubilation in moments of uncertainty and of disappointment when the nation seemed poised to elevate its collective understanding of humanity. Nevertheless, the authors explain that with each passing generation, the U.S. Constitution has changed in ways that expanded democracy, guaranteed fundamental rights, and brought more people into the political community of the United States.[8]

Kowal and Codrington also explain that the people who crafted the U.S. Constitution are no more important than those who were prohibited from being in the room where it happened. Surely, the irony would not have been lost on enslaved Africans and Black Americans when hearing the Convention's delegates profess that "'all men are created equal'" when "nearly half of them owned slaves."[9] Poor white colonists were likely skeptical of a national charter being created by delegates most of whom "took it as a given that only men of property, like themselves, could possess the civic virtue necessary for self-governance."[10] And women could only hope that the all-male convention would "[r]emember the [l]adies" when drafting the new national charter.[11] But the power of the story that Kowal and Codrington tell is that the amendment process has been a vehicle for mitigating repeated intransigence against inhabitants of the United States and expanding democracy.

It has, however, been a long time since this nation has taken any steps toward remedying the democracy problem affecting the unincorporated territories of the United States: the nearly four million people without political power under federal jurisdiction in American Samoa, Guam,

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6. Id. John F. Kowal is the Vice President for Programs at the Brennan Center for Justice. Id. at 459. Wilfred U. Codrington III is an associate professor at Brooklyn Law School and a fellow at the Brennan Center for Justice. Id.

7. Id. at 6.

8. See id. at 5 ("*The People's Constitution* tells the story of how the American people took an imperfect Constitution . . . and, despite all obstacles, made it more democratic, more inclusive, and more responsive to the needs of a changing country through the constitutional amendment process.").

9. Id. at 2 (quoting The Declaration of Independence para. 2 (U.S. 1776)).

10. Id.

11. Letter from Abigail Adams to John Adams (Mar. 31, 1776), available at Nat'l Archives: Founders Online, https://founders.archives.gov/documents/Adams/04-01-02-0241 [https://perma.cc/EM74-H927].

Puerto Rico, the Northern Mariana Islands, and the U.S. Virgin Islands.[12] The lack of democratic accountability is astounding. The inhabitants of the territories pay federal taxes, have served in the armed forces, and have been granted U.S. citizenship, with the exception of American Samoans.[13] Since these territories fall under U.S. jurisdiction, they are subject to federal statutes, sometimes in ways that could never apply to the states.[14] Meanwhile, inhabitants of the territories cannot vote for the President or Vice President of the United States, nor do they have voting representation in Congress, rendering them politically powerless.[15] To be sure, this reality was consciously produced. The Constitution's understanding of The People has never included those living in the United States' unincorporated territories.

Their plight is not without a solution. A conventional narrative is that Congress and the courts have traditionally expanded rights and democracy. But Kowal and Codrington highlight the centrality of the amendment process in expanding rights and democracy. Indeed, most significant rights have been protected and produced by constitutional amendment. Accordingly, an amendment providing full voting rights to the U.S. territories would continue the trajectory of democratic expansion by ameliorating the clear lack of democratic accountability for a group that has repeatedly been denied the ability to enter the United States polity.[16] But this optimism should be seriously tempered. It is certainly worth commending the intervention this book makes, but it is no secret that the amendment process has been paralyzed for some time. Leading constitutional scholars have noted as much, explaining that the Constitution has been implicitly amended outside of the formal Article V process through electoral politics, political pressure, legislation, and constitutional interpretation.[17] But *The People's Constitution* serves as a cautious reminder of a lost process that can once again usher in needed change.

This Piece offers a deeper look at Kowal and Codrington's exciting and important text. It also interrogates what a constitutional amendment bringing the U.S. territories into the federal political community could

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12. Tom C.W. Lin, Americans, Almost and Forgotten, 107 Calif. L. Rev. 1249, 1251 (2019).

13. Id. at 1259, 1267.

14. Emmanuel Hiram Arnaud, Llegaron los Federales: The Federal Government's Prosecution of Local Criminal Activity in Puerto Rico, 53 Colum. Hum. Rts. L. Rev. 882, 910 (2022) (explaining how Congress discriminates between states and territories in federal criminal statutes).

15. Lin, supra note 12, at 1254.

16. See Igartúa v. United States, 626 F.3d 592, 594 (1st Cir. 2010) (denying the ability of Puerto Ricans to elect a federal voting representative).

17. See, e.g., Bruce Ackerman, Higher Lawmaking, *in* Responding to Imperfection: The Theory and Practice of Constitutional Amendment 63, 70–74, 79–82 (Sanford Levinson ed., 1995).

look like and applies some of the lessons *The People's Constitution* provides for this endeavor.

I. WHO ARE THE PEOPLE OF THE UNITED STATES?

"Who wrote the United States Constitution?"[18] Those are the opening words of Kowal and Codrington's book, and the authors provide the obvious answer at first: The foundational text was mainly authored by white property-owning men in powdered wigs.[19] Although that may seem elementary to constitutional scholars and just about anyone who paid attention in their high school history course, the most illuminating part of the authors' opening inquiry does not rest with those who were present in Philadelphia, but rather those who were not. Kowal and Codrington use the people excluded from the nation's political community as the lens to further understand the evolution of the federal Constitution. Through this lens, they tell the story of how the North American polity wrote almost half of the Constitution after 1788 and how, over time, more inhabitants of this country participated in the Constitution-making process. In doing so, Kowal and Codrington provide a significant contribution to constitutional law scholarship.

The People's Constitution has three main strengths: (1) the depth and breadth of research combined with its clear distillation and analysis of constitutional history; (2) the ability to connect the history of the amendment process with the strength and the political will of the American people; and (3) the explicit departure from the idea of infallible Founding Fathers, which, in turn, humanizes America's democratic experiment and provides the reader with an understanding that the Constitution is likewise imperfect and is in need of periodic updates.[20] In achieving these goals, the authors employ accessible language, making the story of the amendment process easily understood by lawyers and nonlawyers alike. *The People's Constitution* in this way functions much like an advocate's field manual—providing blueprints for future amendments and their corresponding political struggles.

In the following sections, this review highlights some moments when the Constitution needed repair or when The People clamored for an expansion of rights. Notably, the amendment process was used immediately after the Constitution's ratification to remedy an imperfect document, producing the Bill of Rights. Further, subsequent amendments fixed procedural deficiencies, expanded access to democratic tools, and voiced displeasure with judicial opinions by overturning the Supreme Court on several occasions. Some other proposed amendments, however, met their demise in the treacherous political arena.

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18. Kowal & Codrington, supra note 1, at 1.

19. Id.

20. See id. at 34–43, 66–68.

A. *Article V at the Genesis*

The People's Constitution is a masterfully researched book that carefully tracks almost 250 years of constitutional history.[21] The book accurately covers the varied trajectories of constitutional amendments. The first two chapters cover the creation of the Constitution as a reaction to the weakness of the Articles of Confederation and then meticulously explain why the first ten amendments were crucial in bringing together the fledgling nation.[22] These chapters set the tone for the rest of the book. The authors use letters and the personal writings of the Founders, in which the Founders expressed their views on various topics of debate. They also use relevant stories and vignettes that make the book a pleasurable and relatable read. For example, one of the most excited delegates in Philadelphia was James Madison, who personally reached out to power brokers from each of the former colonies to ensure that a critical mass of delegates attended the Philadelphia Convention, even managing to pull George Washington out of retirement.[23] The authors also lay bare the politicking required to create and amend the Constitution. At the Philadelphia Convention, political allies sought strength in numbers, representatives from smaller states proved to be a thorn in the side of the larger ones, and delegates from Rhode Island did not even bother showing up.[24] The Convention had all the ingredients for failure, but compromise prevailed, giving way to a new foundational charter. Importantly, the authors explain, the delegates compromised on issues that are still being debated today: the scope of the federal government's power,[25] key issues of democracy,[26] and, yes, slavery.[27]

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21. Conservative constitutional scholar Professor Charles Kesler generally praised the book and noted that he believes the Framers designed the amendment process to allow only "deliberate and well considered" amendments to the Constitution. Nat'l Constitutional Ctr., The Crisis of Two Constitutions: The Founders' vs. The Peoples', YouTube, at 21:40 (Oct. 26, 2021), https://www.youtube.com/watch?v=pjNLIvL6IOU&ab_channel=NationalConstitutionCenter (on file with the *Columbia Law Review*).

