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TERRITORIAL CONSTITUTIONAL LAW

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The field of constitutional law occupies a most peculiar place in the American legal academy. By its very nature, it elevates form over substance by treating constitutions differently from statutes and other sources of law, including utilizing distinct interpretative methods, seemingly because they are labelled constitutions.[1] Courts and scholars typically justify this "constitutional law exceptionalism" by emphasizing that a constitution establishes certain first principles with respect to the structure of government and its relationship with its people.[2]

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1. *See* Christopher Serkin & Nelson Tebbe, *Is the Constitution Special?*, 101 CORNELL L. REV. 701 (2016).

2. *See, e.g.*, Vanhorne's Lessee v. Dorrance, 2 U.S. 304, 308–09 (C.C.D. Pa. 1795); Frederick Douglass, *The Constitution of the United States: Is It Pro-Slavery or Anti-Slavery?* (Mar. 26, 1860), *in* 2 THE LIFE AND WRITINGS OF FREDERICK DOUGLASS 467, 468–69 (Philip S. Foner ed., 1950); David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 877, 879 (1996); Christopher R. Green, *"This Constitution": Constitutional Indexicals as a Basis for Textualist Semi-Originalism*, 84 NOTRE DAME L. REV. 1607, 1615–17 (2009).

If that is the case, the United States Constitution serves as a rather poor example of a constitution, since "federal constitutional rights are primarily negative in nature."[3] This, of course, is by design, since the Founders intended for the states to remain distinct sovereign actors serving as an intermediary between the people and the federal government and for state constitutions to confer positive or affirmative rights to the people of their states.[4] Yet if one were to review the syllabus of a typical "Constitutional Law" course offered at an American law school or read an issue of a constitutional law journal, one would likely believe that the United States Constitution is the only constitution and that the Supreme Court of the United States is the only court that issues decisions of a constitutional magnitude.[5]

The past few decades have seen the growing emergence of a movement described as "a state constitutional law renaissance" or a "new judicial federalism."[6] The proponents of this approach recognize the importance of state constitutions and believe that state courts should pay more than mere "lip service" to long forgotten or overlooked state constitutional provisions and instead interpret them to confer greater rights than those required by the United States Constitution – even if the text of the state constitution is word-for-word identical.[7]

While scholars and jurists invoke case law, historical sources, and various jurisprudential theories to support this approach, they also make no secret that they believe state supreme courts should rely on state constitutions to insulate their decisions from review and potential reversal by the Supreme Court of the United States.[8] In effect, state constitutions and the state courts interpreting them serve as a check on the Supreme Court of the United States and the lower federal courts by recognizing rights, liberties, and protections for the citizens of a state that

3. Robert F. Williams, *The Brennan Lecture: Interpreting State Constitutions as Unique Legal Documents*, 27 OKLA. CITY U. L. REV. 189, 192 (2002).

4. *See id.* at 191–92; *see also* Burt Neuborne, *Foreword: State Constitutions and the Evolution of Positive Rights*, 20 RUTGERS L.J. 881 (1989); Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131 (1999); Helen Hershkoff, *Rights and Freedoms Under the State Constitution: A New Deal for Welfare Rights*, 13 TOURO L. REV. 631 (1997); Frank P. Grad, *The State Constitution: Its Function and Form for Our Time*, 54 VA. L. REV. 928 (1968).

5. *See* Jeffrey S. Sutton, *What Does—And Does Not—Ail State Constitutional Law*, 59 U. KAN. L. REV. 687, 687–89 (2011).

6. *See, e.g.*, William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977); Joseph Blocher, *What State Constitutional Law Can Tell Us About the Federal Constitution*, 115 PA. ST. L. REV. 1035, 1037 (2011); JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW (2018).

7. Thomas M. Hardiman, *New Judicial Federalism and the Pennsylvania Experience: Reflections on the Edmunds Decision*, 47 DUQ. L. REV. 503, 505–07 (2009); *see also* Brennan, *supra* note 6, at 500–01; SUTTON, *supra* note 6, at 8–10.

8. *See, e.g.*, Hardiman, *supra* note 7, at 507.

the federal courts are unwilling or unable to recognize nationally.[9] This constitutes a radical departure from the once-common belief that federal courts are more likely to safeguard such rights than state courts.[10]

But the United States consists of more than just the federal government and the fifty states. Article IV of the United States Constitution recognizes that territories are part of the United States as well.[11] Yet the law of United States territories has recently been described as an "emerging" area of the law.[12] This characterization is somewhat curious, in that territories have been part of our nation since the Founding Era. Yet the territories and their laws have been absent from mainstream legal scholarship, for largely different reasons. For the first 125 years of our constitutional republic, territorial status was generally accepted as a temporary phase on a path to eventual statehood.[13] However, the last 125 years have seen the annexation of new territories consisting of largely non-white populations geographically distant from the mainland United States, which remain in territorial status indefinitely without a meaningful prospect of statehood.[14]

Nevertheless, the supreme laws defining the legal relationship between the federal government and the territories of Puerto Rico, the U.S. Virgin Islands, Guam, American Samoa, and the Northern Mariana Islands, as well as the significant bodies of law developed by their jurists and attorneys, are largely "absent from the canon of study of constitutional law in American legal education," to a greater extent than even state constitutional law.[15] Like many Americans,[16] members of "the legal profession in the states [are] mostly unaware of the history and the

9. *See* Darryl K. Brown, *The Warren Court, Criminal Procedure Reform, and Retributive Punishment*, 59 WASH. & LEE L. REV. 1411, 1422 (2002) (noting that the state constitutional law revolution represented "[a] sustained, systemic reaction against" the jurisprudence of the United States Supreme Court); *see also* Brennan, *supra* note 6, at 491; Hardiman, *supra* note 7, at 506.

10. *See* Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1116–17 (1977) (recognizing the widely-held assumption that "persons advancing federal constitutional claims against local officials will fare better, as a rule, in a federal, rather than a state, trial court" and that "[f]ederal district courts are institutionally preferable to state appellate courts as forums in which to raise federal constitutional claims," yet acknowledging that there are "no empirical studies that prove (or undermine) those assumptions").

11. U.S. CONST. art. IV, § 3.

12. *See, e.g.*, *Special Issue on the Law of the Territories*, YALE L.J. (Mar. 23, 2021), https://www.yalelawjournal.org/files/CallforPapersLawofTerritories_p6a17izo.pdf.

13. Harvard L. Rev. Ass'n, *Chapter One*, 130 HARV. L. REV. 1632, 1644–45 (2017).

14. *Id.*

15. Carlos Iván Gorrín Peralta, *Past, Present, and Future of U.S. Territories: Expansion, Colonialism, and Self-Determination*, 46 STETSON L. REV. 233, 233 (2017); *see also* José A. Cabranes, *Puerto Rico and the Constitution*, 110 F.R.D. 475, 477 (1986) (addressing the 1985 Judicial Conference of the First Circuit) (citing William H. Rehnquist, Edward Douglass White Lecture, Louisiana State University (Mar 19, 1983)).

16. *See, e.g.*, Kyle Dropp & Brendan Nyhan, *Nearly Half of Americans Don't Know Puerto Ricans Are Fellow Citizens*, N.Y. TIMES, *The Upshot*, (Sept. 26, 2017) https://www.nytimes.com/2017/09/26/upshot/nearly-half-of-americans-dont-know-people-in-puerto-ricoans-are-fellow-citizens.html.

current relations between the United States and the territories."[17] Those who do know the territories often assume without basis that their legal systems are unsophisticated,[18] and discussions of territorial law are largely ignored and dismissed by legal academia as "a marginal debate about marginal places."[19]

It comes as no surprise, then, that legal scholarship examining state constitutional law and judicial federalism largely ignores the five territories and their constitutions and organic acts.[20] In fact, a line of scholarship has developed within the emerging field of the law of the territories advocating for a so-called "territorial federalism"—a concept which, despite its name, has at its core the premise that the territories cannot stand on their own, but require the active intervention of the federal courts in their affairs; in other words, the opposite of actual federalism.[21]

What is *highly* surprising, however, is that territorial governments and those bringing public interest litigation on behalf of the people of territories have also dismissed territorial courts and territorial constitutions in favor of their federal counterparts, despite having many incentives not to do so. While territorial courts possess concurrent jurisdiction over a wide array of matters such as voting rights, much public interest litigation has been voluntarily filed in federal court rather than territorial court, with claims brought under the United States Constitution and federal statutes rather than pursuant to any territorial constitutional provisions.[22] This has been done even though territorial constitutions and organic acts, like state constitutions, contain numerous provisions granting positive or affirmative rights; several territorial courts have shown their receptiveness to expanding rights under

17. Peralta, *supra* note 15, at 233.

18. *See, e.g.*, Kristen David Adams, *The Folly of Uniformity? Lessons from the Restatement Movement*, 33 HOFSTRA L. REV. 423, 451 (2004) (describing the U.S. Virgin Islands as a "legal backwater"); Arin Greenwood, *My Clerkship in Paradise*, FIRSTHAND, https://firsthand.co/blogs/job-search/my-clerkship-in-paradise (Mar. 31, 2009) (discussing applying to clerk in the Northern Mariana Islands to have "a restful year on a tropical island" and then being surprised that "the work is astonishingly normal").

19. Christina Duffy Burnett, *A Convenient Constitution? Extraterritoriality After* Boumediene, 109 COLUM. L. REV. 973, 1040–41 (2009).

20. Even the editors of venerable Harvard Law Review, in the very first sentence of a review of a book on state constitutional law, incorrectly state that "[t]he American federal system contains not just one constitution or just one supreme court, but fifty-one constitutions and fifty-one supreme courts with the ultimate authority to interpret those constitutions." Jeffrey S. Sutton, *51 Imperfect Solutions: States and the Making of American Constitutional Law*, 132 HARV. L. REV. 811, 811 (2018) (reviewing JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW (2018)).

21. *See* Harvard L. Rev. Ass'n, *supra* note 13, at 1634; *see also* Russell Rennie, *A Qualified Defense of the Insular Cases*, 92 N.Y.U. L. Rev. 1683 (2017); Tom C.W. Lin, *Americans, Almost and Forgotten*, 107 CALIF. L. REV. 1249 (2019).

22. *See, e.g.*, Ballentine v. United States, 486 F.3d 806, 811 (3d Cir. 2007); Igartua–De La Rosa v. United States, 417 F.3d 145 (1st Cir. 2005).

territorial constitutions; and a demonstrated unwillingness of many federal courts to distinguish or overturn precedents hostile to territorial rights.[23]

This Article examines the nascent field of territorial constitutional law and its critical importance in remedying inequality and maintaining territorial autonomy.[24] Part I provides an overview of the relationship between the federal government and the territories, and briefly summarizes the structure of modern territorial governments, including their constitutions and the relations between territorial and federal courts. Part II considers the legal effect of territorial constitutions and addresses the misconceptions that territorial courts somehow lack the authority to definitively interpret territorial constitutions or that territorial constitutional law cannot develop independently of federal constitutional law.[25] Part III examines other challenges to the viability of territorial constitutional law, including the seeming hesitancy of litigants who choose not to file territorial rights case in territorial court, and highlights several cases in which territorial courts have asserted their independence and embraced federalist principles vis-à-vis the federal courts and compares the outcomes to similar cases brought in federal court in the first instance. Finally, Part IV envisions the potential future of territorial constitutional law, identifying several areas where territorial governments or their people receive unequal treatment but which territorial courts are empowered to remedy in appropriate cases through territorial constitutional law.

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23. *Compare* Balboni v. Ranger Am. of the V.I., Inc., 70 V.I. 1048 (V.I. 2019); People v. Guerrero, 2000 Guam 26, *with Ballentine*, 486 F.3d 806; *Igartua–De La Rosa*, 417 F.3d 145.

24. As used in this Article, the phrase "territorial constitutional law" refers to the interpretation of territorial constitutions and territorial organic acts by territorial courts or by federal courts predicting how a territorial supreme court would interpret such a document. While it does not encompass interpretation of the Territorial Clause of the United States Constitution or the applicability of certain federal constitutional rights to the territories, such issues are nevertheless intrinsically interwoven with the question of whether territorial constitutional law can exist as a free-standing field of the law in the same manner as state constitutional law.

25. I acknowledge at the outset that some of the discussion in Parts I and II of this Article may resemble legal scholarship from a bygone era, describing the current state of law akin to a treatise or hornbook as opposed to presupposing a level of common knowledge. However, as should shortly become apparent, the law of the territories is an area where "nothing can be assumed as common knowledge or taken for granted." Charles W. Collier, *The Use and Abuse of Humanistic Theory in Law: Reexamining the Assumptions of Interdisciplinary Legal Scholarship*, 41 DUKE L.J. 191, 201 (1991). Because the law of the territories has been "a strangely neglected field," scholarship in the area remains "sparse" and much of the scholarship that does exist is in a "confused state," often relying on significant misunderstandings of the law, leaving "many crucial questions unanswered," or otherwise not written in a manner suitable "to provid[ing] judges useful advice as to how to clean up the mess." William F. Fisher III, *The Significance of Public Perception of the Takings Doctrine*, 88 COLUM. L. REV. 1774, 1791 (1988).

