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## ARTICLE

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### THE IMPERIAL TREATY POWER

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*The modern debate over the scope of the federal government's treaty-making power is largely framed by motivated histories written at the turn of the last century. These histories, by and large, gave a legal imprimatur to the acquisition of the insular possessions and the exercise of colonial government over them. A principal contribution of these constitutional histories was to make it an obvious proposition that the American treaty-making power contained the law-of-nations power to acquire territory and to take an imperial sovereign's original title to it: "What Spain could do we can do."*

*This Article contends that these imperial and canonical histories of the treaty-making power erased a vibrant and contrary view of American foreign-affairs federalism. This now-interred theory of American foreign-affairs federalism, which produced victories in several important public law disputes in prior eras, argued that the Tenth Amendment's reservation of sovereign power to the popular sovereign proscribed both the state and federal governments from exercising an "eminent dominion" over territory. That is to say, this rival view forbade both the state and federal governments from acquiring territory, ceding territory, and holding original title to territory so acquired. Crucially, this idea rejected altogether the familiar lens of "dual-sovereignty" in limiting the foreign-affairs powers of American governments.*

*This Article traces the arc of the erased idea about the American governments' foreign-affairs powers through bureaucratic archives, state and federal court decisions, and various sources of elite legal opinion. In accounting for the bygone victories of the now-dormant idea, as well as the ultimate defeat of that idea at the hands of imperial bureaucrats, the Article sheds new light on one of the central preoccupations of the*

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*modern public law governing America's foreign relations. I contend that the imperial history continues to cast a dubious shadow over our current debates about the treaty-making power and the status of American territory that is not yet a state. And I argue that modern federal courts' reliance on historically inflected arguments about our foreign-affairs powers is often fundamentally misguided. Our received constitutional histories from the early-twentieth century are often motivated glosses—sometimes committed to shoring up an imperial enterprise—that do not offer neutral principles to settle our hard cases.*

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## INTRODUCTION

In April of 1911, John Bassett Moore, a law professor, statesman, and sometime-judge on the Permanent Court of International Justice, delivered a series of lectures at Johns Hopkins University on the history of American government. Moore explained that in undertaking these lectures, his first

duty as a historian was to “deal[] in realities.”<sup>1</sup> Surveying the prior century, Moore explained that there had been, in reality, several “phases” in the political development of American public law: the first was “federalism,” and the two most recent were “imperialism” and “expansion.”<sup>2</sup> In Moore’s view, the latter phases involved frequent acquisitions of new territories and peoples, despite the clamor of those who argued that “[w]e do not want more territory any more than we want fish bones in our coffee.”<sup>3</sup> Indeed, he noted, “the fish bones have continued to appear in our cups and we have continued to gulp them down without any specially unseemly grimaces.”<sup>4</sup>

Moore’s theory of the development of American public law, and his effort to discern a long arc of history culminating in the recent imperial acquisitions, mirrored views held by many other prominent professors, bureaucrats, and courts of his time. These curators of constitutional culture left behind a now-canonical history of American foreign-affairs federalism that pervades modern debates concerning the power to acquire territory by treaty and to subject it to the sovereignty of Congress.

In a debate now lost to modern legal argument, this imperial history of our governments’ foreign-affairs powers reduced a diverse and rivalrous debate about American federalism to something far simpler. Namely, Moore and many others jettisoned the longstanding argument that the Tenth Amendment limits federal treaty-making power *not* by reserving a plenary police power over “domestic” concerns to the states (a familiar claim of modern *dual*-sovereign federalism), but rather by “reserving” to the people themselves any use of the treaty-making power that affects the constitutive relationship between the state and federal governments and the people (call it *popular*-sovereign federalism, which sees in our federalism the allocation of power between state and federal “dual governments”). The popular-sovereign theory of foreign-affairs power viewed the relevant “sovereign” whose interests might be infringed by the treaty-making power as the popular sovereign, and it dismissed appeals to state and federal sovereignty in understanding the treaty power’s limits. Because neither the state nor the federal government could engage in this sort of treaty-making, the popular-sovereign theory could therefore define a small but *defensible* set of subject-matter limitations on the treaty-making power.

To parse this more carefully: chief among the limitations imposed by the popular-sovereign view of the treaty-making power is that no

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1 JOHN BASSETT MOORE, FOUR PHASES OF AMERICAN DEVELOPMENT: FEDERALISM-DEMOCRACY-IMPERIALISM-EXPANSION 6 (1912).

2 *Id.* at 7.

3 *Id.* at 149 (internal quotation marks omitted).

4 *Id.*

government—neither state nor federal—can claim the sovereign “eminent dominion” necessary to exercise imperial government over territory outside of the union. Although, in the American republic, the popular sovereign is ordinarily dormant,<sup>5</sup> its agents cannot act to change its composition by treaty while it sleeps. Yet that is the subject-matter limitation on the treaty-making power most frequently breached in our constitutional history—breaches, as I shall argue, that were omitted from canonical histories of the treaty power to serve imperial ends.

Today, in the wake of the seminal decision of *Missouri v. Holland* and more recently in *Bond v. United States*, we are accustomed to thinking that if the exercise of the treaty-making power has any limit at all, it must be found in the balance that “our federalism”<sup>6</sup> strikes between the federal and state “dual sovereigns.” In *Holland*, Justice Oliver Wendell Holmes denied that the Constitution imposed a subject-matter limitation on the federal treaty-making power within the states; Holmes framed the relevant question as “whether [a treaty] is forbidden by some invisible radiation from the general terms of the Tenth Amendment.”<sup>7</sup> And in *Bond*, six Justices avoided revisiting *Holland* by creating a federalism-inspired clear-statement rule to narrow a

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<sup>5</sup> See *infra* text accompanying note 27 (describing Richard Tuck’s Seeley Lectures on the “sleeping sovereign”).

<sup>6</sup> See, e.g., *Bond v. United States*, 572 U.S. 844, 855 (2014) (summarizing Bond’s views concerning the treaty power’s capacity to “afford the [federal] Government a police power” and “usurp[] . . . traditional state authority”); *id.* at 879 (Scalia, J., concurring) (concluding that a case affording the federal government a broad treaty-making power “places Congress only one treaty away from acquiring a general police power”); *id.* at 882 (Thomas, J., concurring) (concluding that “the Treaty Power . . . is itself a limited power,” as otherwise the Treaty Power “would . . . lodge in the Federal Government a potential for a ‘police power’ . . . [that] would threaten the ‘liberties that derive from the diffusion of sovereign power’” (citations omitted)); *Missouri v. Holland*, 252 U.S. 416, 432–433 (1920) (analyzing whether a statute implementing a migratory bird treaty was unconstitutional because it interfered with rights reserved to the states); Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390, 450–461 (1998) (surveying options for “protecting federalism” from a broad treaty-making power and proposing “equal treatment” of federal statutes and treaties that attends to the “states’ rights”); David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 MICH. L. REV. 1075, 1279–86, 1310–14 (2000) (rejecting Professor Bradley’s proposed limitations on the treaty-making power in light of the “nationalist” decision by the founders to “lodge the whole of the foreign-affairs powers exclusively in the national government”); see also Oona Hathaway et al., *The Treaty Power: Its History, Scope, and Limits*, 98 CORNELL L. REV. 239, 249 (2013) (canvassing founding-era history and concluding that the states “g[ave] up all power over foreign relations to the central government” but retained “structural and procedural checks to protect states’ interests”); Duncan B. Hollis, *Executive Federalism: Forging New Federalist Constraints on the Treaty Power*, 79 S. CAL. L. REV. 1327, 1329–31 (2006) (describing two “camps” that have emerged on the question whether “federalism constrain[s] the Article II treaty power”: the “nationalists” and the “new federalists”); Michael D. Ramsey, *Missouri v. Holland and Historical Textualism*, 73 MO. L. REV. 969, 980 (2008) (offering a “historical textualist” account defending the proposition that “treaties cannot overturn protections of state sovereignty expressed elsewhere in the Constitution’s text”).

<sup>7</sup> 252 U.S. at 433–34.

statute implementing a treaty.<sup>8</sup> Three Justices in *Bond*, however, would have held that American federalism does not tolerate a “conceal[ed] . . . police power over domestic affairs” and thus must proscribe the federal treaty-making power to make agreements concerning “wholly domestic[]” matters or agreements that might “regulate the relationship between nations and their own citizens.”<sup>9</sup> Justice Thomas predicted that “the increasing frequency with which treaties have begun to test the limits of the Treaty Power” would offer the Court the opportunity to limit the power “soon enough.”<sup>10</sup>

As I shall argue, however, the more important and now-forgotten limit on the treaty-making power, which was frequently consequential in our constitutional history, followed from an altogether different view of the nature of sovereignty in a constitutional republic. Recovering this purged constitutional history counsels caution about the broad reception of the history written by law professors, bureaucrats, and courts about the treaty-making power at the turn of the twentieth century. That history still dominates our modern public law concerning the treaty-making power and the status of the insular possessions, especially in light of the Court’s solicitude for constitutional history in these areas.<sup>11</sup>

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<sup>8</sup> 572 U.S. at 860 (holding that a clear indication from Congress that the relevant federal statute was designed to supersede state law was necessary before the Court would interpret that federal statute as intruding on the states’ police power).

<sup>9</sup> *Id.* at 894–96 (Thomas, J., concurring) (internal quotations marks and citations omitted).

<sup>10</sup> *Id.* at 896 (Thomas, J., concurring) (citing Bradley, *supra* note 5, at 402–409).

<sup>11</sup> Two caveats about scope: I focus here on the work product of lawyers, courts, and agencies debating public law questions posed by American treaty-making and the sovereignty of the insular possessions. Recent historical work on other aspects of American colonialism is vast and vibrant. *See generally* Paul A. Kramer, *How Not to Write the History of U.S. Empire*, 42 *DIPLOMATIC HIST.* 911 (2018) (collecting books and dissertations on U.S. colonialism since 2007). Relatedly, I focus on one of two legal questions raised in the treaty-power debate: the scope of the treaty-making power and the plausibility of subjecting that power to a “subject-matter limitation.” I leave to one side the scope of Congress’s treaty-implementing power, which receives focused analysis elsewhere. *See generally* Jean Galbraith, *Congress’s Treaty-Implementing Power in Historical Practice*, 56 *WM. & MARY L. REV.* 54, 62 (2014); Nicholas Quinn Rosenkranz, *Executing the Treaty Power*, 118 *HARV. L. REV.* 1867, 1868 (2005) (arguing that the capacious view of Congress’s treaty-implementing power set forth in *Missouri v. Holland* should be rejected); *see also Bond*, 572 U.S. at 876 (Scalia, J., concurring) (adopting Professor Rosenkranz’s approach).

Because my focus is trained on the use of an idea of American *federalism* in resolving debates about the foreign-affairs powers of the federal government, and ultimately the reframing of “our federalism” to accommodate imperial ends, I do not engage directly with the now-flourishing history of imperial constitutionalism. My focus on the constitutional debate about whether the acquisition power, the cession power, and the sovereign’s eminent dominion, are part of American “sovereignty,” is principally motivated by current debates about the federal government’s foreign-affairs powers and the extent to which these modern debates rest on a contingent settlement concerning the compatibility of imperial government with American federalism. Tracing the arc of that settlement does not displace the thought that the broad thrust of American ideological development during this period included a robust “settler” ideology, which entailed dispossession of indigenous peoples. *See generally* AZIZ RANA, *THE TWO FACES OF AMERICAN FREEDOM* 12–13 (2010) (describing the

My aim in what follows is to chart the final ascendance—during precisely the episode of territorial acquisition in which Moore was lecturing—of an imperial idea of dual sovereignty in the foreign-affairs powers of the American republic. In doing so, I will show some of the compromises of our public law that underwrite modern views of the treaty-making power and the federal government’s special title to acquired territory.

To preview that story, in the century before Moore delivered his history of our “imperial” phase, the notion that any American government could exercise a power to acquire, cede, and hold title to territory *did* cause plenty of sophisticated commentators to “grimace.”<sup>12</sup> Their reactions stemmed from a credible view of foreign-affairs federalism that rivaled the now-dominant theory that the federal government may exercise *all* sovereign powers not reserved to the states, and especially the treaty powers necessary to practice imperial government. Instead, the rivals argued that the Constitution distributes some, but not all, of a sovereign’s powers at international law between the two principal American governments. Crucially, this theory drew on the law of nations to posit that with respect to the eminent dominion,<sup>13</sup> the dormant popular sovereign (the people themselves) withheld from their governments the powers necessary to barter territory or grant title to it.

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role of settler ideology in American public law). Nor does my account shed light on the distinctive development of federal Indian law during this period. See Maggie Blackhawk, *Federal Indian Law as Paradigm Within Public Law*, 132 HARV. L. REV. 1787, 1787 (2019) (calling for a renewed focus on federal Indian law, and the “tragic history of colonialism and violent dispossession of Native lands” in understanding American constitutional development); see also *id.* at 1809-15 (applying this insight to the treaty-making power). And, finally, my account does not comprehensively address the vexed and still-open questions of status and self-government created by the *Insular Cases* and the theory of nonincorporated territory. See generally FOREIGN IN A DOMESTIC SENSE (Christina Duffy Burnett & Burke Marshall eds., 2001); SAM ERMAN, ALMOST CITIZENS: PUERTO RICO, CONSTITUTION, AND EMPIRE (2018) (elaborating a comprehensive account of the status and naturalization questions created by the Spanish American War, and the partial resolution of those questions in the *Insular Cases*); see also *id.* at 163 n.4 (collecting scholarship concerning the “imperial turn,” especially in connection with territories acquired in the Spanish-American War); Christina Duffy Burnett, *Untied States: American Expansion and Territorial Deannexation*, 72 U. CHI. L. REV. 797, 797-98 (2005) (advancing a “revised understanding” of the *Insular Cases* that emphasizes their installation of a “doctrine of territorial deannexation” in constitutional law).

<sup>12</sup> See MOORE, *supra* note 1, at 149.

<sup>13</sup> I adopt the nineteenth-century phrase “eminent dominion” to forestall the inaccurate reduction of the phrase “eminent domain” to the power of taking private property for public purposes. Instead, these debates concerned a capacious bundle of ideas received, somewhat haphazardly, from the law-of-nations literature. See JOHN LEWIS, A TREATISE ON THE LAW OF EMINENT DOMAIN IN THE UNITED STATES 6-9 (1888) (tracing the name “eminent domain” to the law of nations); James Bradley Thayer, *The Right of Eminent Domain*, Note, 19 MONTHLY L. REV. 241 (1856); see also Henry E. Smith, *Property as the Law of Things*, 125 HARV. L. REV. 1691, 1696 n.13 (2012) (citing Lewis’s treatise). By nineteenth-century lights, the eminent dominion encompassed the public powers of acquiring, ceding, and title to land, as well as more familiar rights such as exclusion and alienation.

As applied to the federal government's power to make treaties, the rivals' view of federalism—which I call throughout “popular-sovereign federalism” or “dual-government federalism” with reference to the Tenth Amendment's text<sup>14</sup>—provided a workable principle that could limit the federal government's foreign-affairs powers. For these proponents, the central inquiry was which powers the popular sovereign may legitimately delegate *at all* to its governmental agents under the law of nations. The law-of-nations idea of eminent dominion yielded an answer to that inquiry: because acquisition and cession impermissibly modify the constitutive relationship between the popular sovereign and its governments, no mere government could exercise these powers. Because acquiring or ceding territory by treaty would alter the composition of the republic, these exercises of sovereignty were denied to all American governments. Lawful acquisition or cession could only proceed by somehow awakening the popular sovereign and involving it in the treaty-making process.<sup>15</sup>

Such limitations on the treaty-making power do not, by contrast, follow from the *dual*-sovereign theory of foreign-affairs federalism, which would attempt to allocate all powers of acquiring and ceding territory between the federal and state sovereigns. The dual-sovereign approach to the treaty-making power has foundered for more than a century in identifying some criterion that might sort the “domestic” from the “international,” or the “police power” from the “foreign-affairs power,” in order to divide the powers among the sovereigns. That effort can, moreover, be defeated by the rejoinder that state governments lack the international legal personality necessary to make treaties with other sovereigns about plainly urgent “domestic” concerns.<sup>16</sup> Indeed, on the question of acquisition and cession, dual-sovereign federalism yields the least satisfying account of the treaty power's limits: treaties accomplishing acquisition and cession—especially those that purchase peace—are quintessentially “international,” while also altering the relationship between citizens and their government in utterly fundamental ways. Such treaties change the balance of power between states composing the federal union, dilute the existing states' suffrage in the Senate, and modify the composition of “the people.”

Remarkably, popular-sovereign limitations on the treaty-making power survived long into our constitutional history and proved decisive in several episodes of constitutional lawmaking.<sup>17</sup> But the popular-sovereign federalism theory has now been lost to orthodox constitutional history. We are left, instead,

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<sup>14</sup> U.S. CONST. amend. X (providing that “powers not delegated to the United States by the Constitution . . . are reserved to the States respectively, or to the people”).

<sup>15</sup> See *infra* Section II.A.

<sup>16</sup> See, e.g., *infra* text accompanying notes 54–56 (discussing Sutherland's defense of a nationalist treaty-making power).

<sup>17</sup> See *infra* Part II.

with a history motivated by a *dual*-sovereign view. This history assumed a narrow frame for the treaty-power disputes, in service of an early-twentieth-century project of imperial government. The legacy of that imperial project continues to animate some of the Supreme Court's most-watched cases in the past few Terms, including *Bond v. United States* and *Puerto Rico v. Sanchez Valle*.<sup>18</sup>

This Article provides an in-depth account of how the claims of the popular-sovereign's treaty power, particularly its limitation on American governments' capacity to exercise the eminent dominion, have been relegated from a central situs of partisan conflict to the implausible fringes of public law. The canonical erasure of this idea came at the hands of a generation of bureaucrats and law professors who were committed to defending territorial acquisition and imperial government over the insular territories. Although the Insular Bureau, the State Department, powerful American states, and land-office bureaucrats had sometimes embraced the idea that that popular sovereignty could limit the government's foreign-affairs powers, this theory is now a casualty of our imperial ambitions.

As I argue here, the purging of popular-sovereign federalism from the intellectual history of American public law matters for two reasons. The first is connected to the partisan disputes that were pivotal in shaping U.S. territory. That is to say, in debating about the American governments' "eminent dominion," *vel non*, partisans touched upon fundamental questions about the composition of the popular sovereign, its relationship to federal and state governments, and the place of public and private international law in American public law. These debates coursed through questions about acquiring new territory (augmenting the popular sovereign), ceding territory (dilacerating some of the popular sovereign), and the lucrative question of title to public land.

Second, the decline of popular-sovereign federalism has been a loss for modern battlegrounds that are still active. We have been left with the history, and the ideas, of the winners. As I will show, this history domesticated some parts of the nineteenth-century international law canon to serve imperial ends, shoring up the foreign-affairs powers needed to acquire the insular possessions and to subject them to the sovereignty of Congress. At virtually the same time that the imperial histories of the treaty power were being popularized, a closely-related fight over whether the state or federal sovereign exercised an "eminent dominion" over possessions acquired by treaty was briefed and decided by the Supreme Court in *Missouri v. Holland*.<sup>19</sup> These briefs are the final exemplar of the vocabulary of eminent dominion that is now purged from public law, and the Court's decision remains a central preoccupation of foreign-affairs federalism.

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<sup>18</sup> 136 S. Ct. 1863 (2016).

<sup>19</sup> See Brief of Appellant, *Missouri v. Holland*, 252 U.S. 416 (1920) (No. 609).



Taken together, the fight over the eminent domain and the victory of imperialist bureaucrats illuminate the ways in which ideas about American public law both bound and are bounded by partisanship. This history also demonstrates a long-running and richly textured process by which the law of nations was brought into domestic law. During this period, the boundary, so to speak, between public and private law, and between American public law and international public law, was especially porous. Accordingly, with respect to the treaty-power questions taken up in *Missouri v. Holland* and revived once again in *Bond v. United States* just six years ago, this history discloses a road once taken and now almost entirely forgotten.

This purged constitutional history sheds an altogether different light on recurring questions about the federal government's foreign-affairs powers and the peculiar status of the American sovereign's title to acquired territory. Indeed, the old debates are illuminating precisely because modern federal courts, and especially the Supreme Court, have become distinctively historicist when they make doctrinal choices in cases where foreign affairs and our federalism meet.<sup>20</sup> To the extent these modern doctrinal choices assume a constitutional history that speaks with one voice, they wager our public law on risky foundations. If, indeed, some of our received constitutional histories from the early-twentieth century were in fact motivated glosses—made in the jaws of an imperial enterprise—the received history does not offer a neutral principle to settle our hard cases. History instead offers familiar constitutional politics dressed, by the victors, in the garb of inevitability. If the apparent inevitability claimed by these histories represents, instead, utter contingency—or worse, an imperial politics that modern minds might abhor—it is important to see such contingency clearly, and to acknowledge our acquiescence in it before building a modern public law upon it.

This Article demonstrates the imperial erasure of popular-sovereign federalism from American foreign-affairs law, and the modern consequences of that erasure, in three Parts.

Part I sets the stage for the central nineteenth-century debates about federal power to acquire and cede land. The theory that a *dormant, popular* sovereign inherently limits the federal government's foreign-affairs powers was still live and effective in constraining politics during this period. Moreover, this theory embraced a concept of civil power that interacted in

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<sup>20</sup> See *infra* Part III (discussing modern courts' use of imperial constitutional histories in resolving treaty-power and territories questions); see also Galbraith, *supra* note 11, at 62 (noting that the treaty-power debate that has occupied the Court and scholars over the past two decades has grown to "include substantial consideration of other principles of constitutional interpretation, most notably the historical practice of the political branches and precedents based upon this practice"); cf. *NLRB v. Noel Canning*, 573 U.S. 513, 525 (2014) (noting that "the longstanding 'practice of the government' can inform our determination of 'what the law is'" (citations omitted)).

novel ways with the ambient international public law. Most conspicuously, in insisting that the dual state and federal governments are ministerial agents of the popular sovereign, federalism provided a vocabulary to resist the idea that *any* American government could lay claim to a sovereign's "eminent dominion" from the law of nations. On this view, the eminent dominion—that is, the private and public rights and powers called the eminent dominion in the law of nations—and not an amorphous category of "domestic" or "police" powers, was reserved from the national government's treaty-making power by the last clause of the Tenth Amendment.

Part II traces the opposing theories of dual-sovereign federalism and popular-sovereign (or "dual-government") federalism in the hands of advocates with opposing views on the eminent dominion, as well as opposing views on title to land acquired using that power. I argue that the battles between these constitutional partisans yielded incommensurable outcomes that remain suspended in contradiction in American foreign-affairs law. These battles were put to rest by the now-canonical constitutional histories written to support our imperial government, but some artifacts of judicial decisionmaking during the earlier period have lingered to become misleading fodder for modern constitutional argument.

Part III first assesses the imperial reframing of foreign-affairs federalism as a question of dual sovereignty. Here, I describe the influence that the old eminent-dominion disputes about acquisition and cession exert upon modern reasoning about the structural principles of our foreign-affairs public law. In particular, I contend that popular-sovereign federalism and the fight over the eminent dominion remained open questions at least until the last era of imperial acquisition—an era that included *Missouri v. Holland*. At that time, in response to considerable energy invested by constitutional historians, public intellectuals, and courts, it finally became canonical that any and all sovereign powers described by the law of nations were distributed between the federal and state governments, not reserved to the popular sovereign. It thus became natural to assert that (1) all powers exercised by other sovereigns must be allocated to *some* American government; (2) those powers enabled an imperial mode of government; and (3) the sovereign exercising those powers should almost always be the federal government. As the most prominent constitutional law professor wrote in 1899: "What Spain could do we can do."<sup>21</sup>

Part III then proposes present-day extensions of the material unearthed in the prior Parts. I first take on the historical claims underlying several Justices' recent effort in *Bond v. United States* to limit the federal government's foreign-affairs powers by invoking the public law of the nineteenth century—

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<sup>21</sup> Letter from James Bradley Thayer to Moorfield Storey 2 (Oct. 27, 1899) (on file with Harvard Law School Historical and Special Collections).

such as discerning a workable distinction between “domestic” and “international” treaties.<sup>22</sup> On the contrary, the approach the concurring Justices advanced in *Bond* would actually yield no defensible principle that attends to the modern structure of the American republic. Treaty-making in the nineteenth-century republic was prone to exercises of power that were quite municipally invasive. Treaties of acquisition and cession touched concerns no less “domestic” than the composition of the federal union and the lucrative title to public land composing the federal fisc. For related reasons, however, the dormant idea of popular-sovereign federalism offers no alternative: in part because of its fraught history and in part because of methodological innovations in international (but not American) public law, popular-sovereign federalism is now unimaginably implausible. The bell of the imperial treaty-making power cannot be unrung.

By contrast, there are good reasons to reject the modern Supreme Court’s parsing of this history in answering new questions about the imperial territories’ political status. I argue that the Court’s recent attempt in *Puerto Rico v. Sanchez Valle* to distinguish between the “sovereign” statuses of the insular territories and the new (post-Founding) states is, by its own lights, dubious. To the extent the “historical . . . wellsprings”<sup>23</sup> of state sovereignty are relevant to determining the status of territories acquired pursuant to treaty, historical methods of constitutional interpretation suggest that the new states’ claim to membership in the union was just as politically fraught as that of the insular territories. Neither the structure of the Constitution nor the nineteenth-century law of nations disclosed anything obvious about the juridical status of either the new states or the insular possessions: their status has from their inception been marked by bureaucrats’ conviction that our imperialism was a *fait accompli*.

The Article concludes by resisting the thought that the old roads not taken in our foreign-affairs federalism should be revived. Some forgotten roads, as with the popular-sovereign critique of the treaty-making power, cannot be walked anew. Others, as with the political status of the insular possessions, are so overdetermined by the fact of imperialism that modern courts should reject historicist approaches altogether. I thus observe that the principal lesson to be gleaned from the public law of prior eras is that the effort to revive the partisan federalisms of the past is no substitute for coming to constitutional judgments by our own lights.

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<sup>22</sup> See *Bond v. United States*, 572 U.S. 844, 867-82 (2014) (Scalia, J., concurring) (contending that the federal government’s treaty-making power, properly understood, has always been limited to issues of genuine international concern, such as international commerce, diplomacy, and war); *id.* at 882-96 (Thomas, J., concurring) (same); *id.* at 896-97 (Alito, J., concurring) (same).

<sup>23</sup> *Sanchez Valle*, 136 S. Ct. at 1871.

## I. IDEOLOGICAL ORIGINS

This Part describes the intellectual apparatus built by nineteenth-century partisans to answer two public law disputes before the Marshall and Taney Courts: the power to acquire and cede land, and title to land within the states. Neither power is expressly granted to the federal government; both were the objects of decades of sophisticated constitutional argument; and both caused lawyers and courts to draw upon a law-of-nations canon to claim or disclaim the marks, prerogatives, eminent powers, and majesties of sovereigns.

During this period our federalisms were plural, and the thought that the people distributed *all* sovereign powers to their two governments—i.e., that the Tenth Amendment stops at the comma following “reserved to the states”—was not yet obvious. Indeed, neither the power to acquire nor the power to convey title to land emerged from this period as a power reserved to the states, as the modern reading of the Tenth Amendment might suggest. But the conclusion that the *federal* government possesses some version of these powers has served, for more than a century-and-a-half, as a stalking horse for broader debates about the contours of American foreign-affairs federalism.

The claim that the treaty power implies the power to acquire and cede territory, and the claim that the sovereignty of the federal government permits it to convey title to public lands, continually recur in the intellectual history of American federalism. Accordingly, the acquisition and cession powers remain issues that, like many similar issues arising under the Constitution’s sparse regulation of our governments’ foreign-affairs powers, “continue to cry for understanding.”<sup>24</sup> The constitutional politics of this period thus became the genesis of a permanent confusion in the theory of American federalism. That is because to answer the puzzle of an implied federal power to acquire and cede land, partisans and courts drew the law-of-nations language of eminent dominion into the American theory of government and searched for a sovereign to which they could attach these law-of-nations powers. The problems of acquisition, cession, and original title to territory were thus all taken to ask a blended question of public constitutional and international law: what is the eminent dominion and which government can claim it?