22. Kowal & Codrington, supra note 1, at 9–77.

23. Id. at 13.

24. Id. at 12–14.

25. The debate over a small or large central government never died down. A recent iteration of that debate at the Supreme Court was the attacks on the Affordable Care Act as exceeding congressional authority. See NFIB v. Sebelius, 567 U.S. 519, 552 (2012).

26. For example, the power to elect representatives to the House was left in the hands of the people of the states, but the states themselves retained the ability to define who could vote in those elections. Senators, the President, and the Vice President would be chosen by intermediaries—senators elected by the state legislatures and the President and Vice President by the Electoral College. Kowal & Codrington, supra note 1, at 22–23.

27. The vestiges of slavery and anti-Black racism are alive and well, and the effects are prominently felt in the criminal justice arena. See generally Michelle Alexander, The New Jim Crow (2010) (analyzing how the criminal legal system structurally discriminates against Black Americans by subjecting formerly incarcerated people to legalized discrimination in employment, housing, voting rights, and education).

The desire to create a novel unifying charter took precedent over objections to some less-than-ideal compromises.[28] After fiercely debating the new federal Constitution, the delegates of the Philadelphia Convention finally agreed to take the Constitution to their home states, albeit with some hesitation due in large part to the Constitution's failure to explicitly protect The People from the new federal government's power.[29] Given that a handful of delegates raised these concerns within the final days of the Convention, the delegates returned to their home states with a new governing document that nobody was entirely happy with.[30] But during the ensuing ratification debates, the supporters of the Constitution, especially Madison, convinced the majority of the states that if the new Constitution were approved, the Federalists would amend the Constitution and add a Bill of Rights.[31] The Founders' faith in each other was not in vain. By 1791, the states and Congress approved the first ten amendments to the Constitution, the Bill of Rights, which ameliorated some of the central fears that the Anti-Federalists had expressed.[32] The federal Constitution survived its first major obstacle—its very genesis—and the amendment process was the vehicle of its salvation.

The authors, and now this Piece, do not recount this story because of its importance to this nation's treasured history, but rather to highlight that the creation of the federal Constitution would not have been possible without an amendment process. Moreover, the authors explain that although the Bill of Rights is rightly celebrated as a paragon of compromise and national trust, it should also be viewed as the first set of corrections to an imperfect Constitution.[33] Many revisions were to come—seventeen more to be exact—and Kowal and Codrington continue their deft storytelling by dividing the remaining seventeen amendments into chapters corresponding to their historical periods.

B. *An Imperfect Constitution Requires Generational Solutions*

Continuing the theme of an imperfect Constitution, the second set of Founding-era amendments tied loose ends from the ratification contest and would be the first time that The People used Article V to overturn Supreme Court precedent. During the ratification contest, Anti-Federalists worried that the Constitution's language undermined the states' sovereign

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28. Chief among those were the various compromises on slavery that made their way into the Constitution, including the Three-Fifths Clause, the Slave Trade Clauses of Article I, and the Fugitive Slave Clause in Article IV. See U.S. Const. art. I, §§ 2, 9; id. art. IV, § 2, cl. 3. These compromises not only enshrined slavery in the Constitution, but also tipped the balance of political power toward slave states. Kowal & Codrington, supra note 1, at 24–25.

29. Kowal & Codrington, supra note 1, at 42–52.

30. Id. at 26–27, 32, 41. Virginia delegate George Mason requested that a Bill of Rights be added to the Constitution during the last week of the Convention. Id. at 26–27.

31. Id. at 37–40.

32. Id. at 64.

33. Id. at 7.

immunity from suit.[34] Sure enough, in 1793, the Supreme Court confirmed the Anti-Federalists' fears in *Chisholm v. Georgia*,[35] in which the Court permitted the estate of a South Carolina businessman to sue the state of Georgia for portions of an unpaid contract.[36] In 1794, The People responded with the Eleventh Amendment, which confirmed that states enjoyed the previously generally understood baseline immunity from suits.[37] The importance of this amendment cannot be understated: "By invoking the . . . amendment process to overturn a . . . judicial ruling, the Eleventh Amendment set an important precedent that would inspire no fewer than five amendments to the Constitution over the years . . . . Its quick adoption demonstrated that Article V provided a means for correcting the Court's errors" and established that The People had a check on the Supreme Court's power to decide cases.[38] In just a few years, Article V became an essential tool for both solving political disputes and expressing The People's views over those of the unelected Supreme Court.

Besides consecrating substantive changes to the Constitution, some amendments have been procedural in nature. About a decade after the ratification of the Eleventh Amendment, the Twelfth Amendment mended deficiencies in the election of the chief executives.[39] The Electoral College,[40] which provided for an indirect system of election and satisfied the "Framer's wariness of popular democracy and political factions, along with their casual accommodation of slavery" turned out to have a few bugs.[41] The Election of 1800 showed that the emergence of political parties and the unification of the presidential and vice presidential race could lead to controversial results.[42] In that election, neither John Adams nor Thomas Jefferson (the two front-runners) received a majority of the vote.[43] When the presidential contest went to the House, Aaron Burr (Jefferson's choice for Vice President) famously kept himself in the running for President.[44] A raucous thirty-six rounds of balloting ensued, and Jefferson emerged victorious.[45] Three years later, the Twelfth Amendment attempted to avoid a repeat of the Election of 1800 by, among other things,

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34. Id. at 66.

35. 2 U.S. (2 Dall.) 419, 464–66 (1793) (opinion of Blair, J.).

36. Id.

37. U.S. Const. amend XI.

38. Kowal & Codrington, supra note 1, at 66–68. Nevertheless, as the authors note, the Supreme Court has departed from the original interpretation of the Eleventh Amendment in recent years. Id.

39. U.S. Const. amend. XII.

40. Id. at art. II, § 1, cl. 3.

41. Kowal & Codrington, supra note 1, at 69.

42. Id. at 71–72.

43. Id.

44. Id.

45. Id.

requiring that the electors vote for President and Vice President on separate ballots.[46]

Within the first decade and a half of the federal Constitution's existence, The People amended the Constitution twelve times.[47] Following this active period, the states would not ratify another amendment for more than sixty years.[48] When they did, in the 1860s and 1870s, entirely new types of amendments emerged from the crucible of war.[49] Kowal and Codrington explain that the Reconstruction Amendments departed in form and substance from the previous twelve in significant ways.[50] Instead of simply preserving individual rights or fixing procedural deficiencies, the Thirteenth, Fourteenth, and Fifteenth Amendments accomplished the momentous and belated objective of recognizing the humanity of an entire segment of the population while expanding the enumerated powers of Congress.[51]

In the Civil War's aftermath, the Reconstruction Amendments were aimed at eradicating slavery as an institution and substantiating the claim that "all men are created equal." Kowal and Codrington explain that the Thirteenth Amendment "represented something entirely new in constitutional law. For the first time, the Article V amendment process was used to expand the power of the national government, augmenting the list of Congress's enumerated powers in Article I."[52] The amendment prohibited slavery in the United States, except as punishment for a crime, and the second section of the amendment also gave Congress the power to enforce the amendment by appropriate legislation.[53] As Kowal and Codrington note, the amendment simultaneously granted rights to formerly enslaved peoples, restricted the private acts of individuals who wanted to own human chattel, and provided Congress with new powers to enforce that prohibition.[54] This innovation was a significant departure from previous amendments.