I. TERRITORIAL GOVERNANCE

A. The Insular Cases

At the end of the nineteenth century and the start of the twentieth century, the United States became a colonial power. In 1898, the United States acquired Guam, the Philippines, and Puerto Rico from Spain at the conclusion of the Spanish-American War.[26] The following year, the islands comprising the Samoan archipelago were partitioned between Germany and the United States, resulting in the transfer of sovereignty over the islands of Tutuila and Aunu'u to the United States on April 17, 1900, which thereafter would collectively be known as American Samoa.[27] Shortly thereafter, in 1903, the United States acquired the Panama Canal Zone from Panama through the Hay-Bunau-Varilla Treaty.[28] And effective March 31, 1917, the United States purchased from Denmark the islands of St. Croix, St. John, and St. Thomas, as well as many surrounding minor islands, which collectively became the U.S. Virgin Islands.[29]

Unlike other territories previously acquired by the United States in the late eighteenth and early-to-mid nineteenth century, these new territories were both non-contiguous with the mainland United States and had overwhelmingly non-white populations. Despite more than a century of congressional actions and judicial precedents recognizing certain limitations on the power of Congress to legislate for the territories, the legal academy, including prominent scholars of the time such as Abbott Lawrence Lowell and Christopher Columbus Langdell, openly advocated for separate and unequal treatment of the territories acquired after the Spanish-American War based on conceptions of racial inferiority.[30]

Unfortunately, those efforts were successful. In a series of decisions collectively known as the *Insular Cases*,[31] the Supreme Court of the United States

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26. Treaty of Paris, U.S.-Spain, Dec. 10, 1898, 30 Stat. 1754.

27. Instrument of Cession by the Chiefs of Tutuila Islands to United States Government, U.S.-Tutuila, Apr. 17, 1900.

28. Panama Canal Treaties, 33 Stat. 2234.

29. Treaty for Cession of Danish West Indies, Aug. 4, 1916, U.S.-Den., 39 Stat. 1706.

30. *See, e.g.*, C.C. Langdell, *The Status of Our New Territories*, 12 HARV. L. REV. 365 (1899); Simeon E. Baldwin, *The Constitutional Questions Incident to the Acquisition and Government by the United States of Island Territory*, 12 HARV. L. REV. 393 (1899); James Bradley Thayer, *Our New Possessions*, 12 HARV. L. REV. 464 (1899); Abbott Lawrence Lowell, *The Status of Our New Possessions—A Third View*, 13 HARV. L. REV. 155 (1899).

31. *See* Juan R. Torruella, *Ruling America's Colonies: The "*Insular Cases*"*, 32 YALE L. & POL'Y REV. 57, 58 (2013). The *Insular Cases* typically refers to a series of six opinions issued by the Supreme Court of the United States during its 1901 term, including De Lima v. Bidwell, 182 U.S. 1 (1901), Goetze v. United States, 182 U.S. 221 (1901), Dooley v. United States, 182 U.S. 222 (1901), Armstrong v. United States, 182 U.S. 243 (1901), Downes v. Bidwell, 182 U.S. 244 (1901), and Huus v. N.Y. & Porto Rico S.S. Co., 182 U.S. 392 (1901). However, some jurists and scholars include additional cases within the *Insular Cases*, such as The Diamond Rings, 183 U.S. 176 (1901), Kepner v. United States, 195 U.S. 100 (1904),

relied on these now-discredited theories of racial inequality and the white man's burden to interpret the Territorial Clause of the United States Constitution as permitting Congress to treat the "savage," "half-civilized," "ignorant and lawless" "alien races" inhabiting America's territories in the Caribbean Sea and the Pacific Ocean differently than white Americans in the states and mainland territories.[32] To do so, the United States Supreme Court invented the doctrine of territorial incorporation to draw distinctions between "incorporated" and "unincorporated" territories,[33] despite there being absolutely no textual, historical, or jurisprudential basis for doing so.[34]

Today, any judge or lawyer who used the same racist rhetoric relied upon in the *Insular Cases* would face professional discipline,[35] and any law professor who promoted such ideas in the classroom or through scholarship would be fired or otherwise sanctioned.[36]

Consistent with the legal profession's evolving views on race, the reasoning of the *Insular Cases* has been repudiated by all corners of the legal community, to the point where they have been described as having "nary a friend in the world."[37]

Dorr v. United States, 195 U.S. 138 (1904), and Balzac v. Porto Rico, 258 U.S. 298 (1922). For purposes of this Article, the term *Insular Cases* encompasses all cases decided by the Supreme Court of the United States prior to the transition of the insular territories from direct federal control to democratically elected local governments.

32. *Downes*, 182 U.S. at 287; Baldwin, *supra* note 30, at 415; Thayer, *supra* note 30, at 475.

33. Anthony Ciolli, *The Power of United States Territories to Tax Interstate and Foreign Commerce: Why the Commerce and Import-Export Clauses Do Not Apply*, 63 TAX L. 1223, 1225 (2010) ("The concept of incorporation was first proposed by Justice Edward White in his concurring opinion in *Downes v. Bidwell* and later adopted by a majority of the Supreme Court in *Dorr v. United States*" and is premised on the idea that "the United States Constitution would only apply in full force in a territorial possession if Congress had somehow expressed an intent to incorporate the territory into the United States and to provide its inhabitants with all of the rights guaranteed by the Constitution.").

34. Gary Lawson & Robert D. Sloane, *The Constitutionality of Decolonization by Associated Statehood: Puerto Rico's Legal Status Reconsidered*, 50 B.C. L. REV. 1123, 1177 (2009) ("From the standpoint of an originalist . . . The *Insular Cases* are, as Judge Torruella has aptly put it, 'a strict constructionist's worst nightmare.' From the standpoint of one who views the Constitution in more functional or normative terms . . . The *Insular Cases* look even worse.")

35. *See* Model Rules of Pro. Conduct r. 8.4(g) (Am. Bar Ass'n 2021); Model Code of Jud. Conduct r. 2.3 (Am. Bar Ass'n 2004).

36. *See, e.g.*, *UPenn Law Professor Removed for Calling Black Students Inferior*, N.Y. POST (Mar. 15, 2018), https://nypost.com/2018/03/15/upenn-law-professor-removed-for-calling-black-students-inferior/; Brian Dakss, *Georgetown Law Professor Fired Over Remarks About Black Students That a Dean Called "Abhorrent" and "Reprehensible,"* CBS NEWS (Mar. 12, 2021), https://www.cbsnews.com/news/georgetown-law-professor-fired-over-remarks-about-black-students-that-a-dean-called-abhorrent-and-reprehensible/.

37. Luis Fuentes-Rohwer, *The Land That Democratic Theory Forgot*, 83 IND. L.J. 1525, 1536 (2008).

But although rhetoric has changed, perceptions of the law have not.[38] The Supreme Court of the United States has cautioned that "[n]either the [*Insular Cases*] nor their reasoning should be given any further expansion,"[39] and expressly reconceptualized the *Insular Cases* as holding "that the Constitution has independent force in these territories, a force not contingent upon acts of legislative grace."[40] Yet at the same time, the United States Supreme Court has never formally overturned the *Insular Cases*, despite receiving several invitations to do so.[41] In fact, judges, lawyers, and presidential administrations of all parts of the ideological and political spectrum continue to cite to the *Insular Cases* as grounds for treating certain American territories less favorably.[42] And despite its admonition that the *Insular Cases* not be given any further expansion, the Supreme Court of the United States has repeatedly denied certiorari in cases where lower federal courts relied on the *Insular Cases* to withhold important rights such as citizenship and freedom from unreasonable warrantless searches.[43] While their racist reasoning may have been disavowed, the *Insular Cases* thus nevertheless hover as a specter over the territories and continue to serve as a justification for treating some Americans differently from other Americans based on the part of the United States they call home. [44]

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38. As shall be examined in greater detail in Part II, *infra*, the conventional wisdom that the *Insular Cases* conclusively held that the United States Constitution does not fully apply to unincorporated territories is simply incorrect. "[W]hile the *Insular Cases* unquestionably distinguished between unincorporated and incorporated territories, the difference between these territories with respect to the application of constitutional provisions has never been as great as courts and commentators have argued." Burnett, *supra* note 19, at 984. Significantly, although the reasoning used to support the *Insular Cases* is abhorrent and cannot be reconciled with modern theories of constitutional interpretation, the ultimate results of the individual cases encompassing the *Insular Cases* are fully consistent with—and often support—principles of territorial autonomy and self-governance, including the authority of territorial courts to develop territorial constitutional law independently of the federal courts and the federal constitution. *See* discussion *infra* Part III.

39. Reid v. Covert, 354 U.S. 1, 14 (1957).

40. Boumediene v. Bush, 553 U.S. 723, 757 (2008).

41. See Financial Oversight & Mgmt. Bd. for P.R. v. Aurelius Investment, LLC, 140 S. Ct. 1649, 1665 (2020). Most recently, the United States Supreme Court expressly declined to consider a request from the Virgin Islands Bar Association and other amicus curiae to "overrule the much-criticized 'Insular Cases' and their progeny," although it again reiterated that "whatever their continued validity we will not extend them in these cases." *Id.*

42. *See generally* Adriel I. Cepeda Derieux & Neil C. Weare, *After* Aurelius*: What Future for the Insular Cases?*, 130 YALE L.J.F. 284, 284–85 (2020) (providing examples of judges, lawyers, and presidential administrations using the *Insular Cases* to treat territories less favorably).

43. *See, e.g.*, Baxter v. United States, 141 S. Ct. 1269 (2021); Tuaua v. United States, 136 S. Ct. 2461 (2016).

44. Derieux & Weare, *supra* note 42.

B. Development of Territorial Constitutions and Legal Institutions

If one's only familiarity with the territories were the *Insular Cases* and the limited scholarly commentary on them, one may wrongly assume that American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands are mere "colonies" that may exercise only "limited, local self-governance" but are otherwise under the direct day-to-day control of the federal government.[45] It is of course true that at the time the *Insular Cases* were decided, Puerto Rico, Guam, and American Samoa were either under military rule or administered by non-indigenous civilian governors who were appointed by the President of the United States.[46] This was also the case with the U.S. Virgin Islands after its annexation in 1916,[47] and while certain reforms were adopted—such as elected territorial legislatures—all four of those territories remained under the control of presidentially-appointed governors through the 1950s and 1960s.[48]

Scholars have written entire books on the developmental history of territorial governments, and this Article cannot do justice to the many important events on the road to autonomy that occurred in these territories over the course of the past century.[49] But while territorial governments may have only exercised "limited" power in the past, this is certainly no longer the case today. Puerto Rico became self-governing in 1952 with the ratification of the Constitution of Puerto Rico, which provided for a locally-elected governor, locally-elected legislature, and a judicial branch consisting of local judges appointed by the governor with the advice and consent of the Puerto Rican Senate.[50] American Samoa also achieved nearly equivalent local control over its internal affairs upon the adoption of the Constitution of American Samoa in 1967, which provided for a locally-elected governor, a locally-elected legislature, and a judicial branch whose judges are mostly appointed by the governor.[51] The U.S. Virgin Islands and Guam achieved self-governance in a more piecemeal fashion, with a locally-elected legislature authorized, respectively, in 1936 and 1950, a locally-elected governor granted in 1968, and a completely locally-appointed judicial branch authorized in 1984; although, the territories chose not to establish the local supreme courts so authorized until later.[52] And the Commonwealth of the Northern Mariana Islands has always been self-governing, having voluntarily joined the United States as a

45. *See* Lin, *supra* note 21, at 1265.

46. *See* Jon M. Van Dyke, *The Evolving Legal Relationships Between the United States and Its Affiliated U.S.-Flag Islands*, 14 U. HAW. L. REV. 445, 472–93 (1992).

47. *Id.* at 494–96.

48. *Id.* at 472–96.

49. *See, e.g.*, WILLIAM W. BOYER, AMERICA'S VIRGIN ISLANDS: A HISTORY OF HUMAN RIGHTS AND WRONGS (2d ed. 2010); JUAN R. TORRUELLA, THE SUPREME COURT AND PUERTO RICO (1985).

50. Van Dyke, *supra* note 46, at 472–73.

51. Tuaua v. United States, 951 F. Supp. 2d 88, 90 (D.D.C. 2013).

52. *See In re* Camacho, 2004 Guam 10 para. 28–30 (2004); Jackson v. West Indian Co., 944 F. Supp. 423, 429 (D.V.I. 1996).

territory in 1986 with a constitution authorizing a locally-elected governor, a locally-elected legislature, and a locally-appointed judicial branch.[53]

The modern-day territorial governments of American Samoa, Guam, Puerto Rico, the Northern Mariana Islands, and the U.S. Virgin Islands are in virtually every way the equivalent of a state government. Their territorial governors exercise the same powers with the same limitations as their counterparts in the fifty states.[54] Their territorial legislatures may legislate on any subject that a state legislature would be permitted to do so.[55] The territorial judicial branches exercise the same jurisdiction as a state court system and are treated by the federal courts as if they were state courts, including application of the *Erie* doctrine, *Rooker-Feldman* abstention, and other limitations on the power of the federal courts vis-à-vis the state courts.[56] But perhaps most importantly, all three branches of the territorial governments are ultimately accountable to the people of the territory, just as all branches of a state government answer to the people of their state. For all intents and purposes, the governments of American Samoa, Guam, Puerto Rico, the Northern Mariana Islands, and the U.S. Virgin Islands are largely indistinguishable from the governments of the fifty states.[57]

Nevertheless, some dismiss the powers exercised by territorial governments and the rights enjoyed by their people as a mere "legislative grace" which Congress has granted these territories and could theoretically repeal,[58] with some outright stating that Congress could "abolish the institutions of local self-government altogether and reestablish a colonial regime."[59] While it is readily acknowledged that "[t]here is no reason . . . to anticipate that the United States would take these or comparable steps—and strong reasons to think that it would not,"[60] many continue to believe that the *Insular Cases* permit Congress to simply erase all territorial legal institutions—including territorial constitutions—and wipe the slate clean. As the following section shall explain, this is not actually the case, and is

53. *See* United States *ex rel.* Richards v. De Leon Guerrero, 4 F.3d 749, 751–52 (9th Cir. 1993).

54. *See* Virgin Islands Revised Organic Act of 1954 48 U.S.C. §§ 1541–1645; Guam Organic Act 48 U.S.C. §§ 1421–28e; P.R. CONST.; AM. SAM. CONST.; N. MAR. I. CONST.