The following Part describes these aged vocabularies of political thought, which came together in the acquisition, cession, and title debates of the mid-to late-nineteenth century.

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<sup>24</sup> LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* ix (2d ed. 1996).

A. *Sovereign Federalisms*

Claims about American federalism are almost invariably inflected through claims about the intellectual history of American sovereignty. Indeed, the terms “sovereignty” and “government” are used more or less interchangeably in the Supreme Court’s modern federalism jurisprudence.<sup>25</sup> The identification of state and federal governments with “sovereignty” is so dominant that a new generation of federalism scholarship aims to move “beyond” sovereignty, with “dual” sovereignty as the point of departure.<sup>26</sup>

Yet, as explained in his recent Seeley lectures, Richard Tuck has called attention to the “novelty” of the American idea that a “sovereign legislator” called the People “has an institutional shape but is usually dormant.”<sup>27</sup> By way of example, the difference between the sovereign and its governments can be perceived in widely quoted<sup>28</sup> letters published during the ratification debates. The first, Federalist 39, aimed to give comfort about the new Constitution by explaining that “the proposed government cannot be deemed a national one; since its jurisdiction extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects.”<sup>29</sup> The second, Federalist 46, was published two weeks later and critiqued “gentlemen” who viewed the proposed state and federal

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<sup>25</sup> See, e.g., *Shelby County v. Holder*, 570 U.S. 529, 542–43 (2013) (deriving, from the idea of state sovereignty, a principle of “equal footing” that would limit the federal government’s power to regulate voting); *Bond v. United States*, 564 U.S. 211, 221 (2011) (“Federalism is more than an exercise in setting the boundary between different institutions of government for their own integrity. ‘State sovereignty is not just an end in itself: Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.’” (citation and internal quotation marks omitted)); *Northwest Austin v. Holder*, 557 U.S. 193, 203 (2009) (“The Act also differentiates between the States, despite our historic tradition that all the States enjoy ‘equal sovereignty.’” (citations omitted)); see also generally Gregory Ablavsky, *Empire States: The Coming of Dual Federalism*, 128 YALE L.J. 1792 (2019) (critiquing the modern Supreme Court’s “dual-sovereign” conceit and describing a history of American federalism focused on the centralization of authority in the state and federal governments).

<sup>26</sup> See Heather Gerken, *Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 7, 44, 71 (2010) (urging both “nationalists” and “federalists” to “move beyond sovereignty”); see also Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1259 (2009) (analyzing states’ propensity to defy the federal government under the theory of federalism); Abbe R. Gluck, *Our [National] Federalism*, 123 YALE L.J. 1996 (2014) (emphasizing the role of states notwithstanding Congress’s dominance in prevailing accounts of in U.S. federalism). An earlier wave of scholarship following *Printz v. United States*, 521 U.S. 898 (1997), similarly endeavored to modernize the vocabulary of federalism so that it could move beyond “dual sovereignty” with, for example, the idea of “autonomy.” See, e.g., Roderick Hills, *State Autonomy*, 96 MICH. L. REV. 815, 832–55 (1998) (critiquing the “modern doctrine of state autonomy” on the basis that the doctrine was still tethered to notions of dual federalism).

<sup>27</sup> RICHARD TUCK, *THE SLEEPING SOVEREIGN* 252 (2015).

<sup>28</sup> Compare *Printz v. United States*, 521 U.S. 898, 918–19 (1997) (quoting THE FEDERALIST NO. 39 (James Madison)), with *Lane County v. Oregon*, 74 U.S. 71, 76 (1868) (quoting THE FEDERALIST NO. 46 (James Madison)).

<sup>29</sup> THE FEDERALIST NO. 39, at 256 (James Madison) (Clinton Rossiter ed., 1961).

governments “not only as mutual rivals and enemies, but as uncontrolled by any common superior in their efforts to usurp the authorities of each other.”<sup>30</sup> Madison countered that “the ultimate authority, wherever the derivative may be found, resides in the people alone . . . .”<sup>31</sup> These two letters frame a long-vexed problem in defining American federalism and describing how the government should exercise civil power: in what sense is the state or federal government “sovereign”—if at all?

In what follows, I argue that the principle that the “people” are the true sovereign helps to explain the forgotten language of federalism that arose in the debate over the federal government’s eminent dominion.

### 1. Federalism as a Contest of Sovereigns

Most court-authored explanations of “our federalism” embody a split-the-baby approach to the Constitution’s distribution of powers: the federal government and the states are sovereign within their “spheres.” This “basic” “dual federalism”<sup>32</sup> theory ends at the last comma of the Tenth Amendment: whatever powers are neither delegated to the federal government nor prohibited to the states are reserved to the states (full stop).

On this theory, the special genius of the Constitution is that it “split the atom”<sup>33</sup> of sovereignty between—and only between—the federal government and the states. “States are not mere political subdivisions of the United States . . . . The Constitution . . . ‘leaves to the several States a residuary and inviolable sovereignty,’ reserved explicitly . . . by the Tenth Amendment.”<sup>34</sup> Thus, dual-sovereignty apportions sovereignty between the federal and state governments, preserving the residual sovereignty of the latter.

The dual sovereignty thesis has had special traction in modern debates about powers implied by the Constitution’s more capacious grants of civil power, such as the treaty-making power or the Necessary and Proper Clause.<sup>35</sup>

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<sup>30</sup> THE FEDERALIST NO. 46, at 294 (James Madison) (Clinton Rossiter ed., 1961).

<sup>31</sup> *Id.*

<sup>32</sup> See Edward S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1, 4 (1950) (defining “dual federalism” as a national government reduced to enumerated powers, in tension with equally sovereign state governments).

<sup>33</sup> *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).

<sup>34</sup> *New York v. United States*, 505 U.S. 144, 188 (1992) (quoting THE FEDERALIST NO. 39, at 245 (James Madison) (Clinton Rossiter ed., 1961)).

<sup>35</sup> See Bradley, *supra* note 6, at 434-36 (examining the sources of the “purported immunity of the treaty power from federalism limitations”); see also Corwin, *supra* note 32, at 17 (describing the “New Court” of the New-Deal era as leaving “the Federal System . . . in ruins” by extracting a “latitudinarian construction of the ‘necessary and proper’ clause” notwithstanding “the State Police Power”).

Indeed, most contexts in which powers are said to inhere in “sovereignty” usually incorporate some version of dual-sovereign federalism.<sup>36</sup>

## 2. Federalism as a Contest of Governments

Counterpoised to dual-sovereign federalism is the classical republican view: in framing their Constitution, the people vested their sovereignty in *neither* government. Instead, “the supreme, absolute and uncontrollable power resides in the people at large; . . . they have vested certain proportions of this power in the state governments; but . . . the fee-simple continues, resides and remains, with the body of the people.”<sup>37</sup> While the state governments are “prominent features of the system,”<sup>38</sup> in truth the Constitution commits to the “original and supreme authority”<sup>39</sup> of the people. The popular-sovereign view of federalism reads the Tenth Amendment to its end: only the people may lay claim to the full measure of sovereign prerogatives exercised by other nations.

The popular sovereign, even when dormant, thus has a juridical *shape*: the popular sovereign reserves to itself those powers that remain un-delegated to either the state or federal governments.

Before proceeding, it is worth noting—as the following pages will demonstrate—that the popular-sovereign view of federalism does not tend to an obvious ideological valence. On this contest-of-governments view of American federalism, the placement of sovereignty in either government is equally pernicious: a sovereign federal government is as odious as sovereign states.<sup>40</sup> Take, by way of example, the alignment between the politics and constitutional theory of John Taylor of Caroline, Chief Justice Marshall’s “most pertinacious critic.”<sup>41</sup>

Taylor argued for a popular-sovereign, dual-government theory of federalism precisely to attack Chief Justice Marshall’s “heavy” federal government.<sup>42</sup> Taylor viewed sovereign states as anathema and urged constitutional lawyers to be “vigilant custom-house officer[s]” to prevent a

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<sup>36</sup> See, e.g., *Kansas v. Nebraska*, 135 S. Ct. 1042, 1066–67 (2015) (Thomas, J., dissenting) (describing states’ power to regulate water use as “an essential attribute of [state] sovereignty” or “pre-existing sovereign rights” (citation omitted)).

<sup>37</sup> James Wilson, Speech (Dec. 4, 1787), reprinted in 4 AM. L.J. 359, 364 (1813).

<sup>38</sup> *Id.* at 368.

<sup>39</sup> *Id.* at 366.

<sup>40</sup> See, e.g., Simeon Eben Baldwin, Lecture V (1899) (unpublished manuscript) (on file with Yale MSSA, Group 55, Series VI, Box 103, Folder 1088) (“This relation of the U.S. to the States makes each of them always an *imperium in imperio*—a source of weakness & danger. We—the U.S.—are more in danger from invasion of our rights by a State than by a foreign power. . . . No force can be applied vs. a *State*. . . . We can only appeal to slow processes of suits in Gov’t . . .”).

<sup>41</sup> Corwin, *supra* note 32, at 7.

<sup>42</sup> *Id.*

foreign idea of sovereignty from invading American institutions.<sup>43</sup> He especially hated that the language of sovereignty had “crept into our political dialect,” and sovereignty’s “unknown powers,” described in varied and ambiguous ways in the law-of-nations literature, now “tickle[d] the mind” of constitutional lawyers “with hopes and fears.”<sup>44</sup> Instead, an “indefinite word” of sovereignty had become the “traitor of civil rights” and “transfer[ed] sovereignty from the people . . . to their own servants.”<sup>45</sup> In Taylor’s view, “neither of the[] governments can legitimately acquire any species of sovereignty at all, because it would be contrary to the conventional sovereignty actually established.”<sup>46</sup> The popular sovereign—neither the states nor the federal government—is the true sovereign.

Taylor was also the most clear-eyed early theorist to identify the tendency of his adversaries’ dual-sovereign brand of federalism to domesticate into American law a set of public law principles loosely defined by the law of nations. In a passage that foreboded the constitutional battles that are the focus of the remainder of this Article, Taylor criticized the tendency of those who speak of “sovereignty” to use the “laws of nations” to make constitutional arguments. He lambasted the “great ingenuity” of those who had used the “formidable phalanx” of international law to enlarge the implied sovereign powers of the people’s governments.<sup>47</sup> The law of nations had been conscripted to the “wicked design . . . of increasing domestick oppression” by those who wished to argue that American “governments were invested with sovereignty.”<sup>48</sup> That “wicked design” would allow powers to be inferred from the “powers of sovereignty,” until the people’s governments become “unlimited” in their enumerated powers.<sup>49</sup> Correctly understood, Taylor argued, American federalism ensured that international lawyers could not “find a sovereignty to receive their bounty” in the United States—that is to say, lawyers who would make use of sovereignty-oriented claims about American public law could not identify a sovereign government to which law-of-nations theories of public law might apply.<sup>50</sup>

As I explain in the next Section, the now-defunct grammar of constitutional argument that Taylor identified, and the mid-nineteenth-century effort that Taylor observed to domesticate the law of nations into

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<sup>43</sup> JOHN TAYLOR, *CONSTRUCTION CONSTRUED, AND CONSTITUTIONS VINDICATED* 2 (Richmond, Shepherd & Pollard 1820).

<sup>44</sup> *Id.* at 25.

<sup>45</sup> *Id.* at 26.

<sup>46</sup> *Id.* at 36.

<sup>47</sup> *Id.* at 279.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 281.

<sup>50</sup> *Id.* at 282.



American public law, are critical to understanding the ways in which principles of federalism were embodied, extended, and eclipsed<sup>51</sup> in the din of nineteenth-century constitutional battles over land. This was a fight over which sovereign—state, federal, or popular—holds the eminent dominion. In fits and starts in the mid-nineteenth century, and then completely by the early twentieth, American lawyers who aimed to acquire territory did in fact assign the federal government a “sovereignty” to “receive the bounty” of the law of nations.

### B. “Receiving the Bounty” of the Law of Nations

A century after Taylor’s writing, the “unknown powers” provided by the law of nations became central features of foreign-affairs federalism. I consider two: the conservation-of-powers thesis and the eminent dominion.

#### 1. The Conservation-of-Powers Thesis

One important principle of modern constitutional law often travels with dual-sovereign federalism, though less frequently with popular-sovereign federalism. Call it the “conservation of powers” thesis.<sup>52</sup> The conservation-of-powers thesis advances the claim that “division of the sum total of legislative powers between a ‘general government’, on the one hand, and the ‘States’, on the other” must be *complete*.<sup>53</sup> On the conservation-of-powers thesis, no plausible interpretation of the Constitution may leave a useful sovereign power undistributed to at least one of the American governments.

The illustration of the conservation-of-powers thesis that is most recognizable to modern debates was written by Senator George Sutherland, who wrote in 1910 that

Vattel had written in 1758, and this [the framers] read: ‘Whatever is lawful for one nation is equally lawful for another; and whatever is unjustifiable in

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<sup>51</sup> See Saul Cornell, *Meaning and Understanding in the History of Constitutional Ideas: The Intellectual History Alternative to Originalism*, 82 FORDHAM L. REV. 721, 725–33 (2013) (describing the growth of intellectual history in American constitutional history as an effort to illuminate constitutionalism outside of the courts, and to focus on “men and women thinking: making, consuming, and remaking ideas and language” (quoting Daniel T. Rodgers, *Thinking in Verbs*, 18 INTELL. HIST. NEWSL. 21, 21–22 (1996))).

<sup>52</sup> I name the thesis the “conservation of powers,” but I am far from the first to notice the constitutional argument. For more on the argument that powers not residing with the states must reside in the federal government or not exist at all, see, for example, HENKIN, *supra* note 24, at 20; Sarah H. Cleveland, *The Plenary Power Background of Curtiss-Wright*, 70 U. COLO. L. REV. 1127 (1999); G. Edward White, *The Transformation of the Constitutional Regime of Foreign Relations*, 85 VA. L. REV. 1, 5 (1999) (collecting examples of the argument that proving the *absence* of a power in the states is sufficient to prove its *presence* in the federal government).

<sup>53</sup> Corwin, *supra* note 32, at 3.

the one is equally so in the other.' With this knowledge [the framers] introduced the United States of America into the family of nations, to be governed by the law of nations.<sup>54</sup>

The claim that Sutherland, and others, was advancing in order to domesticate the law of nations into American public law is worth defining with precision.

Although dual-sovereign federalism does not, strictly speaking, entail the conservation of powers, the affinity is clear enough: if the federal and state governments are *sovereigns* within their spheres, *and* the state sovereign holds the remainder of sovereignty, then the Constitution must have distributed every conceivable power between the two governments (apart from those expressly withheld by the Constitution's text).

The conservation-of-powers thesis can do difficult work in making arguments about the Constitution's distribution of public power. Indeed, the thesis supplied the following truism to a generation of constitutional lawyers: "Under the constitution of the United States, all possible powers must be found in the Union or the states, or else they remain among those reserved rights which the people have retained, as not essential to be vested in any government."<sup>55</sup> This imperative—to find all *essential* powers in our governments—can surmount even the last clause of the Tenth Amendment: "[I]f that which is essential to government is prohibited to one, it must, of necessity, be found in the other; and the prohibition, in such case, on the one side, is equivalent to a grant on the other."<sup>56</sup> The operative textual rule is thus: the express or implied denial of a power to one government amounts to a grant to the other.

This 1865 description of the conservation-of-powers thesis is important because its author, Judge James Valentine Campbell, taught Michigan's constitutional law course when George Sutherland received his training in the law there.<sup>57</sup> Sutherland would, as a Supreme Court Justice, come to

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<sup>54</sup> George Sutherland, *The Internal and External Powers of the National Government*, 191 N. AM. REV. 373, 381 (1910).

<sup>55</sup> *Van Huse v. Kanouse*, 13 Mich. 303, 312-13 (1865).

<sup>56</sup> *Id.* at 313.

<sup>57</sup> See Sutherland, *supra* note 54, at 386 (quoting *Van Huse* and describing Campbell as a jurist "whose historical and legal learning has been seldom excelled in this country"); see also HADLEY ARKES, *THE RETURN OF GEORGE SUTHERLAND* 42-43 (1994) (explaining Campbell's influence); Marshall Davis Ewell, *Notes Taken From Lectures Given by Ashley Pond and J.V. Campbell, 1866-1868*, at 7 (Dec. 17, 1866) [hereinafter *Ewell's Campbell Notes*] (on file with Bentley Historical Library, University of Michigan) ("The jurisdiction of the U.S. government is of three classes: first all external jurisdiction, second jurisdiction relative to all domestic matters relating to more than a single state; third all matters that can not be safely intrusted to local jurisdiction without imperiling the peace & harmony of the states."). In light of the coronavirus pandemic, the editors were unable to obtain a copy of the Ewell source to confirm its contents before press.

elevate Campbell's theory into law.<sup>58</sup> For Campbell and then for Sutherland, American governments must "possess every power that has been found to be absolutely necessary to all other nations."<sup>59</sup> No matter the interpretive niceties, any theory of the Constitution must "portion[] out *all the possible powers* to the general and state governments."<sup>60</sup>

And indeed, as a Senator, Sutherland sharpened Campbell's theory into a thorough rejection of popular-sovereign federalism. He argued that "[t]o say that the power is not destroyed but is reserved to the people does not meet the difficulty. Such a reserved power is in effect no power. . . . A power reserved to the people is not come-at-able; it cannot be translated into action."<sup>61</sup> Sutherland thus rejected popular-sovereign federalism and its focus on the last clause of the Tenth Amendment in defining the distribution of sovereignty within the American republic: "We must assume that no necessary or beneficial power was intentionally withheld . . . , but that the powers reserved to the people were only such as they were capable or desirous of themselves exercising or were unnecessary to the operations of government . . . ."<sup>62</sup>

In Sutherland's hands, the conservation-of-powers thesis would become a bedrock principle of a foreign-affairs federalism that committed our Constitution to a theory of dual sovereignty. From the idea that "the consequence of denying to the general government any specified power over *external* affairs is to preclude its exercise by governmental agency altogether"<sup>63</sup> one conclusion quickly followed: "all necessary power over external affairs should be vested in the National Government . . . ."<sup>64</sup> In denying foreign-affairs powers to the states, Article I, Section 10, according to Sutherland's conservation-of-powers thesis, entails the plenary grant of that power to the federal sovereign. The conservation-of-powers thesis has since become a central feature of modern foreign-affairs federalism.

Yet, as I have argued, views on the conservation-of-powers thesis were not fixed before Sutherland's era. I focus in what follows on an especially knotty question that drew partisans into warring about the popular-sovereign, dual-sovereign, and conservation-of-powers ideas: do American governments possess the eminent dominion?

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<sup>58</sup> See Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 277 (2002) [hereinafter Cleveland, *Powers Inherent*] ("Sutherland's 1919 variation on [Judge Campbell's] essay largely tracked the same argument, though it asserted that the Territory Clause provided no power to govern territories (e.g., the power must be inherent) and updated the argument to include the *Insular Cases*.").

<sup>59</sup> Ewell's Campbell Notes, *supra* note 57, at 13 (emphasis added).

<sup>60</sup> *Id.* (emphasis added).

<sup>61</sup> Sutherland, *supra* note 54, at 380.

<sup>62</sup> *Id.* at 381.

<sup>63</sup> *Id.* at 375.

<sup>64</sup> *Id.* at 378.

## 2. The American Eminent Domain

Like any serviceable property concept, the “eminent domain” entered American law as a confused bundle of ideas, replete with a complex intellectual history. Early constitutional reasoning about the eminent domain—or, as I shall call the broader idea, the “eminent dominion”—was marked by a partisan reception of the idea from a broad and vibrant law-of-nations literature.

For example, the nineteenth-century law student learned that the takings power had to be borrowed from the law of nations because the state and federal constitutions “do not gen[erally] . . . use the phrase ‘em. dom.’”<sup>65</sup> The term, as those students were taught, originated with the law-of-nations publicist Grotius, “and imports supreme or ultimate property or control.”<sup>66</sup>

The last few words of Grotius’s description—“ultimate property or control”—suggest the central conceptual difficulty (and consequent opportunity) facing constitutional lawyers who wished to domesticate this idea of the eminent dominion into American law. The idea defined by Grotius contained multitudes: in Grotius’s hands, the eminent domain describes both a *power* over property and a *right* of dominion in that property.

Despite Grotius’s uncontroversial claim that the eminent dominion includes a sovereign’s takings power,<sup>67</sup> motivated readers of the law-of-nations canon could pluck a number of disparate claims from his elaborate description of the idea. First, Grotius’s rendition permitted partisans to use “eminent domain” as a stand in for “power,” *tout court*. Sutherland’s favorite publicist Vattel, for example, wrote that “when the nation takes possession of a country, the property of certain things is [then] allowed to individuals only with th[e sovereign’s] reserve [of eminent domain].”<sup>68</sup> The people thus must presumptively “yield[] to [the sovereign] the eminent domain.”<sup>69</sup> Second, because Grotius argued that the sovereign’s takings *power* flowed from the sovereign’s original property *right*, several publicists and constitutional

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<sup>65</sup> James Bradley Thayer, Lectures on Constitutional Law, at 100 (unpublished manuscript) (on file with Harvard Law School Library).

<sup>66</sup> *Id.* Thayer quoted Grotius in his seminal work on the eminent domain, arguing that a review of the law of nations “will bring out the conceptions . . . which the framers of our first constitutions entertained” regarding the takings power. 1 JAMES BRADLEY THAYER, CASES ON CONSTITUTIONAL LAW, 945 (Cambridge Univ. Press 1895).

<sup>67</sup> See HUGO GROTIUS, THE RIGHTS OF WAR AND PEACE 1556 (Richard Tuck ed., Liberty Fund 2005) (1625) (“[T]he State has an eminent Right of Property over the Goods of the Subjects, so that the State, or those that represent it, may make Use of them, and even destroy and alienate them, . . . for the publick Benefit . . .”).

<sup>68</sup> M. DE VATTEL, THE LAW OF NATIONS; OR, PRINCIPLES OF THE LAW OF NATURE; APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS 173 (New York, Samuel Campbell 1796).

<sup>69</sup> *Id.* (emphasis omitted).

lawyers thought that the eminent dominion was simply shorthand for a sovereign's exclusive control and jurisdiction over territory.<sup>70</sup>

Indeed, the title-oriented theory of the sovereign's eminent dominion recurred in the classic nineteenth-century treatments of title to territory in public international law. Wheaton's *Elements of International Law*, for example, explained that "[t]his national proprietary right, so far as it excludes that of other nations, is absolute; but in respect to the members of the state it . . . forms what is called the eminent domain."<sup>71</sup> Similarly, when Thomas Rutherford delivered an influential course of lectures on public law, he explained that "[a] n[a]tion by settling upon any tract of land, . . . acquires, in respect of all other nations, an exclusive right of full or absolute property . . . . This absolute property of a nation, in what it has thus seized upon, is its right of territory."<sup>72</sup> And, by the late-nineteenth century, Thomas Woolsey lectured his Yale students on the "Territorial Rights of States." After noting that "[a] nation exists within certain territory," he likewise noted that a nation "has juris[diction] over its subjects" and "has the domin. eminens."<sup>73</sup>

Unlike his forebears, however, Woolsey rejected the idea that the "domin. eminens" arose because "th[e] state was the original proprietor of the soil."<sup>74</sup> Instead, Woolsey would argue that the "true" justification for the "domin. eminens" is the more familiar idea that "there are rights of all which affect land" that might overcome any individual proprietor's rights.<sup>75</sup> Just a few moments later, however, Woolsey's lecture contended that "a govt [sic] may not sell or give away its subjects prop. or even alienate a part of territory without the inhabitants consent."<sup>76</sup>

I highlight Woolsey's limitation of the sovereign's prerogative to cede territory for two reasons. It not only underscores the extent to which sovereignty, takings, and cession were all closely related aspects of the eminent dominion,<sup>77</sup> but it also demonstrates the extent to which Americans

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<sup>70</sup> See, e.g., *Beekman v. Saratoga & Schenectady R.R.*, 3 Paige Ch. 45, 73 (N.Y. Ch. 1831) ("[T]he *eminent domain*, the highest and most exact idea of property, remains in the government, or in the aggregate body of the people in their sovereign capacity . . . ."); *Lindsay v. East Bay St. Comm'rs*, 1 S.C.L. (1 Bay) 38, 56 (S.C. 1796) (recognizing how "eminent civilians and jurists" interpret the power to "appropriate a portion of the soil of every country for public roads and highways" as part of "the original rights of sovereignty" within "the authority of the state").

<sup>71</sup> HENRY WHEATON, *ELEMENTS OF INTERNATIONAL LAW* 137 (Philadelphia, Carey, Lea & Blanchard 1836) (emphasis omitted).

<sup>72</sup> 2 THOMAS RUTHERFORTH, *INSTITUTES OF NATURAL LAW* 455 (Philadelphia, William Young 1799).

<sup>73</sup> Thomas D. Woolsey, Woolsey Family Papers A (unpublished lecture notes) (on file with Yale MSSA, Group 562, Series II, Box 45, No 193).

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at B.

<sup>76</sup> *Id.*

<sup>77</sup> RUTHERFORTH, *supra* note 72, at 456-57.

inherited the entirety of these confused definitions of the eminent domain from the law-of-nations canon.

The confusion surrounding the eminent domain's conflated treatment of a sovereign's takings power with original title was excellent fodder for constitutional politics.

Indeed, the limitation that Woolsey conveyed to his students—that republics may not barter territory without the inhabitants' consent—encapsulated a hard-fought dispute about the treaty power that has now vanished from the constitutional canon. As Woolsey's lectures suggest, a critical U.S. public law dispute about the power to exchange territory with other sovereigns caused partisans to mobilize the law-of-nations idea of the eminent domain.<sup>78</sup> That is because some publicists in the law-of-nations canon, such as Grotius, considered the acquisition and cession powers to follow from the eminent domain, and sometimes concluded that sovereigns lack the power to cede their territory to other sovereigns without the consent of the ceded "part."<sup>79</sup> Grotius was certain of this limit because he thought that the compacts that create governments could "never be reasonably imagined to . . . invest the Body with a Power to cut off its own Members whenever it pleases, and to subject them to the Dominion of another."<sup>80</sup> On the other hand, several later publicists, such as Vattel, argued that when it came to "the cession of a town or province," the nation "has a right to cut them off from the body[ i]f the public safety requires it."<sup>81</sup> For Vattel, "the cession ought to remain valid as to the state, since it hath a right to make it . . ."<sup>82</sup> In short, the sovereign's eminent domain included original *title*, permitting the sovereign to get and spend territory at will.

The mid-nineteenth-century student at Harvard Law School was assigned all of these materials—Grotius, Vattel, and Rutherford—as core texts in the "Law of Nations" and left to puzzle over the definition of the "eminent domain"—an idea that would become a significant focus of American public law in the century that followed.<sup>83</sup> The first clear-eyed American treatment of the eminent domain was thus written by a young Harvard law student named James Bradley Thayer in 1856. When Thayer finished law school in

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<sup>78</sup> See *infra* Section II.B (describing the use of "eminent domain" to mean sovereign's title in mid-nineteenth-century public land debates).

<sup>79</sup> GROTIUS, *supra* note 67, at 1554 (accepting that in "[c]ase[s] of extreme Necessity," a part of a state may sever *itself* "because it is probable that Power was reserved, when civil Societies were instituted").

<sup>80</sup> *Id.* at 569.

<sup>81</sup> VATTEL, *supra* note 68, at 179-80.

<sup>82</sup> *Id.* at 180.