The Fourteenth Amendment picked up where the Thirteenth left off. It soon became apparent that the abolition and prohibition of slavery was insufficient to afford formerly enslaved people full membership in the

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46. Id.

47. Id.

48. Id.

49. Id. at 90–105.

50. Id. at 138–40.

51. Following the ratification of the Reconstruction Amendments by the Northern states and, eventually, by Southern states as a condition for being readmitted to the Union, Black people suffered from massive backlash in Southern states. The Black Codes, de jure segregation, de facto segregation, and the era of mass incarceration have been serious, and at times seemingly insurmountable, obstacles to eradicating racism in the United States. See Kowal & Codrington, supra note 1, at 98–99.

52. Id. at 97.

53. U.S. Const. amend. XIII.

54. Kowal & Codrington, supra note 1, at 96–97.

political community of the United States.[55] Many Southern states banned formerly enslaved people from participating in "certain lines of work, limiting them from entering into contracts or testifying in court, and even restricting their physical movement."[56] The Fourteenth Amendment broke new ground by "guaranteeing the citizenship of all persons born or naturalized in the United States" and "prohibiting [state governments] from passing laws abridging the privileges or immunities of the citizens of the United States, depriving any person of life, liberty, or property without due process of law and denying to any person the equal protection of the law."[57] The Constitution was thus amended to provide the contours of national citizenship (amorphous as they may be), and repudiate the central holding of the Supreme Court's decision in *Dred Scott v. Sanford*.[58] Moreover, section two of the amendment repealed the dreaded Three-Fifths Clause and included a provision permitting Congress to penalize states that denied suffrage to any male over the age of twenty-one by diminishing that state's congressional representation—a powerful provision that has never been invoked in the nation's history.[59]

Within a decade of the Civil War, the Reconstruction period produced yet another constitutional modification: the Fifteenth Amendment.[60] The Thirteenth and Fourteenth Amendments did not cause white Americans to fully embrace formerly enslaved people.[61] For example, the continuous denial of suffrage was a focal point, especially in the former Confederate states that sought to ban Black people from the ballot box while circumventing the Thirteenth and Fourteenth Amendments. In response, the Fifteenth Amendment prohibited the denial of suffrage on account of race, color, or previous condition of servitude. And with this amendment, the third era of constitutional reforms came to an end.

The next great epoch of constitutional changes the authors identify is the Progressive Era. The Progressive Era, the authors explain, shares an uncanny resemblance to the current age of political division and economic disparities.[62] It was the peak of the Gilded Age—a time of brazen inequality when "[m]oneyed interests dominated politics and policy making" and "a conservative Supreme Court stood as a barrier to progressive reform."[63] This era was also marked by infamous decisions curtailing federal and local government's regulation of the marketplace, signaling that the economic

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55. Id. at 99.

56. Id.

57. Id. at 103.

58. 60 U.S. (19 How.) 393, 447 (1856) (enslaved party); superseded by constitutional amendment, U.S. Const. amend. XIV; see also Kowal & Codrington, supra note 1, at 103.

59. U.S. Const. amend. XIV, § 2.

60. U.S. Const. amend. XV.

61. Kowal & Codrington, supra note 1, at 109–10.

62. Id.

63. Id.

and legal system put the interests of robber barons and titans of industry well above the interests of people who made those fortunes possible.[64] The People's response was most notably manifested in the creation of two political parties, The Populists and The Progressives, which generally sought to reform politics, curb corporations and the wealthy, and place everyday people's welfare above all else.[65] The era was also extremely politically polarized, seeing the Republican North and West encounter the Democratic South in fierce political contests resulting in "frequent swings in the balance of political power" and "five straight presidential elections . . . [in which] the popular vote margin was three percentage points or less."[66] Despite the era's political turmoil, The People of the United States managed to band together and ratify four significant modifications to the federal Constitution from 1909 to 1920.

The Sixteenth Amendment represented the first of several confrontations between moneyed interests and the masses and established Congress's power to lay and collect taxes on incomes. Ratified over the dissent of corporations and even the Supreme Court, the Sixteenth Amendment was directed at the millionaire class that had been able to evade taxes on their fortunes while the rest of the country footed the bill.[67] This Amendment resulted from endless jousting between a Supreme Court sympathetic to the moneyed interests, corporations, and families of unfathomable wealth on one hand, and the common person on the other, and ultimately saw a unified population triumph.[68] The Seventeenth Amendment followed suit.[69] In the wake of "public outrage over corruption in the world's greatest deliberative body," The People insisted on the direct election of Senators.[70] The corruption associated with choosing senators was quite remarkable: "Senate seats were bartered for patronage or special favors to the powerful," and there were instances of outright bribery.[71] Famously, in 1900 one mine owner spent over $2 million over a decade in a successful scheme to purchase a Senate seat by paying lawmakers' mortgages and buying their votes.[72] Despite the amendment's ratification, the authors point out that the Senate is still by and large a Rich Man's Club.[73] Next, the Nineteenth Amendment was the

64. Id. at 128–29.

65. Id.

66. Id. at 127.

67. Id. at 130, 132.

68. As the authors note, this was the fourth time a constitutional amendment corrected an objectionable Supreme Court ruling, in this case, Pollock v. Farmers' Loan & Trust Co., 158 U.S. 601 (1895), which had struck down a federal bill imposing a direct income tax. Kowal & Codrington, supra note 1, at 133.

69. U.S. Const. amend. XVII.

70. Kowal & Codrington, supra note 1, at 135.

71. Id. at 136.

72. Id.

73. Id. at 139–40.

culmination of a century-old campaign for women's suffrage.[74] The history of the Nineteenth Amendment has been well told elsewhere,[75] but Kowal and Codrington situate it within the context of the prior eighteen amendments.[76] The Nineteenth Amendment represented a massive expansion of the political community of proportions not seen since the Reconstruction Amendments and again welcomed people who had been explicitly barred from exercising their voices into the political community.[77] By now, a pattern of constitutional amendments should be clear. Through political discourse, in response to brazen disrespect for democratic systems, or as a product of war, The People worked to expand democracy and redefine who "The People" of the United States are. But by the 1920s, "the energy of the Progressive Era was spent" and "pro-business fundamentalism of the *Lochner*-era Supreme Court severely limited the power of Congress and state legislatures to solve pressing problems in a rapidly transforming economy."[78] The country would not see a similar expansion of democracy until the 1960s.

C. *Modern Expansions of Democracy*

The next expansion of democracy came by way of one of the Framers' most obvious constitutional oversights. After much discussion as to the location and purpose of a capitol, the Framers decided to build the District of Columbia on land carved out of Virginia and Maryland.[79] Millions of U.S. citizens have lived in Washington, D.C., and have worked to build this nation, yet the Framers never included them in the nation's political community.[80] Before the 1960s, residents of the nation's capital could not vote for President, Vice President, or a voting member of Congress.[81]

Further, the federal Constitution placed the responsibility to govern the District entirely in the hands of the U.S. Congress.[82] The antithetical nature of the arrangement was not lost on the founding generation. During the Constitution's ratification debates in New York, one delegate argued that the "plan for the capital 'departs from every principle of freedom'" and that "subjecting American citizens 'to the exclusive legislation of Congress, in whose appointment they have no share or vote,'

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74. U.S. Const. amend. XIX.

75. See, e.g., Elaine Weiss, The Woman's Hour: The Great Fight to Win the Vote (2019).

76. Kowal & Codrington, supra note 1, at 145.

77. Id.

78. Id. at 154.

79. The History of Washington, D.C., Wash. D.C., https://washington.org/DC-information/washington-dc-history [https://perma.cc/56VP-26K5] (last visited Oct. 14, 2022).