55. 48 U.S.C. §§ 1541–1645, 1421–28e; P.R. CONST.; AM. SAM. CONST.; N. MAR. I. CONST.

56. *See, e.g.*, MRL Dev. I, LLC v. Whitecap Inv. Corp., 823 F.3d 195, 201–02 (3d Cir. 2016); Davison v. Gov't of P.R.-P.R. Firefighters Corps, 471 F.3d 220, 223 (1st Cir. 2006).

57. One noticeable difference from the typical structure of a state government is present in American Samoa, where the Constitution of American Samoa provides for the United States Secretary of the Interior to appoint the Chief Justice of American Samoa and the Associate Justices of the High Court of American Samoa. However, the role of the Secretary of Interior in the appointment of American Samoa's judicial officers is expressly provided for in the Constitution of American Samoa, which was adopted by a local constitutional convention and approved by popular referendum. AM. SAM. CONST. art. III § 3. As such, the people of American Samoa have made a conscious decision for their Judicial Branch to be completely independent of the Executive and Legislative Branches.

58. *See, e.g.*, Stephen I. Vladeck, *Military Courts and Article III*, 103 GEO. L.J. 933, 981 (2015).

59. Gary Lawson & Robert D. Sloane, *The Constitutionality of Decolonization by Associated Statehood: Puerto Rico's Legal Status Reconsidered*, 50 B.C. L. REV. 1123, 1183 (2009).

60. *Id.* at 1184.

based on a fundamental misunderstanding of the *Insular Cases* and the Territorial Clause.

II. THE LEGAL EFFECT OF TERRITORIAL CONSTITUTIONS

This Article began by acknowledging that for centuries scholars and jurists generally recognized a constitution as the supreme law of the land, establishing certain first principles with respect to the structure of government and its relationship with its people.[61] While the United States Constitution largely meets this definition, it intentionally frames the rights of the people using negative rather than positive language, with the understanding that state constitutions would serve as the primary source of such affirmative rights.[62] While the Supremacy Clause of the United States Constitution provides for the federal constitution and federal statutes to take precedence over these state constitutions,[63] it remains generally accepted that state constitutions constitute the supreme law of their respective states in all areas not preempted by federal law, with even the Supreme Court of the United States powerless to reverse the judgment of a state supreme court if the decision was based on an independent interpretation of a state constitutional provision or other state law.[64] The United States Supreme Court succinctly explained:

> The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and Federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of Federal laws, our review could amount to nothing more than an advisory opinion.[65]

Thus, the limitation on the power of the Supreme Court of the United States to review the correctness of state courts' interpretations of their own state constitutions appears predicated on the federalist principles inherent in the structural provisions of the United States Constitution.[66]

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61. See *supra* references and text accompanying note 2.

62. See *supra* references accompanying note 4.

63. U.S. CONST. art. VI, cl. 2.

64. *See, e.g.*, Murdock v. City of Memphis, 87 U.S. 590, 609 (1874); Black v. Cutter Lab'ys, 351 U.S. 292, 298 (1956); Wilson v. Loew's, Inc., 355 U.S. 597, 598 (1958).

65. Herb v. Pitcairn, 324 U.S. 117, 125–26 (1945).

66. *See* Marcia L. McCormick, *When Worlds Collide: Federal Construction of State Institutional Competence*, 9 U. PA. J. CONST. L. 1167, 1203 (2007).

What, then, is the legal effect of territorial constitutions and organic acts? Over the past several decades, "the U.S. territories have moved toward mimicking the federal-state relationship" in a way that has resulted in "the devolution of power from D.C. to the territorial capitals," to the point where today the territories operate under a "form of functional territorial federalism that has flourished outside the traditional mold's formal legal limits."[67] As explained earlier, today the territorial governments of American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands are indistinguishable in virtually every respect from the governments of the fifty states.[68] Yet it remains generally accepted that unlike state governments, these territorial governments do not exercise any sovereign authority separate and apart from that of the federal government.[69]

Can it really be the case that such territorial constitutions are constitutions in name only, and that the idea that territorial supreme courts may develop their own territorial constitutional law to provide greater protections than the United States Constitution, without the inference of the federal courts, is merely illusory? To answer this question, it is critically important to first examine the federal constitutional underpinnings of territorial governments, as determined by the Supreme Court of the United States in the *Insular Cases* and other precedents. For the reasons set forth in the following sections, neither the *Insular Cases* themselves nor any abstract notions of sovereignty or congressional power preclude any of the territories from developing a robust and binding canon of territorial constitutional law.

A. Misconceptions of the Insular Cases

Much modern scholarship on the *Insular Cases* focuses on their abhorrent reasoning, and in particular the express reliance on theories of white supremacy and racial inferiority while completely ignoring prior judicial precedents, historical sources, and the plain text of the United States Constitution. However, it is important to remember that the *Insular Cases* were not a single decision, but rather a set of decisions in different cases raising distinct legal questions that were decided over the course of multiple decades.[70] The result of collectively grouping these otherwise-unrelated decisions is that scholars have paid comparatively little attention to the individual cases themselves, including the specific legal questions raised in those cases. Rather, legal scholarship has reframed the *Insular Cases* as collectively answering a significant question of first principles—"Does the Constitution follow the flag?"—in the negative.[71]

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67. Harvard L. Rev. Ass'n, *supra* note 13, , at 1634.

68. See *supra* references and text accompanying notes 54–57.

69. Puerto Rico v. Sanchez Valle, 579 U.S. 59, 68–72 (2016).

70. See Krishanti Vignarajah, *The Political Roots of Judicial Legitimacy: Explaining the Enduring Validity of the* Insular Cases, 77 U. CHI. L. REV. 781, 784 (2010).

71. *See, e.g.*, Joseph E. Sung, *Redressing the Legal Stigmatization of American Samoans*, 89 S. CAL. L. REV. 1309, 1319–20 (2016); Pedro A. Malavet, *The Inconvenience of a "Constitution [That] Follows the*

In recent years, some scholars have recognized that the "traditional story" that the *Insular Cases* "h[eld] that the U.S. Constitution did not 'follow the flag' to the recently annexed possessions in the Pacific Ocean and the Caribbean Sea" is a gross mischaracterization of what those decisions actually held and is "fundamentally wrong."[72] The conventional wisdom that the *Insular Cases* stand for the proposition that the United States Constitution does not apply to the territories has even been expressly rejected by the Supreme Court of the United States, which recently emphasized that the *Insular Cases* actually adopted the opposite holding: "that the Constitution has independent force in these territories, a force not contingent upon acts of legislative grace."[73]

One may wonder, if the *Insular Cases* never held that the United States Constitution does not follow the flag, why so many scholars and others believe that they did. A substantial part of the misconception certainly stems from what the *Insular Cases* clearly did: permit Congress to draw distinctions between "incorporated" and "unincorporated" territories based on a belief that the "savage," "half-civilized," "ignorant and lawless" "alien races" inhabiting the so-called "unincorporated" territories warranted different treatment than white Americans in the states and the so-called "incorporated" territories.[74]

But what did this differential treatment entail? Contrary to popular belief, the questions raised in many of the decisions comprising the *Insular Cases* were not of a constitutional magnitude. Rather, they involved relatively mundane questions of statutory interpretation, such as whether Puerto Rico and the then-Territory of the Philippines were a "foreign country" for purposes of tariff laws;[75] whether customs duties applied to imports from Puerto Rico;[76] whether vessels traveling between Puerto Rico and New York were engaged in trade for purpose of federal maritime laws;[77] and whether residents of Puerto Rico qualified as "aliens" under a federal immigration statute.[78] Significantly, such cases typically expressly avoided deciding constitutional questions—such as the citizenship status of the inhabitants of Puerto Rico—in favor of resolving the issue presented as a pure matter of statutory interpretation.[79]

Flag . . . But Doesn't Quite Catch Up With It": From Downes v. Bidwell *to* Boumediene v. Bush, 80 MISS. L.J. 181, 185–86 (2010).

72. Christina Duffy Burnett, *Untied States: American Expansion and Territorial Deannexation*, 72 U. CHI. L. REV. 797, 797 (2005); *see also* Gary Lawson, *Territorial Governments and the Limits of Formalism*, 78 CALIF. 853, 875–76 (1990) (noting "the full and immediate application of the Constitution in incorporated territories is at odds with" numerous precedents, including that territorial courts need not satisfy the structural requirements of Article III).

73. Boumediene v. Bush, 553 U.S. 723, 757 (2008).

74. Downes v. Bidwell, 182 U.S. 244, 287 (1901).

75. De Lima v. Bidwell, 182 U.S. 1, 174 (1901); The Diamond Rings, 183 U.S. 176, 177 (1901).

76. *Downes*, 182 U.S. at 245; Armstrong v. United States, 182 U.S. 243 (1901); Dooley v. United States, 182 U.S. 222 (1901); Goetze v. United States, 182 U.S. 221 (1901).

77. Huus v. N.Y. & Porto Rico Steamship Co., 182 U.S. 392 (1901).

78. Gonzales v. Williams, 192 U.S. 1, 7 (1904).

79. *See, e.g.*, *id.* at 12, 16.

Of course, some of the *Insular Cases* did directly implicate federal constitutional issues. These include decisions holding that the then-Territory of Hawaii could prosecute a criminal defendant in its local courts by information without an indictment by a grand jury;[80] that Puerto Rico and the Philippines could withhold a trial by jury in criminal cases tried in their local courts;[81] that the territorial appellate courts of the Philippines could reverse an acquittal and order a conviction;[82] and that the federal government could not try a federal criminal defendant in the then-Territory of Alaska for a violation of a crime against the United States before a six-person jury rather than a twelve-person jury.[83]

A cursory reading of the summaries of these holdings certainly supports the proposition that the Supreme Court of the United States held that some provisions of the federal Bill of the Rights did not apply to the territories. However, it is well-established that "[t]he simple words of the opinions . . . are not as important as the contexts in which those cases were decided,"[84] and that "the precedential value of a decision is defined by the context of the case from which it arose."[85] While it is technically true that the United States Supreme Court held, for instance, that criminal defendants tried in the local courts of Puerto Rico were not entitled to a trial by jury, it would be gravely wrong to infer from that naked holding, divorced from any legal or historical context, that the Court held that the relevant portions of the United States Constitution do not apply to the territories.

The United States Constitution divides powers between several distinct entities—the United States and the states—and further divides the power of the United States into three separate branches of government who exercise the sovereign power of the United States in different ways. This division of power is reflected in the structure of the United States Constitution itself, in that Article I is captioned "The Legislative Branch," Article II is titled "The Presidency," Article III is labelled "The Judiciary," while Article IV is called "The States." As such, the United States Constitution contains numerous provisions directed specifically to each of these four actors without mentioning the others. For example, the United States Constitution provides that Congress may coin money and establish post offices,[86] that the President serves as the commander-in-chief of the military,[87] that the federal courts adjudicate cases and controversies;[88] and that the states give full faith and credit to acts, records, and judicial proceedings of every other state.[89] However, it would be frivolous to say that the entire United States Constitution does not apply to the states because only Congress has the power to coin money,

80. Hawaii v. Mankichi, 190 U.S. 197, 217–18 (1903).

81. Balzac v. Porto Rico, 258 U.S. 298, 313 (1922); Dorr v. United States, 195 U.S. 138, 149 (1904).

82. Trono v. United States, 199 U.S. 521, 534–35 (1905).

83. Rasmussen v. United States, 197 U.S. 516, 528 (1905).

84. King v. Morton, 520 F.2d 1140, 1147 (D.C. Cir. 1975).

85. UC Health v. N.L.R.B., 803 F.3d 669, 683 (D.C. Cir. 2015) (Edwards, J., concurring).

86. U.S. CONST. art. I § 8.

87. *Id.* art. II § 2.

88. *Id.* art. III § 1.

89. *Id.* art. IV § 1.

or that the entire Constitution does not apply to Congress because only the President serves as commander-in-chief. Rather, these omissions simply reflect that the United States Constitution establishes a federalist form of government which allocates powers between the United States government and the states, and then further provides for a separation of powers amongst the three branches constituting the United States government.

Like Articles I through IV of the United States Constitution, some provisions of the Bill of Rights contain language directed towards certain actors. For example, the First Amendment states that "Congress shall make no law respecting an establishment of religion."[90] Other provisions, however, do not expressly mention the states or a branch of the federal government and are written in the passive voice, such as Second Amendment which provides that the right to bear arms "shall not be infringed"[91] or the Fourth Amendment stating that the right to be free from unreasonable searches and seizures "shall not be violated."[92]

One highly overlooked—yet exceptionally important—aspect of contextualizing the *Insular Cases* is the application of the federal Bill of Rights to the states at the time the *Insular Cases* were decided. Today, it is largely taken for granted that the Fourteenth Amendment has incorporated virtually all provisions of the Bill of Rights of the United States Constitution against the fifty states.

It is easy to forget, however, that the incorporation of the Bill of Rights against the states is a relatively recent development in American jurisprudence. In 1833, the Supreme Court of the United States unanimously held in *Barron v. Baltimore* that the Bill of Rights did not apply to the states, and that the protections set forth in the Bill of Rights could only be provided in state constitutions.[93] To reach this decision, Chief Justice John Marshall expressly relied on the fact that the plain text of the United States Constitution contained no dictatory language towards the states.[94] In 1868, the United States Supreme Court reaffirmed the holding of *Barron* even though the Fourteenth Amendment had been ratified several months earlier, holding that the Fifth and Sixth Amendments did not apply to criminal prosecutions in the courts of Pennsylvania or other states because they were intended only to limit federal power.[95]

Four decades later, in the *Slaughter-House Cases*, the United States Supreme Court again reaffirmed the core holding of *Barron*.[96] Although it recognized that the plain text of the Privileges or Immunities Clause of the Fourteenth Amendment provides that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States,"[97] a majority of the United States Supreme Court interpreted this language exceptionally narrowly, so that

90. U.S. CONST. amend. I.

91. *Id.* amend. II.