<sup>83</sup> See generally WILLIAM WOODWARD, A CATALOGUE OF THE LAW LIBRARY OF HARVARD UNIVERSITY IN CAMBRIDGE, MASSACHUSETTS (Cambridge, Folsom, Wells & Thurston 1841).

1856, a prominent Boston lawyer heralded his entry to the bar by publishing his Harvard prize essay called “The Right of Eminent Domain.”<sup>84</sup>

Remarkably, Thayer devoted much of his first scholarly publication to explaining what the eminent domain *is not*. The eminent domain is not, he cautioned, “the right of sovereign power in general”; nor is it the literal “domain” of public land; nor is it the power of taxation; nor is it the regulation of property; nor is it the law of necessity in the sense contemplated by the law of private property.<sup>85</sup> Indeed, for Thayer, the eminent dominion was not an abstract “right of property” at all: “although Grotius originated the name, yet he did not originate that for which the name stands . . . .”<sup>86</sup> Eminent domain simply stands for the “taking [of] private property for public purposes.”<sup>87</sup>

Thayer would argue for more than fifty years that the title-oriented idea of the sovereign’s eminent dominion was “petty.”<sup>88</sup> But the equivalence between “takings” and “eminent domain” was not as crisply fixed as Thayer would have liked. As I shall now explain, the other meanings of the eminent dominion instead became a central situs of constitutional conflict in the mid-nineteenth through mid-twentieth century.

## II. FEDERALISM AND THE SOVEREIGN’S EMINENT DOMINION

Having explained the ideological origins of the eminent dominion, and having described the warring ideas of dual-sovereign federalism, popular-sovereign federalism, and the conservation-of-powers thesis, I now turn to the constitutional battles over whether any American government could exercise a broad “eminent dominion” by treaty. As I have noted and will explain in the last Part of this Article, this history was excised from canonical histories of the treaty power in the early-twentieth century, in order to practice cleanly an imperial government.

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<sup>84</sup> James Bradley Thayer, Note, *The Right of Eminent Domain*, 19 MONTHLY L. REP. 241 (1856).

<sup>85</sup> *Id.* at 244-46.

<sup>86</sup> *Id.* at 246.

<sup>87</sup> *Id.* at 247. John Lewis advanced the same argument decades later. See 1 JOHN LEWIS, A TREATISE ON THE LAW OF EMINENT DOMAIN IN THE UNITED STATES 6 (Chicago, Callaghan & Co. 1888) (“All other exercises of power over private property . . . may properly be referred . . . to some other of the sovereign powers of the State. Therefore eminent domain is properly limited in its application to the appropriation by a sovereign State of private property to particular uses, as the public welfare demands.”); see also William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 799 (1995) (highlighting Lewis’s declaration that the Takings Clause applied not only to the deprivation of physical things, but also to the deprivation of “certain rights in and appurtenant to those things”).

<sup>88</sup> James Bradley Thayer, Book Review, 8 HARV. L. REV. 237 (1894); see also 1 PHILIP NICHOLS, THE LAW OF EMINENT DOMAIN 24 nn.47-51 (2d ed. 1917) (surveying the nineteenth-century confusion); cf. Letter from Carman Randolph to James Bradley Thayer (July 1, 1894) (on file with Harvard Law School Special Collections) (“[Y]ou know better than most . . . how many mistakes have been made in defining [the eminent domain].”).

From 1825 to 1850, the American political elite debated two related constitutional puzzles: the first-order question of whether any government possesses the power to acquire and cede territory; and the second-order question of whether the federal government or the states hold original title to land so acquired.

These disputes demanded answers to mixed questions of private and public law, and so they drew out careful reasoning from the partisans who debated their answers. The stakes were also high: "All together this public domain represented a vast reservoir of potential national wealth and provided a crucial outlet for the growth of the American population."<sup>89</sup> And, because these disputes are largely settled, they reveal something about the history of our constitutional culture while being less prone to revelatory vindications of modern political intuitions.

A small vignette illustrates the extent to which these issues were conjoined in constitutional politics: In March 1837, former Chancellor James Kent invited Daniel Webster to New York City to give a public address. Webster arrived in New York on March 15, 1837, where over two-and-a-half hours he discussed hallmark issues of nineteenth-century politics: slavery, the national bank, paper money, internal improvements, and the presidency.<sup>90</sup> But much of his speech was dedicated to the annexation and cession of foreign land, and the government's title to such lands once acquired.<sup>91</sup> On these last questions, Webster ably defended the views of his party. He argued that the annexation of Texas by treaty would be unconstitutional.<sup>92</sup> He also acknowledged the existence of "[t]he idea, that when a new State is created, the public lands lying within her . . . become [her] property . . . in consequence of her sovereignty" but rejected it as "too preposterous for serious refutation."<sup>93</sup>

Yet Webster's sweeping rejection of annexation and the new states' title suggests that the positions he was assailing were not so preposterous as to pass without mention. Indeed, Webster's speech assumed a partisan posture on central constitutional battles that left an enduring imprint on our foreign-affairs federalism. Fifty years later, the power to annex was finally accepted as a *fait accompli*; the title to territory acquired by such acquisition was firmly vested in the federal government (though the U.S. Reports still bear the scars of litigation connected to that settlement); and the power to cede territory was denied to the federal government.<sup>94</sup>

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<sup>89</sup> Jerry Mashaw, *Reluctant Nationalists*, 116 YALE L. J. 1636, 1696 (2007).

<sup>90</sup> Senator Daniel Webster, Speech at Niblo's Saloon in New York: We Have One Country—One Constitution—One Destiny 1-2 (Mar. 15, 1837).

<sup>91</sup> *Id.* at 11-12.

<sup>92</sup> *Id.* at 11.

<sup>93</sup> *Id.* at 7.

<sup>94</sup> See *infra* Section II.A.



By accounting for Webster's victories and losses, we can get some purchase on the peculiar constitutional history that the mid-nineteenth century furnished to the twentieth. That is to say, we can understand what Justice Holmes would come to obliquely criticize as an "invisible radiation from the general terms of the Tenth Amendment" in *Missouri v. Holland*,<sup>95</sup> and what Justices Scalia and Thomas would later critique as "[a]n unreasoned and citation-less sentence" in the Court's seminal discussion of the limits of the American government's treaty power.<sup>96</sup> As I shall argue in the concluding Part of this Article, reviving these mid-nineteenth-century contests also draws into view the early-twentieth-century effort to shore up an imperial power to acquire territory and to maintain it as the dominion of the federal sovereign.

#### A. *Acquisitions and Cessions*

The legal history of the powers of acquisition and cession is well settled. First, despite his initial scruples about whether a federal acquisition power was consistent with "strict construction," Thomas Jefferson accomplished the Louisiana Purchase.<sup>97</sup> Second, the Marshall Court took up the acquisition power twenty-five years later in *American Insurance v. Canter*.<sup>98</sup> Marshall agreed with counsel's argument in that case that although the "express terms" of the Constitution do not contemplate acquisition, the power could be derived from the "universal principles of general law; from the powers of making peace, and war, and of making treaties, etc."<sup>99</sup> Marshall thus sanctioned Jefferson's purchase by holding that the power to acquire territory is a "consequen[ce]" of the federal government's treaty or war-making powers.<sup>100</sup> Marshall, it is thought, "entirely put to rest" the "power to acquire territory by treaty."<sup>101</sup> Finally, the acquisition of Texas enlarged the power by allowing annexation by mere joint resolution.

The above-recited history evinces a fair measure of victor's justice, both domestic and imperial. Viewing the history of acquisition in this way suffers from three critical flaws.

The first flaw is that Jefferson's misgivings were unknown for the first few decades of the nineteenth century and were not public when Marshall decided *Canter*. Jefferson's skepticism entered the vernacular of popular constitutional

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<sup>95</sup> *Missouri v. Holland*, 252 U.S. 416, 434 (1920).

<sup>96</sup> *Bond v. United States*, 572 U.S. 844, 873 (2014) (Scalia, J., concurring).

<sup>97</sup> See, e.g., EVERETT SOMERVILLE BROWN, *THE CONSTITUTIONAL HISTORY OF THE LOUISIANA PURCHASE, 1803–1812*, at 28 (1920); 2 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* 160 n.1 (Boston, Little & Brown 1851).

<sup>98</sup> See *Am. Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511, 524 (1828).

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 542.

<sup>101</sup> Golove, *supra* note 6, at 1190 n.357.

argument thirty years later. At that point, Jefferson's reservations became a cudgel of hypocrisy with which people like Joseph Story could beat strict constructionists.<sup>102</sup> Because Jefferson's constitutional scruples entered the debate so late, in order to understand the annexation problem and its resolution, one must look to the political era in which the issue was genuinely debated—that is, the decades after *Canter* was decided.

The second problem with the prevailing history of the acquisition power is that Marshall's quick pronouncement in *Canter* that there was a consequent power to acquire territory was easily distinguished in the decades that followed. As described in more detail below, as the acquisition of Texas moved to the fore of constitutional debate, influential opponents of the acquisition power dismissed *Canter* as dicta or distinguished *Canter* as inapplicable to anything but the territory of Louisiana.<sup>103</sup> In short, *Canter* settles the acquisition question only to the eyes of the modern lawyer who is committed to the historical fidelity of the U.S. Reports.<sup>104</sup>

But the most important flaw in the orthodox history of territorial acquisition is that it expunges the most sophisticated fights over the treaty power's reach from the American constitutional narrative. The annexation question, which turned on the propriety of drawing the eminent domain into American public law, remained open to dispute to the end of the nineteenth century. Indeed, the question remained so unsettled as to permit a national partisan fight over acquiring Texas, and it remained an open question in the twentieth century with respect to the propriety of imperial government.

### 1. Acquiring Louisiana and Texas

The orthodox history of the acquisition power was written by Everett Brown, whose 1920 Ph.D. dissertation entitled "The Constitutional History of the Louisiana Purchase" collected Jefferson's skeptical thoughts about acquisition in a chapter describing the "contemporary opinion" of the "constitutional right to acquire territory."<sup>105</sup> Today, Brown's history

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<sup>102</sup> See, e.g., STORY, *supra* note 97, at 160 n.1 ("President Jefferson himself . . . was of the opinion that the measure was unconstitutional . . . . What a latitude of interpretation is this! The constitution may be overleaped, and a *broad* construction adopted for favorite measures . . . !").

<sup>103</sup> See, e.g., COMMONWEALTH OF MASS., REPORT ON THE ANNEXATION OF TEXAS TO THE UNITED STATES, S. 50, at 19 (1838) ("[T]he power exercised in the case of Louisiana, and that which is proposed to be exercised in the admission of Texas . . . are distinct in their character, and depend upon entirely different principles.").

<sup>104</sup> See Mark A. Graber, *Settling the West: The Annexation of Texas, the Louisiana Purchase, and Bush v. Gore*, in SANFORD LEVINSON ET AL., THE LOUISIANA PURCHASE AND AMERICAN EXPANSION, 1803–1898, at 84 (2005) ("Efforts to analogize the process by which the West was settled to the processes by which the constitutional questions that occupy much contemporary scholarship are settled risks embroiling American constitutionalism in a vicious circle.").

<sup>105</sup> BROWN, *supra* note 97, at 14–35.

underwrites nearly all the major general and specialist histories of the constitutionality of acquisition.<sup>106</sup>

As Brown's history argued, Jefferson had concluded that the Constitution would have to be amended to authorize the acquisition of Louisiana. Some in Jefferson's cabinet tried to square an acquisition power with the Constitution's text; others resisted.<sup>107</sup> Ultimately, Brown wrote, Jefferson swallowed his doubts: Although Jefferson was convinced that "[t]he Executive . . . ha[s] done an act beyond the Constitution," it would be up to later generations to judge his choice.<sup>108</sup> When that generation comes of age, an "act of indemnity will confirm and not weaken the Constitution, by more strongly marking out its lines."<sup>109</sup>

Brown's notion was that Jefferson was, with a heavy heart, transgressing the Constitution for the good of the country—he "risk[ed him]self for you."<sup>110</sup> That conceit dovetailed with widespread contemporary public approval of the Louisiana Purchase. A young Joseph Story, for example, recommended that Massachusetts vote to approve the purchase.<sup>111</sup> An even younger Daniel Webster praised the purchase in a senior declamation at Dartmouth.<sup>112</sup>

Crucially, Jefferson's misgivings were not known outside his circle of confidants and played no role in the early settlement of the acquisition question. A diplomatic history published in the same year as Jefferson's death, for example, makes no mention of Jefferson's critique, describing instead an unremarkable incorporation of Louisiana following the "surrender of the province . . . in the usual form."<sup>113</sup>

To be sure, the conclusion that Jefferson's acquisition accomplished an "act beyond the Constitution"<sup>114</sup> did eventually enter popular constitutional politics, but only after *Canter* was decided. *Canter* brought the uncertain constitutional basis for acquisition into focus to those who resisted further

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<sup>106</sup> See, e.g., PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING 155 n.92 (7th ed. 2018) (referring to Brown's treatment of the history of the Louisiana Purchase); Cleveland, *Powers Inherent*, *supra* note 58, at 167-71 (repeatedly citing Brown's history in a discussion of the history of the Louisiana Purchase).

<sup>107</sup> See BROWN, *supra* note 97, at 20, 31 (noting that "[Secretary of State] Madison answered that 'he did not know that it was universally agreed that it required an amendment'" and that Secretary of the Treasury Gallatin "could see no difference 'between a power to acquire territory for the United States and the power to extend by treaty the territory of the United States'" (citation omitted)).

<sup>108</sup> *Id.* at 25 (citation omitted).

<sup>109</sup> *Id.* (citation omitted).

<sup>110</sup> *Id.* (citation omitted).

<sup>111</sup> See Letter from Jacob Crowninshield to Joseph Story (Feb. 13, 1804) (on file with University of Michigan Archives).

<sup>112</sup> See Daniel Webster, *Would it be Advantageous to the United States to Extend Their Territories?* (Dec. 25, 1800), in 11 PROC. MASS. HIST. SOC'Y 329-330 (1870) ("[W]e are under necessity of extending our territories by possessing ourselves of all the country adjacent those rivers, necessary for our commerce, or of giving up the idea of ever seeing Western America a flourishing country.").

<sup>113</sup> THEODORE LYMAN, THE DIPLOMACY OF THE UNITED STATES 113 (Boston, Wells & Lily 1826).

<sup>114</sup> BROWN, *supra* note 97, at 25 (citation omitted).

acquisitions. By then, the principal resistors were two men who had once supported the acquisition of Louisiana—Joseph Story (since elevated to the Supreme Court) and Daniel Webster—and a prominent abolitionist named William Ellery Channing. These three participated in the creation of a widely circulated set of documents that resisted the acquisition of Texas on constitutional grounds. They nearly won.

Channing's contribution to the Texas debate started with a series of letters to his classmates.<sup>115</sup> Channing intended to oppose publicly the annexation of Texas to staunch the spread of slavery.<sup>116</sup> He asked a friend to help him canvass the constitutional objections, who in turn forwarded the request to Justice Joseph Story.<sup>117</sup> Story replied from Washington by explaining that the relevant points of constitutional law were "much discussed in the debates on the Louisiana Treaty in 1803, which were collected in a volume (which I have) printed in 1804."<sup>118</sup> Story admitted that he agreed with Marshall's holding in *Canter* that the federal government could acquire territory, but added that is a "very different question from the point whether a *foreign State, as such*, is admissible into the Union."<sup>119</sup> On that question, Story could not "see any ground, upon which Texas, as an independent state, is admissible into the union."<sup>120</sup>

Story offered to send his own copy of the 1804 debates to aid Channing's argument against Texas.<sup>121</sup> This copy is preserved in Harvard Law School's library,<sup>122</sup> and is marked up by someone eager to contest the constitutionality of acquisition. Nearly all of the floor speeches opposing the acquisition of Louisiana are highlighted. For example, the argument by one congressman that the "power to incorporate new territory did not exist" is highlighted in the margin.<sup>123</sup> The speaker argued that annexation would allow the Senate and the Executive to "add to the numbers of the union by treaty whenever they please" and "destroy[] the perfect union contemplated between the original parties, by interposing an alien . . . to share the powers of government with them."<sup>124</sup>

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<sup>115</sup> See Fulmer Mood & Granville Hicks, *Letters to Dr. Channing on Slavery and the Annexation of Texas*, 1837, in 5 NEW ENGL. Q. 587, 587 (1932) (describing the correspondence between classmates); Russell K. Osgood, Book Review, 71 CORNELL L. REV. 726, 730 (1986) (noting that Story and Channing were classmates).

<sup>116</sup> Mood & Hicks, *supra* note 115, at 587.

<sup>117</sup> *Id.* at 587-88 (describing Channing's correspondence with Joseph Tuckerman and Joseph Story).

<sup>118</sup> *Id.* at 593 (footnote omitted).

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 594.

<sup>122</sup> See DEBATES IN THE HOUSE OF REPRESENTATIVES ON THE BILL FOR CARRYING INTO EFFECT THE LOUISIANA TREATY (Philadelphia, Thomas & George Palmer 1804) (on file with Harvard Law School Library) (signed by Joseph Story).

<sup>123</sup> *Id.* at 62.

<sup>124</sup> *Id.* at 102-03.

Channing used the material gleaned from Story's volume to write an open letter opposing annexation. "The annexation of Texas," he predicted, "will give rise to constitutional questions and conflicts, which cannot be adjusted."<sup>125</sup> Although the North agreed to annex Louisiana "very reluctantly, on account of [its] obvious utility," Channing argued that the proposed annexation of Texas would unlawfully "admit an independent community, invested with sovereignty, into the confederation."<sup>126</sup> Channing then asked a series of rhetorical questions: "can the treaty-making power do this? Can [the treaty-making power] receive foreign nations, however vast, to the Union?"<sup>127</sup> And finally, "Does not the question carry its own answer?"<sup>128</sup>

Many Northerners answered Channing's questions. One history reports that 182,400 citizens petitioned the House to oppose the annexation of Texas.<sup>129</sup> Chief among them was a brief of the Massachusetts legislature, which neatly elaborated the popular-sovereign theory that federalism prohibited any exercise of the treaty-making power that altered the composition of the popular sovereign.

Massachusetts argued that no arm of the federal government has the "competency" to acquire Texas and contended that annexation "can only be accomplished by the exercise of the reserved sovereignty of the people."<sup>130</sup> Indeed, the government could not accomplish annexation without adopting "another frame of government radically different, in objects, principles and powers from that which was framed for our own self-government, and deemed to be adequate to all the exigences of our own free Republic."<sup>131</sup> A power to annex cannot be "incidental to the general nature of our government," Massachusetts argued, because "all and each have a right to say with whom they will or will not be connected."<sup>132</sup> And, if Louisiana was taken to be an analogous precedent, Massachusetts had a ready answer: "The posthumous publication of [Jefferson's] writings [in 1829] has fully disclosed that Jefferson himself believed . . . that his own acts . . . were not authorized by the constitution, but that they implied the exercise of a power forbidden by its spirit . . . ."<sup>133</sup> If even Jefferson had rejected the Louisiana Purchase, Massachusetts contended, then the purchase was no precedent at all.

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<sup>125</sup> WILLIAM ELLERY CHANNING, *THE COMPLETE WORKS OF W.E. CHANNING* 639, (London, Routledge & Sons 1873).

<sup>126</sup> *Id.* at 639-40.

<sup>127</sup> *Id.* at 640.

<sup>128</sup> *Id.*

<sup>129</sup> AUSTIN WILLEY, *THE HISTORY OF THE ANTISLAVERY CAUSE IN STATE AND NATION* 83 (Portland, Thurston & Co. 1886).

<sup>130</sup> COMMONWEALTH OF MASS., *supra* note 103, at 4.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at 8.

<sup>133</sup> *Id.* at 17-18.

In Massachusetts's view, the treaty power was not unlimited. To find its extent, one should "look for its nature and limits . . . to the law of nations, except so far as it may be restrained by other provisions of the constitution itself."<sup>134</sup> One cardinal limitation furnished by the law of nations, Massachusetts argued, is that the treaty-making power cannot affect things that "belong inalienably to the *people*, and . . . cannot be[] delegated by them to their *governments*."<sup>135</sup> Treaties could settle boundaries or exchange "dependencies" that are "the mere property of the Prince," but treaties could not transfer the "principal empire"—the eminent dominion—of the state.<sup>136</sup> Massachusetts then canvassed the eminent-domain writings of Vattel, Samuel Puffendorf, and Grotius to shore up the argument that the "disposition of . . . sovereignty" cannot be "a subject of barter by *governments*."<sup>137</sup> (The emphasis in these passages is in the original: a people's *government* cannot barter away the people's *sovereignty*—their eminent dominion—to other sovereigns.) So, Texas could not give itself to us, and we could not receive it.<sup>138</sup>

Crucially, Massachusetts argued, the union of a foreign sovereignty with our government can only be "effected by the *summa jus*, the highest rights of reserved sovereignty. It must be the act of the people themselves, and not of their rulers and servants."<sup>139</sup>

The Senate rejected the acquisition of Texas by treaty, spurring proponents of annexation to begin a new effort to acquire Texas by ordinary legislation. With a new sense of alarm, on January 26, 1845, Daniel Webster summoned two local lawyers to his Boston office.<sup>140</sup> As he paced the room, Webster dictated one final argument to oppose the annexation of Texas.<sup>141</sup> The question, Webster argued, "touches the identity of the Republic" and presents a "plain violation of the Constitution."<sup>142</sup> Like Channing and the Massachusetts legislature, Webster argued that no member of Congress is "clothed with any such authority" to modify the union.<sup>143</sup> Nor would the state legislatures have such power. Like the consent required to form the union, the "assent was given, not by the Legislature, but by a Convention of Delegates, chosen directly by the people . . . and with authority, therefore, to bind the people in a manner to which no other representative body was

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<sup>134</sup> *Id.* at 21.

<sup>135</sup> *Id.* at 22.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 23.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 24 (emphasis omitted).

<sup>140</sup> 15 WRITINGS AND SPEECHES OF DANIEL WEBSTER 192 n.1 (1903).

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 194-95.

<sup>143</sup> *Id.* at 198.

competent.”<sup>144</sup> Annexation of foreign states would thus require higher-order lawmaking<sup>145</sup> by the dormant popular sovereign—no representative government was competent to exercise the sovereign people’s eminent dominion whether by treaty or otherwise. So here was Massachusetts’s fully formed popular-sovereign federalism: even if annexation is part of some sovereigns’ treaty-making power, the American sovereign delegated that power to neither of its governments. Massachusetts thus elaborated a vision of American foreign-affairs federalism that required no theory of “state sovereignty” to limit the treaty power.

Yet Massachusetts lost. Congress voted to annex Texas on March 1, 1845 and to admit Texas on December 29, 1845.<sup>146</sup> The joint resolutions carried simple majorities in both houses.<sup>147</sup> Although Massachusetts generated a plausible critique of annexation, politics overbore high ideals. The election of a President—James K. Polk—who favored annexation<sup>148</sup> would become, in the gloss of the imperial histories written at the turn of the next century, a constitutional moment that enlarged the treaty power by placing the issue on the ballot.

The constitutional debate over the power to annex Texas is now consigned to a long footnote in the constitutional history of Texas.<sup>149</sup> Yet the resolution of the Texas question represented the first, highly contingent effort to define a canonical view of the annexation power received from the eminent dominion. For the first time, the fact that Jefferson thought that acquisition was unconstitutional entered public debate. And partly as a consequence of that timing, Marshall’s view of the treaty-making power elaborated in *Canter* did not settle the question. In short, the annexation power could not be clothed in “our federalism” or resolved by invoking the founders’ meaning recovered from time out of mind.

But politics did not vanquish Massachusetts’s argument for good. After all, there were two other eminent-dominion debates still to be resolved: the power to *cede* territory and the right of title over territory acquired from others.

## 2. Maine’s Pride of Dominion

Just as a treaty controversy sparked the constitutional upheaval over Texas, a treaty motivated the contest over the federal government’s power to cede territory. Today, as Justice Thomas recently demonstrated, it is possible

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<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at 201.

<sup>146</sup> 5 STAT. 797–98 (annexing Texas), 9 STAT. 108 (admitting Texas as a state).

<sup>147</sup> A. RAY STEPHENS, TEXAS: A HISTORICAL ATLAS 124, 127 (2010) (showing breakdown of votes).

<sup>148</sup> See EUGENE IRVING MCCORMAC, JAMES K. POLK: A POLITICAL BIOGRAPHY 226–27 (1922) (summarizing Polk’s support of “re-annexing” Texas).

<sup>149</sup> See, e.g., JUSTIN H. SMITH, THE ANNEXATION OF TEXAS 328 n.11 (1911) (describing the relevant history in a footnote spanning four pages).

to draw from the Federalist Papers the contention that “[t]he President and Senate lacked the power ‘to dismember the empire.’”<sup>150</sup> But, as the second generation of constitutional lawyers would discover, the generalities of the Federalist Papers gave way to the realities of international life. Maine’s northern boundary produced the constitutional contest.

The northeast boundary of the United States was ostensibly fixed in 1783 by the Treaty of Peace that ended the Revolutionary War.<sup>151</sup> Accordingly, the territory which included Maine was to be a “free, sovereign and independent” state, whose boundary, in pertinent part, was to run along “Highlands which divide those rivers that empty themselves into the River St. Lawrence.”<sup>152</sup> As was apparent to the drafters, the treaty’s incorporation of a boundary line running through “Highlands” was ambiguous.<sup>153</sup>

The highland boundary became mired in decades of arbitration and the object of a hard-fought constitutional debate. By the end of the War of 1812, confusion over Maine’s highland boundary entered its fourth decade. A new treaty of peace referred the boundary dispute to arbitration.<sup>154</sup>

While arbitration negotiations were unfolding, Maine—since made a state independent from Massachusetts—loudly resisted any arbitration of its border with Canada. Governor Enoch Lincoln used his inaugural address to call upon Maine to be “tenacious of its territorial possessions,” and sketched out a view of the eminent dominion that would develop into a rallying cry over the following decade.<sup>155</sup>

Lincoln told his legislature that “we have no reason to believe that the right or disposition anywhere exists to cede our soil, . . . which would be an abuse in which neither the people nor the governments of the Union or the States would acquiesce.”<sup>156</sup> He confidently predicted that “our inalienable

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<sup>150</sup> *Bond v. United States*, 572 U.S. 844, 888 (2014) (Thomas, J., concurring) (citing 3 *DEBATES ON THE FEDERAL CONSTITUTION* 514 (Jonathan Elliot ed., 2d ed. 1876)).

<sup>151</sup> *Definitive Treaty of Peace*, Gr. Brit.-U.S., Sept. 3, 1783, 18 Stat. 266-69.

<sup>152</sup> *Id.* at 266-67.

<sup>153</sup> See 1 JOHN BASSETT MOORE, *HISTORY AND DIGEST OF THE INTERNATIONAL ARBITRATIONS TO WHICH THE UNITED STATES HAS BEEN A PARTY* 98 (Washington, Gov’t Printing Off. 1898) (providing that the highland line would be resolved “as soon as conveniently . . . after the war” (citing 5 FRANCIS WHARTON, *THE REVOLUTIONARY DIPLOMATIC CORRESPONDENCE OF THE UNITED STATES*, 808 (Washington, Gov’t Printing Off. 1889))); President Jefferson’s Third Annual Message to Congress (Oct. 17, 1803), *reprinted in* 1 *AMERICAN STATE PAPERS: FOREIGN RELATIONS* 62 (1833) (noting that the Maine boundary was “too imperfectly described to be susceptible to execution”).

<sup>154</sup> *Treaty of Ghent*, Gr. Brit.-U.S., art. V, Dec. 24, 1814, 8 Stat. 218 (referring the “Highlands” boundary first to commissioners, but in the alternative to binding arbitration by a “friendly sovereign”).

<sup>155</sup> Israel Washburn, Jr., *The North-Eastern Boundary*, in 8 *COLLECTIONS OF THE MAINE HISTORICAL SOCIETY* 31 (Portland, Hoyt, Fogg & Donham 1881).