80. Id.

81. Kowal & Codrington, supra note 1, at 280.

82. U.S. Const. art. I, § 8, cl. 17.

would pave the way for 'tyranny.'"[83] Over a hundred years later, Senator Ted Kennedy of Massachusetts would refer to the District as "America's last colony,"[84] seemingly forgetting about the unincorporated territories (but more on that later).

It would take over one hundred years to meaningfully, albeit inadequately, address this glaring issue of democratic accountability. Kowal and Codrington explain that the "first proposed constitutional fix dates back to 1888," but that proposal was met with radio silence.[85] Several more people took up the charge, but a proposal would not garner support until 1960 when Senator Kenneth Keating brought a constitutional amendment proposal to the Senate floor.[86] The version he introduced was very different from the version that Congress ultimately approved.[87] Under his version, the District's residents would have "the right to 'elect [. . .] delegates to the House of Representatives,' who could become full voting members upon the approval of Congress, along with the right to choose presidential electors."[88] The Senate approved the proposed amendment with little opposition. But the House would "pare down the measure to provide only for presidential electors for the District of Columbia."[89] The District's presidential electors would be appointed "'in such manner as the Congress may direct,'" and the proposal "ensured that the District could never have more electors than the least populous state."[90] According to Congressman Emanuel Celler, the thought process behind paring the amendment down was to make a more realistic and politically palatable proposal.[91] The practical consequence, however, was the imposition of a "permanent inferior status upon the District's participation in the electoral college."[92] Congress approved the amendment, and the states ratified the Twenty-Third Amendment nine months later.[93]

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83. Kowal & Codrington, supra note 1, at 184 (quoting Statement of Thomas Tredwell, *in* 2 The Debates in the Several State Conventions on the Adoption of the Federal Constitution as Recommended by the General Convention at Philadelphia in 1787, at 396, 402 (Jonathan Elliot ed., Philadelphia, J.B. Lippincott Co. 1836)).

84. Id. at 230 (quoting Voting Representation for the District of Columbia, Hearing Before the Subcomm. on Const. Amends. of the S. Comm. on the Judiciary, 91st Cong. 2 (1970) (statement of Sen. Ted Kennedy)).

85. Id. at 185.

86. Id.

87. Id. at 230.

88. Id. at 185 (quoting 106 Cong. Rec. 1759 (1960) (statement of Sen. Keating)).

89. Id. at 186.

90. Id. (quoting U.S. Const. amend. XXIII).

91. Id. at 186.

92. Id. (quoting 106 Cong. Rec. 12,563 (1960) (statement of Rep. John Lindsay)).

93. Notably, but unsurprisingly, ten of the eleven states that did not ratify the amendment were former members of the Confederacy. There was, to be sure, heavy Southern opposition to enfranchising residents of Washington, D.C., which had by the 1960s an increasingly significant Black population. Id. at 188.

The last expansion of democracy through the amendment process occurred in 1971 when the Twenty-Sixth Amendment extended suffrage to citizens aged eighteen years or older. The Constitution does not include age restrictions for voting. One of the most consequential compromises of the Philadelphia Convention was to leave the procedural elements of voting in the hands of the states. As a result, just about every state's minimum voting age was twenty-one. Kowal and Codrington explain that the campaign to welcome young adults into the political fold was long and initially spurred by military conflicts.[94] The Second World War prompted Congressman Jennings Randolph to introduce what would eventually become the Twenty-Sixth Amendment in 1942. In his view, those under the age of twenty-one should be considered old enough to vote in the elections of the country for which they gave their lives.[95] Initially, the proposed amendment received little support, but Randolph would reintroduce the amendment over the course of three decades until 1971, when the confluence of the counterculture, the terrors of the Vietnam War, and the youth anti-war protests reached a fever pitch.[96] As with many other amendments, the path to ratification was no walk in the park. A contingent of dissenters felt that young adults lacked the intellectual capacity to cast votes for a representative, while another group felt it wiser to force the states to lower the voting age via federal legislation—an attempt that the Supreme Court rebuked.[97] Eventually, the pressure of the amendment's supporters and a confusing Supreme Court voting rights decision spurred even the amendment's detractors to lend their support.[98] With its ratification, the last great era of constitutional amendments came to a close.

D. *Lessons Learned*

As much success as past generations have had in amending the Constitution, there has also been much failure and disillusion. But, as Kowal and Codrington contend, these failures provide fascinating insights and lessons for our understanding of the Constitution and future advocacy. The Bill of Rights, for example, originally consisted of twelve proposed amendments, two of which fell victim to Article V's difficult process.[99] The "original First Amendment" would have regulated the size of the districts in the House of Representatives, but it ultimately failed primarily because the "final version [was] sliced and diced by a drafting

94. Id. at 207–11.

95. Id. at 207.

96. Id. at 207, 211–14.

97. Oregon v. Mitchell, 400 U.S. 112, 117–18 (1970). By repudiating the Supreme Court's opinion in *Oregon v. Mitchell*, the amendment joined the ranks of six other amendments adopted in response to Supreme Court rulings. Kowal & Codrington, supra note 1, at 208, 214.

98. Kowal & Codrington, supra note 1, at 212–15; see also *Mitchell*, 400 U.S. at 112.

99. Kowal & Codrington, supra note 1, at 49.

committee, imposed a complicated formula," and was "sloppily drafted, to say the least."[100] The "original Second Amendment" had a different fate.[101] That measure sought to curtail Congress's ability to raise their own wages, requiring that changes in their compensation not take effect before the next election.[102] Only six states ratified the amendment, seemingly casting the amendment into the dustbin of history.[103] In a surprising turn of events, a student writing a term paper in 1982 discovered the amendment and slowly convinced the minimum remaining states to ratify it by 1992.[104] Apparently, for an amendment, there is hope for life after death, unless Congress imposes a time limit for state ratification, as is now the norm.

Kowal and Codrington also explain that many amendments have expired following major political pushes for their adoption. For example, in the early twentieth century millions of children fueled the nation's workforce. They toiled countless hours in dangerous conditions, often risking, and losing, life and limb. A sensible campaign emerged to regulate child labor.[105] At first, children's advocates attempted to convince individual state legislators of their cause, but that approach resulted in a nonuniform collection of laws, many of which were only protective in name and toothless in practice.[106] Advocates then turned to the federal legislature. Congress attempted to regulate child labor, and twice the Supreme Court, which was in the thick of the *Lochner* era, struck down those statutes. Seeing no other available path, reformers crafted a simple amendment granting Congress the "power to limit, regulate, and prohibit the labor of persons under eighteen years of age."[107] The amendment passed with overwhelming majorities in the House and the Senate but would meet its demise in the state ratification contests.[108] Powerful interests banded together, creating a "sophisticated opposition campaign bankrolled by big business."[109] The campaign relied on "misleading and

100. Id.

101. Id. at 50–51, 244–45.

102. Id. at 50.

103. Id. at 51.

104. Richard B. Bernstein, The Sleeper Wakes: The History and Legacy of the Twenty-Seventh Amendment, 61 Fordham L. Rev. 497, 536–37 (1992) (detailing the events of a student learning about the forgotten amendment).

105. John A. Fliter, Child Labor in America: The Epic Legal Struggle to Protect Children 123 (2018) (noting the campaign to use Article V to amend the Constitution in favor of child labor regulation).

106. Kowal & Codrington, supra note 1, at 218–19.

107. Id. at 155 (internal quotation marks omitted) (quoting Proposed Amendment to the Constitution, H.R.J. Res. 194, 68th Cong., 43 Stat. 670, 670 (1924)). This amendment would have directly overruled one of the Supreme Court's decisions on child labor, Hammer v. Dagenhart, 247 U.S. 251, 276 (1918), which found that Congress could not pass nationwide laws regulating child labor under its power to regulate interstate commerce. Instead, the power to regulate child labor conditions was purely in the hands of the states. Id.