92. *Id.* amend. IV.

93. Barron v. Baltimore, 32 U.S. (7 Pet.) 243, 250–51 (1833).

94. *Id.* at 248.

95. Twitchell v. Pennsylvania, 74 U.S. 321 (1868).

96. *The Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36 (1873).

97. U.S. CONST. amend. XIV, § 1, cl. 2.

states were only prohibited from interfering with those rights that "owe their existence to the Federal government," such as traveling to the seat of government, free access to seaports, transacting business with the government, and the privilege of habeas corpus.[98] This interpretation of the Fourteenth Amendment effectively rendered it "a vain and idle enactment, which accomplished nothing."[99] The United States Supreme Court thereafter expressly held in subsequent cases that the First, Second, and Fifth Amendments did not apply to state governments pursuant to the interpretation of the Fourteenth Amendment adopted in the *Slaughter-House Cases*.[100]

Barron, the *Slaughter-House Cases*, and their progeny remained binding precedent throughout the entire two-decade period from 1901 to 1922 in which all the *Insular Cases* were decided. Moreover, throughout this period the United States Supreme Court and the lower federal courts issued numerous additional decisions expressly holding that various provisions of the Bill of Rights did not apply to the states. For instance, in 1908, the United States Supreme Court reaffirmed its earlier holding that the Fifth Amendment right against self-incrimination did not apply in cases brought in the New Jersey court system and in other state courts.[101]

The United States Supreme Court did not retreat from its steadfast refusal to apply the Bill of Rights against the states until it issued its seminal decision in *Gitlow v. New York* in 1925, which extended the rights of freedom of speech and freedom of the press codified in the First Amendment to state governments, in effect overruling *Barron* and other contrary cases. [102] Over the next several decades, the United States Supreme Court would issue decisions incorporating the remainder of the First Amendment[103] as well as the Second,[104] Fourth,[105] and Eighth Amendments,[106] as well as portions of the Fifth[107] and Sixth Amendments.[108]

98.*The Slaughter-House Cases*, 83 U.S. at 79.

99. *Id.* at 96 (Field, J., dissenting).

100. *See* Kelly v. City of Pittsburgh, 104 U.S. 78 (1881); United States v. Cruikshank, 92 U.S. 542 (1875).

101. Twining v. New Jersey, 211 U.S. 78 (1908).

102. Gitlow v. New York, 268 U.S. 652 (1925).

103. *See* Edwards v. South Carolina, 372 U.S. 229 (1963) (right to petition); Everson v. Bd. of Educ., 330 U.S. 1 (1947) (establishment of religion); Cantwell v. Connecticut, 310 U.S. 296 (1940) (free exercise of religion); DeJonge v. Oregon, 299 U.S. 353 (1937) (freedom of assembly).

104. McDonald v. City of Chicago, 561 U.S. 742 (2010).

105. *See* Mapp v. Ohio, 367 U.S. 643 (1961) (unreasonable searches and seizures); Aguilar v. Texas, 378 U.S. 108 (1964) (warrant requirement).

106. *See* Timbs v. Indiana, 139 S.Ct. 682 (2019) (excessive fines); Schib v. Kuebel, 404 U.S. 357 (1971) (excessive bail); Robinson v. California, 370 U.S. 660 (1962) (cruel and unusual punishment).

107. *See* Benton v. Maryland, 395 U.S. 784 (1969) (double jeopardy); Griffin v. California, 380 U.S. 609 (1965) (self-incrimination in court); Miranda v. Arizona, 384 U.S. 436 (1966) (self-incrimination out of court).

108. *See* Klopfer v. North Carolina, 386 U.S. 213 (1967) (speedy trial); *In re* Oliver, 333 U.S. 257 (1948) (public trial); Duncan v. Louisiana, 391 U.S. 145 (1968) (impartial jury); Ramos v. Louisiana, 140

With this context in mind, the prevailing conception of the legal impact of the *Insular Cases*—as opposed to their political or social impacts—is simply wrong. The *Insular Cases* did not treat residents of the territories differently than residents of the states with respect to the constitutional protections of the Bill of Rights. Although a criminal defendant tried in the local territorial courts of Puerto Rico did not have a federal constitutional right to trial by jury, neither did a criminal defendant tried in the courts of New Jersey or any other state. While the Territory of Hawaii could initiate a criminal prosecution by information instead of by grand jury indictment, so could Pennsylvania and other states—in fact, even today the Grand Jury Clause of the Fifth Amendment remains unincorporated to the states.[109] Rather than treating the territories differently from the states, the *Insular Cases* provided equal treatment, in that people of the territories were denied the protections of the Bill of Rights by the federal government on the same basis as the people of the states.[110]

B. Sovereignty and Congressional Power

It is clear, then, that modern scholars and courts' conception of the holdings of those cases is distorted through the lens of modern case law applying the Bill of Rights to the states. This, of course, raises another question. If it was established black-letter law from 1833 to 1925 that the Bill of Rights did not apply to state governments, why was it even an open question as to whether the Bill of Rights applied to territorial governments? After all, if the federal constitutional right to a trial by jury did not apply to prosecutions in state courts, what possible justification would there be to have such a right apply to territorial prosecutions, and in effect provide the residents of the territories with greater minimum constitutional rights than residents of the states?

The arguments in support of applying the Bill of Rights to territorial governments revolved around questions of the nature of congressional power over the territories. Prior to the *Insular Cases*, it had already been well-established that territorial governments lacked separate sovereignty over their lands, and that such

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S. Ct. 1390 (2020) (unanimous jury); Pointer v. Texas, 380 U.S. 400 (1965) (right to confront witnesses); Washington v. Texas, 388 U.S. 14 (1967) (compulsory process); Gideon v. Wainwright, 372 U.S. 335 (1963) (assistance of counsel).

109. *See* Fields v. Soloff, 920 F.2d 1114 (2d Cir. 1990).

110. One scholar has recently set forth a purported "qualified defense" of the *Insular Cases*, and in effect arguing that the ultimate result of the Insular Cases "is not merely defensible but perhaps even necessary" to allow the people of the territories to govern themselves and protect their cultures. Rennie, *supra* note 21. I emphasize, in the strongest terms possible, that I do not subscribe to this view. Even if one were to overlook the racist reasoning of the *Insular Cases* as a product of those times and focus only on the ultimate result, the Supreme Court of the United States accomplished that equal treatment by withholding constitutional rights from both the people of the territories and the states. While it is necessary and important to correct the misconception that the *Insular Cases* endorsed differential constitutional treatment of territories relative to the states, this is necessary only due to the continued invocation of the *Insular Cases* to justify continued differential treatment.

sovereignty instead belonged to Congress. The constitutional authority for this rule stems from the Territorial Clause, which provides that

> [t]he Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.[111]

At first, the Supreme Court of the United States appeared to interpret the phrase "Territory or other Property" to "impl[y] that 'Territory' is to be considered as property" and that "Congress would deal with it as representing the owner, rather than the sovereign."[112] The Court, however, would shortly thereafter retreat from its characterization of the territories as mere property or lands with Congress serving as the owner, and instead reconceptualize the Territorial Clause as authorizing Congress to act as a sovereign. To that end, the United States Supreme Court recognized in *Benner v. Porter* that Congress possessed the authority to establish territorial governments under the Territorial Clause, which it described as follows:

> [Territorial governments] are legislative governments, and their courts legislative courts, Congress, in the exercise of its powers in the organization and government of the territories, combining the powers of both the Federal and State authorities. There is but one system of government, or of laws operating within their limits, as neither is subject to the constitutional provisions in respect to State and Federal jurisdiction. They are not organized under the Constitution, nor subject to its complex distribution of the powers of government, as the organic law; but are the creations, exclusively, of the legislative department, and subject to its supervision and control.[113]

The *Benner* court, however, declined to consider at that time "[w]hether or not there are provisions in that instrument which extend to and act upon these territorial governments," deeming it not material to the issue of statutory interpretation before it.[114]

This characterization of Congress as possessing the combined "powers of both the Federal and State authorities" raised serious issues about the precise nature of this power. From 1833 to 1925, the Supreme Court of the United States had repeatedly held that the Bill of Rights only placed limits on "federal power" and

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111. U.S. CONST. art. IV, § 3, cl. 2.

112. *See* Baldwin, *supra* note 30, at 394 (citing United States v. Gratiot, 14 Peters, 526, 527 (1840)).

113. 9 Howard 235, 242 (1850).

114. *Id.*

thus did not constrain state governments.[115] The constitutional question implicated in the *Insular Cases*, then, was whether Congress, when exercising the "powers of both the Federal and State authorities" to enact legislation in a territory, exercised a "federal power" so as to constrain that legislation by the Bill of Rights under *Barron* and its progeny.

Of course, the Supreme Court of the United States resolved this question in the *Insular Cases* by drawing a distinction between so-called incorporated and unincorporated territories. In doing so, however, it is critically important to recognize that the United States Supreme Court did not address a question of sovereignty.[116] After all, it had already been established decades ago that territorial governments lacked separate sovereignty, with that principle being reaffirmed by the United States Supreme Court as late as two years before the first of the *Insular Cases* was decided,[117] with none of the *Insular Cases* providing any support for the proposition that incorporated territories possessed some form of sovereignty that unincorporated territories did not.[118] It was beyond dispute that Congress had the power under the Territorial Clause to legislate for both incorporated and unincorporated territories; what was certainly in dispute, however, was whether Congress exercised a "federal power" every single time it did so with respect to every territory.

The *Insular Cases* answered this question in the negative, holding in effect that Congress exercises the power of a state, and not a federal power, when it enacts legislation directed towards a territory.[119] In doing so, the United States Supreme Court relied on earlier precedents pertaining to congressional authority over the District of Columbia, in which it had previously held that Congress acts in a "double capacity" with respect to the federal district: "in one as legislating for the states; in the other as a local legislature for the District of Columbia," and when exercising the latter power could enact any law or levy any tax that would be within the power of a state legislature to enact.[120] In another case, the United States Supreme Court relied on a treatise that analogized the relationship between Congress and a territory to that of a state and a municipality:

> It is no doubt most consistent with the general theory of republican institutions that the people everywhere should be allowed self-government; but it has never been deemed a matter of right that a local

115. Twitchell v. Pennsylvania, 74 U.S. 321, 323 (1868); *see also* Barron v. Baltimore, 32 U.S. 243, 248–49 (1833).

116. *See* De Lima v. Bidwell, 182 U.S. 1 (1901); Goetze v. United States, 182 U.S. 221 (1901); Dooley v. United States, 182 U.S. 222 (1901); Armstrong v. United States, 182 U.S. 243 (1901); Downes v. Bidwell, 182 U.S. 244 (1901); Huus v. New York & Porto Rico Steamship Co., 182 U.S. 392 (1901).

117. Simms v. Simms, 175 U.S. 162, 168 (1899).

118. *See De Lima*, 182 U.S. 1; *Goetze*, 182 U.S. 221; *Dooley*, 182 U.S. 222; *Armstrong*, 182 U.S. 243; *Downes*, 182 U.S. 244; *Huus*, 182 U.S. 392.

119. *See De Lima*, 182 U.S. 1; *Goetze*, 182 U.S. 221; *Dooley*, 182 U.S. 222; *Armstrong*, 182 U.S. 243; *Downes*, 182 U.S. 244; *Huus*, 182 U.S. 392.

120. *Downes*, 182 U.S. at 259–60 (citing Loughborough v. Blake, 5 Wheat. 317 (1820)).

> community should be suffered to lay the foundations of institutions, and erect a structure of government thereon, without the guidance and restraint of a superior authority. Even in the older states, where society is most homogeneous and has fewest of the elements of disquiet and disorder, the state reserves to itself the right to shape municipal institutions; and towns and cities are only formed under its directions, and according to the rules and within the limits the state prescribes. With still less reason could the settlers in new territories be suffered to exercise sovereign powers.[121]

Thus, when exercising the power to establish a system of government for a territory, Congress does not exercise the federal power it uses to enact national legislation; rather, it exercises a different power, the same power utilized by the states to establish their own laws and governmental institutions. Consequently, since state governments—at the time the *Insular Cases* were decided—were not bound by the Bill of Rights and could in their discretion elect to deny rights such as the right to trial by jury; Congress, when serving as a stand-in for a state legislature or the people of a state, could similarly exercise its discretion to withhold those same rights. Simply put, in the *Insular Cases*, the United States Supreme Court declined to hold Congress to a higher standard than the states with respect to the Bill of Rights – again, a result contrary to the modern common wisdom that the *Insular Cases* placed territories in a less favorable position than the states.

This, however, does not mean that there are no limitations on Congress when it exercises its powers under the Territorial Clause. It was beyond dispute, even amongst legal scholars supporting significantly broad congressional authority over the territories, that, for example, Congress could create territorial offices but could not make appointments to fill those positions.[122] The United States Supreme Court recognized several such limitations in the *Insular Cases* themselves; most notably, that the notion that one Congress cannot bind another Congress did not always apply, and that "[t]here are steps which can never be taken backward" or otherwise undone.[123]

Perhaps most importantly, the United States Supreme Court reaffirmed in the *Insular Cases* a prior holding that once a particular federal constitutional right is extended to a territory through an organic act, Congress cannot withdraw that right through subsequent legislation, for doing so would render the Constitution "no greater authority than an ordinary act of Congress."[124] Thus, while the *Insular Cases* permitted Congress to exercise its discretion to, for example, withhold the right to a jury trial in Puerto Rico, it could not subsequently repeal the right to a jury trial after electing to grant it.[125] As one scholar succinctly put it, the *Insular Cases* in that

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121. Dorr v. United States, 195 U.S. 138, 147–48 (1904) (quoting COOLEY, PRINCIPLES OF CONST. LAW § 4.3).

122. Baldwin, *supra* note 30, at 399.

123. *Downes*, 182 U.S. at 261.