<sup>156</sup> *Id.*



sovereignty will be respected.”<sup>157</sup> Lincoln then wrote to Secretary of State Henry Clay, holding himself out as “the only organ of communication of the people of Maine.”<sup>158</sup> His letter introduced a remarkable contention, which remains underscored in pencil in the State Department archives: “[n]either the treaty making or executive power of the United States extends to the cession or exchange of the territory of any State, without its consent.”<sup>159</sup>

Maine’s constitutional argument to the State Department was that “neither department of the Federal Government, nor all [federal departments], can be the . . . arbiter . . . of a boundary already established . . . because, if one department, or all, have this power, they may . . . indirectly cede our State.”<sup>160</sup> The following month, Lincoln wrote to President John Quincy Adams to inquire about a “rumor” he had heard that the United States was referring the boundary to arbitration.<sup>161</sup> Although, he wrote, the “treaty making power . . . engage[s] to consider the decision of the Arbitrator conclusive . . . there is another party, not to be an indifferent spectator to its own delaceration.”<sup>162</sup> Secretary Clay replied and disclosed that the boundary would, indeed, be referred to an arbitrator.<sup>163</sup>

Lincoln once again addressed Maine’s legislature to decry the forthcoming arbitration. He contended that the effort to arbitrate the boundary “is to pronounce the State unfit for self-government . . . . Even the privilege of being able to give [the territory] away is worth more than . . . the richest mine of gold.”<sup>164</sup> Lincoln asked whether the treaty-making power could “exercise a function beyond the grasp of the delegated power over the whole” and, with the complicity of a foreign sovereign arbitrator, “do what it could not accomplish without; that is, consent to the alienation . . . of territo[r]y.”<sup>165</sup>

Lincoln’s theory of the eminent dominion—of soil, territory, exclusive possession, and sovereignty—was entirely lifted from the law-of-nations canon. Lincoln thus asked the assembled legislature whether “the United States [has] any constitutional authority to cede any part of an independent

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<sup>157</sup> *Id.*

<sup>158</sup> Letter from Enoch Lincoln, Governor of Me., to Henry Clay, U.S. Sec’y of State (Apr. 18, 1827), in 326 U.S. CONGRESSIONAL SERIAL SET 150 (1838).

<sup>159</sup> *Id.* at 151.

<sup>160</sup> *Id.* at 153.

<sup>161</sup> Letter from Enoch Lincoln, Governor of Me., to John Quincy Adams, U.S. President (May 29, 1827), in RESOLVES OF THE EIGHTH LEGISLATURE OF THE STATE OF MAINE 751 (Portland, Thomas Todd 1828) [hereinafter RESOLVES].

<sup>162</sup> *Id.* at 752.

<sup>163</sup> Letter from Henry Clay, U.S. Sec’y of State, to Enoch Lincoln, Governor of Me. (Nov. 10, 1827), in 6 PAPERS OF HENRY CLAY 1251 (Mary W. M. Hargreaves & James F. Hopkins eds., 1981).

<sup>164</sup> Enoch Lincoln, Governor of Me., Speech to Both Houses of the Legislature (Jan. 3, 1828), in RESOLVES, *supra* note 161, at 621.

<sup>165</sup> *Id.* Enoch Lincoln, Governor of Me., Message to the Joint Select Committee of the House and Senate of Maine (Jan. 5, 1828), in RESOLVES, *supra* note 161, at 661.

sovereignty composing one of its members.”<sup>166</sup> Given the idea of territorial “dominion” expressed in the law of nations, Lincoln argued that “it cannot be supposed that [the states] ever intended to give to the general government any power by which they might be destroyed and consolidated . . . .”<sup>167</sup> Reflecting the complex idea of the eminent domain that pervaded his era, Lincoln made title, jurisdiction, and sovereignty coextensive.<sup>168</sup> Whether lands were cultivated or vacant, territory that was the dominion of the state could not be ceded.<sup>169</sup> Nor could Maine cede the territory to another sovereign on its own.<sup>170</sup>

Maine’s constitutional *cri de coeur* consumed Lincoln’s governorship. Lincoln’s successor, Governor Samuel Smith, continued to press the “justice of the[] claim” by “the people of the state” to the disputed territory.<sup>171</sup>

When the rumor reached Maine that the King of the Netherlands had arbitrated the boundary, Smith wrote to the federal government to express his concern that the “boundaries, as designated by treaties, have been totally disregarded.”<sup>172</sup> Maine saw in the treaty of peace “[a] power of dismembering States” that “might in its consequences break down and absorb all the State sovereignties.”<sup>173</sup> Maine added that “[i]f the . . . United States can cede a portion of an independent State to a foreign government, she can, by the same principle, cede the whole . . . she can by the same principle annex one State to another until the whole are consolidated, and become the sole sovereign . . . .”<sup>174</sup>

Maine’s resistance to the arbitrator’s award thus stumbled upon a difficult question: if all American governments are deprived of a treaty-making power of cession, can territory *ever* be alienated to purchase peace without amending the Constitution? The question would haunt Maine’s constitutional theory. Maine would argue only that the power of cession “cannot be exercised without the agreement and consent of the State, *if it can be done*[] without the agreement and consent of all the States in the manner provided for amending

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<sup>166</sup> *Id.* at 694.

<sup>167</sup> *Id.* at 695.

<sup>168</sup> *Id.* at 699.

<sup>169</sup> See *id.* (noting that Massachusetts had presumed that British settlers would not attempt to settle on Massachusetts land and would immediately withdraw if they so did accidentally).

<sup>170</sup> See Letter from Enoch Lincoln, Governor of Me., to John Quincy Adams, U.S. President (May 29, 1827), in *RESOLVES*, *supra* note 161, at 751 (explaining the Governor’s belief that Maine was “bound from deference” to notify the federal government that Britain had claimed a tract of the state’s land).

<sup>171</sup> Letter from Samuel E. Smith, Governor of Me., to Andrew Jackson, U.S. President (Mar. 2, 1831) (on file with author).

<sup>172</sup> *Id.*

<sup>173</sup> Report of the Select Committee of the Maine House of Representatives (Feb. 28, 1831), in *RESOLVES OF THE ELEVENTH LEGISLATURE OF THE STATE OF MAINE* 242, 244 (Portland, Todd & Holden 1831).

<sup>174</sup> *Id.*

or altering the Constitution.”<sup>175</sup> Like Massachusetts’s argument against annexing Texas by treaty, Maine’s federalism would, if taken to its conclusion, have required some plebiscitary act by the dormant sovereign before its dominion could be ceded to another sovereign.<sup>176</sup>

President Jackson referred Maine’s objections to the Secretary of State and appended a handwritten instruction to assess the merits of Maine’s arguments.<sup>177</sup> He also referred the arbitrator’s award to the Senate, which in turn debated whether it had anything to do. On the one hand, as Webster argued, the Treaty of Ghent already committed the United States to arbitration, and the President was in need of no advice or consent to “take care” that the treaty was executed. On the other hand, the Treaty of Ghent might be an “imperfect” treaty, which might require additional advice and consent.<sup>178</sup> The latter constitutional claim won out, and thirty-four of forty-two Senators voted against “ratifying” the arbitrator’s award.<sup>179</sup>

Following the Senate’s vote, Secretary of State Livingston wrote to his British counterpart to advance a number of arguments impugning the arbitral award. He explained that Maine now “disputes the right of the United States to diminish the extent of her territory,”<sup>180</sup> and proposed yet another round of negotiations to clarify the line provided by the Treaty of 1783. After expressing some exasperation, the British agent asked whether “any arrangement for avoiding the constitutional difficulty . . . has yet been concluded between the United States and the State of Maine.”<sup>181</sup>

There had been a remarkable arrangement. On February 14, 1832, Jackson instructed Secretary of State Livingston to speak privately with a Mainer involved in the boundary dispute.<sup>182</sup> Livingston conveyed a general agreement with Maine’s argument: if the arbitrator’s award deviated from the Treaty of 1783, “a question would arise as to the power of the U.S. to establish

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<sup>175</sup> *Id.* (emphasis added).

<sup>176</sup> *Id.*

<sup>177</sup> See, e.g., Note from Andrew Jackson, U.S. President (June 23, 1831) (on file with National Archives, NARA RG PI-170, Entry 89, No. 61) (referring the report to the “Sec. of State for his reflection and deliberation and a synopsis of the reply . . . to be given, when the proper time arrives . . .”).

<sup>178</sup> See FRANCIS M. CARROLL, *A GOOD AND WISE MEASURE: THE SEARCH FOR THE CANADIAN-AMERICAN BOUNDARY 190-91* (2001).

<sup>179</sup> Proceeding of the Senate on the Subject of the North Eastern Boundary, NILES WKLY. REG., Aug. 25, 1832, at 464.

<sup>180</sup> Report on the Northeastern Boundary at 2 (unpublished and undated manuscript) (on file with National Archives, NARA RG 76, PI-170).

<sup>181</sup> *Id.* at 4.

<sup>182</sup> See Memorandum from Mr. Livingston & Mr. Preble (Feb. 15, 1832) (on file with National Archives, NARA RG 76, Records of Boundary and Claims Commissions and Arbitrations) (“Pursuant to instructions given to me by the President yesterday I requested W. Preble to meet me at the Department . . .”).

any such new boundary at the expense of one or more of the States.”<sup>183</sup> Whatever the answer to the constitutional question, Livingston admitted that “the President was extremely desirous of . . . an arrangement” to resolve the impasse.<sup>184</sup> Livingston proposed an “informal negotiation with some person duly authorized to act for the State of Maine.”<sup>185</sup> This artifice was necessary, Livingston said, because “an agreement between the Executive of the U.S. and an individual state could neither have the form nor the effect of a treaty [since] the President had no power to cede the lands of the U.S.”<sup>186</sup> In reply, Maine’s Governor appointed, “with the advice and consent of Council,” three “Commissioners” empowered to “arrive at some . . . arrangement between the Government of [Maine] and of the United States . . .”<sup>187</sup> Andrew Jackson, in turn, instructed his Secretaries of State, Treasury, and Navy, to all meet with Maine’s commissioners in Washington.

The six agents of the state and federal governments met throughout May and June of 1832, and concluded an “agreement”: if new negotiations with Britain “should be impracticable,” Maine would consent to a “mutually convenient” boundary.<sup>188</sup> The federal government’s compensation to Maine was rich: Maine would receive the value of 1,000,000 acres of territory in present-day Michigan.<sup>189</sup> The agreement between Maine’s three commissioners and the Secretaries of State, Treasury, and Navy, was signed and sealed and remains in the State Department’s archives.

The legal effect of this agreement was never tested. The following spring, Maine rescinded the authority it had given to the commissioners and with it scrapped the Jackson Administration’s ad hoc solution to the federalism puzzle posed by cession of land.<sup>190</sup> The agreement remained secret for six years, until Massachusetts (which retained some title over the disputed territory) publicly decried a “treaty” between Maine and the federal government. This “treaty,” Massachusetts argued, was evidence that “the Executive was satisfied that our claim . . . could not be yielded to Great Britain without violating the constitution.”<sup>191</sup> And, in 1837, Maine argued that

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<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> Letter from Samuel Smith, Governor of Me., to Andrew Jackson, U.S. President (May 10, 1832) (on file with National Archives, NARA RG 76, PI-170, Entry 89, No. 77).

<sup>188</sup> Memorandum signed by Maine Commissioners 4 (unpublished and undated manuscript) (on file with National Archives, NARA RG 76, PI-70, No. 83).

<sup>189</sup> *Id.*

<sup>190</sup> CARROLL, *supra* note 178, at 193.

<sup>191</sup> COMMONWEALTH OF MASS., REPORT AND RESOLUTIONS OF THE COMMITTEE OF THE LEGISLATURE OF MASSACHUSETTS IN RELATION TO THE NORTHEAST BOUNDARY, S. 25-431, at 30 (1838).

even if there were an agreement between the state of Maine and the federal government authorizing the cession of some land, “[i]t is . . . by no means certain how far such consent [by the state] would enable the Treaty authority to exert its powers.”<sup>192</sup> In Maine’s renewed attack on the arbitral award, it pressed the theory that no treaty-making power allowed governments to trade away their subjects. Even a treaty attracting the consent of the Senate, President, and the “constitutional organs” of Maine might still be deficient because “[c]itizens might be made the subjects of a treaty transfer, and . . . allegiance and protection being reciprocally binding, the right to transfer a citizen to a foreign government—to *sell* him . . . might . . . be[] inconsistent with the spirit of our free institutions.”<sup>193</sup>

This most difficult entailment of Maine’s constitutional theory—that *neither* government could cede the people to other sovereigns, even if the two governments worked together—would never be answered in this period. Once the State Department understood that Maine’s vision of federalism could be useful, it invoked Maine’s objection to reject the arbitrator’s award. Maine thus gave the federal government a winning negotiating tactic: if Britain would agree to settle, there would be no constitutional crisis because there would be no unlawful cession; if Britain resisted, then Maine stood ready to deprive the general government of the power to negotiate.<sup>194</sup>

While every federal administration before had been careful to avoid engaging with the merits of Maine’s constitutional claim (and, indeed, had grumbled about Maine’s entry into international diplomacy), by 1838 caution gave way to embrace. Secretary of State John Forsyth wrote to Maine to affirm that “every successive Administration of the Federal Government in respect to its powers” has accepted that “the General Government is not competent . . . unless, perhaps, on grounds of imperious public necessity [to agree to] . . . a cession of territory . . . or the exchange thereof for other territory . . . without the consent of the State.”<sup>195</sup>

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<sup>192</sup> STATE OF MAINE, REPORT OF THE JOINT COMMITTEE OF THE MAINE HOUSE OF REPRESENTATIVES, at 2-3 (1837) (emphasis omitted) (on file with National Archives, NARA RG 76, PI-170, Entry 131).

<sup>193</sup> *Id.* at 3.

<sup>194</sup> See Report on the Northeastern Boundary, *supra* note 180, at 18 (“[T]he only alternative being . . . to decide a conventional line of boundary . . . and the [U]nited [S]tates, not having the power to adopt the former without the assent of Maine . . . [we will] make another effort to discover the line of the treaty.”); see also Letter from John Forsyth to Sir Charles Vaughan (Apr. 28, 1835), reprinted in S. Doc. No. 24-414, at 54 (1836) (“[T]he President does not possess the power to establish a conventional boundary, without the assent of the State of Maine . . .”).

<sup>195</sup> Letter from John Forsyth, U.S. Sec’y of State, to Edward Kent, Governor of Me. (Mar. 1, 1838), in 3 JAMES D. RICHARDSON, A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789–1908, at 442, 442 (1909) [hereinafter MESSAGES AND PAPERS].

Forsyth also told his British counterpart that his government “has no power to agree” to a new boundary, since “a division of the disputed territory . . . would be considered by Maine as tantamount to a cession . . . and . . . the Federal Government has no power to agree to such an arrangement without the consent of the State concerned.”<sup>196</sup> Maine’s constitutional politics succeeded, and its entrepreneurial constitutional argument was embraced by the federal government. The treaty power had found its first durable limit.

Throughout 1840–1842, Webster undertook a public relations campaign in Maine to support an international resolution of the boundary crisis.<sup>197</sup> Most fatefully, the federal government invited both Maine and Massachusetts to send commissioners to Washington to settle the boundary in concert with Great Britain. The Governor of Maine, still grasping at the proper mode of speaking for “the people,” recalled both houses of the legislature. The legislature in turn elected four commissioners. The Governor of Massachusetts had no quibbles about constitutional form and appointed, *sua sponte*, three commissioners.<sup>198</sup> All were given commissions investing them with the full power of the states’ governments.

Thus a large retinue of commissioners, foreign and domestic, arrived in Washington to finally settle the boundary. By July of 1842, Webster wrote to the state commissioners with the last, best offer. Great Britain and the United States would settle a boundary line, would exchange “equivalent” territory where that new line prejudiced something valuable, and would purchase the two states’ constitutional forbearance. Webster promised “that if the commissioners of the two states assent . . . the United States will undertake to pay to these states the sum of two hundred and fifty thousand dollars . . . .”<sup>199</sup>

Massachusetts replied first. Massachusetts conceded that “[w]hether the national boundary . . . be suitable or unsuitable . . . are questions not for Massachusetts, but for the general government, upon its responsibility to the

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<sup>196</sup> See Letter from Henry S. Fox to John Forsyth, U.S. Sec’y of State (Jan. 10, 1838), in *MESSAGES AND PAPERS*, *supra* note 195, at 433, 433 (1909); see also Report on the Northeastern Boundary, *supra* note 180, at 28 (“The Federal government cannot alienate any portion of the territory of a State, and there is little prospect that the State of Maine . . . would agree to the establishment of a new [boundary] line.”). The position represented a fortuitous change of view. As British negotiators explained, the whole conceit of the original arbitration was that the title was not yet quieted for either party: “[T]he title to the disputed territory is left imperfect by the treaty. . . . [T]he territory between the highlands claimed by the United States is not the absolute property of either party, and is not such territory as the United States can be constitutionally prevented from relinquishing.” Report on the Northeastern Boundary, *supra* note 179, at 8.

<sup>197</sup> See CARROLL, *supra* note 178, at 243–63.

<sup>198</sup> See *id.* at 260–61.

<sup>199</sup> Letter from Daniel Webster, U.S. Sec’y of State, to Me. Comm’rs (July 15, 1842), in *THE DIPLOMATIC AND OFFICIAL PAPERS OF DANIEL WEBSTER WHILE SECRETARY OF STATE* 41, 43 (New York, Harper & Bros. 1848) [hereinafter *PAPERS OF DANIEL WEBSTER*].

whole country, to decide.”<sup>200</sup> It promised to “relinquish[] to the United States [Massachusetts’] interest in the lands which will be excluded from the dominion of the United States”—provided that the General Government increased its offer by twenty percent.<sup>201</sup>

Maine then agreed, begrudgingly. While disavowing any “mercenary” or “extortion[ate]” intentions, it once again argued that it was bound to resist any “curtailment or dismemberment” of its dominion.<sup>202</sup> The last paragraphs of Maine’s response pivoted, however, to concede that “the executive of the United States, representing the sovereignty of the Union [now] assents” to the treaty for the “general good.”<sup>203</sup> Even though a new treaty would “lead to a surrender of a portion of the birth-right of the people,” Maine’s commissioners agreed to exercise the “power vested in them by . . . the Legislature of Maine” to “assent” to a new treaty.<sup>204</sup>

The Senate quickly ratified the treaty. The final boundary hewed closely to the boundary line provided by the arbitration award so loathed by Maine.<sup>205</sup> Maine and Massachusetts each received \$150,000 from the general government.<sup>206</sup> The equivalence in their disbursements means that the liquidated value of Maine and Massachusetts’s constitutional objections was about the same, notwithstanding the heightened value Maine claimed for its sovereignty. The equivalence also suggests something about the value of something Maine had called more valuable than the richest mine of gold: the marginal value of Maine’s “jurisdiction and government”<sup>207</sup> over the land was zero, since it received no more than Massachusetts (which, having relinquished sovereignty over Maine, made no such claims to an eminent dominion over the land).

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<sup>200</sup> Letter from Comm’rs of Mass., to Daniel Webster, U.S. Sec’y of State (July 20, 1842), in PAPERS OF DANIEL WEBSTER, *supra* note 199, at 49.

<sup>201</sup> *Id.* at 49.

<sup>202</sup> Letter from Comm’rs of Me., to Daniel Webster, U.S. Sec’y of State (July 22, 1842), in PAPERS OF DANIEL WEBSTER, *supra* note 199, at 55.

<sup>203</sup> *Id.* at 56.

<sup>204</sup> *Id.*

<sup>205</sup> Compare J.L. Herbert, Map Showing British and American Territories with Lands in Dispute on the Maine, Quebec and New Brunswick Borders (1831) (facsimile on file with Yale University Library Map Collection), with Topographical Map of Maine Boundary, USGS TOPOVIEW, <https://ngmdb.usgs.gov/topoview/viewer/#9/47.1117/-68.9231> [<https://perma.cc/AW78-RA8M>] (last visited Mar. 21, 2020) (showing Maine boundary).

<sup>206</sup> See Webster-Ashburton Treaty, Gr. Brit.-U.S., art. V, Aug. 9, 1842, 8 Stat. 572. (“[T]he Government of the United States agreeing, with the States of Maine and Massachusetts, to pay them the further sum of three hundred thousand dollars, in equal moieties . . .”).

<sup>207</sup> As Webster recorded, while Maine and Massachusetts each had “an interest in the soil,” Maine claimed an interest “in the jurisdiction and government.” Letter from Daniel Webster, U.S. Sec’y of State, to John Fairfield, Governor of Me. (Apr. 11, 1842), in PAPERS OF DANIEL WEBSTER, *supra* note 199, at 37.

Despite the central role of Maine's constitutional politics, the preambular declarations of the final Webster-Ashburton treaty obscure the constitutional contest: this was an ordinary treaty, arising solely between the United States and Her Majesty the Queen. But the treaty's substance records the price of Maine's constitutional acquiescence. Article V provided that the United States would pay Maine and Massachusetts "three hundred thousand dollars . . . on account of their assent to the line of boundary described in th[e] treaty . . ."<sup>208</sup> Great Britain's representative insisted on publishing a record that "my Government incurs no responsibility for these engagements," and protested that he was completely uninformed of the "nature and object" of the payments to Maine and Massachusetts.<sup>209</sup> Webster wrote the same day to acknowledge that England would not incur "any responsibility" under Article V.<sup>210</sup> This correspondence was attached to the treaty, though it does not appear in the final instrument of ratification.<sup>211</sup>

The treaty establishing Maine's final boundary looks to modern eyes like an ordinary boundary settlement between coequal international sovereigns, with little to signal the fifty years of constitutional controversy that preceded its ratification. Maine's two decades of constitutional politics nevertheless left an imprint on the mid- to late-nineteenth-century vocabulary of foreign-affairs federalism: no American government holds the eminent dominion necessary to cede territory to other sovereigns.

Maine's victory was eventually memorialized by the Supreme Court, but not in a treaty-power dispute. In *Fort Leavenworth R.R. v. Lowe*, the Court drew upon the history of Maine not to limit the federal treaty-making power, but rather to limit the *states'* power to cede territory without the federal government's consent.<sup>212</sup>

In *Fort Leavenworth*, a railroad company attempted to recover taxes it had paid to the state through which its railway ran, on the theory (among others) that the state had ceded its jurisdiction to tax the railroad to the federal government.<sup>213</sup> In rejecting the railroad's argument, the Court included two important dicta that illustrate the importance of Maine's resistance to modern foreign-affairs federalism.

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<sup>208</sup> Webster-Ashburton Treaty, *supra* note 206, art. V.

<sup>209</sup> Letter from Lord Ashburton, Her Britannic Majesty's Minister Plenipotentiary on Special Mission, to Daniel Webster, U.S. Sec'y of State (Aug. 9, 1842), in 4 T.I.A.S. 371, 371.

<sup>210</sup> Letter from Daniel Webster, U.S. Sec'y of State, to Lord Ashburton, Her Britannic Majesty's Minister Plenipotentiary on Special Mission (Aug. 9, 1842), in 4 T.I.A.S. 371, 371.

<sup>211</sup> See Notes to Document 99, in 4 T.I.A.S. 372, 372 ("[The] notes were among the papers accompanying the treaty when it was submitted to the Senate . . . but they were not mentioned in the Senate resolution of advice and consent . . . or referred to in either instrument of ratification.").

<sup>212</sup> 114 U.S. 525 (1885).

<sup>213</sup> *Id.* at 528.



The first dictum of *Fort Leavenworth* was that the Maine boundary dispute had established that “whether represented by her Legislature, or through a convention specially called for that purpose,” no state may “cede her political jurisdiction and legislative authority over any part of her territory to a foreign country[] without the concurrence of the general government.”<sup>214</sup> The Court thus elided the problem of representation posed by a treaty of cession by concluding that the state and the federal government must agree to do it. The Court further elided the problem of representing the popular sovereign’s interest in such a cession by remarking that a legislature *or* “a convention specially called” could authorize a cession.<sup>215</sup> In the cases of Maine and Massachusetts, the Court noted, “[i]t was not deemed necessary to call a convention of the people” to empower the states’ commissioners to act.<sup>216</sup> The Court explained that while the federal and state governments are different, they are closer kin than foreign sovereigns: “the State and general government[] may deal with each other in any way they may deem best to carry out the purposes of the Constitution.”<sup>217</sup> On the facts presented, the Court had no need to decide the question of cession.<sup>218</sup>

The Court’s second important dictum in *Fort Leavenworth* was its explanation that the general government “possess[es] the right of eminent domain within the States, using those terms, not as expressing the ultimate dominion or title to property, but as indicating the right to take private property for public uses. . . .”<sup>219</sup> The Court’s dwelling on the definition of “eminent domain”—that is, that “eminent domain” does *not* signify “ultimate dominion or title to property”—marked the growth of American public law to reject the law-of-nations idea of the “domin. eminens.”<sup>220</sup> The story of that evolution, and the constitutional battles that occasioned it, are the subject of the next Section.

### B. *The Sovereign’s Title*

The exercise of the treaty-making power to barter territory created a second-order constitutional difficulty related to acquisition: which sovereign held original title to—or “eminent dominion” over—the unappropriated land

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<sup>214</sup> *Id.* at 540.

<sup>215</sup> *Id.*

<sup>216</sup> *Id.* at 541.

<sup>217</sup> *Id.*

<sup>218</sup> *Id.* at 541-42 (explaining that if the cession were proved defective, that would simply leave the state’s original taxing power intact).

<sup>219</sup> *Id.* at 531.

<sup>220</sup> *Id.*

within new territory acquired by the federal government?<sup>221</sup> While the issue was being resolved, some unusual arguments migrated from the frivolous to the mainstream. Meanwhile, the domestication of the law-of-nations idea of the eminent dominion reached its apex in American political argument.

To abbreviate a familiar history, in the first decades of the republic, the original thirteen states ceded vast portions of their Westward territory to the federal government. Congress then considered various proposals to structure the admission process for new states composed of that land in order to “secure to the [federal government] the proceeds of the sales of the Western lands, . . . to discharge the public debt, for which [the lands] are solemnly pledged.”<sup>222</sup> Thus, “to secure to the Union their right to the soil,” the compacts of admission would forbid the new states from interfering with the federal government’s sale or regulation of its lands; taxing the federal lands awaiting sale; or disproportionately taxing non-resident purchasers.<sup>223</sup> In exchange, Congress would grant the states one section in each surveyed township for schools, and a fraction of the proceeds of all land sales to aid in the construction of public roads.<sup>224</sup> In Ohio, for example, Congress limited the amount given to the state to five percent of the net proceeds of federal land sales.<sup>225</sup> The states were generally given one-twentieth of the public lands within their limits to finance their internal improvements.<sup>226</sup> Federal title to the rest was protected in triplicate: treaties of cession; compacts; and conditions included in the statutes enabling the territories to enter the

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<sup>221</sup> I bracket an inquiry into the title of indigenous people to this land. I do so for the sake of airing what these partisans took to be a discrete public law inquiry, but I do not mean to imply that indigenous peoples’ claim to original sovereign title was either spurious or settled.

<sup>222</sup> Letter from Albert Gallatin to William B. Giles, Chairman of the Comm. for Admitting the North-Western Territory into the Union (Feb. 13, 1802), in 1 *THE WRITINGS OF ALBERT GALLATIN* 76, 76 (Henry Adams ed., London, J.B. Lippincott & Co. 1879).

<sup>223</sup> *Id.* at 77 (“States shall never interfere with the primary disposal of the soil by Congress; nor with any regulations which Congress may find necessary . . . [and] no tax shall be imposed on the property of the United States [nor] shall non-resident proprietors be taxed higher than residents.”).

<sup>224</sup> *Id.* at 78.