108. Kowal & Codrington, supra note 1, at 156–57.

109. Id. at 156.

demagogic attacks" and argued that the amendment would take away the rights of parents to educate and discipline their children.[110] Ultimately, these attacks doomed the amendment.[111] Countermovements, Kowal and Codrington show, are powerful and effective tools for sinking amendment campaigns.

Finally, the authors provide a word of caution. As much as courts have been, at times, harbingers of justice[112] and alternatives to the amendment process,[113] they have also significantly weakened the strength of constitutional amendments. Kowal and Codrington make this point clear. One of the most notorious examples comes from the aftermath of the Reconstruction Amendments. The Fourteenth Amendment prohibited the federal government and states from abridging the "privileges and immunities of citizens of the United States."[114] And for many involved in the Fourteenth Amendment's creation, the phrase "privileges and immunities" was associated with an expansive definition, often covering "the personal rights guaranteed and secured by the first eight amendments to the Constitution."[115] But the Supreme Court reduced the Privileges and Immunities Clause "to jurisprudential irrelevance"[116] when it ignored the clear intent of its principal authors in finding that the Privileges and Immunities Clause merely stood for a "set of rights relating to *national* citizenship from the right to access courts and government agencies to the free use of seaports and navigable waters."[117] The Supreme Court all but gutted the purpose and power of the Fourteenth Amendment. A similar fate awaited section five of the Fourteenth Amendment and the enforcement section of the Fifteenth Amendment.[118]

II. A CONSTITUTIONAL AMENDMENT FOR THE U.S. TERRITORIES

The People's Constitution is primarily about hope in the promise of our democratic experiment. Members of this nation's polity can continue

110. Id.

111. Id.

112. See, e.g., Obergefell v. Hodges, 576 U.S. 644, 681 (2015) (holding that "there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character"); Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954) (holding that "in the field of public education the doctrine of 'separate but equal' has no place" and that "[s]eparate educational facilities are inherently unequal").

113. Civil rights litigation has been a vehicle to incorporate the aims of failed amendments into the jurisprudential corpus of state and federal courts. Kowal & Codrington, supra note 1, at 229–30 (describing how civil rights litigation achieved many of the principal aims of the failed Equal Rights Amendment).

114. U.S. Const. amend. XIV, § 1.

115. Kowal & Codrington, supra note 1, at 104 (internal quotation marks omitted) (quoting Cong. Globe, 39th Cong., 1st Sess. 2765 (1866)).

116. Id.

117. Id. at 120 (citing the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872)).

118. Id. at 120–21.

shaping the Constitution in a manner that puts the interests of everyday people above all else. Fueling this belief are the stories told by Kowal and Codrington: Amendments have expanded democracy, fixed constitutional bugs, and even reversed the Supreme Court. Yet, this nation's principles of, and commitment to, democracy have not been extended to all its inhabitants. When it comes to a dearth of democratic accountability, the millions of politically powerless U.S. citizens and U.S. nationals residing in the several territories and possessions of the United States immediately come into to view.

A. *Expansion and Exclusion*

Returning to a central theme of the book: Who are The People of the United States? Kowal and Codrington explain that, for a long time, The People did not include significant portions of the population like Black people, women, or even those living in our nation's capital. But this Piece goes even further and argues that The People has never included those living in the United States' unincorporated territories. To understand why the territories would not be included, one can look at the evolution of what Alexander Hamilton[119] and Chief Justice John Marshall[120] called the great "American empire."

Territorial expansion has been at the heart of United States history. The colonists that reached North America adopted, applied, and perfected a style of settler colonialism that catered to an unquenchable thirst for land,[121] and thirteen colonies were not enough. That feeling was palpable even prior to the American Revolution when, in 1754, the French and Indian War began as the result of the British colonists' claims to lands outside of their borders. The thirst for land was so considerable that the Crown's attempts at tempering westward expansion made their way into the Declaration of Independence.[122] Following the war, a precise mechanism for acquiring land was not included in the Constitution, but the Founders still had the foresight to include the general mechanisms for

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119. The Federalist No. 22, at 107 (Alexander Hamilton) (Jim Miller ed., 2014). Hamilton's phrase was somehow both exclusive and inclusive. It reads: "The fabric of American empire ought to rest on the solid basis of the consent of the people." Id. (emphasis omitted). "Empire" implies at a minimum the dispossession of land followed by conquest by the hegemon's population.

120. Loughborough v. Blake, 18 U.S. (5 Wheat.) 317, 319 (1820).

121. See Natsu Taylor Saito, Tales of Color and Colonialism: Racial Realism and Settler Colonial Theory, 10 Fla. A&M U. L. Rev. 1, 6 (2014).

122. The Declaration of Independence para. 9 (U.S. 1776) ("He has endeavored to prevent the population of these States; for that purpose . . . raising the conditions of new Appropriations of Lands."). Those lands that had been at the center of the conflict during the French and Indian War became the prized possessions of the United States in the form of the Northwest Territories.

territorial governance and admitting new states into the Union.[123] Soon enough, the nation's geographical breadth would reach the West Coast, generally displacing and killing the local population, replacing those peoples with white settlers, and admitting those new territories as states along the way.[124]

Since the Founding, there was no question that an acquired territory would become a state of the Union in due course. The Supreme Court in *Dred Scott* made that point clear when it explained that a territory "is acquired to become a State, and not to be held as a colony and governed by Congress with absolute authority."[125] Then came 1898. Following the Spanish–American War, Spain ceded the Philippines, Guam, and Puerto Rico to the United States. For the first time, the United States acquired noncontiguous land that had a local non-white population with foreign customs and that was largely untouched by U.S. interests or settlers.[126] Following the acquisition, the nation questioned what position these islands would have within the Union.[127] This question caused the executive branch, in a departure from previous treaties of acquisition, to place the responsibility of defining the inhabitants' civil and political rights with Congress.[128] In Congress, Representative Thomas Spight stated the dilemma clearly: The "inhabitants are of wholly different races of people from ours—Asiatics, Malays, negroes and mixed blood. They have nothing in common with us and centuries cannot assimilate them."[129] So what would the nation do with its new territories?

The Supreme Court settled the matter in the infamous *Insular Cases*.[130] In these cases, the Supreme Court would explain that the newly acquired territories were "foreign to the United States in a domestic

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123. U.S. Const. art. IV, § 3. Notably, the Articles of Confederation also included several sections regulating the mode of expansion. See, e.g., Articles of Confederation of 1781, arts. VI, IX (detailing state duties and restrictions).

124. Roxanne Dunbar-Ortiz, An Indigenous Peoples' History of the United States 117–33 (2014).

125. Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 447 (1856) (enslaved party), superseded by constitutional amendment, U.S. Const. amend. XIV.

126. See Arnaud, supra note 14, at 901–02.

127. Sam Erman, Almost Citizens: Puerto Rico, the U.S. Constitution, and Empire 27–46 (2019) [hereinafter Erman, Almost Citizens].

128. Treaty of Peace Between Spain and the United States, Spain-U.S., art. IX, para. 2, Dec. 10, 1898, 187 Consol. T.S. 100 (finding that the "civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by the Congress"). Moreover, it "bears noting that this was the first time in its history that the United States acquired territories without the concomitant promise of citizenship or eventual statehood." Luis Fuentes-Rohwer, The Land that Democratic Theory Forgot, 83 Ind. L.J. 1525, 1538 (2008).

129. 33 Cong. Rec. 2105 (1900) (statement of Rep. Spight).