124. *Id.* at 269–70 (citing Springville v. Thomas, 166 U.S. 707 (1897)).

125. *Id.* at 270.

sense "served the aims of empire in a different and unexpected way: not by opening the door to the annexation of American colonies, but by paving the way for their release."[126] In other words, "[t]he retreat of American colonial rule, not its projection, was what the *Insular Cases* authorized," in that these newly-annexed territories would either be relinquished after temporary American stewardship or transition to statehood or other permanent status.[127]

A necessary part of any such transition to statehood or other permanent status within the United States is the establishment of a territorial government elected by the people. Although most of the scholarship and case law on the *Insular Cases* has primarily focused on the distinction between incorporated and unincorporated territories, the *Insular Cases* also differentiated between so-called "organized" and "unorganized" territories.[128] Under this framework, a territory is "organized" if it operates under a civil government constituted either under a territorial constitution or organic act which includes "a bill of rights and the establishment and conditions of the insular area's tripartite government," but is "unorganized" if the territory is not self-governing and is under the direct control of the federal government.[129]

The distinction between organized and unorganized territories is not merely academic. The Guarantee Clause of the United States Constitution requires that the United States "guarantee to every State in this Union a Republican Form of Government."[130] In the *Insular Cases*, the Supreme Court of the United States reaffirmed its well-entrenched precedents that the Guarantee Clause is not automatically self-executing in any territory, whether incorporated or unincorporated, but emphasized that there may come a time in a territory's development in which it may become applicable:

> Notwithstanding its duty to "guarantee to every state in this Union a republican form of government," Art. IV, sec. 4, by which we understand, according to the definition of Webster, "a government in which the supreme power resides in the whole body of the people, and is exercised by representatives elected by them," Congress did not hesitate, in the original organization of the territories of Louisiana, Florida, the Northwest Territory, and its subdivisions of Ohio, Indiana, Michigan, Illinois, and Wisconsin and still more recently in the case of Alaska, to establish a form of government bearing a much greater analogy to a British Crown colony than a republican state of America, and to vest the legislative power either in a governor and council, or a governor and judges, to be appointed by the President. It was not until

126. Burnett, *supra* note 72, at 799.

127. Burnett, *supra* note 72, at 799.

128. *See, e.g.*, Rassmussen v. United States, 197 U.S. 516, 517–20 (1905); Dooley v. United States, 183 U.S. 151, 156 (1901).

129. Alexander K. Langton, *The Inconsistent Limits of the Commerce and Import-Export Clauses on Territorial Governments' Taxing Ability*, 69 TAX L. 883, 885 (2016).

130. U.S. CONST. art. IV, § 4.

> they had attained a certain population that power was given them to organize a legislature by vote of the people. In all these cases, as well as in territories subsequently organized west of the Mississippi, Congress thought it necessary either to extend to Constitution and laws of the United States over them, or to declare that the inhabitants should be entitled to enjoy the right of trial by jury, of bail, and of the privilege of the writ of habeas corpus, as well as other privileges of the bill of rights.[131]

Consequently, the *Insular Cases* themselves provide a clear, bright-line standard for when the Guarantee Clause must extend to any territory: it occurs either upon the territory becoming self-governing through a government elected by the people, or Congress conferring the Bill of Rights to the territory.[132]

This finds further support in the plain text of the United States Constitution itself. The Territorial Clause provides, in pertinent part, that "[t]he Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."[133] The use of the word "needful" to modify the phrase "Rules and Regulations" necessarily indicates that this power is limited, and that the ability of Congress to legislate for a territory cannot be unrestricted. Samuel Johnson's *A Dictionary of the English Language*, which is "generally seen as the most authoritative founding era dictionary,"[134] defines "needful" as "[n]ecessary; indispensably requisite," and corollary defines "necessary" as "[n]eedful; indispensably requisite."[135]

Thus, at the time of the Founding, the words "needful" and "necessary" were effectively used as synonyms. In the context of the Constitution's Necessary and Proper Clause, the United States Supreme Court has long construed the word "necessary" in the Constitution as effectively requiring that "the end be legitimate" and "be within the scope of the constitution."[136] This is consistent with the contemporaneous writings of Alexander Hamilton, who wrote that

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131. Downes v. Bidwell, 182 U.S. 244, 278–79 (1901).

132. *Id.* This conclusion is further bolstered by more recent case law. For example, in *Reid v. Covert*, a plurality of the United States Supreme Court characterized the *Insular Cases* as only standing for the proposition that Congress has the power "to provide rules and regulations to govern *temporarily* territories with wholly dissimilar traditions and institutions." Reid v. Covert, 354 U.S. 1, 14 (1957) (emphasis added).

133. U.S. CONST. art. IV, § 3, cl. 2.

134. Jeffrey M. Schmitt, *Limiting the Property Clause*, 20 NEV. L. J. 145, 152 (2019) (citing Gregory E. Maggs, *A Concise Guide to Using Dictionaries from the Founding Era to Determine the Original Meaning of the Constitution*, 82 GEO. WASH. L. REV. 358, 359 (2014)).

135. SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE IN WHICH THE WORDS ARE DEDUCED FROM THEIR ORIGINALS, EXPLAINED IN THEIR DIFFERENT MEANINGS, AND AUTHORIZED BY THE NAMES OF THE WRITERS IN WHOLE WORKS THEY ARE FOUND (10th ed. 1792).

136. McCulloch v. Maryland, 17 U.S. 316, 421 (1819).

> a criterion of what is constitutional, and of what is not so . . . is the end, to which the measure relates as a mean. If the end be clearly comprehended within any of the specified powers, and if the measure have an obvious relation to that end, and is not forbidden by any particular provision of the Constitution, it may safely be deemed to come within the compass of the national authority. There is also this further criterion which may materially assist the decision: *Does the proposed measure abridge a pre-existing right of any State, or of any individual?* If it does not, there is a strong presumption in favour of its constitutionality.[137]

While not directly referenced in the *Insular Cases*, the ultimate results of those decisions were governed largely by this analysis. At the time the *Insular Cases* were decided, the pertinent constitutional rights said to not apply to Puerto Rico and the other territories had never previously been extended, whether under United States sovereignty or under prior sovereigns, and thus were not pre-existing. Moreover, declining to extend such rights had an obvious relation to what the Supreme Court considered—although gravely erroneously—to be a legitimate end: ensuring that the "savage," "half-civilized," "ignorant and lawless" "alien races" inhabiting those territories were not compelled to follow Anglo-Saxon values.[138] But once Congress has made the decision to extend such rights to a territory, under what circumstances could eliminating that now pre-existing right be legitimate? As the Supreme Court recognized, it simply cannot.[139]

When they were first acquired by the United States, the territories of American Samoa, Guam, Puerto Rico, and the U.S. Virgin Islands were placed under military rule.[140] Over the course of several decades, those territories gradually obtained greater levels of self-government from Congress, to the point where today every territory has a democratically-elected local governor and legislature as well as a fully-developed local judiciary consisting of judges appointed or elected pursuant to local law.[141] Moreover, each territorial constitution or organic act extends all or most of the federal Bill of Rights to the respective territory. As such, pursuant to the standard articulated in the *Insular Cases*, the Guarantee Clause has now either explicitly or implicitly been extended by Congress to each inhabited territory. And again, as articulated in the *Insular Cases*, by organizing these territories, and thus extending the Guarantee Clause in such a manner, Congress is

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137. 8 ALEXANDER HAMILTON, *Opinion on the United States Bank*, *in* THE PAPERS OF ALEXANDER HAMILTON 97, 107 (Syrett ed. 1965) (emphasis added).

138. Downes v. Bidwell, 182 U.S. 244, 287 (1901); *see also* Baldwin, *supra* note 30; Thayer, *supra* note 30.

139. *Downes*, 182 U.S. at 278–79.

140. Van Dyke, *supra* note 46, at 472, 488, 496. As noted earlier, the Northern Mariana Islands voluntarily joined the United States in 1986 and has thus always been self-governing.

141. *See supra* discussion in Part I.

bound to the extension and cannot simply take a step backward by rescinding it at some future date.[142]

What, then, is the practical effect of this? Simply put, Congress cannot undo—under the Territorial Clause or otherwise—what it has already done. It cannot unilaterally repeal a territorial constitution and reimpose military rule on that territory,[143] or enact new legislation eliminating a territory's locally elected governor or locally appointed territorial supreme court and replacing them with federal appointees.[144] In other words, once Congress has organized a territory, that organization cannot subsequently be undone, any more than Congress can rescind an act recognizing a state.[145]

The proposition that territorial self-governance is among the "steps which can never be taken backward" by Congress is certainly not without controversy.[146] For instance, one may wonder how this proposition could be reconciled with the recent holding of the Supreme Court of the United States in *Financial Oversight & Management Board for Puerto Rico v. Aurelius Investment, LLC*, in which it held that the members of the congressionally-created entity colloquially known as the "PROMESA Board" were officers of the territorial government of Puerto Rico and not officers of the United States and thus do not require Senate confirmation under the Appointments Clause of the United States Constitution.[147] The congressional legislation creating the PROMESA Board, among other things, conferred that Board with the authority to set its own budget for the government of Puerto Rico without the consent of Puerto Rico's governor or legislature.[148] Is this not, then, a textbook example of Congress undoing a prior grant of self-governance to a territory by divesting the elected government of Puerto Rico from control over perhaps one of its most fundamental governmental powers?[149]

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142. *Downes*, 182 U.S. at 261.

143. *See generally* Adam W. McCall, *Why Congress Cannot Unilaterally Repeal Puerto Rico's Constitution*, 102 CORNELL L. REV. 1367 (2017).

144. *See* United States v. Mercado-Flores, 312 F. Supp. 3d 249, 255 (D.P.R. 2015).

145. *Downes*, 182 U.S. at 261.

146. *See id.*

147. Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC, 140 S. Ct. 1649, 1665 (2020).

148. 48 U.S.C. §§ 2121(d)(1)(B)–(C), (e)(3).

149. It is worth noting that the authority of Congress to establish the PROMESA Board and vest it with such powers to the exclusion of the elected government of Puerto Rico was not at issue in the *Aurelius* case—the question presented to the United States Supreme Court was limited to whether the members of the PROMESA Board required Senate confirmation. *See* 140 S. Ct. at 1671 (Sotomayor, J., concurring) ("One would think the Puerto Rican home rule that resulted from that mutual enterprise might affect whether officers later installed by the Federal Government are properly considered officers of Puerto Rico rather than 'Officers of the United States' subject to the Appointments Clause. Yet the parties do not address that weighty issue or any attendant questions it raises. I thus do not resolve those matters here and instead concur in the judgment." (citation omitted)). Rather, it was simply an "unstated assumption" that Congress possessed the constitutional authority to create the PROMESA Board and vest it with those powers, and it may very well be the case that this assumption may ultimately

The answer is, perhaps surprisingly, no. Again, it is critically necessary to reemphasize that "[t]he simple words of the opinions . . . are not as important as the contexts in which those cases were decided,"[150] and that "the precedential value of a decision is defined by the context of the case from which it arose."[151] To do so, it is necessary to look at the circumstances that gave rise to passage of the legislation establishing the PROMESA Board and vesting it with these powers.

The Bankruptcy Clause of the United States Constitution vests the Congress with the enumerated power to enact "uniform Laws on the subject of Bankruptcies throughout the United States."[152] The power of Congress under the Bankruptcy Clause has long been characterized by the Supreme Court of the United States and lower federal courts as not just a plenary power, but a "supreme power," to which even the states are wholly subservient.[153] Congress has exercised this power to, among other things, permit state municipalities and other public corporations and instrumentalities to restructure their debts under a procedure set forth in Chapter 9 of the Bankruptcy Code, and to preempt state laws to the contrary.[154]

As a result of expiration of certain tax incentives and the global financial crisis of 2008, Puerto Rico and its instrumentalities incurred substantial, and largely unserviceable, debt.[155] Although the Bankruptcy Code included Puerto Rico within the statutory definition of a "state," it also expressly precluded Puerto Rico's municipalities from being debtors under Chapter 9.[156] Therefore, Puerto Rico enacted its own debt modification procedure, known as the Puerto Rico Corporation Debt Enforcement and Recovery Act, which provided for a procedure like Chapter 9 with a "court-supervised restructuring process intended to offer the best solution for the broadest group of creditors."[157]

The Supreme Court of the United States, however, determined in *Puerto Rico v. Franklin California Tax-Free Trust* that the preemption clause of Chapter 9 nevertheless preempted the municipal bankruptcy laws of Puerto Rico just as it does the laws of the fifty states.[158] That the United States Supreme Court engaged in a preemption analysis under the Bankruptcy Clause is itself significant. If it were

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be rejected in a future proceeding where the issue is raised and fully briefed. *See, e.g.*, Sakamoto v. Duty Free Shoppers, Ltd., 764 F.2d 1285, 1287–88 (9th Cir. 1985). However, as shall be explained shortly, Congress does, in fact, have the authority to establish the PROMESA Board—not pursuant to its powers under the Territorial Clause, but under its enumerated power to enact "uniform Laws on the subject of Bankruptcies throughout the United States." U.S. CONST. art. I, § 8, cl. 4.

150. King v. Morton, 520 F.2d 1140, 1147 (D.C. Cir. 1975).

151. UC Health v. NLRB, 803 F.3d 669, 683 (D.C. Cir. 2015) (Edwards, J., concurring).

152. U.S. CONST. art. I, § 8, cl. 4.

153. *See* New York v. Irving Trust Co., 288 U.S. 329, 333 (1933); *see also* Sacred Heart Hosp. v. Dep't of Pub. Welfare (*In re* Sacred Heart Hosp.), 133 F.3d 237, 243 (3d Cir. 1998); Hood v. Tenn. Student Assistance Corp. (*In re* Hood), 262 B.R. 412 (B.A.P. 6th Cir. 2001).