<sup>225</sup> See Ohio Enabling Act of 1802, Pub. L. No. 7-40, 2 Stat. 173, 175 § 7 (1802) (“[O]ne twentieth part of the nett proceeds of the lands lying within the said state sold by Congress . . . shall be applied to the laying out and making public roads . . .”).

<sup>226</sup> *Id.*; HANNIS TAYLOR, *THE ORIGIN AND GROWTH OF THE AMERICAN CONSTITUTION* 256 (1911).

union.<sup>227</sup> Only Texas retained title to its public lands after its above-described unorthodox admission to the union.<sup>228</sup>

Although it accounts for a vanishingly small portion of the modern federal fisc, the federal government's income from land was the only substantial source of revenue apart from customs duties and the tariff.<sup>229</sup> The new states were left to view the federal public lands with jealousy. In 1845, a critical year in the story that follows, the state of Illinois collected \$305,309.03 from *all* sources between 1845 and 1846, of which only \$184.37 came from the sale of public land.<sup>230</sup> In the same period, Alabama collected \$274,246.79 from all sources.<sup>231</sup> Yet the federal government realized \$609,366.14 from the sale of public lands in Illinois and \$97,369.81 from the sale of public lands in Alabama.<sup>232</sup> In the delicate words of a House Select Committee, "[t]he new States . . . occupy a peculiar position with regard to their soil, having it owned by another government than their own."<sup>233</sup>

Illinois and Alabama especially loathed their "peculiar" eminent dominion. They channeled their loathing into constitutional litigation. Illinois was the innovator. In 1828, Governor Ninian Edwards addressed his legislature and invoked the *dominium eminens* to decry his state's "one-twentieth share" of its "sovereignty."<sup>234</sup> Edwards argued that "instead of that

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<sup>227</sup> See, e.g., Northwest Ordinance of 1787, art. 4 (codified at 1 U.S.C. LV-LVII (2018)) (establishing a congressionally-appointed secretary and setting aside 500 acres as the secretary's preserve); Ohio Enabling Act of 1802, *supra* note 225, § 7 (granting Section 16 to each township and remitting 5 percent of federal land sale revenue to the states); Resolutions for the Government of the Western Territory, passed Apr. 23, 1784 (repealed 1787), in PUBLIC LAND COMMISSION, THE PUBLIC DOMAIN, ITS HISTORY, WITH STATISTICS 148, 148-49 (Washington, Gov't Printing Off. 1880) (discussing the division of land ceded by the states to the federal government and conditions imposed by Congress on those wishing to form new states in the ceded territory); Treaty of Paris of 1783, Gr. Brit.-U.S., art. 1, Sept. 3, 1783, 8 Stat. 80, 81 (relinquishing all territorial claims held by the British Crown to the United States).

<sup>228</sup> See ALDON SOCRATES LANG, FINANCIAL HISTORY OF THE PUBLIC LANDS IN TEXAS 23 (1932) (noting that Texas is "the only public land state that has had complete control over both the public lands within its boundaries and the proceeds arising from . . . [the] sale of the lands").

<sup>229</sup> See DEP'T OF THE TREASURY, AN ACCOUNT OF THE RECEIPTS AND EXPENDITURES OF THE UNITED STATES FOR THE FISCAL YEAR ENDING JUNE 30, 1776, at XIV (1886) (noting \$309,710,959.92 in receipts from the sale of public lands in 1886). Nearly all the remainder came from the tariff. See *id.* at VIII (noting \$184,902,215.20 in receipts from customs).

<sup>230</sup> See JOHN A. FAIRLIE, A REPORT ON THE TAXATION AND REVENUE SYSTEM OF ILLINOIS 243 (1910).

<sup>231</sup> See AMERICAN ALMANAC AND REPOSITORY OF USEFUL KNOWLEDGE FOR THE YEAR 1847, at 267 (Boston, James Munroe & Co. 1846).

<sup>232</sup> REPORT OF THE COMMISSIONER OF THE GENERAL LAND OFFICE, H.R. Doc. No. 29-9, at 15 (1846).

<sup>233</sup> SWAMP LANDS IN WISCONSIN AND ARKANSAS, H.R. Rep. No. 30-130, at 11 (1849).

<sup>234</sup> See Ninian W. Edwards, HISTORY OF ILLINOIS FROM 1778 TO 1833: LIFE AND TIMES OF NINIAN EDWARDS 113, 119 (Springfield, State J. Co. 1870) ("The right which belongs to the society, or to the sovereign, of disposing, in case of necessity, and for the public safety, of all the wealth

equality with our sister States, . . . we [are] reduced to the twentieth part of a State, with little detached spots of sovereignty, to be ascertained only by going to the Land Offices, and hunting for the quarter and half quarter sections of lands . . . .”<sup>235</sup> Edwards argued that “*domain* and *empire* are inseparable,” and that whoever holds “territory . . . ha[s] the exclusive right to govern it . . . . Both rights must concur, or neither can exist.”<sup>236</sup> Indeed, Edwards continued, “Sovereignty gives the empire, or right of commanding in all places of the country belonging to the nation.”<sup>237</sup> In short, Edwards thought that the eminent dominion must defeat federal title: “[t]he sovereignty of a State includes the right to exercise supreme and exclusive control over all lands within it.”<sup>238</sup>

For proof of his distinctive theory of the title to public lands, Edwards invited the Illinois legislature to “hear Vattel on the subject.”<sup>239</sup> Notwithstanding the statutes and treaties securing the federal title to the land, all such “bargains, agreements, compacts or treaties . . . are [] perfect nullities” because “the United States can neither possess nor exercise the powers of sovereignty over nineteen-twentieths of the territory within the limits of a sovereign and independent State . . . .”<sup>240</sup> Edwards asked his legislature to petition for a return of the public lands, and to pursue relief in the courts.

Edwards’s political theory was thus a prototypical mixture of an appeal to dual-sovereign federalism and the idea of eminent dominion domesticated from the law of nations. Title to soil was simply part of the eminent dominion that all sovereigns—new states included—enjoy as a matter of public law: “If [the states] have not all these powers they have none, in virtue of the right of jurisdiction. The exercise of one is, therefore, a claim to all.”<sup>241</sup>

Edwards’s speech laying claim to Illinois’s eminent dominion was widely circulated. It found its way to the influential publisher of the *Washington Telegraph*. He wrote to Edwards less than two weeks after the address, and

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contained in the State, is called eminent domain . . . [and it] is everywhere considered inseparable from the sovereignty.” (internal citation and quotation marks omitted)).

<sup>235</sup> *Id.* at 121.

<sup>236</sup> *Id.* (emphasis added).

<sup>237</sup> *Id.* (internal citation and quotation marks omitted).

<sup>238</sup> *Id.* at 118.

<sup>239</sup> *Id.* at 119.

<sup>240</sup> *Id.* at 113. Edwards assumed away the problem posed by the silence of the Constitution regarding the power to acquire territory. *See id.* at 120 (arguing that Article 4, Section 3 of the Constitution only applies to territory “beyond the limits or boundaries of any other States” and that by admitting a State into the union, Congress has thus “released the claim of the United States to all lands that lie within it” (first quotation quoting 17 JOHNSON’S REPORTS 223)).

<sup>241</sup> *Id.* at 122.

declared that he was “prepared to defend” Illinois’s claim.<sup>242</sup> He agreed with Edwards but warned that “I greatly doubt . . . your success before the Supreme Court. That Court, like other great things, dwindles as you approach it.”<sup>243</sup> He would later write that if Illinois were to succeed in breaking federal title, it “will be the work of time, four years may not be enough. You . . . run butt against the Supreme Court . . . . In that Court is lodged [John Marshall] the Tyrant, the monarch of this country.”<sup>244</sup> The *Telegraph*’s editorial page then proclaimed to the Washington elite that “[t]he constitutional rights of the new States have never, until of late, been demanded. . . . Give the people light.”<sup>245</sup> The paper implored “the West [to] examine and understand how far that system, which has made them tributary to the other States, is sanctioned by the Constitution, and the treaties of cession through which the Federal Government claims title . . . .”<sup>246</sup>

Nearly all of the old states opposed the effort to cede the public lands to the new states. In January 1827, Senator Barton took the floor to urge Congress not to “rip up the goose that lays the golden eggs.”<sup>247</sup> If Illinois’s argument were accepted, Barton continued, the opponents of federal title would “syllogi[ze]” themselves “out of the Union” because “[t]he same Constitution that authorizes the admission of new States[] also authorizes the [federal] holding and disposing of the Western lands . . . .”<sup>248</sup> Barton did not let the new states’ law-of-nations gloss on the eminent domain go unanswered. He explained that “[t]o talk of ‘eminent domain,’ and Vattel, in a case created and regulated by our own Constitution, is an idle affectation of learning.”<sup>249</sup>

Notwithstanding the objections of old states, Edwards was joined in the Senate by other politicians who saw the utility of appealing to the new states’ interests—especially Senator John McKinley.<sup>250</sup> In 1828, McKinley referred a

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<sup>242</sup> Letter from Duff Green, Publisher of Wash. Tel., to Ninian Edwards, Governor of Ill. (Dec. 22, 1828), in 3 NINIAN W. EDWARDS, THE EDWARDS PAPERS 377, 378 (E. B. Washburne ed., Chicago, Fergus Printing Co. 1884).

<sup>243</sup> *Id.* at 379.

<sup>244</sup> Letter from Duff Green, Publisher of Wash. Tel., to Ninian Edwards, Governor of Ill. (Jan. 6, 1829), in 3 NINIAN W. EDWARDS, THE EDWARDS PAPERS 379, 380-81 (E. B. Washburne ed., Chicago, Fergus Printing Co. 1884).

<sup>245</sup> WASH. TELEGRAPH, Apr. 24, 1828 (emphasis omitted).

<sup>246</sup> *Id.*

<sup>247</sup> 3 REGISTER OF DEBATES IN CONGRESS 43 (Washington, Gales & Seaton 1829).

<sup>248</sup> *Id.*

<sup>249</sup> *Id.*

<sup>250</sup> Professors Ablavsky and Leshy have recently elaborated Justice McKinley’s involvement with these public land disputes with more precision. See Gregory Ablavsky, *The Rise of Federal Title*, 106 CAL. L. REV. 631, 675 (2018) (“McKinley fretted that [federal] ownership [of land under states’ navigable waters] would give the federal government a ‘weapon’ to wield against ‘state sovereignty’ . . . .”); see also John D. Leshy, *Are U.S. Public Lands Unconstitutional?*, 69 HASTINGS L.J. 499, 535 (2018) (highlighting that McKinley expressed that to “deny Alabama the ownership of

memorial from Alabama to the committee on public lands seeking the sale of all public land to the state.<sup>251</sup> The proposal died in committee.<sup>252</sup>

After the committee refused to act, McKinley took to the Senate floor, Vattel in hand, to argue that “the ablest jurists of ancient and modern times agree that sovereignty is necessarily and inseparably connected with the territory and *right of soil* over which it is exercised. So essential is this right, that sovereignty cannot exist without it.”<sup>253</sup> He quickly drew out the implication: “the creation of a sovereign State over this territory . . . was of itself a transfer of the whole title to the land, and *right of domain* of the United States to the new States.”<sup>254</sup> In short: The eminent domain gives new states title.

Like Edwards, McKinley dismissed the conditions placed on his state’s admission as nullities. “If the United States can enter into treaties or compacts with the new States for the acquisition of sovereignty, . . . she may do the same with the old States, and thereby change, amend, or destroy the fundamental law of the land . . . .”<sup>255</sup> McKinley ominously warned that “[i]f the United States refuse to give or sell to us what we believe we are constitutionally entitled to, we . . . will continue to complain until we obtain our rights.”<sup>256</sup> It was no idle threat: in 1837, McKinley was appointed to the Supreme Court, where he decided one crucial and profoundly misleading case—*Pollard’s Lessee v. Hagan*.<sup>257</sup>

In 1845, *Pollard’s Lessee v. Hagan* came to the Supreme Court as a shopworn land-title case, involving a minor variation on a theme that had occupied the Court many times before. By way of background, once American sovereignty over Alabama territory was settled, Congress began to sort through complex property claims created by the administration of prior sovereigns. In 1824, Congress granted title to unoccupied water lots—which

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the beds of navigable waters would be ‘to deny that Alabama has been admitted into the union on an equal footing with the original states’” (quoting *Pollard v. Hagan*, 44 U.S. 212, 229 (1845)).

<sup>251</sup> JOURNAL OF THE SENATE OF THE UNITED STATES OF AMERICA 133 (Washington, D.C., Duff Green 1827).

<sup>252</sup> See JOHN MCKINLEY, SPEECH ON THE BILL TO GRADUATE THE PRICE OF PUBLIC LANDS 19 (Washington, D.C., Green & Jarvis 1828) (“A majority of that Committee decided against selling the lands to Alabama . . .”).

<sup>253</sup> 4 REG. DEB. 509 (1828) (emphasis added) (citation omitted).

<sup>254</sup> *Id.* at 509-10 (emphasis added).

<sup>255</sup> *Id.* at 512; see also *id.* at 514 (“I have shown, by irresistible implication, that Congress believed that the new States would be entitled to the land within their limits, and all the other rights of eminent domain, of which they have been deprived . . .”).

<sup>256</sup> *Id.* at 521. McKinley published the speech the month later and prefaced it with the hope that the reader would be led “to a full and fair investigation of the constitutional powers of the General and State Governments.” MCKINLEY, *supra* note 252, at 3.

<sup>257</sup> 44 U.S. (1 How.) 212 (1845).

were below the high water mark of the Mobile River—to the city of Mobile.<sup>258</sup> The statute further provided, however, that if those lots had been improved, title was instead “vested in the several proprietors and occupants.”<sup>259</sup> Litigation ensued: could the improvers take title under the federal grant?

In 1839, the Alabama Supreme Court embraced Illinois’s theory of the eminent domain in denying the federal grant to the improvers. In *City of Mobile v. Eslava*,<sup>260</sup> the City and Miguel Eslava each claimed title—Eslava as improver, Mobile under the broader grant. The Alabama court held that Congress is “incompetent . . . to grant the space intervening between high and low water marks” to the improvers.<sup>261</sup> And, because Alabama is a coequal sovereign, “the rights of sovereignty of the new [states] are quite as extensive as those possessed by the original States.”<sup>262</sup>

When *Eslava* arrived at the Supreme Court, the majority was unimpressed. The Court—sitting without Justice McKinley and Chief Justice Taney—simply ignored the lower court’s opinion.<sup>263</sup> The case required statutory interpretation: was Eslava one of the individuals granted title to improved water lots?<sup>264</sup> If Eslava was an improver, title was his.<sup>265</sup>

Justice Catron lambasted the majority’s constitutional avoidance, especially the pretense that the Court could not take notice of the opinion below.<sup>266</sup> He would have met Alabama’s constitutional theory directly: a *treaty* gave the federal government eminent domain. Catron marveled that although it is “free from doubt” that “the United States acquired by cession all his powers over the vacant soil,” yet Alabama nevertheless contended that “the lands flowed by the tides are . . . part of [Alabama’s] sovereign rights.”<sup>267</sup> Catron detected a looming danger in the attempt to take the tide waters along the river: on that thin reed the state could hang a claim to *all* public lands.<sup>268</sup> When the Court followed the same path the next year in *City of Mobile v. Emanuel*, Catron added that it was now “established with a plainness admitting of no doubt, that Alabama . . . hold[s], by force of her judicial

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<sup>258</sup> An Act Granting Certain Lots of Ground to the Corporation of the City of Mobile, and Certain Individuals of Said City, Pub. L. No. 18-185, 4 Stat. 66, 68-69 (1824).

<sup>259</sup> *Id.*

<sup>260</sup> *City of Mobile v. Eslava*, 9 Port. 577, 587-88 (Ala. 1839).

<sup>261</sup> *Id.* at 590.

<sup>262</sup> *Id.* at 603.

<sup>263</sup> See 41 U.S. (1 Pet.) 234, 246 (1842) (holding that the lower court’s opinion “constitutes no part of the record, and is not properly a part of the case”).

<sup>264</sup> See *id.* (“Some doubt has been expressed whether the improvements required were to have been made on the front or water lot.”).

<sup>265</sup> *Id.* at 247.

<sup>266</sup> *Id.* at 248 (Catron, J., concurring).

<sup>267</sup> *Id.* at 252.

<sup>268</sup> *Id.* at 254.

decisions, all the lands within the state, flowed by tide water . . . .”<sup>269</sup> If Alabama’s theory of the eminent domain was right, Catron warned, it would undo the Court’s precedents.<sup>270</sup>

The Court would indeed return to Alabama’s overflowed lands, though not until Justice McKinley introduced the new states’ eminent domain into the Supreme Court’s jurisprudence.

In *Hagan*, McKinley precisely traced Illinois’s eminent-domain argument, and Vattel again supplied the necessary law-of-nations authority. The “eminent domain,” McKinley wrote, means “[t]he right which belongs to the society, or to the sovereign, of disposing, in case of necessity, and for the public safety, of all the wealth contained in the state . . . .”<sup>271</sup> McKinley contended that the power of the eminent domain is “necessary” for sovereigns.<sup>272</sup> Because McKinley could lay claim to the variegated law-of-nations idea—in which sovereignty, jurisdiction, and title are commingled—McKinley held that even if statutes and treaties granted the United States title, they are “void and inoperative” against the states “because the United States have no constitutional capacity to exercise municipal jurisdiction, sovereignty, or eminent domain, within the limits of a state or elsewhere, except in the cases in which it is expressly granted.”<sup>273</sup>

These last few clauses of *Hagan* are historically significant, both because they reveal the law-of-nations genealogy of McKinley’s theory of the “eminent domain,” and because they would be abused in the century and a half that followed. Without further narrowing, McKinley’s rendition of the “eminent domain” would require a radical reordering of federal title. After all, McKinley’s theory of “eminent domain” was indistinguishable from Illinois’s argument that it held title to *all* public lands.

The *Hagan* plaintiffs were shocked by the Court’s decision. Two weeks after the opinion came down, the improver’s counsel moved for reargument, admitting that “the question was regarded . . . as virtually settled . . . and consequently it was not argued with as much care and preparation as its great importance demanded.”<sup>274</sup> Counsel observed that the Court’s new judgment “involves the title to all the lands professed to have been granted by the United States . . . as well as to vast quantities of land similarly circumstanced.”<sup>275</sup> Although the suit ostensibly involved a tiny sliver of land

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<sup>269</sup> 42 U.S. (1 How.) 95, 102 (1843).

<sup>270</sup> *Id.*

<sup>271</sup> Pollard’s Lessee v. Hagan, 44 U.S. (1 How.) 212, 223 (1845).

<sup>272</sup> *Id.* (citing VATTTEL, *supra* note 68, § 244).

<sup>273</sup> *Id.* at 223.

<sup>274</sup> Motion for Rehearing, Feb. 19, 1845, Journal of the United States Supreme Court (on file with National Archives, NARA RG 267, Box 244, Case 2313).

<sup>275</sup> *Id.*



on the Mobile River, “[a]s was remarked by one of the members of the Court[,] this case turns upon a principle which involves a larger amount of property than perhaps ever was in any one suit . . . .”<sup>276</sup> The Court overruled the motion a week later.<sup>277</sup>

The predicted upheaval in federal title never came to pass. Alabama courts chose a narrow reading of *Hagan*: it applied only to the overflowed tidelands, nothing more.<sup>278</sup> The court in *Doe ex dem. Kennedy v. Bebee* advised the bar that “[i]t is difficult to educe a harmonious system, even from the decisions of the federal judiciary, in respect to private land claims in the States acquired from France and Spain.”<sup>279</sup> The court breathed a sigh of relief that “[t]his anomalous litigation, under the influence of the statute of limitations, . . . must be drawing to a close . . . .”<sup>280</sup>

To further mitigate the unraveling of federal title, Chief Justice Taney summarized the Court’s activity when similar cases came to the Court: they all involved the simple argument that “the premises were a part of the shore of a navigable tide-water river, lying below high-water mark.”<sup>281</sup> McKinley was again absent from the Court when Taney smoothed over the prior cases,<sup>282</sup> and *Hagan* then faded to a minor decision in the environmental law canon.<sup>283</sup>

McKinley’s gloss on the eminent domain has since led two lives in the busy hands of constitutional lawyers. The least controversial reception of *Hagan* adopts Taney’s synthesis: it settled that the shore below the high-water mark belongs to the new states and the old states alike. McKinley’s broader designs for *Hagan* proved irresistible, however, as time progressed.

One of the more important consumers of McKinley’s work was his successor on the Court: John Archibald Campbell. Campbell was intimately aware of the issues involved in *Hagan* and the politics that motivated its

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<sup>276</sup> *Id.*

<sup>277</sup> *Id.*

<sup>278</sup> *Doe ex dem. Kennedy v. Bebee*, 8 Ala. 909, 913-14 (1846).

<sup>279</sup> *Id.* at 914.

<sup>280</sup> *Id.* at 915.

<sup>281</sup> *Goodtitle v. Kibbe*, 50 U.S. (1 How.) 471, 477 (1850).

<sup>282</sup> Roll Call of Supreme Court Justices, Monday, May 15th, 1850 (on file with author).

<sup>283</sup> *Cf.* BENJAMIN C. HOWARD, 3 REPORTS OF CASES ARGUED AND ADJUDGED IN THE SUPREME COURT OF THE UNITED STATES, JANUARY TERM 1845, at 223 n.1 (Stewart Rapalje ed., Philadelphia, T. & J.W. Johnson 1884) (“The statement [in *Hagan*], that the United States government has no power to take lands within the boundaries of a state by the exercise of the right of eminent domain, has been overruled by the Supreme Court . . . without any reference to this statement.”); *see also generally* William Baude, *Rethinking the Federal Eminent Domain Power*, 122 YALE L.J. 1738 (2013). In populating their Supreme Court database to include older Supreme Court opinions, Westlaw editors used Rapalje’s 1884 edition of *Hagan*. Because Rapalje’s footnote does not disclose that it was the editor’s own work, Rapalje’s interpretation that *Hagan* involved the *takings* power—rather than other aspects of the eminent domain—erroneously appears in Westlaw’s report. *See* E-mail from Ben Petersburg, Westlaw Reference Attorney, to author (Oct. 21, 2014, 16:26 EST) (on file with author).

distinctive federalism.<sup>284</sup> Campbell's most enduring contribution to the reception of *Hagan* in the constitutional canon was an act of legal error, committed in his concurrence to *Dred Scott v. Sandford*.<sup>285</sup> In a passage attacking the effort to enlarge the free territory of the union, Campbell revived the new states' vision of the eminent dominion—one that exceeded even McKinley's elliptical prose. He wrote that in *Hagan*,

[T]he Court say[s]: "The United States have no constitutional capacity to exercise municipal jurisdiction, sovereignty, or eminent domain, within the limits of a State or elsewhere, except in *cases where it is delegated, and the court denies the faculty of the Federal Government to add to its powers by treaty or compact*."<sup>286</sup>

Despite the quotation marks that surround it, all of the italicized material was Campbell's gloss—not a holding by the *Hagan* Court. While the *Hagan* majority cautioned that no treaty could transfer "royal prerogatives" from the Spanish Crown to the general government,<sup>287</sup> it did not, Campbell claimed, deny the federal government's "faculty . . . to add to its powers by treaty."<sup>288</sup>

In Campbell's hands, *Hagan* came to express an enduring limitation on the treaty-making power: no exercise of that power by the federal government could infringe upon the states' sovereignty. Campbell's gloss on *Hagan* then entered the twentieth century as a central piece of evidence that older generations had constrained the treaty-making power to account for states' rights. So, for example, when a 1908 American Society of International Law (ASIL) conference addressed conflicts between treaties and state law, one professor quoted Justice Campbell's *Hagan* concurrence as evidence that the Supreme Court had denied "the faculty of the Federal Government to add to its powers by treaty."<sup>289</sup> *Hagan* was then emblematic of the view that "there are constitutional limits [on the treaty power], despite the fact that the Constitution grants the power without limitation . . ."<sup>290</sup> Because no principle

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<sup>284</sup> See Letter from John A. Campbell, Supreme Court Justice, to Judge Bragg (Jan. 3, 1853) (on file with Library of Congress, Manuscript Division, Carl Brent Swisher papers, Box 4) (inviting Bragg to make a "great speech" on the public lands since "half of Alabama belongs to the federal government" and holding out an offer of an investment in various water lots though there was "no obligation upon [him] to do so from anything that took place at Washington" in connection with Campbell's confirmation).

<sup>285</sup> 60 U.S. (1 How.) 393 (1856).

<sup>286</sup> *Id.* at 508-09 (Campbell, J., concurring) (emphasis added) (quoting Pollard's Lessee v. Hagan, 44 U.S. (1 How.) 212, 223 (1845)).

<sup>287</sup> *Hagan*, 44 U.S. (1 How.) at 225.

<sup>288</sup> *Dred Scott*, 60 U.S. (1 How.) at 509 (Campbell, J., concurring).

<sup>289</sup> W. W. Willoughby, Address at First Annual Meeting of the American Society of International Law (Apr. 19, 1907), in 1 PROC. AM. SOC'Y INT'L L. 201, 201 (1908) (quoting *Dred Scott*, 60 U.S. (1 How.) at 509 (Campbell, J., concurring)).

<sup>290</sup> *Id.*

could unite these cases, the ASIL panelist insisted that our forebears left us an enduring puzzle: the Supreme Court would eventually have to choose between state and federal *sovereigns* in defining the limits of the treaty-making power.<sup>291</sup>

As I shall describe in the next Part, the panelist's rendition of *Hagan* was of a piece with the scholarship of his time. Constitutional historians writing during the early-twentieth century made certain that the foreign-affairs powers would start from a dual-sovereign premise but conclude with a vision of foreign-affairs power that favored the national government. As the panelist noted, the national government had lately acquired territory from other sovereigns "because other sovereign states possess this power. This, indeed, was the only basis upon which this act could be justified . . ." <sup>292</sup> In this way, the canonical constitutional history of the acquisition power and the eminent dominion were rewritten to shore up the federal sovereign's power to practice imperial government.

### III. THE FOREIGN-AFFAIRS INTERNMENT OF POPULAR-SOVEREIGN FEDERALISM

Nearly every prominent history of foreign-affairs federalism omits the history of the eminent dominion described above. As I argue in what follows, the prominent early-twentieth-century histories that frame the modern conversation about the treaty-making power were written to shore up our last episode of territorial conquest.<sup>293</sup>

It is worth considering whether this inherited history conveys something immemorial about our constitutional structure, and whether the constitutional vision endorsed by this history misshapes our modern conversation. Two areas of the modern conversation trade upon this history: the status of former sovereigns' territory acquired with the treaty-making power, and the scope of this power in light of American federalism. I discuss each in turn.

#### A. *The Sovereign's Dominion and the Insular Histories*

The first decades of the twentieth century brought two jousting histories of the Constitution's limitations on the treaty-making power and that power's exercise in acquiring territory abroad. Despite some disagreement, both framed a vision of the government's foreign-affairs power that assumed the truth of dual sovereignty and the conservation-of-powers thesis. That is to

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<sup>291</sup> *Id.* at 203.

<sup>292</sup> *Id.* at 206.

<sup>293</sup> My claim that these treaty-power histories obscured earlier theories of the treaty-making power's limitations should not be read to suggest that the earlier eras were anti-imperial. Rather, my claim is that these histories *canonized* an imperial treaty power. In so doing, these histories erased popular-sovereign federalism from courts' modern conversation.

say, it became a truism of foreign-affairs federalism that all law-of-nations powers must have been distributed to the federal sovereign.