130. See Christina Ponsa-Kraus, A Note on the *Insular Cases*, *in* Foreign in a Domestic Sense: Puerto Rico, American Expansion, and the Constitution 389–92 (Christina Ponsa-Kraus & Burke Marshall eds., 2001) (noting "differences in the lists of opinions cited" as *Insular Cases*).

sense,"[131] and that sometimes the territories could be construed as domestic under federal law, but other times not.[132] Further, the Supreme Court explained that the newly acquired territories were "unincorporated" ones and that at least some constitutional provisions did not apply ex propio vigore.[133] The Supreme Court would further define the constitutional relationship between the territories and the mainland when it refused to acknowledge that Puerto Ricans became U.S. citizens upon acquisition (despite the language of the Fourteenth Amendment), but were also not "aliens" under national immigration law.[134] The granting of citizenship to Puerto Ricans in 1917 did not mean much either. It did not incorporate the Island (nor would it incorporate any of the other territories)[135] and only meant that inhabitants of the unincorporated territories could travel freely into the states and enjoy the benefits of citizenship therein.[136]

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131. Downes v. Bidwell, 182 U.S. 244, 341–42 (1901).

132. See id. at 270–71 (noting "territories are not states within the judicial clause of the Constitution" nor "within the clause of the Constitution providing for the creation of . . . courts" but "are states as that word is used in treaties with foreign powers"). Prior to the *Insular Cases*, the Constitution had always given Congress plenary power to legislate over the territories and treat them differently under the Territory Clause. Christina Ponsa-Kraus, *Untied* States: American Expansion and Territorial Deannexation, 72 U. Chi. L. Rev. 797, 815–16 & n.84 (2005).

133. See Balzac v. Porto Rico, 258 U.S. 298, 307–09 (1922) (noting that incorporating Puerto Rico into the Union would "ex proprio vigore make applicable the whole Bill of Rights," but instead a separate bill of rights excluding the right to trial by jury was created). Judge Torruella summarized the "doctrine for which the *Insular Cases* have become known," sometimes referred to as the "standard account": "[I]n the case of unincorporated territories—that is, those for which, at the time of acquisition, the United States did not express an intention of incorporating into the Union—only those parts of the Constitution dealing with 'fundamental' rights apply." Igartúa-de la Rosa v. United States, 417 F.3d 145, 164 (1st Cir. 2005) (en banc) (Torruella, J., dissenting). Moreover, only incorporated territories were destined for statehood. Fitisemanu v. United States, 1 F.4th 862, 876 (10th Cir. 2021) ("[The] Fourteenth Amendment's authors could only have been speaking of incorporated territories destined for statehood, not the unincorporated territories . . . ."). Not all scholars agree with the standard account. Professor Christina Ponsa-Kraus, for example, has contested that the *Insular Cases* created a constitution-free zone, instead positing that the cases created a new domestic territory that could be governed and later relinquished. Ponsa-Kraus, supra note 131, at 798–800.

134. Gonzalez v. Williams, 192 U.S. 1, 13, 16 (1904).

135. See *Balzac*, 258 U.S. at 304–05 (1922) ("It was further settled . . . that neither the Philippines nor Porto Rico was territory which had been incorporated in the Union or become a part of the United States, as distinguished from merely belonging to it; and that the acts giving temporary governments to the Philippines . . . had no such effect." (citations omitted)).

136. United States v. Cotto-Flores, 970 F.3d 17, 51 (1st Cir. 2020) (Torruella, J., concurring) ("[A]ll the granting of U.S. citizenship did for the residents of Puerto Rico was to allow them the right to enter the United States freely, and there exercise full citizenship rights if they became residents . . . ."). See generally Christina D. Ponsa-Kraus, A Perfectly Empty Gift, 119 Mich. L. Rev. 1223 (2021) (reviewing Erman, Almost Citizens, supra note 126) (noting how "U.S. citizenship of Puerto Ricans became an ambiguous sort-of

B. *Toward More Democratic Ends*

Today, those living in the U.S. territories remain second-class citizens and cannot participate in the national democratic project. The Supreme Court has recently reminded the nation of this reality. In the last eight years alone, the Court explained three times that the territories remain at the whim of Congress's plenary powers.[137] Lower federal courts have also done their bit.[138] But most egregiously, people living in the territories cannot vote for the people who are making decisions about their future. They lack the ability to vote for the President or Vice President of the United States or for any voting member of Congress. Instead, they get a consolation prize: a nonvoting member of Congress.[139]

It does not have to be this way. A constitutional amendment granting the territories votes in the Electoral College and voting representation in the Senate and House of Representatives would alleviate their fundamentally undemocratic governance.[140] It is true that the Constitution has not been amended to expand democracy in almost a half-century[141] and that the current political divide does not bode well for advocates needing to reach across the aisle. But there may yet be hope in the Article V amendment process for the people of the territories. In fact, Kowal and Codrington provide valuable insight by way of a similar struggle for voting rights in the District of Columbia.[142]

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citizenship"). Notably, American Samoans have not been conferred birthright citizenship by Congress. *Fitisemanu*, 1 F.4th at 865.

137. See United States v. Vaello Madero, 142 S. Ct. 1539, 1541 (2022) (holding that, under the Territories Clause, Congress may extend fewer benefit programs to the U.S. territories as long as there is a rational basis for doing so); Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC, 140 S. Ct. 1649, 1661 (2020) (holding that officers appointed to the congressionally created Puerto Rico Financial Oversight and Management Board pursuant to the Territories Clause were not officers of the United States subject to the Appointments Clause); Puerto Rico v. Sanchez Valle, 579 U.S. 59, 73 (2016) (holding that Puerto Rico, unlike the states, was not a separate sovereign for purposes of the double jeopardy clause because its prosecutorial power stems from Congress).

138. See, e.g., *Fitisemanu*, 1 F.4th at 877; *Cotto-Flores*, 970 F.3d at 30; United States v. Liburd, 291 F. Supp. 2d 383, 385–86 (D.V.I. 2003).

139. See Peter Clegg, Mette Marie Stæhr Harder, Elisabeth Nauclér & Rafael Cox Alomar, Parliamentary Representation of Overseas Territories in the Metropolis: A Comparative Analysis, 60 Commonwealth & Compar. Pol. 229, 242–43 (2022). The District of Columbia sent its first nonvoting delegate to Congress in 1971. Congress granted the District the ability to have its own elected city council a few years later. Kowal & Codrington, supra note 1, at 231.

140. Although an uphill battle, an amendment has several advantages. Statehood for some territories, for example, has been lost in political purgatory because it connotes a potential loss of national identity and culture and is not a decolonial option. Voting rights legislation would be subject to repeal or amendment by a bare majority of Congress. A push for an amendment could reinvigorate the movement for democratic accountability without affecting the relationship between the territories and the federal government.

141. Kowal & Codrington, supra note 1, at 7.

142. The District of Columbia should also be afforded full participation in federal politics.

Kowal and Codrington explain that after the Twenty-Third Amendment was ratified, the logical next step for many advocates was to secure a constitutional amendment providing voting representation to D.C. residents.[143] It would be hypocritical, the argument went, to deny the very inhabitants of the nation's capital representation in the Congress that directly governed them.[144] Yet, when advocacy for a new D.C. amendment began in the late 1960s, politics would trump democracy.[145] The effort intensified in 1975, when a large coalition engaged in a "phone-athon," an effort to convince congressional members through direct constituent outreach.[146] After gaining important new sponsors, a new proposal emerged. The new amendment would repeal the Twenty-Third Amendment and give District residents the right to participate in the ratification of new amendments as well as full voting representation in Congress as if the District were a state.[147]

Unlike the Twenty-Third Amendment, which sailed through Congress and was quickly ratified by the states, the new proposal ran into a brick wall. The obstacle was not objections to the propriety of expanding democracy but rather concerns about which political party would benefit from the amendment. Washington, D.C., had seen a significant expansion in its African American population and a decline in its white population throughout the mid-twentieth century.[148] The result was a District that leaned heavily toward the Democratic Party.[149] This political reality was front and center during the congressional hearings and debates on the amendment. Civil rights attorney Joseph Rauh Jr. warned that the amendment would face fierce opposition because the D.C. senators likely would be Black and "[l]ikely, there would be two Democrats. Likely, there would be two liberals."[150] He was right. Virginia Congressman M. Caldwell Butler plainly stated: "It seems inconceivable to me that legislatures across the land will support the expansion of the United States Senate to include

143. Kowal & Codrington, supra note 1, at 230. The original version of the Twenty-Third Amendment included some voting representation in Congress, but it was later removed from the proposal out of fear that the amendment would not garner enough support. Id. at 185–86.