154. *See* 11 U.S.C. §§ 901–46.

155. Puerto Rico v. Franklin Cal. Tax-Free Tr., 579 U.S. 115, 118 (2016).

156. *Id.*

157. *Id.* at 119.

158. *Id.* at 126–28.

the case that the Territorial Clause confers Congress with the absolute and unrestricted plenary power to make any law whatsoever for the territories—whether organized or unorganized, incorporated or unincorporated—there would be no need to conduct any sort of preemption analysis under the Bankruptcy Clause. Under such a broad reading of the Territorial Clause, it would have been sufficient to simply note that Congress could exercise plenary authority under the Territorial Clause to legislate for Puerto Rico, without the need for any more extensive preemption analysis under the Bankruptcy Clause or otherwise. On the contrary, the United States Supreme Court went to great lengths to examine the effect of the preemption provision on the laws of the states, and heavily emphasized its belief that Congress had treated Puerto Rico no differently than a state with respect to the applicability of its local laws.[159] In fact, neither the majority opinion nor the dissenting opinion mention or cite to the Territorial Clause.

It is this situation—the Supreme Court of the United States striking down a local Puerto Rico bankruptcy statute, holding that only Congress could act—which resulted in the legislation creating the PROMESA Board. While Congress identified the Territorial Clause and not the Bankruptcy Clause as the constitutional basis for the legislation creating the PROMESA Board,[160] it did so for political reasons: "by avoiding the term 'bankruptcy,' and relying on its authority under the Territories Clause of the Constitution, lawmakers may have sought to reassure state bankruptcy critics that PROMESA is not intended to lay a foundation for state bankruptcy."[161] Importantly, the United States Supreme Court in *Aurelius* expressly rejected reliance on the labels chosen by Congress, instead electing to look beyond the terms used and examine the substance of the matter.[162]

Certainly, it is not in dispute that the legislation establishing the PROMESA Board represents a significant infringement on the right of Puerto Rico to govern itself. The question, however, is not whether the PROMESA Board infringes on the self-governance of Puerto Rico, but whether it does so *to an extent that would not be permitted against a state*.

As alluded to earlier, the conception of state "sovereignty" under the United States Constitution is in many ways a legal fiction or myth. While nominally sovereign, Congress possesses substantial—and in some cases, plenary—authority over numerous aspects of state operations, including the right of a state to govern itself. Under the Supremacy Clause of the United States Constitution, Congress possesses plenary authority over the states in all areas in which federal power exists, including enacting federal laws that "curtail or prohibit the States' prerogatives to make legislative choices respecting subjects the States may consider important."[163]

Such federal powers include the power to regulate interstate commerce under the Commerce Clause, a power which is so broad that it has been described

159. *See id.* at 126–27.

160. 48 U.S.C. § 2121(b)(2).

161. David Skeel, *Reflections on Two Years of P.R.O.M.E.S.A.*, 87 REV. JUR. U.P.R. 862, 873 (2018).

162. Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC, 140 S. Ct. 1649, 1661 (2020).

163. Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264, 290 (1981).

as authorizing Congress to regulate virtually anything,[164] with Chief Justice Marshall famously writing that "the power over commerce . . . is vested in Congress as absolutely as it would be in a single government" and "the influence which their constituent possess at elections, are . . . the sole restraints" on that power.[165] This includes state governmental spending, in that the Supreme Court of the United States has already affirmed the constitutionality of a federal statute that mandated a salary freeze for all state government employees, expressly rejecting the argument that the sovereign status of the states precluded Congress from taking such action in response to an economic emergency.[166] In fact, the Supreme Court of the United States even acquiesced to Congress dissolving the state government of Georgia and placing the state under military rule during the Reconstruction Era pursuant to its authority under the Guarantee Clause.[167]

The field of bankruptcy is one such area of plenary congressional authority over the states. Although Congress has not enacted a law providing for states to declare bankruptcy, it is largely accepted that it possesses the authority to do so.[168] And while most proposals for a system of state bankruptcy focus on voluntary state bankruptcy, if its Bankruptcy Clause powers reach the states, then it would necessarily also be within the power of Congress to exercise its plenary power under the Bankruptcy Clause to provide for a system of involuntary bankruptcy for a state.[169]

With these congressional powers and precedents in mind, the legislation establishing the PROMESA Board and vesting it with such power over the budget of Puerto Rico, while of substantial local and national importance and concern, is nevertheless unremarkable as a matter of constitutional law. It is not predicated on Puerto Rico's status as a territory. As referenced above, Congress not only retains similar power over state governments but has utilized such authority in the past, including over fiscal matters. Moreover, the PROMESA Board is not an original creation, in that virtually identical boards with similar—and in several cases, greater—powers have previously been established in the context of municipal bankruptcies, including in New York City, Detroit, and the District of Columbia.[170]

For these reasons, whether a state or territory of the United States is, or is not, a sovereign is effectively wholly irrelevant to the question of whether the state

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164. *See* Ronald D. Rotunda, King v. Burwell *and the Rise of the Administrative State*, 23 U. MIAMI BUS. L. REV. 267, 271 (2015).

165. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 197 (1824).

166. *See* Fry v. United States, 421 U.S. 542 (1975).

167. *See* Georgia v. Stanton, 73 U.S. (6 Wall.) 50 (1867).

168. *See generally, e.g.*, Michael W. McConnell, *Extending Bankruptcy Law to States: Is It Constitutional?*, *in* WHEN STATES GO BROKE: ORIGINS, CONTEXT, AND SOLUTIONS FOR THE AMERICAN STATES IN FISCAL CRISIS 229, 229 (Peter Conti-Brown & David Skeel eds., 2012); Steven L. Schwarcz, *A Minimalist Approach to State "Bankruptcy"*, 59 UCLA L. REV. 322, 335–36 (2011); David Solan, *State Bankruptcy: Surviving a Tenth Amendment Challenge*, 42 GOLDEN GATE U.L. REV. 217, 218 (2012).

169. *See* Adam Feibelman, *Involuntary Bankruptcy for American States*, 7 DUKE J. CONST. L. & PUB. POL'Y 81, 81 (2012).

170. Skeel, *supra* note 161, at 864.

or territory exercises self-governance, including with respect to interpretation of its state or territorial constitution. As the above examples illustrate, the powers Congress is authorized to exercise over the supposedly sovereign fifty states are virtually—if not completely—identical to the power it yields over the territories of American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands. This includes the power of Congress to in effect nullify portions of state and territorial constitutions it disagrees with by enacting preemptory legislation through its enumerated powers.[171] That Congress may wield such power over the states and the territories does not render any of those jurisdictions non-self-governing—rather, it simply reflects the reality that

> federalism is not at all a system in which two distinct agents pursue distinct and nonoverlapping goals in distinct spheres of authority, but rather a system in which two agents pursue the same set of largely overlapping goals, each exercising independent authority within what is for many if not most purposes essentially the same sphere of authority[,]

and that within such a system, the authority of Congress will ultimately prevail in most cases in the event of a conflict with a given state or territory.[172] To somehow distinguish between congressional preemption or interference with state laws and identical nullification of territorial law based on abstract notions of "sovereignty," Congress simply elevates form over substance and ignores how the United States Constitution operates in practice in the states and territories that constitute our federalist system.

III. THE VIABILITY OF TERRITORIAL CONSTITUTIONAL LAW

This Article has thus far examined the relationship between Congress and territorial governments and concluded that the *Insular Cases* and other judicial precedents, as well as the original meaning and plain text of the Territorial Clause, place limits on congressional power over the territories. Specifically, Congress exercises a non-federal power—the power of a state legislature—when it initially legislates on behalf of the territories but cannot roll back federal constitutional rights—including the right to a republican form of government—once it has already elected to extend such rights to a particular territory, except on the same basis as it could do so with a state pursuant to its enumerated powers.

While this may answer the question of whether territorial courts may interpret territorial constitutions without interference from Congress, it does not fully answer whether territorial constitutional law represents a viable means to safeguard individual rights and liberties for the people of the territories, or to otherwise ensure parity between the territories and the fifty states. This section

171. *See* Jim Rossi, *The Puzzle of State Constitutions*, 54 BUFF. L. REV. 211, 211–12 (2006).

172. JAMES A. GARDNER, INTERPRETING STATE CONSTITUTIONS: A JURISPRUDENCE OF FUNCTION IN A FEDERAL SYSTEM 234–35 (2005).

addresses some of the other challenges—both theoretical and practical—to the idea that territorial courts could both invoke and enforce territorial constitutional law in a viable manner.

A. The Power of Territorial Courts to Interpret Territorial Constitutions

Congress represents only one of three branches of the federal government. Even if Congress cannot, for instance, outright repeal the Constitution of Puerto Rico, can federal courts such as the United States Court of Appeals for the First Circuit simply disregard decisions of the Supreme Court of Puerto Rico interpreting that territorial constitution? And since the Revised Organic Act of 1954, although serving as the *de facto* territorial constitution of the U.S. Virgin Islands, is nominally a federal statute, does that mean that the Supreme Court of the Virgin Islands must interpret it as if it were a federal statute rather than a territorial constitution?[173] Moreover, since all territorial constitutions and organic acts were at some point adopted by Congress through its powers under the Territorial Clause of the United States Constitution, do the federal courts possess federal question jurisdiction over issues implicating provisions in such constitutions and organic acts, in effect permitting either the plaintiff through its filing discretion or the defendant through its removal discretion to circumvent territorial courts in favor of federal courts and deprive those courts of opportunities to create or enforce territorial constitutional law?

If the answer to any of the above questions is "Yes," then it is difficult to imagine how territorial courts could serve the same role as state courts in interpreting their local constitutions to confer positive rights on their people. But as shall be explained below, the federal courts, like Congress, cannot exercise plenary and unrestricted authority over the territories. The federal courts do not have the constitutional or statutory power to effectively serve as "super supreme courts" empowered to overturn, second-guess, preclude, or otherwise interfere with the authority of territorial supreme courts to resolve binding and conclusive questions of territorial constitutional law. Rather, territorial supreme courts may interpret territorial constitutions and organic acts in the same manner and under the same terms as state courts of last resort interpreting state constitutions, including interpreting those documents to confer greater rights than the minimum required under the United States Constitution.

The issue of deference involves two distinct, yet interrelated, inquiries. Do federal courts possess plenary power to interpret territorial constitutions and organic acts, or must they defer to the decisions of territorial supreme courts interpreting those documents? Similarly, even if territorial supreme courts may interpret their constitutions or organic acts without interference from the federal courts, do territorial courts have an obligation to defer to Congress and interpret such documents pursuant to federal rules of statutory construction, or can they interpret them in a different manner? Each question is addressed in turn.

173. Bryan v. Fawkes, 61 V.I. 416, 427 (V.I. 2014).

i. Relations Between Federal and Territorial Courts

Today it is very well-established that federal courts must defer to territorial courts with respect to their interpretation of territorial statutes and other laws in the same manner which are the same terms as federal courts deferring to state courts.[174] This includes, among other things, applying the *Erie* doctrine to the territories and treating a territorial supreme court decision on a question of territorial law as binding and conclusive.[175] The rationale for such deference is simple: Congress, by providing for territorial self-government which includes an independent territorial judiciary, expressed its implicit—and in some cases, explicit[176]—intent for the relationship between federal and territorial courts to mirror the federal-state relationship.[177] Such substantial deference applied even during the transition periods when the federal courts of appeals temporarily exercised direct appellate or certiorari jurisdiction over newly-formed territorial supreme courts, with the federal courts only reversing territorial courts on issues of territorial law if they were inescapably wrong—a standard that, in practice, was never reached.[178]

The question of whether federal courts must defer to territorial courts as to their constructions of territorial constitutions and organic acts, however, represents a somewhat more difficult question. Unlike territorial statutes, which are drafted and adopted by territorial legislatures, territorial organic acts are enacted by Congress without any required input from territorial legislatures which, in some instances, might not have even existed until after passage of the organic act. Even territorial constitutions, which ostensibly were adopted by the people of a territory, are not free of congressional power and input in that at least theoretically the authority to establish a territorial constitution comes from Congress,[179] with Congress in some instances even mandating that a territorial constitution be amended prior to becoming legally operative.[180]

The issue of whether federal courts should defer to territorial courts with respect to interpretation of territorial constitutions and organic acts is closely

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174. *See, e.g.*, Banks v. Int'l Rental & Leasing Corp., Nos. 08-1603, 08-2512, 2011 WL 7186340, at *1, *3 (3d Cir. Apr. 19, 2011); Edwards v. Hovensa, LLC, 497 F.3d 355, 360 (3d Cir. 2007); Osorio v. Grupo Hima San Pablo, Inc., 280 F. Supp. 3d 322, 323 (D.P.R. 2017).

175. *See* Katy Womble & Courtney Cox Hatcher, *Trouble in Paradise? Examining the Jurisdictional and Precedential Relationships Affecting the Virgin Islands Judiciary*, 46 STETSON L. REV. 441, 457–58 (2017).

176. *See, e.g.*, 48 U.S.C. § 1613 (2021).

177. *See, e.g.*, MRL Dev. I, LLC v. Whitecap Inv. Corp., 823 F.3d 195, 201–02, 201 n.2 (3d Cir. 2016).

178. *See, e.g.*, De Castro v. Bd. of Comm'rs, 322 U.S. 451, 458 (1944); Waialua Agric. Co. v. Christian, 305 U.S. 91, 111 (1938); Pichardo v. V.I. Comm'r of Lab., 613 F.3d 87, 89 (3d Cir. 2010).

179. *See* Puerto Rico v. Sanchez Valle, 579 U.S. 57, 75–76 (2016).