### 1. Creating a Canonical History of an Imperial Treaty Power

The first influential history of the treaty-making power was Charles Henry Butler's two-volume opus on the treaty-making power, which concluded in 1902 that "the treaty-making power . . . is derived not only from the powers expressly conferred by the Constitution, but . . . is also possessed . . . as an attribute of sovereignty . . . ."<sup>294</sup> On this view, the popular sovereign had, in fact, given the federal government the full measure of foreign-affairs power that it might have otherwise given to the states.<sup>295</sup> Accordingly, Congress could legislate "co-extensive[ly]" with a *plenary* treaty-making power.<sup>296</sup>

Crucially for Butler, the prior century's pattern of acquiring territory—with no mention of the controversies described in the last Part of this Article—furnished evidence of the "nationality and sovereignty"<sup>297</sup> of the federal government. That is because Butler thought that dual sovereignty and the proposition that *all* powers were distributed to the sovereign American governments were obvious: all sovereigns must have the "right" to "cede territory to, and to acquire territory from, other sovereign powers."<sup>298</sup> If a government cannot cede and acquire territory, that is because it "does not possess the full measure of sovereignty."<sup>299</sup> Citing the Court's opinion in *Canter*, in which Marshall found the power of acquiring territory to be an implication of the federal government's treaty-making or war-making power, Butler reasoned that since the federal government has not "surrendered any of its fully sovereign powers, as to the matters wholly within its own domain, the United States therefore possesses, in common with every other sovereign power, this right of acquisition of territory."<sup>300</sup> Indeed, in his sustained discussion of popular sovereignty in the United States, Butler emphasized that the "people retain only that portion of sovereignty" that has been neither delegated to the states nor held "by the United States in its national capacity."<sup>301</sup> So understood, popular sovereignty "is a part of the heritage of the Anglo-Saxon race" and will "naturally" exist in nations they compose.<sup>302</sup> Popular sovereignty "does not, however, necessarily exist naturally in people

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<sup>294</sup> 1 CHARLES HENRY BUTLER, *THE TREATY-MAKING POWER OF THE UNITED STATES* 5 (1902).

<sup>295</sup> *Id.* at 351.

<sup>296</sup> *Id.* at 5-6.

<sup>297</sup> *Id.* at 69-70.

<sup>298</sup> *Id.* at 72.

<sup>299</sup> *Id.* at 74.

<sup>300</sup> *Id.* at 77.

<sup>301</sup> *Id.* at 17.

<sup>302</sup> *Id.*

of other races.”<sup>303</sup> The national treaty-making power can thus acquire territory—consistent with its full measure of foreign-affairs powers—yet it does not thereby enlarge the popular sovereign’s domain. After the acquisition of new people and new territory, it thus “remains for the United States to clothe the people of the ceded possessions . . . with the same degree of autonomy as other portions of our people possess.”<sup>304</sup>

Butler acknowledged some historical skepticism regarding the power to acquire territory, but answered that Chief Justice Marshall had ended the matter in *Canter* long before the Texas and Maine disputes.<sup>305</sup> In an oblique reference to the then-recent acquisition of the insular territories, Butler argued that “it must be conceded at the present time that questions relating to annexation . . . belong exclusively to the political departments of the government . . . .”<sup>306</sup> It was a belt-and-suspenders answer: the Supreme Court had blessed the acquisition of territory in the 1820s, and, in any event, the matter had become a political question that no court could now second guess.

As to the question of cession (that is, Maine’s constitutional grievance), Butler did not acknowledge that there had ever been a cession of territory in the United States. He advanced only the disputed law-of-nations principle that “the consent of the inhabitants of territory, ceded by one sovereign power to another, is *not* required to validate the transfer . . . .”<sup>307</sup> As we have seen, that position was disputed by law-of-nations publicists, and disregarded the Maine boundary settlement, but would be necessary if the federal government wished to acquire and hold foreign sovereignties as imperial possessions.<sup>308</sup>

In 1915, Henry St. George Tucker wrote the second influential history of the treaty power as a rejoinder to Butler’s “nationalist” history.<sup>309</sup> Tucker argued that it was necessary to look to the Constitution, not the law of nations, to “eliminate the prevalent error of the ‘unlimited’ and boundless scope of [the

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<sup>303</sup> *Id.*

<sup>304</sup> *Id.*

<sup>305</sup> *Id.* at 116-17.

<sup>306</sup> *Id.* at 117.

<sup>307</sup> *Id.* at 83 (emphasis added).

<sup>308</sup> See generally FOREIGN IN A DOMESTIC SENSE, *supra* note 11. In 1908, Robert Devlin similarly cited only Justice Marshall’s 1828 opinion in *Canter* for the principle that the government “possesses the power of acquiring territory.” ROBERT T. DEVLIN, THE TREATY POWER UNDER THE CONSTITUTION OF THE UNITED STATES 307-08 (1908) (citing *Am. Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511, 512 (1828)).

<sup>309</sup> HENRY ST. GEORGE TUCKER, LIMITATIONS ON THE TREATY-MAKING POWER OF THE UNITED STATES (1915); see also *Bond v. United States*, 572 U.S. 844, 881 (2014) (Scalia, J., concurring) (citing Tucker’s work).

treaty-making] power.”<sup>310</sup> He singled Butler out for special criticism.<sup>311</sup> Tucker framed the problem as choosing *which sovereign* should be allowed to exercise the fullest measure of civil power. Tucker then advanced the modern critique of *Missouri v. Holland*: the treaty power must not be allowed to “annihilate others equally important and equally supreme,” such as the states.<sup>312</sup> To say that the treaty-making power “may include the rights and powers of the citizens of the States not granted to the Federal Government,” Tucker argued, “is to claim a superiority for [federal] power over the . . . powers of the States, which are equally supreme with the treaty-making power.”<sup>313</sup>

Unlike most post-*Missouri* treaty-power scholarship,<sup>314</sup> Tucker acknowledged both the contest-of-sovereigns and the contest-of-governments models of foreign-affairs federalism. He called the former “Jeffersonian” model and the latter “Hamiltonian.”<sup>315</sup> The Jeffersonian school contended that “the States, prior to the adoption of the Constitution, existed as independent sovereigns; . . . and that from the reservoir of their original powers they granted certain ones to the Federal Government . . . .”<sup>316</sup> The Hamiltonians, by contrast, view the Constitution as the result of the “whole mass of the people of the United States, giving the Federal Government the large powers contained therein and denying certain powers to the States.”<sup>317</sup> On that model, “[t]here is one reservoir from which flowed all powers, the people of the United States as one body politic.”<sup>318</sup> Tucker elected the Jeffersonian model. On that view, the last clause of the Tenth Amendment was superfluous: in ratifying the Constitution, the *states* “gave part and

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<sup>310</sup> TUCKER, *supra* note 309, at 3. Tucker’s book begins by claiming that the prior fifty years had witnessed America’s rise to international prominence and a concurrent increase in its international entanglements. *Id.* at 1. For the modern equivalent, see *Bond*, 572 U.S. at 895 (Thomas, J., concurring).

<sup>311</sup> See TUCKER, *supra* note 309, at 120 (“When Mr. Butler declares that the treaty-making power of the United States ‘extends to every subject that may be the basis of negotiation . . . between any of the powers of the world,’ it is evident that his statement is too broad.” (alteration in original)).

<sup>312</sup> *Id.* at 79.

<sup>313</sup> *Id.* Tucker illustrated his critique elsewhere by asking his audience to imagine the absurdity of a Frenchman selling liquor in Savannah, where blue laws prohibited local inhabitants from doing the same. The Frenchman, Tucker conjectured, could outfit a resplendent barroom and say to the local magistrate: “There is a treaty between France and this country which gives me the right over all your little local State laws to do business as I please.” HENRY ST. GEORGE TUCKER, *THE SUPREME COURT AND THE TREATY-MAKING POWER* 1-2 (1917) (internal quotation marks omitted).

<sup>314</sup> But see Cleveland, *Powers Inherent*, *supra* note 58, at 268 (explaining that by the early-twentieth century, “the assumption that all sovereign powers were held by either the national or state governments facilitated the conclusion that a power was held by the national government whenever state authority was inappropriate,” and that this assumption “eliminat[ed] the possibility that power had been reserved to the people”).

<sup>315</sup> TUCKER, *supra* note 309, at 329.

<sup>316</sup> *Id.* at 83.

<sup>317</sup> *Id.*

<sup>318</sup> *Id.* at 84.

retained part” of their sovereign powers, so that “the[] reserved powers referred to in the Tenth Amendment were supreme in their sphere.”<sup>319</sup> On Tucker’s account, the Maine and Texas disputes supplied proof of the non-supremacy of treaties: the acquisition of Texas by congressional resolution and the payment of funds to Maine proved only that treaties are not “supreme” over the House of Representatives.<sup>320</sup>

Our modern history of the treaty power labors in the shadow of the histories written during the imperial era. Both Tucker’s and Butler’s histories prevalently appear in courts and scholars’ recent puzzling over the scope of the federal government’s treaty power. As I shall argue, the problem of territorial acquisition was critical context for the authors’ normative claims about the scope of the treaty-making power.

## 2. Claiming Imperial Dominion over the Insular Territories

Butler, Tucker, Moore, and even Brown—whose 1920 history of the Louisiana Purchase noted that the debates about the *Insular Cases* were so replete with references to the Louisiana Purchase they had become a “source book of constitutional documents” on the Purchase<sup>321</sup>—were all engaging with the contemporary fact of American imperial government.<sup>322</sup> Accordingly, their theories of foreign-affairs federalism accommodate that political reality. The history they created was either imperial from first principles, or imperial in fact, in light of the unimaginable impracticability of denying a power that had so evidently restructured the republic.<sup>323</sup>

If one looks to elite legal opinion in the short period before the *Insular Cases*, the effort to give a legal and historical imprimatur to the power of the

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<sup>319</sup> *Id.*

<sup>320</sup> *Id.* at 220, 223. In earlier work, Tucker and his father previewed the argument that treaties cannot “regulate the internal concerns of the country,” JOHN RANDOLPH TUCKER, 2 CONSTITUTION OF THE UNITED STATES 727 (Henry St. George Tucker ed. 1899), but assumed that territory could be acquired “by . . . cession from a foreign power.” *Id.* at 730. They agreed, moreover, that as to “the burning question of territorial expansion” raised in their own time, including matters of “citizenship, statehood, etc.,” a long line of decisions established the “power of Congress to govern the Territories of the United States.” *Id.* at 609 & n.1.

<sup>321</sup> BROWN, *supra* note 97, at 196.

<sup>322</sup> The *Insular Cases* is shorthand for a series of turn-of-the-century decisions in which the Supreme Court “settled the question of whether the United States could hold colonies indefinitely (taking sides . . . with the imperialists).” Christina Duffy Burnett, *A Convenient Constitution? Extraterritoriality After Boumediene*, 109 COLUM. L. REV. 973, 1041 (2009); *see also* Christina Duffy Burnett & Burke Marshall, *Between the Foreign and the Domestic*, in FOREIGN IN A DOMESTIC SENSE, *supra* note 11, at 2 (describing this era’s invention of the idea of unincorporated territories). On the question of the identity of the *Insular Cases*, *see* Burnett, *supra*, at 975 n. 4 (collecting sources on the question of which cases should number among the “insular cases”). Histories of the *Insular Cases* are flourishing. *See generally, e.g.*, ERMAN, *supra* note 11.

<sup>323</sup> I owe this way of putting the point to Jean Galbraith.

federal sovereign to acquire colonies by treaty comes into view. First, several of the most prominent constitutional histories invoked the acquisition power as a settled fait accompli of public law. Second, several prominent constitutional professors expressed confidence that courts would avoid the acquisition and political-status questions raised by imperial conquest by treating the whole field as a “political question.” And finally, the relevant bureaucrats and tastemakers of elite legal opinion heaped disdain on the theory that American federalism limits American governments’ power to acquire another sovereign state by treaty.

For example, in New Haven, Chief Judge Simeon Baldwin taught his students the central lesson of the public-lands cases surveyed in the last Part of this Article. He explained that the “U.S. has a police power, as to *its* land in a State,”<sup>324</sup> and after asking his students, “How far can [a treaty] alter State domestic institutions?” he answered: “Land it has.”<sup>325</sup> Baldwin also penned an imperial history of the acquisition power for Congress. Months before the annexation of Hawaii in 1898, Baldwin described the “Historic Policy of the United States as to Annexation” and fully endorsed the power to acquire territory.<sup>326</sup> Baldwin also blessed the Louisiana Purchase as prudent, calling “for action rather than deliberation.”<sup>327</sup> The annexation of Louisiana was, moreover, sanctioned by “the lips of our greatest Chief Justice, John Marshall” in *Canter*.<sup>328</sup>

Baldwin acknowledged that the question of “absor[bing] of a foreign sovereignty” by acquiring Texas posed some difficulties, but he answered that ordinary national elections—constitutional moments of a kind—had sanctioned the acquisitions.<sup>329</sup> Baldwin’s upshot was that the intense public debate over the acquisition of Texas and its eventual settlement gave, as a matter of accomplished fact, “the popular branch equal powers as to the admission of a foreign State.”<sup>330</sup> Baldwin then concluded by describing a steady parade of acquisitions—Alaska, Arizona, California, New Mexico—to demonstrate an unbroken practice sanctioning acquisition.<sup>331</sup>

Harvard professor James Bradley Thayer—who had once so labored to rescue the idea of the “*eminent domain*” from its many abuses—joined his

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<sup>324</sup> Lecture Notes of Simeon Eben Baldwin 203 (on file with Baldwin Family Papers, Yale MSSA, Group 55, Series VI, No. 202).

<sup>325</sup> *Id.* at 238. He appended to this conclusion a question, presumably for class discussion: “Land it has. Marriage?” *Id.*

<sup>326</sup> SIMEON EBEN BALDWIN, THE HISTORIC POLICY OF THE UNITED STATES AS TO ANNEXATION, S. REP. NO. 55-102, at 12 (1898).

<sup>327</sup> *Id.* at 6.

<sup>328</sup> *Id.*

<sup>329</sup> *Id.* at 7.

<sup>330</sup> *Id.* at 8.

<sup>331</sup> See *id.* at 9-15 (explaining the many acquisitions made by the United States in the nineteenth century).



Yale colleague to defend the constitutional bona fides of imperial acquisition. On November 17, 1898, *The World* newspaper telegraphed both professors and asked whether the United States could “hold colonies” and what would be the “status of natives of and residents in any territory that may become part of the possessions of the United States?”<sup>332</sup> Their answers ran together in print.

Baldwin replied with a précis of the history he sent to Congress: “the United States can acquire territory by conquest or treaty in any part of the world . . . .”<sup>333</sup> Baldwin allowed that “the framers of the Constitution probably did not contemplate a status intermediate between slavery and full citizenship” but he noted that the Constitution did not forbid the exclusion of the insular territories’ inhabitants from the union.<sup>334</sup> Indeed, he continued, the Louisiana Purchase proved that the government may annex “without paying much deference to the desires of the inhabitants.”<sup>335</sup> Like Baldwin, Thayer thought that “the United States has the same power to acquire and to hold colonies that any nation has. . . . The relation of colonies to the United States will be just what the political department chooses to make it.”<sup>336</sup> As to the status of the territories, Thayer argued that there was no binding precedent: “The United States . . . can give its colonies any form of government it chooses.”<sup>337</sup>

Thayer also famously published his imperial theory of acquisition in the *Harvard Law Review*.<sup>338</sup> His argument expounded a version of dual-sovereign federalism in which all foreign-affairs powers are vested in the federal government. “If you ask what this nation may do in prosecuting the ends for which it was created,” Thayer wrote, “the answer is, [i]t may do what other sovereign nations may do.”<sup>339</sup> Thayer denounced much of the angst about acquiring insular territories as “crying over spilled milk,”<sup>340</sup> and he took the acquisition power to be so obvious as to require little elaboration.<sup>341</sup>

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<sup>332</sup> See Letter from *The World* editors to James Bradley Thayer (Nov. 17, 1898) (on file with Harvard Law School Rare Book and Early Manuscript Library).

<sup>333</sup> Simeon E. Baldwin, Letter to the Editor, *WORLD*, Nov. 20, 1898, at 4.

<sup>334</sup> *Id.*

<sup>335</sup> *Id.* Baldwin did, however, split from Thayer on the question whether the “constitution follows the flag” to the new territories. See *FOREIGN IN A DOMESTIC SENSE*, *supra* note 308, at 6 (describing Thayer’s and Baldwin’s contrasting views on incorporation).

<sup>336</sup> James B. Thayer, Letter to the Editor, *WORLD*, Nov. 20, 1898, at 4.

<sup>337</sup> *Id.*

<sup>338</sup> James Bradley Thayer, *Our New Possessions*, 12 *HARV. L. REV.* 464 (1898). Thayer’s article circulated widely. For example, John Davis Long, then Secretary of the Navy, wrote to express his “special interest” in the article, and promised that he would lay it before the President. Letter from John D. Long to James Bradley Thayer (Mar. 6, 1899) (on file with Harvard Law School Rare Books and Early Manuscript Library). Long hoped the article would “really mould [sic] the trend of public opinion as much as if [the professor] were in active political life.” *Id.*

<sup>339</sup> Thayer, *supra* note 336, at 469.

<sup>340</sup> *Id.* at 464.

<sup>341</sup> *Id.* at 471.

One important reader of Thayer's defense of annexation was Moorfield Storey—an anti-imperialist and eventual founder of the NAACP. Storey's public opposition to the acquisition and imperial government of the insular territories became a significant irritant to President Theodore Roosevelt and his Administration's imperial government.<sup>342</sup>

Storey and Thayer shared a table at a Boston dinner party in 1899 and debated whether Thayer's writings about "our new possessions" could be squared with the American theory of government.<sup>343</sup> From Abraham Lincoln's speeches, Storey drew the argument that "[w]hen the white man governs himself, that is self-government; but when he governs himself and also governs another man . . . that is despotism."<sup>344</sup> Tackling Thayer's imperialism directly, Storey contended that the argument that the federal government can do whatever other sovereigns can do misstates the Constitution's distribution of power from the popular sovereign to its governments: "As against other nations the Federal government is sovereign. . . . As against its own citizens and subjects its powers are limited."<sup>345</sup> The question, he wrote, should instead be "what rights our *agents*, the President and Congress, have as against the persons whom they govern: what position we as a nation must take toward our citizens or subjects."<sup>346</sup>

Thayer replied to Storey in a private letter, condescending to note that "[i]n matters of State, as in life, it appears to me wiser and more helpful . . . to keep one's inner state wholesome and sweet with these things [i.e., the Declaration of Independence], and then to turn in on his everyday practical questions with all the horse-sense that he can muster."<sup>347</sup> Rather than embrace the philosophy of government, Thayer counseled that "[i]n dealing with

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<sup>342</sup> President Roosevelt, for example, wrote a letter to his Secretary of War, Elihu Root, to forward a letter he had received from Philippines Governor William Howard Taft. Taft described Storey as being of a class of "men, who when they come to die will look back over their lives and be unable to point out clearly any good which they have done to their fellow men . . . ." Letter from Theodore Roosevelt, U.S. President, to Elihu Root, Sec'y of War (July 17, 1903) (on file with Library of Congress, Elihu Root Papers, Special Correspondence). Taft reflected that these anti-imperialists "despise most the men who are really accomplishing anything in the way of progressive improvement of their race." *Id.* Taft was confident that Root's "great work" as Secretary of War would "be remembered when the rhetorical mouthings of Moorfield Storey . . . will be buried in that oblivion in which have been buried the utterances of so many self satisfied persons, who have been . . . utterly lacking in a sense of historical or political proportion." *Id.*

<sup>343</sup> Letter from John Ropes to James Bradley Thayer 4 (Oct. 14, 1899) [hereinafter Ropes-Thayer Letter] (on file with Harvard Law School Library).

<sup>344</sup> Letter from Moorfield Storey to James Bradley Thayer 4 (Oct. 21, 1899) (internal quotation marks omitted) (on file with Harvard Law School Rare Books Library, Thayer Collection, Correspondence, Folder 18-17).

<sup>345</sup> *Id.* at 6.

<sup>346</sup> *Id.* at 7 (emphasis added).

<sup>347</sup> Letter from James Bradley Thayer to Moorfield Storey 1 (Oct. 27, 1899) (on file with Harvard Law School Rare Books Library, Thayer Collection, Correspondence, Folder 18-17).

practical questions we must deal with things as they are and build on what we find.”<sup>348</sup> Thayer marshalled the “facts of three centuries” against Storey, and argued that our late acquisition of “various islands” was “valid by International Law. What Spain could do we can do.”<sup>349</sup> Indeed, “[the] state of things means colonial government. We are in for it, and can’t escape it.”<sup>350</sup>

For Thayer, the Constitution must be “read side by side with the fact that it created a nation, with all the prodigious implications of that fact.”<sup>351</sup> One implication was more prodigious than the rest: “Much, under such an instrument will be ‘unconstitutional but legal,’ . . . . Our protection here . . . is in other things than courts.”<sup>352</sup>

By the end of the year in which Baldwin and Thayer penned their defenses of annexation, the Secretary of War prefaced his report to the President on “Insular Government” by “assum[ing], for I do not think that it can be successfully disputed, that all acquisition of territory [by the United States over the insular possessions] was the exercise of a power which belonged to the United States, because it was a nation, and for that reason was endowed with the powers essential to national life . . . .”<sup>353</sup> The obviousness of annexation—and even annexation of other fully formed sovereignties—was now expressed as settled wisdom: all sovereign powers, even imperial power, must have been distributed to the federal government.

By 1900, a treatise on the constitutional law of the “public domain” (that is, McKinley’s “eminent domain”) admitted that the “[i]nherent [p]ower of a [n]ation to [a]cquire [t]erritory” had been one “of the great struggles between political parties of the United States,” but explained that acquisition had been settled as an “inherent power.”<sup>354</sup> Although the acquisition of “disconnected” territory stretched the inherent-power theory furthest,<sup>355</sup> nevertheless “the people of the United States, as sovereign owners . . . have supreme power over [territories] and their inhabitants. In the exercise of this *sovereign dominion*, they are represented by the government of the United States.”<sup>356</sup>

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<sup>348</sup> *Id.* at 1.

<sup>349</sup> *Id.* at 2.

<sup>350</sup> *Id.* at 3.

<sup>351</sup> *Id.* at 4.

<sup>352</sup> *Id.* John Ropes wrote to Thayer after the dinner to agree with him on the question of annexation: “In regard to our ‘constitutional power[]’ I never have had any difficulty . . . on that score, and I suppose the only clause of the Constitution that applies . . . is the one which forbids slavery.” Ropes-Thayer Letter, *supra* note 343, at 2.

<sup>353</sup> Elihu Root, *Report of the Secretary of War, in* 1 ANNUAL REPORTS OF THE WAR DEPARTMENT FOR THE FISCAL YEAR ENDED JUNE 30, 1899, at 24, 24 (Washington, D.C., Gov’t Printing Off. 1899).

<sup>354</sup> JAMES DEWITT ANDREWS, A TREATISE ON THE JURISPRUDENCE, CONSTITUTION AND LAWS OF THE UNITED STATES 217 (1900) (emphasis omitted).

<sup>355</sup> *Id.* at 223.

<sup>356</sup> *Id.* at 230 (emphasis added).

During the same period, the law officer of the War Department's Insular Affairs Division prepared dozens of reports on the legal entanglements created by the acquisition of the insular territories. In February 1900, he submitted an elaborate report on the "Legal status of the territory and inhabitants of the islands" America had conquered. He asserted plainly that "[t]he United States derives the right to acquire territory from the fact that it is . . . a sovereign nation. Such a nation has an inherent right to acquire territory."<sup>357</sup> Indeed, consistent with its sovereignty, the acquisition of territory simply increased the country's landed wealth while leaving its inhabitants outside of United States government: "The subsequent erection [within acquired territory] of a political entity or government . . . and the bestowal of citizenship upon the inhabitants are acts of grace on the part of the new owner or sovereign."<sup>358</sup> As a sovereign conqueror possessed of the eminent domain, the "President . . . presents to Congress the territory of said islands as so much property, seized as a spoil of war and to be dealt with by the sovereign people of the United States as shall be determined by that sovereign's will."<sup>359</sup> In sum, the insular territories were part of the American sovereign's eminent domain.

Like Thayer and Baldwin, the legal advisor concluded that dual-sovereign federalism and the conservation-of-powers thesis made the federal government's foreign-affairs power plenary. That is to say, "[i]n the redistribution of sovereign powers made by the people . . . [the] National Government exercises every sovereign power not expressly prohibited by the Constitution, for the reason that the National Government in our international relations represents the sovereign people; the States have no international standing, powers, or existence."<sup>360</sup> The possibility that the popular sovereign had reserved some of the sovereign powers described by the law of nations—especially in determining the composition of the American people—was purged from legitimate constitutional argument.

Seven months later, the legal advisor wrote another opinion to supplement his treatment of the acquisition power based on a review of "important incidents of our national history."<sup>361</sup> He turned first to the Louisiana Purchase. Jefferson, like the modern administration, had to deal with the accusation that he was an "imperialis[t]," and his opponents

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<sup>357</sup> 2 CHARLES E. MAGOON, REPORTS ON THE LAW OF CIVIL GOVERNMENT IN TERRITORY SUBJECT TO MILITARY OCCUPATION BY THE MILITARY FORCES OF THE UNITED STATES 37 (3d ed. 1903) [hereinafter MAGOON, REPORTS] (citing *Am. Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511, 542 (1828)).

<sup>358</sup> *Id.*

<sup>359</sup> *Id.* at 48.

<sup>360</sup> *Id.* at 68.

<sup>361</sup> *Id.* at 121.

“exhibited quite as much alarm as do the antiexpansionists of to-day.”<sup>362</sup> In an accurate recitation of the earlier legal theory opposing acquisition, the advisor reported that at the time of the Louisiana Purchase, the idea that the President, “exercising only the authority to make treaties,”<sup>363</sup> could acquire and incorporate territory “was declared to be absurd and a usurpation of authority possessed by kings and kings’ councils.”<sup>364</sup> And after reciting the floor debates used by those who opposed the acquisition of Texas (Webster, Story, and Channing), the advisor admitted that during earlier eras of constitutional history, “no one believed that the President and Senate could extend the boundaries of the United States by treaty stipulations, or incorporate foreign territory into the United States . . . .”<sup>365</sup> Indeed, in a complete restatement of Massachusetts’s and Maine’s brand of federalism, the legal advisor explained that “additions to the realm and the privilege of participating in the Government were matters to be determined by the sovereign, and that in the United States the sovereign was the people and not the President or the Senate.”<sup>366</sup>

The advisor’s answer to the anti-imperialists’ theory of popular-sovereign federalism was that politics had chosen a victor: “That Jefferson was an expansionist admits of no denial. His greatest glory was derived from the acquisition of Louisiana . . . .”<sup>367</sup> In the advisor’s view, Jefferson’s election furnished a constitutional moment that blessed the propriety of acquiring territory by treaty and subjecting its inhabitants’ political status to Congress’s legislative power. By presidential election, “[t]he course pursued by [Jefferson] in the acquisition and government of Louisiana was submitted to the people,” and Jefferson won overwhelmingly.<sup>368</sup> Accordingly, the advisor concluded that now the “great power of the sovereign was vested . . . in the people,” and—crucially—that “[t]he will of the sovereign people in regard [to acquisition and government of new territory] was to be declared by the *legislative department* of the [federal] Government.”<sup>369</sup>

The Insular Bureau’s use of the law-of-nations idea of eminent dominion was not clean, however. Just a year prior, the same legal advisor had opined that once the fact of annexation was accomplished, the Constitution must then apply, by its own force, in the acquired territory. That is to say, once the war of conquest ended, the federal government would “cease[] to derive its

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<sup>362</sup> *Id.*

<sup>363</sup> *Id.* at 122.

<sup>364</sup> *Id.*

<sup>365</sup> *Id.* at 128.

<sup>366</sup> *Id.*

<sup>367</sup> *Id.* at 122.

<sup>368</sup> *Id.* at 136.