144. See id. at 185–86.

145. See id. at 230.

146. Id. at 232.

147. See id. at 231–33.

148. See id. at 188 (explaining that from 1950 to 1960 African Americans went from being outnumbered two-to-one by white citizens to being a majority of the District's population).

149. See id. at 189.

150. Id. at 233 (internal quotation marks omitted) (quoting Representation for the District of Columbia, Hearing Before the Subcomm. on Civ. & Const. Rts. Amends. of the H. Comm. on the Judiciary, 95th Cong. 81 (1977) (statement of Joseph Rauh Jr., General Counsel, Leadership Conference on Civil Rights)).

two entirely urban-oriented members in that body."[151] And Senator Ted Kennedy acknowledged that the opposition mainly arose from the "fear that Senators elected from the District of Columbia may be too liberal, too urban, too black, or too Democratic."[152] Even though the amendment would get out of the House and Senate, it would only garner the support of sixteen state legislatures—all controlled by the Democrats.[153]

The District and the U.S. territories share many similarities. Both are subject to the plenary powers of Congress,[154] neither have voting representation in the federal legislature, both have a majority-minority population, and both inhabit an amorphous space between statehood and foreign land. People born in the territories, with the exception of American Samoa, are U.S. citizens, and people from all the territories have served and died in service of the United States.[155] It seems odd, then, that Congress has never seriously considered an amendment giving the territories representation in Congress or votes in the Electoral College. Using Kowal and Codrington's analysis of the D.C. amendments as a guidepost, however, it is no secret that this type of amendment would face an uphill battle. Similar to the D.C. voting rights amendment, most detractors would rely on arguments irrelevant to the question of representative democracies.

Would the territories be Republican or Democratic states? This argument is as old as our nation. For example, when new states began to be formed out of the Northwest Ordinance, many Federalist congressmen opposed the admission of some states because they "perceived that the

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151. Id. at 234 (internal quotation marks omitted) (quoting 124 Cong. Rec. 5105 (1978) (statement of Rep. Butler)). "I subscribe to the principle that the time has come that the District of Columbia should have representation in Congress . . . but what I offer the members is a kite that will fly." Id. (internal quotation marks omitted) (quoting 124 Cong. Rec. 5264 (1978) (statement of Rep. Butler)).

152. Id. at 235 (quoting 124 Cong. Rec. 26,345 (1978) (statement of Sen. Ted Kennedy)).

153. Id. at 234–36.

154. The territories and the District of Columbia are governed under two separate provisions of the Constitution. Compare U.S. Const. art. I, § 8, cl. 17 ("Congress shall have Power . . . To exercise exclusive Legislation in all Cases whatsoever . . . and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be."), with id. art. IV, § 3, cl. 2 ("Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States.").

155. See, e.g., Shannon Collins, Puerto Ricans Represented Throughout U.S. Military History, DOD (Oct. 14, 2016), https://www.defense.gov/News/News-Stories/Article/Article/974518/puerto-ricans-represented-throughout-us-military-history/ [https://perma.cc/TN2A-N57A]; Braedyn Kromer, Thousands of U.S. Veterans Call the Island Areas Home, U.S. Census Bureau (May 2, 2016), https://www.census.gov/newsroom/blogs/random-samplings/2016/05/thousands-of-u-s-veterans-call-the-island-areas-home.html (on file with the *Columbia Law Review*).

new state would vote Republican."[156] And, as Kowal and Codrington explain, similar arguments have arisen in opposition to the push for D.C. voting rights. So, it should be no surprise that when Donald Trump spoke to the former governor of Puerto Rico, Ricardo Rosselló, about Puerto Rico becoming a state, Trump suggested that Puerto Rico would quickly become a state so long as Governor Rosselló guaranteed that two Republican Senators would come of it.[157] Similarly, Trump spoke for many when he explained that the District of Columbia would never become a state: "Why? So we can have two more Democratic—Democrat senators and five more congressmen? No thank you."[158] Republican Senator Mike Lee expressed similar opposition, noting that if Puerto Rico and the District became states, there would be four more Democratic senators.[159] Folks on the other side of the political spectrum have also fallen victim to this line of reasoning. Some liberal-leaning commentators have pushed for D.C. and Puerto Rico statehood, believing that it would tip the balance in the Senate towards the Democrats.[160] But, as many have pointed out, it is by no means a certainty that the territories would elect Democratic

156. David P. Currie, The Constitution in Congress: Jefferson and the West, 1801–1809, 39 Wm. & Mary L. Rev. 1441, 1443 (1998).

157. See Puerto Rico News, Puerto Rico Governor Ricardo Rosselló Discusses Statehood With President Trump, YouTube, at 02:45 (June 21, 2018), https://www.youtube.com/watch?v=07rFXUt1U1Q&ab_channel=PuertoRicoNews (on file with the *Columbia Law Review*). Let's not forget that former President Trump eventually opposed statehood, partly based on a personal feud with San Juan's Mayor Carmen Yulín Cruz Soto. John Wagner, Trump an 'Absolute No' on Puerto Rico Statehood Because of San Juan's 'Horror Show' of a Mayor, Wash. Post (Sept. 24, 2018), https://www.washingtonpost.com/politics/trump-an-absolute-no-on-puerto-rico-statehood-because-of-san-juans-horror-show-of-a-mayor/2018/09/24/897ec214-c021-11e8-9005-5104e9616c21_story.html (on file with the *Columbia Law Review*); see also CBS News, San Juan's Mayor Responds to Trump's Remarks on Statehood, YouTube, at 0:33 (Sept. 24, 2018), https://www.youtube.com/watch?v=jZiTrIq5ZLw&ab_channel=CBSNews (on file with the *Columbia Law Review*).

158. Steve Benen, On DC Statehood, Trump Accidentally Says What He's Thinking, MSNBC (May 5, 2020), https://www.msnbc.com/rachel-maddow-show/maddowblog/dc-statehood-trumpaccidentally-says-what-he-s-thinking-n1200761 [https://perma.cc/WTE4-RKGE] (internal quotation marks omitted) (quoting Steve Nelson & Ebony Bowden, Trump Says Washington, DC, Will Never Be a State — Because of All the Democrats, N.Y. Post (May 5, 2020), https://nypost.com/2020/05/05/trump-says-washington-dc-will-never-be-a-state-because-of-all-the-democrats/ [https://perma.cc/KA8E-VCHR]). Washington, D.C., would most certainly not get five congresspeople. Given the city's population, it would be much closer to one member of the House.

159. Scott A. Olsen & José A. Cabrera, Opinion, Why Conservatives Should Support Puerto Rican Statehood, Deseret News (Mar. 18, 2021), https://www.deseret.com/opinion/2021/3/18/22328061/why-conservatives-should-support-puerto-rican-statehood-republicans-gop-senate-balance-of-power [https://perma.cc/7U7K-Z3BY].