180. *See, e.g.*, United States v. Lopez Andino, 831 F.2d 1164, 1172–73 (1st Cir. 1987) (Torruella, J., concurring) (noting amendments Congress made to the Constitution of Puerto Rico); Act of June 30, 2010, Pub. L. No. 111-194, 124 Stat. 1309 (disapproving the proposed U.S. Virgin Islands Constitution unless certain changes are made).

related to the question of federal jurisdiction. For instance, some federal courts have issued "drive-by jurisdictional rulings" and other "unrefined dispositions"[181] in which they state, in passing and without any substantive legal analysis, that federal courts may exercise federal question jurisdiction[182] over any matter involving interpretation of territorial constitutions or organic acts because—unlike territorial statutes—they purportedly are federal statutes.[183]

If it is true that every case implicating a territorial organic act or constitution constitutes a federal question that authorizes federal courts to exercise their federal question jurisdiction, then territorial constitutional law can never emerge as a distinct field of the law and cannot serve as an effective mechanism to safeguard or confer individual rights and liberties to the people of the territories. The reason for this is clear: under such a regime, decisions of territorial supreme courts interpreting territorial constitutions and organic acts would have little to no practical effect. Because federal courts owe no deference to state or territorial courts on questions of federal law, federal courts could simply ignore the decisions of territorial supreme courts on such matters.[184] And while territorial supreme courts possess no obligation to defer to lower federal courts and thus their own interpretations of their territorial constitutions and organic acts would remain binding within the territorial court system,[185] the federal interpretation would always prevail as a practical matter. This is because if territorial constitutions and organic acts are federal statutes that form the basis for federal question jurisdiction, then any litigant who prefers the federal interpretation could simply bypass the territorial court system entirely—a plaintiff by choosing to file the complaint in federal court, and a defendant by removing the complaint to federal court if it were filed in territorial court. In effect, each party would have the option to in effect veto or nullify a territorial supreme court's interpretation of the territorial constitution or organic act, with the territorial court interpretation only given effect if both parties give their consent by permitting the matter to be litigated in territorial court.

Nevertheless, the Supreme Court of the United States has clearly established in a line of cases spanning more than a century, that territorial constitutions and organic acts do not give rise to federal question jurisdiction, and that the deference territorial supreme courts must receive with respect to their interpretations of territorial statutes extends to interpretations of those documents as well. The reason, again, goes to the question of power: when Congress has exercised the

181. Arbaugh v. Y & H Corp., 546 U.S. 500, 511 (2006).

182. *See* 28 U.S.C. § 1331 (2021).

183. *See, e.g.*, Dunston v. Mapp, 672 F. App'x 213, 214 n.1 (3d Cir. 2016); Kendall v. Russell, 572 F.3d 126, 131 n.4 (3d Cir. 2009).

184. *See, e.g.*, Vandevere v. Lloyd, 644 F.3d 957, 964 (9th Cir. 2011); Hawkman v. Parratt, 661 F.2d 1161, 1166 (8th Cir. 1981); *see also* Sumner v. Mata, 449 U.S. 539, 543–44 (1981) ("It has long been established . . . that even a single federal judge may overturn the judgment of the highest court of a State insofar as it deals with the application of the United States Constitution or laws to the facts in question.").

185. *See* Hughley v. Gov't of the V.I., 61 V.I. 323, 337–38 (2014) (collecting cases).

authority to enact organic acts and to authorize, approve, and amend territorial constitutions, it does not exercise a federal power.

The United States Supreme Court first recognized this principle in the context of a territorial organic act in 1894, when it held that even though the organic act of the then-Territory of Oklahoma codified certain crimes, those crimes were not "offense[s] against the United States" or "offenses against the federal government" since Congress did not exercise a federal power in enacting them.[186] Rather, because Congress stood in place of a territorial legislature when enacting those provisions, they "were to be treated as if [they] had been enacted by the territorial legislature, and w[ere] to be dealt with as if the crimes thereby declared were crimes, not against the United States, but against the territory," and consequently federal courts lacked jurisdiction over their prosecution.[187]

The Supreme Court of the United States would consistently reaffirm and extend this important principle. It held in the same year the Organic Act of the then-Territory of Utah, although enacted by Congress, was not a "statute of the United States" and could not form a basis for federal jurisdiction.[188] Twenty years later, in 1914, it directly addressed the question of deference, and expressly held that interpretation of a provision in the Organic Act of the then-Territory of New Mexico was "a matter of purely local concern" for which the Supreme Court of New Mexico was entitled to deference.[189]

The United States Supreme Court thereafter extended these principles to Puerto Rico. It held, as it had done previously in the context of the Oklahoma and Utah Organic Acts, that an act of Congress authorizing the treasurer of Puerto Rico to file suit to enforce tax laws was not a "law of the United States" even though it had been enacted by Congress.[190] It thereafter considered the question of deference in a case where the United States Court of Appeals for the First Circuit, exercising its temporary appellate jurisdiction over the Supreme Court of Puerto Rico, had reversed the Puerto Rico Supreme Court's construction of section thirty nine of the Organic Act of Puerto Rico.[191] Ultimately, the United States Supreme Court reversed the First Circuit, and in doing so emphasized that "section 39 of the Organic Act is not one of 'the laws of the United States'" but rather "is peculiarly concerned with local policy," and that the First Circuit therefore could not simply set aside the Puerto Rico Supreme Court's construction in favor of its own.[192]

Four decades later, the Supreme Court of the United States again reaffirmed these decisions in the context of the District of Columbia which, although not a territory, is subject to the plenary control of Congress through the Seat of Government Clause.[193] It held, as it had previously done with Puerto Rico and other

186. United States v. Pridgeon, 153 U.S. 48, 53 (1894).

187. *Id.*

188. Linford v. Ellison, 155 U.S. 503, 508 (1894).

189. Santa Fe Cent. Ry. Co. v. Friday, 232 U.S. 694, 700 (1914).

190. Puerto Rico v. Russell & Co., 288 U.S. 476, 483 (1933).

191. Rubert Hermanos, Inc. v. Puerto Rico, 106 F.2d 754, 759 (1st Cir. 1939).

192. Puerto Rico v. Rubert Hermanos, Inc., 309 U.S. 543, 550 (1940).

193. U.S. CONST. art. I, § 8, cl. 17.

territories, that "the same deference is owed to the courts of the District with respect to their interpretations of Acts of Congress directed toward the local jurisdiction."[194] In fact, the United States Supreme Court granted this deference to the District of Columbia courts even though the District of Columbia then—as now—is less self-governing than any of the territories; in fact, the judges of the District of Columbia Court of Appeals and the Superior Court of the District of Columbia continue to be nominated by the President of the United States and confirmed by the United States Senate, without the approval of the mayor or other locally-elected leaders.[195]

A decade later, the United States Supreme Court reaffirmed its commitment to territorial deference through what it elected not to do. In *Frazier v. Heebe*, the Supreme Court of the United States invoked its supervisory power over the federal district courts to abolish local court rules that limited bar admission to those federal courts only to residents.[196] The United States District Court for the Virgin Islands, however, continued to enforce a court rule limiting admission to its bar only to residents of the U.S. Virgin Islands, which the United States Court of Appeals for the Third Circuit struck down after determining that the *Heebe* decision controlled.[197] While the United States Supreme Court affirmed the Third Circuit in the ultimate result, it expressly rejected that court's reliance on *Heebe*:

> In *Frazier v. Heebe* . . . we invoked supervisory power over district courts of the United States to invalidate discriminatory residency requirements for admission to the Bar of the United States District Court for the Eastern District of Louisiana. The Court of Appeals in the case now before us expressed "no doubt" that our supervisory power extends to the bar requirements of the District Court of the Virgin Islands.
>
> Without attempting to define the limits of our supervisory power, we decline to apply it in this case. Both the nature of the District Court of the Virgin Islands and the reach of its residency requirements implicate interests beyond the federal system. As to the former, the District Court, which was given its current form and jurisdiction by Congress in the Revised Organic Act of 1954 . . . is not a United States district court, but an institution with attributes of both a federal and a territorial court. Although it is vested with the jurisdiction of a United States district court, the District Court also has original jurisdiction over certain matters of local law not vested in the local courts of the Virgin Islands as well as concurrent jurisdiction with the local courts over certain criminal matters. It also serves as an appellate court for decisions rendered by the local courts. In fact, Congress provides in the Revised Organic Act that, for certain purposes, the District Court "shall

194. Pernell v. Southall Realty, 416 U.S. 363, 367 (1974).

195. *See* Act of July 29, 1970, Pub. L. No. 91-358, 84 Stat. 473.

196. Frazier v. Heebe, 482 U.S. 641 (1987).

197. Thorstenn v. Barnard, 842 F.2d 1393, 1397 n.6 (3d Cir. 1988).

> be considered a court established by local law." The application of [the bar admission rule] itself similarly extends beyond practice in the federal system. Unlike the rule in *Heebe*, which was confined to practice before the United States District Court, [the rule] applies to admission to the Bar of the Virgin Islands, and so governs practice before the territorial courts.
>
> Because these territorial interests are intertwined with the operation of [the bar admission rule], we decline to examine this case as an issue of supervisory power.[198]

The United States Supreme Court then went on to consider the question as one arising under the Privileges and Immunities Clause of the United States Constitution, which had been extended to the U.S. Virgin Islands through the Virgin Islands Revised Organic Act.[199]

Most recently, the Supreme Court of the United States confronted the deference question in *Limtiaco v. Camacho*, in which it had granted certiorari to review a decision of the Supreme Court of Guam adjudicating a lawsuit between the Attorney General of Guam and the Governor of Guam.[200] That decision involved interpretation of a provision of the Guam Organic Act limiting the amount of debt the Guamanian government could incur. The parties fully briefed the question of deference, with the Governor of Guam arguing that the United States Supreme Court should defer to the Guam Supreme Court's construction, while the Attorney General of Guam maintained that no deference was due.

The United States Supreme Court in *Limtiaco* ultimately declined to defer to the Guam Supreme Court. Nevertheless, it did not overrule any of its prior precedents regarding deference to territorial courts. On the contrary, it reaffirmed that federal courts "accord deference to territorial courts over matters of purely local concern," but determined that the debt-limitation provision, although included in the Guam Organic Act, "is not a matter of purely local concern," since "the potential consequences of territorial insolvency" would be borne by the United States and not Guam alone.[201] To eliminate any doubt that it was not overturning its prior decisions and that territorial supreme courts must continue to receive deference on all matters of local concern, the United States Supreme Court concluded its opinion by again emphasizing that "decisions of the Supreme Court of Guam, as with other territorial courts . . . are entitled to respect when they indicate how statutory issues, *including the Organic Act*, apply to matters of local concern."[202]

198. Barnard v. Thorstenn, 489 U.S. 546, 551–52 (1989) (internal citations omitted).

199. *Id.* at 552–53.

200. Limtiaco v. Camacho, 549 U.S. 483 (2007).

201. *Id.* at 491–92.

202. *Id.* (emphasis added).

ii. Interpretation of Territorial Constitutions and Organic Acts

For more than a century, the Supreme Court of the United States has clearly and emphatically held that federal courts must defer to territorial courts on all issues of purely local concern, including interpretation of territorial constitutions and organic acts, and that such documents—standing alone—cannot establish federal question jurisdiction. Territorial courts thus unquestionably possess the power to interpret their territorial constitutions and organic acts without being subject to having those decisions overruled or otherwise interfered with by the federal courts.

But *how* should territorial courts go about actually interpreting their territorial constitutions and organic acts? It is easy, in principle, to simply say that a territorial supreme court should interpret a territorial constitution in the same manner as a state supreme court interprets a state constitution. But state supreme courts do not interpret state constitutions uniformly. Because state supreme courts are largely unconstrained in how they may interpret their state constitutions due to the inability of the Supreme Court of the United States to review the correctness of those interpretations, they have collectively developed a variety of different—and sometimes contradictory—methods of state constitutional interpretation employed by state courts.[203]

The proliferation of such competing theories of state constitutional interpretation may be attributed to the idea that

> Americans are now a people who are so much alike from state to state, and whose identity is so much associated with national values and institutions, that the notion of significant local variations in character and identity is just too implausible to take seriously as the basis for a distinct constitutional discourse.[204]

To the extent this may be true—at least in the fifty states—it is rather easy to dismiss the interpretative methods adopted by state supreme courts as pretextual, with courts attempting to engage in "principled decision-making to avoid the criticism of being merely results-oriented."[205] After all, if the Supreme Court of the United States has already interpreted phrases such as "equal protection" and "due process" to mean one thing in the United States Constitution, how can a state supreme court principally reach a completely different—sometimes entirely opposite—conclusion?

In addition to concerns about being results-oriented, there are practical reasons for state constitutional interpretation to develop differently and without uniformity. While debates about federal constitutional interpretation often focus

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203. Rachel A. Van Cleave, *State Constitutional Interpretation and Methodology*, 28 N.M. L. REV. 199, 219 (1998).

204. James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 818 (1992).

205. Van Cleave, *supra* note 203, at 220.

on overarching theories such as originalism or the living constitution, theories of this sort have relatively little place—at least as a practical matter—in state constitutional adjudication. This is largely "[b]ecause state constitutions are iterative, derivative, and assimilative," in that "they are not crafted solely out of framers' creativity but rather arise from multiple sources—they are derived from earlier versions, created by newly western Americans from pre-existing states, modeled on the consensus of experts, and forged under substantial and systemic congressional pressure to conform."[206] As such, it is often extraordinarily difficult to even identify the "founding fathers" of a state—let alone determine their intent in adopting certain language in a state constitution—particularly in states where the state constitution may be amended by citizen referendum.[207] Moreover, there is a serious concern, at least regarding more recent state constitutions, that "interested delegates manipulated the convention's historical record" knowing that future courts may rely on transcripts of floor statements and other history.[208]

It is for these reasons that one of the most popular methods of state constitutional interpretation downplays the constitutional text itself in favor of ascertaining whether the state or its legal system is sufficiently "unique" or "distinctive" from the rest of the United States in some aspect to justify interpreting a state constitutional provision differently from how the Supreme Court of the United States and other federal courts interpreted similar or identical provisions in the United States Constitution.[209] "This theory assumes that state constitutionalism is the same as federal constitutionalism unless the state court is able to point to a uniqueness in the state charter."[210] In effect, by following this approach, "the state court ends up isolating itself from the national discourse and debate on constitutionalism."[211]

It stands to reason that this method of state constitutional interpretation readily translates to territorial constitutions. In both form as well as substance, territorial constitutions such as the Constitution of Puerto Rico are remarkably like state constitutions, in that the drafters borrowed provisions from or were otherwise inspired by a variety of sources.[212] Moreover, such territorial constitutions were initially drafted by representatives of the people of the territory, and in many cases were ratified by popular vote.[213] And while it is certainly true that Congress played a substantive role in the adoption of the Constitution of

206. Michael Schwaiger, *Understanding the Unoriginal: Indeterminant Originalism and Independent Interpretation of the Alaska Constitution*, 22 ALASKA L. REV. 293, 300 (2005).