<sup>369</sup> *Id.* at 128 (emphasis added).

authority from the laws and usages of war,” and would instead “bec[o]me subject to the Constitution and laws of the United States.”<sup>370</sup> Remarkably, the advisor quoted Justice McKinley’s treatment of the eminent domain in *Hagan* for the proposition that acquired territory must be held “subject to the constitution and laws of [the American sovereign’s] own government.”<sup>371</sup> In short, when the Insular Bureau’s lawyer first addressed the question of the possession’s legal status, he concluded that the Constitution would follow the flag: the insular possessions were “now a civil government, subject to and controlled by the Constitution and Federal laws of the United States.”<sup>372</sup>

The advisor’s apparent about-face concerning the application of the Constitution to the insular territories became public when an anti-imperialist Congressman quoted the earlier opinion on the floor. That member opposed the developing colonial policy, which included differential tariffs on goods from the new territories, by arguing that the President’s party intended to “convert this Republic into an empire in fact.”<sup>373</sup> In response to the floor statements and an official request for the earlier opinion concluding that the Constitution follows the flag, the War Department furnished the opinion to Congress with the caveat that it had been deemed to be “not . . . well founded.”<sup>374</sup> The War Department and Congress ordered the Insular Bureau’s legal opinions published in the summer of 1902, to the approval of significant taste-makers of legal culture.<sup>375</sup>

Most significantly, the Insular Bureau’s archival records contain a seventy-six page document bearing a handwritten notation that the “undated and unsigned” memorandum was “probably” composed “by Sec’y of War [Elihu] Root.”<sup>376</sup> The document concerned “the rights of U.S. to hold and govern newly acquired territory.”<sup>377</sup> As described in what follows, that memorandum describes the culmination of the ideological development traced in the foregoing Parts: it advanced the arguments that the federal government, not the states, holds a sovereign’s eminent domain; that in matters of foreign

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<sup>370</sup> CHARLES E. MAGOON, RELATIONS OF PUERTO RICO TO THE CONSTITUTION, H.R. Doc. No. 56-594, reprinted in ELIHU ROOT COLLECTION OF UNITED STATES DOCUMENTS, SER. A.-F., 815, 829 (Washington, D.C., Gov’t Printing Off. 1895) [hereinafter MAGOON, RELATIONS].

<sup>371</sup> MAGOON, REPORTS, *supra* note 357, at 188 (citing Pollard’s Lessee v. Hagan, 44 U.S. (1 How.) 212, 225 (1845); VATTEL, *supra* note 68, at bk. 1, ch. 19, s. 210, 244, 250).

<sup>372</sup> MAGOON, RELATIONS, *supra* note 370, at 829.

<sup>373</sup> 34 CONG. REC. 1555 (1901) (statement of Sen. Towne).

<sup>374</sup> 33 CONG. REC. 4063 (1900) (statement of Assistant Sec’y of War G.D. Meiklejohn).

<sup>375</sup> See, e.g., *Our Colonial Law*, N.Y. TIMES, July 26, 1902, at 503.

<sup>376</sup> Memorandum (unpublished manuscript) [hereinafter War Department Memo] (on file with NARA RG 350, Stack 150, Compartment 8, Shelf 4, Box 197, Doc. No. 1444-9). The document also bears a clerk’s stamp dated April 13, 1904, which accords with Root’s tenure as Secretary. On Root’s creation of a legal theory permitting an “imperial household with Puerto Rican dependents,” see ERMAN, *supra* note 11, at 40. See also *id.* at 41 n.40 (also attributing the memorandum to “Root?”).

<sup>377</sup> War Department Memo, *supra* note 376, back page.

affairs the federal government is properly conceived of as an *absolute* sovereign in which all powers at international law are reposed; and that from these premises it follows that the federal sovereign holds a power of acquiring territory and practicing colonial government within it.

The first half of the memorandum is devoted to a question that “at first sight seem[s] to present unsurmountable difficult[y]”<sup>378</sup>—that is, the source of the power of the federal government to acquire territory notwithstanding the Constitution’s silence regarding that power. The memorandum argued that a century of practice as well as Marshall’s early opinion in *Canter* “necessarily remove[d] all these apparent complications . . . and clearly demonstrate[d] the absolute power of the National Government, not only to acquire, but also to subsequently govern, all territory which may come under its jurisdiction in any manner whatsoever.”<sup>379</sup> To resolve the constitutional “complication,” the memorandum explained, it was necessary to bear in mind a central distinction “between the control of matters which belong to the separate States”—as to which the “United States *are* a federation”<sup>380</sup>—and the “control by Congress of matters affecting the general property which belongs to all the States”<sup>381</sup>—as to which the federal government acts as a trustee. Because Congress controls the eminent domain as a “nation,” the memorandum continued, all constitutional “limitations so far as the central government is concerned . . . cannot relate to the control of territory and property which belongs to the United States as a whole.”<sup>382</sup>

Once this federal eminent domain was fully accepted, the memorandum continued, it was possible to understand three related propositions: (1) the power to acquire territory; (2) the constitutional power of Congress to govern “such acquired territory”; and (3) the status of the inhabitants with respect to “the United States as a governing power.”<sup>383</sup>

Turning first to “the right of the United States to acquire new territory,” the memorandum cautioned that “before the source of the right . . . can be clearly understood, it is necessary to thoroughly appreciate what the Government of the United States is . . . .”<sup>384</sup> The answer, the author explained, turned on what I have labeled dual-sovereign federalism and the conservation-of-powers thesis: with respect to “those matters . . . over which no particular state can exercise any control,” the federal government “as vested in, and wielded by, Congress and the Executive, *is an absolutely sovereign power*,

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<sup>378</sup> *Id.* at 1.

<sup>379</sup> *Id.*

<sup>380</sup> *Id.* at 2.

<sup>381</sup> *Id.*

<sup>382</sup> *Id.* at 3.

<sup>383</sup> *Id.* at 4.

<sup>384</sup> *Id.* at 5.

subject only to” the Constitution’s express limitations.<sup>385</sup> Such limitations “are very few,” such as the right of habeas corpus or, after the Thirteenth Amendment, a prohibition on “the institution of slavery in any form.”<sup>386</sup>

The author admitted that his “declaration of the absolute sovereignty of Congress may for a moment appear startling and even repugnant,” but he countered that “a moment’s reflection” reveals that “there is nothing whatever derogatory to the dignity or prejudicial to the interests of any State, in granting the fullest possible power over foreign relations or territorial matters to the Central Government.”<sup>387</sup> To be sure, states “can well be jealous” of their “sovereignty over their own internal affairs,” but as to matters that are “conducted by Congress for the general good of the Union,” the institutions of federal government must possess plenary power.<sup>388</sup>

Root thought that any alternative version of foreign-affairs federalism would be absurd because unless the federal sovereign holds a plenary foreign-affairs power (here expressed as a national treaty-making power to acquire territory), any alternative distribution of sovereignty would “necessarily result[] in a diminution or loss of sovereignty to the general Government, and thereby the entire Union, which can never be restored.”<sup>389</sup> Indeed, identifying the argument that a power might have been withheld from *all* American governments by a popular sovereign—that is, the central claim of Massachusetts’ or Maine’s popular-sovereign federalism—was, in the author’s view, enough to disprove it: such an argument would leave the national government “in the undignified position of being less than a sovereign state and not able to negotiate in regard thereto.”<sup>390</sup> Extensively quoting a mid-nineteenth-century Attorney General’s opinion, the memorandum emphasized that “if the power of negotiation be not in the United States, then it exists nowhere, and one great field of international relation . . . is closed up . . . .”<sup>391</sup> Crucially, therefore, it followed that “[t]his element of complete sovereignty as to all matters other than th[o]se in which the States themselves are separately interested . . . can be exercised in a thoroughly effective manner only by a supreme Government possessed of *absolutely complete sovereignty*.”<sup>392</sup> Indeed, the memorandum continued, “in regard to all such matters as are now under consideration”<sup>393</sup>—that is, the power to acquire territory by treaty and

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<sup>385</sup> *Id.* (emphasis added).

<sup>386</sup> *Id.*

<sup>387</sup> *Id.* at 5-6.

<sup>388</sup> *Id.* at 6.

<sup>389</sup> *Id.* at 6-7.

<sup>390</sup> *Id.* at 7.

<sup>391</sup> *Id.* (quoting 8 Op. Att’y. Gen., 411, 415 (1857)) (emphasis omitted).

<sup>392</sup> *Id.* at 12 (emphasis added).

<sup>393</sup> *Id.* at 18.



Congress's power to govern it as a colony—the United States “is a sovereign nation, and . . . its Central Government has powers which are co-extensive with the power of any other sovereign nation, *no matter what its form of government may be, whether autocratic, limited monarchy, or republican*.”<sup>394</sup>

The treaty-making power was thus national *and* imperial: it expressed a vision of the federal government's sovereignty that is so absolute—and so disconnected from the conceit of popular sovereignty—that it could even be autocratic or imperial.

The War Department's defense of imperial acquisition and government aligned with elite legal opinion of the time. By 1912, Secretary of War Henry Stimson was recommending citizenship for Puerto Rican inhabitants but cautioned that “the grant of citizenship does not, and should not postulate eventual statehood . . . .”<sup>395</sup> His Legal Advisor, Felix Frankfurter, similarly advised the Attorney General of Puerto Rico, “I feel very strongly that if the public opinion of this country is against statehood . . . our dealings with the Island . . . will be furthered by a frank, even an unnecessarily frank, statement of our intentions.”<sup>396</sup> The “frank” statement that the territory would never become a state “will serve to build up a tradition against any possible partisan temptation of the future” while “prevent[ing] the raising of false hopes” among Puerto Ricans.<sup>397</sup> And, of course, the idea of imperial government and the doctrine of incorporation of conquered territory eventually received the sanction of the Supreme Court in the *Insular Cases*.

But in the interstices of insular government, the conceit that the popular sovereign might reserve some powers from its governments recurred.

For example, just after the conquest of Puerto Rico but before Congress had legislated a municipal code for the territory, insular authorities had to determine whether corporations could be created during the interregnum.<sup>398</sup> So, when several Puerto Rican beer-making entrepreneurs applied to create a corporation with special immunities from taxation,<sup>399</sup> the insular authorities demurred, citing *Hagan*: “When Porto Rico was ceded to the United States

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<sup>394</sup> *Id.* (emphasis added).

<sup>395</sup> Henry Stimson, *Annual Report of the Secretary of War*, in 1 WAR DEPARTMENT ANNUAL REPORTS, 1912, at 5, 42 (1913).

<sup>396</sup> Letter from Felix Frankfurter, Dep't of War Legal Adviser, to Foster V. Brown, Att'y Gen. of P.R. 1 (Dec. 29, 1911) (on file with National Archives, NARA RG 350, Entry 16, Stack 150, Row 57, Compartment 24, Shelf 3).

<sup>397</sup> *Id.* at 1-2.

<sup>398</sup> See *In re* Application of Frank H. Griswold, No. 443, Division of Insular Affairs, War Department (June 14, 1899), in MAGOON, REPORTS, *supra* note 357, at 490 (addressing an application for proposed brewing company's incorporation in Puerto Rico).

<sup>399</sup> *Id.* at 491 (“Among other special privileges sought to be secured by these proposed articles of incorporation is one to be allowed to conduct the business of manufacturing and selling malt, spirituous, and vinous liquors ‘without paying any special tax assessed against it or its property.’” (citation omitted)).

our Federal Government did not succeed to the prerogatives . . . inherent in the Crown of Spain under the monarchy. Our Federal Government has never been authorized to receive or . . . secure said prerogatives by transfer from a monarch or otherwise . . .”<sup>400</sup> Because no federal officer could inherit the powers of a Spanish bureaucrat, the insular authorities continued, no corporate charters could be granted.<sup>401</sup> The adviser admonished the public that “attention is directed to the fact that the conqueror in this instance is the sovereign people of the United States,” and accordingly *Congress* would have to permit corporate charters.<sup>402</sup>

As another example, after the American government’s conquest of the Philippines, the Manila Railway Company applied for past-due interest payments guaranteed by the Crown.<sup>403</sup> While the insular authorities admitted that a “sovereignty securing the territory secures all the rights and privileges and assumes all the obligations of the previous sovereign,” they concluded that this doctrine was “inaccurate” in the United States.<sup>404</sup> This law-of-nations doctrine, they reasoned, does not extend to the United States because of the “character of [American] government.”<sup>405</sup> It was “impossible” for the United States *government* to acquire the rights and obligations of a monarch, since it was different in form to the foreign *sovereign*.<sup>406</sup>

The Insular Bureau’s position on corporate charters and interest payments was consistent, of course, with the superseded legal opinion on whether the Constitution follows the flag: if the Constitution displaced the law of nations after conquest, then international law was inapt. Thus, relying on *Hagan*, the legal officer could contend that no American government could receive the sovereign prerogatives of another sovereign by the contrivance of a treaty.

The Insular Bureau’s varied positions on the federal government’s powers in the territories rendered the Bureau’s calculus of imperial public law confused: in what way, precisely, was the federal government “sovereign” over these possessions?

Ultimately, the contradiction between the insular authorities’ invocation of the sovereign’s acquisition power, on the one hand, and a limited federal government, on the other, yielded the general theory that the creature that conquered the insular territories could act as a *sovereign* but not as a *government*.

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<sup>400</sup> *Id.* at 493 (citing *Pollard’s Lessee v. Hagan*, 44 U.S. (1 How.) 212, 235 (1845)).

<sup>401</sup> *Id.* at 494.

<sup>402</sup> *Id.* at 495.

<sup>403</sup> See *In re Claim of the Manila Ry. Co.*, No. 849, Division of Insular Affairs, War Department (Dec. 21, 1899), in *MAGOON, REPORTS*, *supra* note 357, at 178 (responding to the Manila Railway Company’s request for “payment by the United States of interest on the capital invested in the railway owned and operated by said company, pursuant to guarantee of said interest by the Spanish Government”).

<sup>404</sup> *Id.* at 188.

<sup>405</sup> *Id.*

<sup>406</sup> *Id.*

More generally, as these interregnum decisions of the Insular Bureau demonstrate, the compatibility of American government with the law-of-nations idea of the eminent dominion became a central point of dispute about the limits on the government's treaty-making and foreign-affairs powers. Thayer and the War Department's lawyers' imperial views reflected the political realities of their time, and foreshadowed the settlement that the main treaty-power histories would parrot a decade later.<sup>407</sup> That is to say, American federalism was by then framed by dual sovereignty, and the new histories assigned *all* law-of-nations powers to an "absolute" federal sovereign.

### 3. The Imperial Dominion in The New *Insular Cases*

Given the evidence that several of the most influential early-twentieth-century histories of the treaty power embraced the brute fact of imperial government, what are we to make of eminent-dominion problems that continue to arise in America's overseas territories? To be sure, the forthrightness with which these public lawyers embraced the fact of imperial acquisition is, across the distance of time, difficult to judge by their lights and their politics. But it is imperative that we judge them by our lights, since the sovereignty of the newest possessions remains an open question.

In deciding the 2016 case *Puerto Rico v. Sanchez Valle*, for example, the Court charged once more into the breach between sovereignty and government to answer a straightforward question: should the Constitution's double-jeopardy clause protect defendants in Puerto Rico in the same (limited) way that it protects citizens of ordinary states?<sup>408</sup>

In *Sanchez Valle*, the respondents had been indicted for offenses arising from the same course of conduct by both Commonwealth and federal grand juries.<sup>409</sup> After pleading guilty to the federal charges, they contended that the Commonwealth's charges were now barred by the Fifth Amendment's Double Jeopardy Clause.<sup>410</sup> Their conviction of the federal crime, they argued, prohibited their being put in jeopardy once more for the "same offense."<sup>411</sup> The Commonwealth replied that like any other American state, it should be considered a "different separate sovereign[]" for dual-jeopardy purposes,<sup>412</sup> and therefore it could prosecute the respondents regardless of the federal conviction.<sup>412</sup>

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<sup>407</sup> See *infra* Section III.B.

<sup>408</sup> See 136 S. Ct. 1863, 1868 (2016) ("In this case, we must decide if . . . Puerto Rico and the United States may successively prosecute a single defendant for the same criminal conduct.").

<sup>409</sup> *Id.* at 1869.

<sup>410</sup> *Id.*

<sup>411</sup> *Id.* at 1870.

<sup>412</sup> *Id.* at 1869.

Six members of the Court decided that Puerto Rico was not a government possessing sovereignty of the right kind to entitle it to the separate-sovereign exception to the Double Jeopardy Clause.<sup>413</sup> The Court's majority opinion rests almost entirely on a peculiar history of the eminent dominion.

In the opening paragraphs of its opinion, the *Sanchez Valle* Court found that Puerto Rico was not a sovereign for dual-jeopardy purposes because "the oldest roots of Puerto Rico's power to prosecute lie in federal soil."<sup>414</sup> What follows is a dispassionate recitation of the federal conquest and annexation of the territory, Congress's beneficent but halting authorization of "self-governance," and finally the creation of "a new political entity."<sup>415</sup> All of this "historical, not functional"<sup>416</sup> evidence proved, the Court said, that the right of soil over Puerto Rico—the eminent dominion—was federal.<sup>417</sup> Most remarkably, given the vexed origins of the new states' eminent dominion, the *Sanchez Valle* majority decided that Puerto Rico's status as a political entity did not accord with the "ordinary" meaning of sovereignty.<sup>418</sup>

Ultimately, the Court decided that, notwithstanding its practical functioning as a state, the government failed a "historical" test of its "ultimate source of . . . power": Puerto Rican sovereignty is lesser than that sovereignty exercised by the former territories now made states of the union.<sup>419</sup> The authorities cited by the Court for that proposition, in turn, rest expressly on the eminent-dominion principle that Justice McKinley advanced in *Hagan*: the "new" states were "admitted with all the powers of sovereignty and jurisdiction which pertain to the original states."<sup>420</sup>

In its historicist understanding of insular government, the Court could not have provided a clearer summary of the earlier views of the eminent dominion—that federal soil, dominion, jurisdiction, and sovereignty are coextensive. As we have seen, the "ordinary" and "historical" meaning of federal sovereignty over soil—that is, the eminent dominion—was profoundly contested, especially when the historical aperture is opened to take in the nineteenth-century debates over the acquisition, cession, and title to land. In Puerto Rico's case, as War Department lawyers and pro-imperial

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<sup>413</sup> *Id.* at 1876.

<sup>414</sup> *Id.* at 1868.

<sup>415</sup> *Id.* at 1868-69.

<sup>416</sup> *Id.* at 1871.

<sup>417</sup> See *id.* at 1874-75 ("[T]he dual-sovereignty test . . . focuses on . . . where [self-rule] came from. . . . On this settled approach, Puerto Rico cannot benefit from our dual-sovereignty doctrine.").

<sup>418</sup> *Id.* at 1870.

<sup>419</sup> *Id.*

<sup>420</sup> *Coyle v. Smith*, 221 U.S. 559, 573 (1911).

academics aimed to make certain, what the Court called the “deepest wellsprings”<sup>421</sup> of Puerto Rico’s authority was a “sovereign” Congress.<sup>422</sup>

As we have seen, the doctrinal settlements on which the modern Court relied were motivated, in turn, by a desire to wrest dominion from the federal government in the mid-nineteenth century and the desire to elevate the fait accompli of imperial government into the constitutional canon in the early-twentieth. In attending to only the victors of the earlier constitutional battles, the Court’s “historical” approach to determining whether the possessions’ inhabitants enjoy the practical rights of living under local American *government* (as against subjection to federal *sovereignty*) is dubious.

Yet, in light of *Sanchez Valle*, the Court’s historicist gloss now defines the political status of persons governed by a federal dominus.<sup>423</sup> If one takes the Court’s historicist conceit seriously, it is far from clear why the federal government’s exercise of eminent dominion in acquiring the insular territories is not identical in kind to the original source of power by which the new states—like Illinois or Alabama—flowed into the United States. The new states, like the insular possessions, grew from the federal sovereign’s confident embrace of its power of eminent dominion. Indeed, they entered the union despite Massachusetts’s argument that the “disposition of its *sovereignty*” cannot be “a subject of barter by *governments*,”<sup>424</sup> and despite never obtaining the “sovereignty” they claimed over public land held by the federal government.

To be sure, the *Sanchez Valle* majority advanced an answer to the “literalist”<sup>425</sup> objection that the new states, no less than the insular territories, have “roots” in “federal soil.”<sup>426</sup> The Court’s answer was Justice McKinley’s answer in *Hagan*.<sup>427</sup> As in *Hagan*, the Court held that the admission of the

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<sup>421</sup> *Sanchez Valle*, 136 S. Ct. at 1871.

<sup>422</sup> *Id.* at 1874.

<sup>423</sup> See *id.* at 1871 n.3 (noting that “[t]he Court has never explained its reasons for adopting this historical approach to the dual-sovereignty doctrine,” but finding nevertheless that a different approach that would focus on the local government’s “functional autonomy” “would raise serious problems of application”).

<sup>424</sup> COMMONWEALTH OF MASS., *supra* note 103, at 23 (first emphasis added).

<sup>425</sup> See *Sanchez Valle*, 136 S. Ct. at 1871 n.4 (countering the “literalist” objection by citing principles of “equal footing” and “fundamental conceptual premises of our constitutional order” as justification for granting equal sovereignty powers to states admitted after the original thirteen).

<sup>426</sup> A version of the historical argument against the majority’s opinion appears in Justice Breyer’s dissent. See *id.* at 1879 (Breyer, J., dissenting) (“[T]he equal-footing doctrine means that . . . new States must enjoy the same rights and obligations as the original States . . . . [But] there is a federal ‘source’ from which those rights and obligations spring: the Congress which agreed to admit those new States into the Union in accordance with the Constitution’s terms.”).

<sup>427</sup> Justice Kagan’s majority opinion cited *Coyle v. Smith* as the source of an equal sovereignty principle. See *Sanchez Valle*, 136 S. Ct. at 1872 n.4 (highlighting that “the very meaning of ‘a State’ is found in the powers possessed by the original States which adopted the Constitution” (quoting *Coyle v. Smith*, 221 U.S. 559, 566 (1911) (internal quotation marks omitted))). Justice Lurton’s opinion in

new states into the union invested them with the eminent dominion—a confused bric-a-brac of sovereignty, jurisdiction, title, and soil. “[E]ach later-admitted State exercises its authority to enact and enforce criminal laws by virtue not of congressional grace, but of the independent powers that [their] earliest counterparts both brought to the Union and chose to maintain.”<sup>428</sup> The more vexed history of the United States’ century of acquiring new territory and admitting new states from that territory thus obscured, the *Sanchez Valle* majority could freely argue that the new states’ sovereignty follows from “the most fundamental conceptual premises of our constitutional order, indeed the very bedrock of our Union.”<sup>429</sup>

It has been nearly two hundred years since Ninian Edwards and Justice McKinley invented their theory of the eminent-dominion in an effort to wrest title to the public land away from the federal government. They lost. But the ideological apparatus they injected into the U.S. Reports—of a dual-sovereigntist theory of the eminent dominion—now serves as the principle distinguishing the new states from the imperial colonies. The Court now looks upon federal dominion over the insular territories not with Thayer’s practical “horse-sense”—that is, by asking what powers they now exercise as a matter of fact—but rather with his admonition that the territories’ “protection . . . is in other things than courts.”<sup>430</sup>

#### B. *Treaty-Making Without Absolute Dual Sovereignty*

The passage of the problem of conquest and annexation from constitutional aporia to accomplished fact in the early-twentieth century settled only that era’s most vexing practical question about the scope of the treaty-making power. Elihu Root’s peculiar framing of the treaty-making power—that is, asking whether the treaty-making power’s evident *nationality* (as against the states) also makes it *imperial*—must assume, first, that no popular sovereign reserved the power of practicing imperial government away from its government. Indeed, for Root and lawyers of his generation, the nationality of the treaty-making power funded the conclusion that the federal government’s foreign-affairs powers are “co-extensive” with every other nation—even “autocratic” or “monarchical” imperial sovereigns.

To be sure, Root admitted that the treaty-making power could not recreate a slave-holding republic or suspend habeas corpus, but these “very

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*Coyle*, in turn, expressly recites Justice McKinley’s opinion in *Hagan*. See *Coyle*, 221 U.S. at 573 (“The plain deduction from this case is that 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 . . .”).

<sup>428</sup> *Sanchez Valle*, 136 S. Ct. at 1872 n.4 (citing *Coyle*, 221 U.S. at 573).

<sup>429</sup> *Id.*

<sup>430</sup> Letter from James Bradley Thayer to Moorfield Storey, *supra* note 347, at 4.

few” limitations follow only from the express terms of the Suspension Clause and the Thirteenth Amendment. Root’s imperial view was that the federal government’s “full and completely sovereign rights have but the single limitation—that those personal and natural rights which all individuals possess, and the preservation of which is the object of all honestly conducted governments, cannot be destroyed.”<sup>431</sup>

Yet, as we have seen, the move from a *national* treaty-making power to an *imperial* one was neither obvious nor historically straightforward. Contrary to Root’s imperial project, could one accept the evident nationality of the treaty-making power—as *against the states*—without accepting the supremacy of the treaty-making power *as against the popular sovereign*? In other words, what would the treaty-making power look like if it were taken to be plausible that some law-of-nations powers were denied to *all* American governments by their popular sovereign?

In light of the larger history of the eminent-domain powers traced in this Article, we should rethink the frame through which we currently debate the scope of the treaty-making power. In this final subpart, I return to the question whether and how the treaty-making power should be limited.

#### 1. The Eminent Dominion in *Missouri v. Holland*

As I have argued, while it is now thought that Chief Justice Marshall resolved for good the question of whether the federal government possesses the eminent-domain power to acquire and hold title to territory, the historical record simply does not bear this out—the issue was central to thirty years of constitutional debate *after* Marshall’s engagement with the issue and was a persistent feature of late-nineteenth-century anti-imperialism. And while it is now thought that the federal government’s treaty-making power has not once been limited in fact,<sup>432</sup> the public law litigation of earlier eras suggests that this article of faith about the treaty power is untrue. But of course the early decades of the twentieth century brought the Supreme Court’s principal discussion of the treaty power, in the 1920 decision *Missouri v. Holland*.<sup>433</sup> Today, *Holland* remains the single modern case that defines the federal government’s capacity to legislate pursuant to the treaty power<sup>434</sup>—a decision

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<sup>431</sup> War Department Memo, *supra* note 376, at 18.

<sup>432</sup> See, e.g., RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW § 312 n.1 (AM. LAW INST. 2018) (“The Supreme Court has never held that a treaty exceeded the powers of the national government or unconstitutionally invaded the reserved powers of the States.”).

<sup>433</sup> 252 U.S. 416 (1920).

<sup>434</sup> *Id.*

that “set off a maelstrom that has ebbed and flowed for over nine decades,” including the Supreme Court’s 2014 decision in *Bond v. United States*.<sup>435</sup>

Crucially, *Holland* emerged from deeper currents of constitutional reasoning about the sovereign’s eminent dominion—its power to acquire, cede, and hold title to property—traced throughout this Article. In the remaining pages, I aim to demonstrate that *Holland* was in fact a waystation between a world in which it was plausible for constitutional partisans to joust about which sovereign (popular, federal, or state) holds the eminent dominion, and the emergence of the now-dominant theory of dual-sovereign foreign-affairs federalism. The latter theory of dual-sovereign federalism—embraced by proponents of an imperial, nationalist treaty-making power and states-rights critics of the treaty-making power alike—has struggled to offer an intelligible theory of the treaty power’s limits ever since.