160. See Ezra Klein, Democrats Need to Get Serious on Statehood for DC and Puerto Rico, Vox (Oct. 26, 2018), https://www.vox.com/policy-and-politics/2018/10/26/18024542/dc-puerto-rico-statehood-senate-democracy [https://perma.cc/AFJ9-MA9F].

representatives. Puerto Rico, for example, is more socially conservative than much of the mainland, and many of the Island's prominent political figures caucus with the Republican Party.[161] The Island can be more accurately described as a potentially "purple state" at best.[162] The same is true of American Samoa, Guam, the Northern Mariana Islands, and the U.S. Virgin Islands—all of which are often left out of this conversation.[163]

But the political arguments against voting rights for the territories miss the point. Voting rights cannot be predicated on political allegiance. Having a say in government is a foundational principle of democracy. Therefore, the political tendencies of the population are irrelevant to the conversation. What is relevant is that nothing short of representation equal to that of the states would fix this problem. Moreover, the last 100 years of evolving second-class citizenship for the people of the territories demands a timely resolution to their representational deficit.[164] To "focus solely on the racial and partisan politics misses the moral issue" and without action, our fellow citizens "remain[] . . . outsider[s] looking in on the American experiment."[165]

This problem requires an amendment that accomplishes at least four goals. First, it must provide votes in the Electoral College to each territory, equal to the number that a state with the same population as the territory in question would have. Second, it must allow each territory to have a single vote in the case that the presidential election is decided by the House of Representatives. Third, the amendment must provide for two senators for each territory and voting representatives in the House in accordance with their population. Fourth, the amendment should provide that each territory will have the same role as a state under the Article V amendment process. These four objectives would guarantee full participation of the territories in the government that has plenary control over them, while still leaving the door open for potential decolonization.

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161. Ivan Garcia-Hidalgo, Opinion, The Myth About Puerto Rican Statehood that Won't Go Away, Hill (Mar. 6, 2020), https://thehill.com/blogs/congress-blog/politics/486314-the-myth-about-puerto-rican-statehood-that-wont-go-away/ [https://perma.cc/VUB3-3Z5A].

162. See id.

163. See e.g., Nolan G.T. Flores, The Curious Case of Guam: The Unincorporated Territory's Role in the 2020 Primaries, Am. Pol. Sci. Ass'n, https://connect.apsanet.org/raisethevote/2020/02/18/the-curious-case-of-guam-the-unincorporated-territorys-role-in-the-2020-primaries/ [https://perma.cc/DD58-X944] (last visited Oct. 13, 2022) (explaining that the people of Guam "have placed less focus" on a political candidate's "party affiliation or ideology"); see also Republican Party of the Virgin Islands, Ballotpedia, https://ballotpedia.org/Republican_Party_of_the_Virgin_Islands [https://perma.cc/C9BS-69KX] (last visited Oct. 31, 2022) (noting that, in a 2014 analysis, out of 46,739 total active voters in the territory, about half, or 23,455, were active Republican voters).

164. See Sam Erman, Status Manipulation and Spectral Sovereigns, 53 Colum. Hum. Rts. L. Rev. 813, 852–70 (2022) (noting that Puerto Rico's status as an unincorporated territory contributed to the "disastrously inadequate federal response" following Hurricane Maria).

165. Kowal & Codrington, supra note 1, at 189.

It may be true that such a measure could lead the territories into another era of territorial purgatory, undermining the political will to fully decolonize the territories. But in that scenario, the territories would gain the power to elect their federal leaders, drastically improving the current undemocratic arrangement.

This proposal is important for a variety of reasons. At the outset, it would place the U.S. territories on equal political footing with the states of the Union, thereby breaking over 100 years of direct colonial rule.[166] For example, by only granting the territories the ability to vote for President or Vice President, this country would leave the territories with a second-class citizenship akin to that of D.C. residents (who should also be fully included in the political fold). Further, this type of amendment differs from some recent proposals by bringing each of the territories fully into the political community of the United States. Granting a single senator to represent all the territories, as one proposal suggests,[167] would not only dilute the representation of the territories in the Senate but would also pit the territories against each other. Similar problems to those the Founders wrestled with would also reappear: Bigger territories like Puerto Rico and the U.S. Virgin Islands would likely determine the outcome of the election for the senator, and there is no guarantee that a single senator can adequately represent the competing interests of five separate territories. Moreover, the complaint that smaller territories like American Samoa or the Northern Mariana Islands would be overrepresented in the Senate are unconvincing. Their overrepresentation is simply a function of the constitutional structure. To be sure, population distortion in the Senate already exists, made evident by California (the largest state) having sixty-eight times the population of Wyoming (the smallest).[168] With respect to the territories, Wyoming would only have about twelve times the population of American Samoa (the smallest territory),[169] and Puerto Rico's population is over five times larger than Wyoming's.[170] The people

166. One proposal that was made by way of joint resolution only promised the ability to vote for President and Vice President. H.R.J. Res. 17, 109th Cong. (2005).

167. Neil Weare, Equally American: Amending the Constitution to Provide Voting Rights in U.S. Territories and the District of Columbia, 46 Stetson L. Rev. 259, 265 (2017).

168. See Quick Facts: California; Wyoming, U.S. Census Bureau, https://www.census.gov/quickfacts/fact/table/CA,WY/PST045221 (on file with the *Columbia Law Review*) (last updated July 1, 2021) [hereinafter U.S. Census Bureau, California; Wyoming].

169. Compare Press Release, U.S. Census Bureau, Census Bureau Releases 2020 Census Population and Housing Unit Counts for American Samoa (Oct. 28, 2021), https://www.census.gov/newsroom/press-releases/2021/2020-census-american-samoa.html (on file with the *Columbia Law Review*) (noting American Samoa has a population of 49,710), with U.S. Census Bureau, California; Wyoming, supra note 168 (citing that Wyoming has a population of 578,803).

170. Compare Quick Facts: Puerto Rico, U.S. Census Bureau, https://www.census.gov/quickfacts/fact/table/PR/PST045221 (on file with the *Columbia Law Review*) (last updated July 1, 2021) (reporting that Puerto Rico has a population of

of the territories should not be made to pay for the Constitution's directives.

The Declaration of Independence plainly states the purpose of our democratic experiment:

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. [] That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed.[171]

But the nearly four million people living under the United States' jurisdiction in the territories "have historically lived under a system of federal laws in which the Constitutional principle of consent of the governed is a fallacy."[172] Kowal and Codrington's text makes clear that the beauty of this nation's history is that even in times of deep division and extreme partisanship, citizens can band together to expand democracy and improve our governance by amending the Constitution. Our democracy clearly demands that the residents of the territories be included in the democratic process of the federal government. *The People's Constitution* provides the tools to achieve that goal, and also highlights potential pitfalls for this endeavor. It is now up to all of us to pick up the burden of democracy and continue working toward the promise of "a more perfect Union."[173]

CONCLUSION

The People's Constitution should be required reading for anyone interested in constitutional law and political movements. The authors provide an impressive survey of constitutional history in the form of an accessible public legal history. They masterfully recount how the twenty-seven modifications changed our founding document and wrestle with the implications of the amendments that could not pass Article V's hurdle. The authors highlight that the amendment process has been used to fix procedural problems, reverse the Supreme Court, and expand democracy throughout our land. To that end, the text is a rallying call to the next generation of U.S. citizens to continue in that great tradition and fully welcome the people of the U.S. territories—a group that has remained shut out from the Constitution's promises and protections for over 100 years—into our political community via constitutional amendment.

3,263,586), with U.S. Census Bureau, California; Wyoming, supra note 168 (citing that Wyoming has a population of 578,803).

171. The Declaration of Independence para. 2 (U.S. 1776).

172. United States v. Santiago, 998 F. Supp. 2d 1, 2 (D.P.R. 2014) (emphasis omitted).

173. U.S. Const. pmbl.