The beginning of the *Holland* controversy is usually dated to 1904, when Congress first undertook an “active effort . . . to gain federal protection for migratory birds.”<sup>436</sup> Congress passed ordinary legislation that was held unconstitutional in various lower courts.<sup>437</sup> Undaunted, Congress passed a similar statute pursuant to a treaty regulating the same subject matter.<sup>438</sup> This commonplace brief of the case suggests a dual-sovereigntist frame for the constitutional question presented: the state and the federal sovereigns advanced competing claims to a “police power,” on the one hand, and “implied attributes of sovereignty,” on the other, that collided in a debate about whether the federal government could regulate bird hunting within the states.<sup>439</sup> Thus, the proponents of the federal statute are thought to have invoked a “plenary national power in foreign affairs” to displace the states’ power to act as “trustees . . . of animals . . . within their boundaries.”<sup>440</sup>

On the nationalist view of the treaty power, Congress’s passage of the statute pursuant to a treaty engaged a broader fund of absolute sovereign power. As George Sutherland put it just before his elevation to the Supreme Court, Elihu Root had it right: “the treaty-making power was never possessed or exercised by the states separately . . . whatever else may be reserved to the states by the Tenth Amendment, *no part* of the treaty-making power can possibly be included.”<sup>441</sup> Indeed, Sutherland continued, it was a mistake to consider the treaty-making power to be “distributed” at all: “it is *all* vested in

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<sup>435</sup> Hathaway et al., *supra* note 6, at 13.

<sup>436</sup> Charles A. Lofgren, *Missouri v. Holland in Historical Perspective*, 1975 SUP. CT. REV. 77, 78.

<sup>437</sup> GEORGE SUTHERLAND, CONSTITUTIONAL POWER AND WORLD AFFAIRS 154-55 (1918) (citing *United States v. McCullagh*, 221 F. 288 (1915)).

<sup>438</sup> See Galbraith, *supra* note 11, at 66-67.

<sup>439</sup> Lofgren, *supra* note 436, at 78-79.

<sup>440</sup> *Id.* at 79.

<sup>441</sup> SUTHERLAND, *supra* note 437, at 156 (emphasis added).



the National government.”<sup>442</sup> Accordingly, “its full exercise necessarily devolves upon the general government as the only possible agency . . . .”<sup>443</sup> Sutherland and Root’s history of *Holland* thus puts the powers of two sovereign governments in opposition: should the plenary federal treaty-making power or the state police power win out?<sup>444</sup>

The Office of the Attorney General of Missouri, whose head had been charged with violating the “bird bill,” joined a suit challenging the statute before the Supreme Court. His office framed Missouri’s case using the language of the sovereign’s eminent dominion. Indeed, what is most important about *Holland* is the extent to which the case represented the last chapter of the eminent-dominion argument traced throughout this Article.

Missouri’s brief set out to “revive . . . the atmosphere breathed by those who framed . . . the Constitution of the United States.”<sup>445</sup> The most important ambient idea to be revived was the eminent dominion: “Under the ancient law, feudal law, and the common law . . . the absolute control of wild game was an attribute of government and a necessary incident of sovereignty.”<sup>446</sup> Missouri’s argument was thus that its own “trust right . . . [in] the title to all wild game” foreclosed a treaty that would regulate the birds.<sup>447</sup> By virtue of its eminent dominion, Missouri had *title* to the birds. And, as McKinley had established in *Hagan*, “Missouri, upon her admission to the Union, . . . became entitled to and possessed of *all the rights and dominion and sovereignty* which belonged to the original states.”<sup>448</sup>

Replacing “wild game” with “overflowed lands” in Missouri’s brief would make it accord exactly with the question at issue in *Hagan* in 1845.<sup>449</sup> Missouri took itself to be making a straightforward *Hagan* argument: like the tidelands, title to the birds vested in the states by virtue of their eminent dominion.

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<sup>442</sup> *Id.* at 157 (adopting language that Sutherland attributed to Root).

<sup>443</sup> *Id.*

<sup>444</sup> Sutherland sent this history to the Senator who authored the migratory bird statutes, who in turn replied that since the act had been passed, “[t]he Attorney-General of Missouri has been prosecuted for shooting ducks out of season . . . .” Letter from George P. McLean, U.S. Senator, to George Sutherland (June 2, 1919) (on file with Library of Congress, George Sutherland Papers, General Correspondence, Box 1). The Senator promised to forward Sutherland’s views to the U.S. Attorney to aid his defense of the statute’s constitutionality. *Id.*

<sup>445</sup> Brief of Appellant at 18, *Missouri v. Holland*, 252 U.S. 416 (1920) (No. 609).

<sup>446</sup> *Id.* at 27.

<sup>447</sup> *Id.* at 3 (emphasis omitted).

<sup>448</sup> *Id.* at 28–29 (citing *Pollard v. Hagan*, 44 U.S. 212 (1845)).

<sup>449</sup> Similarly, replacing “wild game” with “separate sovereignty” in Missouri’s brief would make its argument accord with the majority’s explication of the difference between the insular possessions and the “new” states in *Sanchez Valle*. See *supra* text accompanying notes 425–427.

Viewed against this backdrop, Justice Holmes's majority opinion in *Holland* does not seem as gaunt as modern commentators have suggested.<sup>450</sup> Holmes's critical move was to reject Missouri's eminent-domain argument out of hand. Despite hundreds of pages of briefing on the subject, Holmes noted only in passing that "[t]he State also alleges a pecuniary interest" in the birds.<sup>451</sup> The limits of the treaty power, Holmes concluded, must be "ascertained in a different way."<sup>452</sup> While a state may "regulate the killing and sale of [migratory] birds, . . . it does not follow that its authority is exclusive of paramount powers [in the federal government]. To put the claim of the State upon *title* is to lean upon a slender reed."<sup>453</sup> Whatever had been reserved to the states by American federalism, Holmes held, it was not a sovereign's "eminent dominion."

In a pregnant omission, Holmes left the question of sovereignty in suspense: "We must consider what this country has become in deciding what [the Tenth] amendment has reserved."<sup>454</sup> Thus, in a terse holding that has infuriated his skeptics, Holmes concluded that the states' interests must give way. Migratory birds represent "a national interest of very nearly the first magnitude . . . . It can be protected only by national action in concert with that of another power."<sup>455</sup> Because treaties can solve "matters of the sharpest exigency for the national well being,"<sup>456</sup> the treaty power ought to supplement Congress's ordinary legislative powers.

In short, Holmes rejected Missouri's claim to a sovereign's dominion over the birds, and thus Justice McKinley's exotic argument drawn from the law of nations was eclipsed by a pragmatist's view of government.

There is more evidence, beyond the briefs, that underscores the extent to which *Holland* distanced the Court from the idea of dual-sovereign eminent dominion. Two weeks before *Holland* was argued, Tucker sent his above-described anti-"nationalist" history of the treaty power to Justice McReynolds. In his letter, Tucker noted that the Court's work "promises to be quite important—especially in respect to the proposed League of Nations."<sup>457</sup> Tucker confessed that he was "look[ing] to your Court to give to us our Constitutional form of Government—you are in fact our *tabula in*

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<sup>450</sup> See, e.g., *Bond v. United States*, 572 U.S. 844, 873-74 (2014) (Scalia, J., concurring) (describing the critical holding of *Missouri v. Holland* as an "unreasoned and citation-less sentence" and "*ipse dixit*").

<sup>451</sup> *Missouri v. Holland*, 252 U.S. 416, 431 (1920).

<sup>452</sup> *Id.* at 433.

<sup>453</sup> *Id.* at 434 (emphasis added).

<sup>454</sup> *Id.*

<sup>455</sup> *Id.* at 435.

<sup>456</sup> *Id.* at 433.

<sup>457</sup> Letter from Henry St. George Tucker to James McReynolds, Assoc. Justice, U.S. Supreme Court (Feb. 17, 1920) (on file with Library of the Supreme Court of the United States).

*naufugio*” and encouraged the Justice to look to Chapters IV and V of his history for an argument against a national view of the treaty-making power.<sup>458</sup>

Justice McReynolds replied to thank Tucker for the book, and about a month later—less than a week before *Holland* was decided—Tucker wrote again. Tucker was more direct, and encouraged McReynolds to review “Chapter 4 of the book . . . especially Paragraph 70.”<sup>459</sup> In that paragraph, Tucker advanced the modern critique of *Missouri v. Holland*: the treaty power must be constrained to avoid “annihilat[ing] others equally important and equally supreme.”<sup>460</sup> Because treaties can encompass anything, a broad view of the federal government’s treaty-making power “may embrace every right or power of the people, pertaining not only to their national but to their State and local rights.”<sup>461</sup> Accordingly, to say that the treaty-making power “may include the rights and powers of the citizens of the States not granted to the Federal government . . . is to claim a superiority for that power over the powers of the [other branches], and the powers of the States, which are equally supreme with the treaty-making power.”<sup>462</sup> The seed Tucker aimed to plant with McReynolds did not take root, as McReynolds joined the Court’s decision upholding the Migratory Bird Act pursuant to the treaty-making power.<sup>463</sup>

## 2. The Dual-Sovereign Treaty Power in *Bond v. United States*

Although Tucker failed to convince McReynolds, the Court’s more recent work suggests that Tucker may have found the “*tabula in naufugio*” to vindicate his dual-sovereignist—but anti-nationalist—theory of the treaty-making power. Tucker’s approach found its way into several Justices’ concurrences in *Bond v. United States*, which raised renewed skepticism about whether the treaty power should enlarge Congress’s ordinary legislative powers.

On its facts, the problem posed in *Bond* would appear as innocuous as hunting out-of-season birds in Missouri. After discovering marital infidelity, a spouse spread toxic chemicals on surfaces that her spouse’s paramour was likely to touch, in an effort to give the paramour a rash.<sup>464</sup> A prosecutor charged the spouse with violating a statute passed by Congress to implement the Chemical

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<sup>458</sup> *Id.*

<sup>459</sup> Letter from Henry St. George Tucker to James McReynolds, Assoc. Justice, U.S. Supreme Court (Apr. 10, 1920) (on file with Library of the Supreme Court of the United States).

<sup>460</sup> TUCKER, *supra* note 309, at 79.

<sup>461</sup> *Id.*

<sup>462</sup> *Id.*

<sup>463</sup> *Missouri v. Holland*, 252 U.S. 416, 430 (1920).

<sup>464</sup> *Bond v. United States*, 572 U.S. 844, 852 (2014).

Weapons Convention, 18 U.S.C. § 229(a)(1), and contended that the statute accorded with federalism because it was passed pursuant to a treaty.<sup>465</sup>

A majority of the Court in *Bond* avoided the federalism puzzle in this “unusual case” by finding the term “chemical weapon” in the statute to be too unclear to permit prosecution for such “local crimes.”<sup>466</sup> In concurring in the judgment, however, three Justices criticized the majority for avoiding the federalism problem by way of strained statutory interpretation.

Instead of avoiding the constitutional question, all three concurring Justices would have found that the statute obviously applied to the spouse’s conduct and thought that the Court should not shirk its duty to address the resultant federalism concerns.<sup>467</sup> To that end, Justice Scalia quoted, at length, from the “famous scholar and jurist Henry St. George Tucker” to demonstrate that the danger of *Holland*’s view of the treaty power was clear “five years before [*Holland*] was written.”<sup>468</sup> (As we have seen, this was no hypothetical; Tucker sent his work to Justice McReynolds twice in connection with *Missouri v. Holland*.<sup>469</sup>) Scalia’s concurrence then adopted Tucker’s dual-sovereign frame—that the dual spheres of state and federal sovereignty must be rebalanced—to argue that Congress could not pass the Chemical Weapons Convention without heralding a “vast expansion of congressional power.”<sup>470</sup> Without some subject-matter limitation, “the possibilities of what the Federal Government may accomplish” by treaty are so boundless as to allow it to usurp state sovereignty.<sup>471</sup>

As I have argued, Scalia’s (and Tucker’s) framing of foreign-affairs federalism as a problem of dual sovereignty simply overlooks the once-influential, now-dormant thought that the category of powers reserved “to the people” is not an empty set: the treaty-making power cannot be used to exercise powers that are denied to *both* governments by the popular sovereign. Yet, on the concurring Justices’ view, the states’ sovereignty is made the relevant limit to the treaty-making power.

This dual-sovereignty view of the treaty-making power is blinkered not only to more robust ideas about the Tenth Amendment’s limitations on treaty-making, but also to the pragmatic difficulties occasioned by separating “domestic”<sup>472</sup> treaties from those of “legitimate international”<sup>473</sup> concern. This proposed limitation invites the practical critique that being too solicitous

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<sup>465</sup> *Id.* at 852–53; see also *id.* at 874 n.5 (Scalia, J., concurring) (discussing waiver of a commerce-clause defense).

<sup>466</sup> *Id.* at 860, 863.

<sup>467</sup> *Id.* at 867 (Scalia, J., concurring).

<sup>468</sup> *Id.* at 881 (Scalia, J., concurring).

<sup>469</sup> See *supra* text accompanying notes 457–458.

<sup>470</sup> *Id.* at 877 (Scalia, J., concurring).

<sup>471</sup> *Id.* at 878 (Scalia, J., concurring).

<sup>472</sup> *Id.* at 883 (Thomas, J., concurring).

<sup>473</sup> *Id.* at 897 (Alito, J., concurring).

of state sovereignty can make the Constitution a suicide pact in matters of true national exigency: the resolution of some existential threats to the republic are prone to be at once classically “international” and enormously municipally invasive. Those who are skeptical of the national treaty-making power but have decided on a dual-sovereign model of federalism are committed to argue either that the Constitution annihilated the capacity to make municipally invasive “domestic” treaties, or constrained the treaty-making power to an undefined zone of “legitimate” international interest.

In light of a century’s worth of municipally invasive treaties about getting and spending land, the *Bond* concurrences’ effort to limit the treaty-making power to subjects of legitimate international intercourse is most difficult to square with our history of acquisition. In earlier eras, the effort to constrain treaty-making to embrace only objects of “international intercourse”<sup>474</sup> rather than those that “conceal[] a police power over domestic affairs”<sup>475</sup> would “syllogi[ze]” the new states (whose territory was acquired by treaty) “out of the Union.”<sup>476</sup> The most effective constitutional opposition to these municipally invasive treaties of acquisition was not that they trenched too far on “domestic” matters, but it was rather the popular-sovereign objection: these treaties infringed the reserved sovereignty of the people. The acquisition of Texas and cession of Maine were unlawful because the “disposition of sovereignty” cannot be “a subject of barter by governments.”<sup>477</sup>

In contrast to the dual-sovereignty view of the treaty-making power, the limitations that popular-sovereign federalism would impose upon the federal treaty power are few, but defensible. Acquisition, cession, and related trappings of imperial (or non-republican) government are impermissible; no more, no less.<sup>478</sup>

My historical corrective—that the treaty-making power has previously been limited by a popular-sovereignty-based view of foreign-affairs federalism—has lessons for modern “nationalists” and “new federalists” alike.

To today’s nationalists, the imperial history suggests that the marriage of dual-sovereign federalism with the idea of an absolutely sovereign federal

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<sup>474</sup> *Id.* at 885 (Thomas, J., concurring).

<sup>475</sup> *Id.* at 894 (Thomas, J., concurring).

<sup>476</sup> 3 REGISTER OF DEBATES IN CONGRESS, *supra* note 247, at 43; *See generally* text accompanying notes 247–251 (discussing the “old” states’ opposition to the cession of public lands to the new states in which they lay).

<sup>477</sup> COMMONWEALTH OF MASS., *supra* note 103, at 23; *see also* text accompanying notes 130–139 (discussing Massachusetts’s opposition to Texas).

<sup>478</sup> These limitations are, of course, in addition to individual-rights limitations expressly imposed by the Constitution. *See Reid v. Covert*, 354 U.S. 1, 16 (1957) (“There is nothing in [the] language [of the Supremacy Clause] which intimates that treaties and laws enacted pursuant to them do not have to comply with the [other] provisions of the Constitution . . .”); *see also* RESTATEMENT (FOURTH) OF FOREIGN RELATIONS § 107 (AM. LAW INST., Tentative Draft No. 1, 2016) (“A treaty provision will not be given effect as law in the United States to the extent that giving it this effect would violate any individual constitutional rights.”).

government is part of an all-too-recent imperial project. That project reduced the number of plausible “nationalist” theories of the treaty-making power to one, by erasing the possibility that popular sovereignty modestly limits the scope of a national treaty-making power while otherwise enlarging the field of permissible federal legislation. And to the “new-federalist” critics of the treaty-making power—including, recently, three Justices of the Supreme Court—recovering this history suggests that the popular contention that today’s treaties are especially “domestic,” or especially municipally invasive, overlooks the many episodes in which treaties remade the composition of the republic by acquiring and ceding territory.<sup>479</sup>

To be sure, the popular-sovereignty-based limit upon treaties of acquisition and cession is now implausible, having been litigated and overcome during a century of bartering territory with other sovereigns. Indeed, before the modern, canonical histories of the treaty-making power became authoritative, proponents of an imperial treaty-making power claimed that the most durable proof that the nation had acquiesced to an imperial treaty power was that the opposition to such treaties had been sophisticated, intense, and ultimately defeated. As Root argued, “[n]ot only has the right of the Central Government to acquire territory been sustained, but it has been upheld by the Supreme Court in the face of most bitter factional opposition, evidenced on every occasion on which the boundaries . . . have been extended.”<sup>480</sup>

The weakness of popular-sovereign federalism, moreover, lies in its canonical unorthodoxy. If popular sovereignty limits the treaty-making power, then foreign-affairs sovereignty must be recast in either tripartite (federal-state-popular) terms or as the antonym of dual-sovereign federalism (the people, but neither the states nor the federal government, are sovereign). Either view is now fantastically unimaginable. Insisting that some treaty-making powers are reserved to the popular sovereign is no longer taken to be a plausible argument—it is, in Sutherland’s words, not “come-at-able.”<sup>481</sup>

Indeed, as a result of judicial settlement and influential historicist arguments crafted in an imperial era, our public law now rejects the idea that a dormant popular sovereign retains any important foreign-affairs power.<sup>482</sup>

This canonical status of the dual-sovereign theory of foreign-affairs federalism is highly unlikely to change for at least two reasons.

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<sup>479</sup> Cf. *Bond*, 572 U.S. at 896 (Thomas, J., concurring) (noting the “increasing frequency with which treaties have begun to test the limits of the Treaty Power”).

<sup>480</sup> War Department Memo, *supra* note 376, at 23.

<sup>481</sup> Sutherland, *supra* note 54, at 380.

<sup>482</sup> See, e.g., *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 317 (1936) (“Sovereignty is never held in suspense. When . . . the external sovereignty of Great Britain in respect of the colonies ceased, it immediately passed to the Union.”).

First, as discussed, the most obvious limitations that popular-sovereign federalism might impose upon the treaty power—prohibiting acquisition or cession—are the limits most breached in our history.

Second, the canonical understanding of the *methods* of public law (international and American) has radically diverged. Whereas international and American public law traveled together in charting the foreign-affairs federalism of the mid-nineteenth to early-twentieth century, they now use materially different grammars of argument.

The best illustration of this divergence is suggested by the last notable episode of the new states' effort to wrest the eminent dominion from the federal government. In October 1945, President Truman issued a proclamation announcing that it would be his Administration's policy that "the natural resources of the subsoil and sea bed of the continental shelf" are "subject to [federal] jurisdiction and control."<sup>483</sup> The same year, the government filed an original-jurisdiction case in the Supreme Court, *United States v. California*, contending that the federal government was the "owner in fee simple of, or possessed of paramount rights in and powers over, the lands . . . underlying the Pacific Ocean . . . on the coast of California."<sup>484</sup>

The parties' briefing in *California* evinces the baroque law-of-nations reasoning that framed the prior century's precedents. The government's opening brief, for example, began with a 30-page disquisition on the concept of a "territorial sea" from the time of Roman law, as well as the "writings of publicists."<sup>485</sup> California's brief teed up a familiar question from the earlier era: because riverbeds often debouch into the territorial sea, should not *Hagan* apply to the land below that sea?

The Court agreed with the federal government that the sovereigntist logic of *Hagan* actually entailed a *national* eminent dominion. As Justice Black wrote for the majority, if *Hagan* gave state sovereigns the right to lands below inland waters, that logic ultimately favored *federal* title to the seabed: unlike inland rivers, these waters implicate "national interests [and] responsibilities, and therefore national rights are paramount."<sup>486</sup> The *California* Court thus used dual-sovereign federalism to favor a preferred sovereign—the federal sovereign holds eminent dominion.<sup>487</sup>

Writing in dissent, Justice Frankfurter criticized the majority's confusion about the eminent dominion. Frankfurter explained Thayer's old lesson that the eminent dominion stood for many different things, some of which are

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<sup>483</sup> Proclamation 2667, 10 Fed. Reg. 12,303 (Oct. 2, 1945).

<sup>484</sup> *United States v. California*, 332 U.S. 19, 22 (1947) (quoting the complaint).

<sup>485</sup> *See generally* Brief for the United States in Support of Judgment, *United States v. California*, 332 U.S. 19 (1947).

<sup>486</sup> *California*, 332 U.S. at 36.

<sup>487</sup> *Id.* at 38-39.

incompatible with American public law.<sup>488</sup> Lou Henkin's first draft of the opinion explained that "[t]he Court confuses 'national dominion' over land or sea with property rights in such areas."<sup>489</sup> Although "the United States exercise[d] national dominion, paramount sovereign power, over all the territory that is properly in the United States . . .," that did not prove enough to give the federal government *title*.<sup>490</sup> If the federal government wished to prove "property rights in the land in question, it can find no support for its claim to such rights in the fact that it has exercised constitutional powers with regard to such property."<sup>491</sup> Frankfurter added to Henkin's draft that "[t]o speak of dominion carries precisely those overtones in the law which relate to property and not to political authority. Dominion . . . was concerned with property and ownership as against *imperium*, which related to political sovereignty."<sup>492</sup> Frankfurter explained that "of course the United States has 'paramount rights' in the sea belt . . . [But the] rights of ownership are something else."<sup>493</sup>

Frankfurter took a moment to mark a critical shift in the methodology of public international law since the prior century. He called for modernization, arguing that the litigants had relied too heavily on the "dubious and tenuous writings of publicists."<sup>494</sup> He also cited a just-published *Harvard Law Review* article that explained how an "inductive" method of international law had now overtaken the "deductive" approach of days past.<sup>495</sup> The old deductivists now failed to "grapple seriously with the systematic presentation of the practice of individual states."<sup>496</sup> Justice McKinley's old law-of-nations reasoning, Frankfurter explained, had led the Court astray.<sup>497</sup>

Frankfurter's emphasis in these cases on the changing sources and methods of international legal argument coincided with international efforts to firm up the discipline as a more positivist, scientific enterprise. His description of the way international law is found and described has ascended as the dominant mode of public international legal argument.<sup>498</sup>

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<sup>488</sup> *Id.* at 44-45 (Frankfurter, J., dissenting).

<sup>489</sup> Lou Henkin, Draft of Dissent of Justice Frankfurter in *United States v. California*, 332 U.S. 19 (1947), at 3 (unpublished manuscript) (on file with author).

<sup>490</sup> *Id.*

<sup>491</sup> *Id.*

<sup>492</sup> Felix Frankfurter, Draft of Dissent in *United States v. California*, 332 U.S. 19 (1947), at 1 (unpublished manuscript) (on file with author).

<sup>493</sup> *Id.* at 2.

<sup>494</sup> *United States v. California*, 332 U.S. 19, 43 (1947) (Frankfurter, J., dissenting).

<sup>495</sup> *Id.* at 43 (citing Georg Schwarzenberger, *The Inductive Approach to International Law*, 60 HARV. L. REV. 539, 540-41 (1947)).

<sup>496</sup> *Id.* at 561.

<sup>497</sup> *California*, 332 U.S. at 43-45 (Frankfurter, J., dissenting).

<sup>498</sup> In the end, Congress vindicated Frankfurter, and passed the Submerged Lands Act of 1953, Pub. L. No. 90-583, 82 Stat. 1146 (codified at 43 U.S.C. §§ 1301-1356b (2018)), to repudiate the *California* rule. See *United States v. Alaska*, 521 U.S. 1, 6 (1997) (explaining that the Submerged



Notwithstanding the modernization of public international law, American public law is still prone to practice the old ways. As Sarah Cleveland has explained, Justice Sutherland expressly forced a dual-sovereigntist frame onto nearly all constitutional questions touching upon foreign affairs, though the roots of his views are quite old.<sup>499</sup> Little, however, secures Sutherland's conceit in the modern Supreme Court.<sup>500</sup>

In taking up the Court's invitation to reappraise the foreign-affairs settlements of the early-twentieth century, it is worth considering whether the post-*Holland* debate over dual-sovereign federalism has exhausted all plausible theories of the people's delegation of foreign-affairs powers to their governments. That is especially so if the imperial era to which this orthodoxy belongs is no longer a part of our public law. While the early-twentieth-century settlements make reviving a popular-sovereign foreign-affairs federalism impossible, defining subject-matter limitations on the treaty power in light of our "dual sovereign" federalism is equally indefensible.

#### CONCLUSION

What are today at least three discrete public law puzzles were in earlier eras a single question: can American governments, by exercising the treaty-making power, lay claim to the eminent domain, as that idea is understood in the law of nations? Today, by contrast, we ask disparate questions that yield provincial (and highly contingent) answers: (1) Can the government acquire territory by treaty? *Yes*—Chief Justice Marshall put that question to rest. (2) Can the federal government dismember the empire by a treaty of cession? *No*—the *Federalist Papers* are skeptical. (3) Can the federal government hold title to public land within the states? *Plainly*. (4) What is the political status of acquired territories? *That is up to Congress*. (5) Finally, are there subject-matter limitations on either the treaty-making power or the legislation-giving effect to treaties? *No, in light of Missouri v. Holland*. All of these were interconnected "eminent domain" questions in mid-nineteenth- to early-twentieth-century national politics, but they could not be further apart in today's constitutional law canon. After all, whose mind now runs from treaties to takings?

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Lands Act "confirm[ed] States' equal footing rights" with the federal government); 42 Op. Att'y Gen. at 252 ("The general purpose of the Submerged Lands Act was 'to restore' to the States and persons claiming under the States what was 'taken away from them' by the decision in [*California*].").

<sup>499</sup> See Cleveland, *Powers Inherent*, *supra* note 58, at 273-77 (arguing that Sutherland's holding in *Curtiss-Wright* "was rooted directly in the principles of dual federalism and the peculiarly unattractive and illiberal view of national power that characterized the late-nineteenth-century inherent powers cases").

<sup>500</sup> See, e.g., *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2089-90 (2015) (finding Sutherland's description of the Executive's foreign-affairs powers overbroad).

This Article revives a view of popular-sovereign federalism that once flourished in the American reception of the eminent domain and in related conflicts regarding acquisition and cession. The records left behind are rich catalogues of federalism in practice. They are also evidence of the republic's almost immediate embrace of a common-law constitutionalism, which selectively deployed the law of nations to spar about national—and then imperial—politics.

As I have argued, our constitutional experience has rendered both the old popular-sovereign limitations and the proposed new state-sovereignty limitations on the treaty-making power impossible to reconcile with the shape of the modern republic. We have not, by contrast, advanced a durable answer to the political status of the insular territories. Instead, the Court remains fixated on a history of the imperial possessions' eminent domain that is nearly impossible to distinguish from the genesis of the new states. The Court's pretense that the identification of "deep" federal "wellsprings" in our acquired territory should resolve the question of the insular territories' "sovereignty" is historically dubious. It is, for related reasons, deeply suspect as a mode of structuring modern American government.

Remarkably, nearly every one of the losing partisans described in this Article expected their remedy in the infamy of history. Whether they sought to wrest title from the federal government or to resist the tide of American imperialism, those who reflected on their moment in constitutional time expected their adversaries to become infamous in the eyes of future generations who soberly reflected on the past.

Our foreign-affairs originalism, which ordinarily finds constitutional meaning in historicist sorties into the past, has made these partisans' hope vain. The eminent-domain debates simply disclose to us what we already knew: the American constitutional regime has acquiesced to and been irretrievably changed by many intense episodes of constitutional politics. Such episodes, when they arise anew, require lawyers practicing public law to do their thinking for themselves. The "deepest wellsprings"<sup>501</sup> of the past are as prone to erase as to reveal our Constitution's meaning.

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501 *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1871 (2016).