207. *See, e.g.*, Sands v. Morongo Unified Sch. Dist., 809 P.2d 809 (Cal. 1991) (illustrating disagreement among the justices of the California Supreme Court as to the history surrounding the adoption of the provisions at issue).

208. Schwaiger, *supra* note 206, at 301–02.

209. Van Cleave, *supra* note 203, at 221–22.

210. Van Cleave, *supra* note 203, at 220.

211. Van Cleave, *supra* note 203, at 220.

212. *See generally* Hiram A. Melendez-Juarbe, *Privacy in Puerto Rico and the Madman's Plight: Decisions*, 9 GEO. J. OF GENDER & L. 1 (2008).

213. Puerto Rico v. Sanchez Valle, 579 U.S. 59, 73 (2016).

Puerto Rico by directing that certain language be amended, this was not unusual, in that it had previously exercised similar veto power over the proposed Constitutions of Louisiana, Utah, New Mexico, and Hawaii, and it has never been seriously argued that those state constitutions are of a lesser character or subject to different interpretative methods.[214]

But what of territorial organic acts, such as those that remain in place in the U.S. Virgin Islands and Guam? Thus far, this Article has largely treated territorial constitutions and territorial organic acts largely interchangeably. Even if territorial supreme courts must receive deference from the federal courts in interpreting territorial organic acts, what methods of interpretation should they employ? Territorial supreme courts could certainly treat territorial organic acts as fully equivalent to territorial constitutions and apply one of the many methods of state constitutional interpretation. Yet is this appropriate, given the potentially more active role that Congress may have played in the adoption of a territorial organic act as opposed to a territorial constitution? For instance, since territorial organic acts are statutes enacted by Congress—even if they are not necessarily "laws of the United States"[215]—should territorial supreme courts simply interpret them pursuant to the same rules of statutory construction that would apply in interpreting any other statute? And if territorial organic acts should be interpreted in the same manner as other statutes enacted by Congress, can it really be said that territorial organic acts are the equivalent of "constitutions"?

As a practical matter, the question of how courts should interpret the Virgin Islands Revised Organic Act of 1954 and the Guam Organic Act is purely academic. Even if territorial courts should interpret territorial organic acts pursuant to the rules of statutory construction, application of those rules should lead to the same result as rejecting those rules, at least with respect to safeguarding individual rights and liberties. Congressional intent is of paramount importance in determining how to interpret a statute enacted by Congress.[216] In enacting the Virgin Islands Revised Organic Act and the Guam Organic Act, Congress both explicitly and implicitly intended to treat the U.S. Virgin Islands and Guam as if they were states, including treating their territorial court systems as if they were state courts and providing that they share the same relationship with the federal courts as the fifty states.[217] While "unlike the constitutional federalism governing the relationship between state and federal courts, federalism in [the territories] is administrative rather than constitutional," the fact remains that Congress provided for this sort of relationship in the territorial organic acts, and thus the Supreme Court of the Virgin Islands and the Supreme Court of Guam may exercise the powers of a state supreme court,

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214. Eric Biber, *The Price of Admission: Causes, Effects, and Patterns of Conditions Imposed on States Entering the Union*, 46 AM. J. LEGAL HIST. 119, 132–73 (2004).

215. Balboni v. Ranger Am. of the V.I., 70 V.I. 1048, 1076-77 (V.I. 2019).

216. *See, e.g.,* McCarthy v. Madigan, 503 U.S. 140, 144 (1992).

217. *See* Balboni v. Ranger Am. of the V.I., Inc., 70 V.I. 1048, 1071 (2019); *see also* Water Isle Hotel & Beach Club, Ltd. v. Kon Tiki St. Thomas, Inc., 795 F.2d 325, 328 (3d Cir. 1986); Gov't of Virgin Islands *ex rel*. Robinson v. Schneider, 893 F.Supp. 490, 495 (D.V.I. 1995).

regardless of whether they do so pursuant to congressional grace or some higher authority.[218]

Nevertheless, the United States Court of Appeals for the Ninth Circuit, in an opinion issued during its temporary certiorari oversight over the Supreme Court of Guam, reviewed *de novo* a decision of the Guam Supreme Court interpreting a provision in the "Bill of Rights" of the Guam Organic Act, and held that the language could not be interpreted to confer greater protection than the United States Constitution simply because "Guam is not a state, has no locally adopted constitution, and its 'Bill of Rights' was passed not by its citizens, but rather by Congress."[219] As a threshold matter, this decision is inconsistent with both past and future decisions of the Supreme Court of the United States providing that that territorial courts must receive deference in their interpretations of territorial organic acts, even on direct review by a federal court,[220] which the Ninth Circuit did not discuss or even cite in its decision.[221] But even more fundamentally, the Ninth Circuit ignored the overwhelming legislative history reflecting that Congress, in enacting the Guam Organic Act and the Virgin Islands Revised Organic Act, did in fact intend for those documents to potentially confer greater rights than the minimum required by the United States Constitution.[222] It is for this reason that the Supreme Court of the Virgin Islands, in its seminal decision in *Balboni v. Ranger American of the V.I., Inc.*, expressly rejected the Ninth Circuit's approach and held that it possesses the inherent and statutory power to independently interpret the Virgin Islands Revised Organic Act of 1954.[223]

While the "Bill of Rights" found in the Guam Organic Act and the Virgin Islands Revised Organic Act bear some superficial similarity to the Bill of Rights in the United States Constitution, the legislative history "reveals that Congress did not model the [territorial] Bill of Rights after the United States Constitution," but "rather, it adopted 'familiar provisions found in various organic acts and in State constitutions in relation to the Bill of Rights.'"[224] This interpretation is further supported by contemporary judicial decisions stating that the Virgin Islands Bill of Rights "supplemented" the federal Bill of Rights,[225] which the Supreme Court of the United States has held "are entitled to great weight, because they dealt with territorial powers in operation at a time . . . that the judges who rendered them well may be credited with such knowledge of the purpose of these powers and their history and application."[226]

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218. *Balboni*, 70 V.I. at 1071–72.

219. Guam v. Guerrero, 290 F.3d 1210, 1216 (9th Cir. 2002).

220. *See* discussion *supra* Part III.C.1.

221. *See Guerrero*, 290 F.3d 1210.

222. *Balboni*, 70 V.I. at 1061.

223. *Balboni*, 70 V.I. at 1061.

224. *Id.* at 1062 (quoting 80 Cong. Rec. 6609 (1936) (statement of Senator William H. King of Utah)).

225. *E.g.*, United States *ex rel.* Leguillou v. Davis, 115 F. Supp. 392, 396 (D.V.I. 1953), *overruled on other grounds by* United States *ex rel.* Leguillou v. Davis, 212 F.2d 691 (3d Cir. 1954).

226. Puerto Rico v. Shell Co., 302 U.S. 253, 266 (1937).

Perhaps most significantly, however, is that Congress subsequently amended both the Guam Organic Act and the Virgin Islands Revised Organic Act to add a new provision providing for most provisions of the federal Bill of Rights, as well as the Fourteenth Amendment, to apply to Guam and the U.S. Virgin Islands. Importantly, during the congressional hearings on the 1968 amendments to the Virgin Islands Revised Organic Act and Guam Organic Act, "numerous witnesses testified that decisions of the Supreme Court of the United States codifying the principle of 'one man, one vote' were not applicable to the Virgin Islands [and Guam], even though they were decided based on the equal protection clause."[227] "Had Congress intended for the equal protection clause in the Virgin Islands [and Guam] Bill of Rights to not have any independent meaning, but to only be interpreted identically to the equal protection clause of the Fourteenth Amendment, then the 'one man, one vote' decisions of the United States Supreme Court premised on the Fourteenth Amendment's equal protection clauses would have already been automatically extended to the Virgin Islands [and Guam] without the need for any further congressional action."[228] Rather, "in enacting the [territorial] Bill of Rights and modelling it after language found in state constitutions," and then "subsequently extending the Fourteenth Amendment to the [territories] as if [they] were a state without repealing the earlier guarantees of the [territorial] Bill of Rights," Congress "manifested an intent for the equal protection and due process clauses of the Fourteenth Amendment to serve as a floor . . . while preserving the possibility that the equal protection and due process clauses of the [territorial] Bill of Rights—modeled after similar state constitutional provisions—could be construed by a court to confer greater rights to the people of the Virgin Islands [and Guam] than the minimum provided for in the United States Constitution."[229] Such an interpretation is the only one that would not render the 1968 amendments to the

227. *Balboni*, 70 V.I. at 1064–65 (quoting Virgin Islands—Elective Governor and Legislative Redistricting: Hearing on H.R. 11777 & H.R. 13277 Before the H. Comm. on Interior and Insular Affairs, 89th Cong. 675 (1966) (statement of Harry R. Anderson, Assistant Secretary of the Interior) ("[T]he proposed amendment incorporates and makes applicable to any reapportionment the language of the equal protection clause of the 14th Amendment of the Constitution, which language is the basis of the Supreme Court's 'one man-one vote' decisions. While those decisions are not for application in the Virgin Islands, we nevertheless strongly believe in the correctness of the principle stated and by the foregoing we would provide for its enforcement in the Virgin Islands...."); 89th Cong. 679 (statement of Ruth Van Cleve, Director, Office of Territories, Department of the Interior) ("As the Secretary stated a moment ago, it is our conclusion that those decisions don't themselves apply, because the equal protection language of the 14th Amendment is by its own terms applicable only to the States."); 89th Cong. 692 (statement of Dr. Aubrey A. Anduze, President of the Virgin Islands Constitutional Convention) ("Although the constitutional requirement of one man, one vote does not apply to such provisions as the Congress may see fit to make for the Virgin Islands, a regard for essential democratic principles does require that this constitutional doctrine be extended to the islands. To the extent that H.R. 13277 advances in such a direction, it is [a] step which I believe the Congress ought to take.")).

228. *Balboni*, 70 V.I. at 1065.

229. *Id.* at 1068–69.

Guam Organic Act and the Virgin Islands Revised Organic Act "completely superfluous."[230]

Further support for the proposition that territorial courts need not interpret words and phrases in territorial organic acts in the same manner as identical language in the federal constitution or federal statutes is again found in judicial decisions addressing virtually identical questions in the context of the District of Columbia. In *Hall v. C & P Telephone Co.*, the United States Court of Appeals for the District of Columbia Circuit considered "the application of *Erie* principles to the construction by the District of Columbia Court of Appeals of a special type of statute: an Act of Congress that applies exclusively to the District of Columbia but whose substance merely mirrors that of another federal statute that applies to the nation as a whole."[231] Even though "Congress acted pursuant to its plenary authority to exercise legislative power for the District of Columbia" and the case involved "a statute that merely applies the terms of another federal statute" which "the D.C. Council has no power to amend or repeal," the court nevertheless determined that the act was a local law and that the interpretation of that law by the District of Columbia Court of Appeals was binding in light of the congressional intent to treat the District of Columbia court system as if it were a state court system.[232]

That Congress intentionally modeled the judicial systems of the territories and the District of Columbia after state judiciaries and similarly modeled territorial organic acts after state constitutions is impressive evidence of its intent for territorial courts to interpret territorial organic acts in the same manner as state courts interpreting a state constitution. Congress was aware that "[t]he Founders chose a system of joint federal/state sovereigns in part for the benefits it provided: greater sensitivity to the needs of a diverse society; increased opportunity for citizen involvement in the democratic process; greater innovation and experimentation in government; productive competition between states to attract a mobile citizenry; and increased personal liberty resulting from multiple governments that check each other's authority."[233] This judicial federalism fosters a "creative ferment of experimentation" even with respect to adjudication of constitutional issues.[234] Had Congress intended for the territories to be "frozen in time" with respect to such rights,[235] for territorial courts to remain subservient to the interpretations of federal courts of similarly-worded federal legislation, or to withhold from the territorial courts the powers universally held by the courts of all fifty states, it could have easily adopted language expressly providing so. Rather, the clear intent of Congress is for the territorial courts to partake in the same

230. *Id.* at 1069.

231. Hall v. C & P Telephone Co., 793 F.2d 1354, 1355 (D.C. Cir. 1986).

232. *Id.* at 1357–59.

233. Justin Weinstein-Tull, *The Structure of Local Courts*, 106 VA. L. REV. 1031, 1090 (2020).

234. Paul M. Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605, 634 (1981).

235. Guam Soc'y of Obstetricians & Gynecologists v. Ada, 776 F. Supp. 1422, 1427 (D. Guam 1990).

innovation and experimentation—including in interpreting their territorial constitutions and organic acts—as occurs in the states.

Yet notwithstanding these authorities, some continue to question the proposition that territorial organic acts can ever be the equivalent of territorial constitutions. Some scholars and jurists—most notably Justices Stephen Breyer and Sonia Sotomayor—have in recent years embraced what may be best described as a theory of Puerto Rico exceptionalism. Although a majority of the Supreme Court has rejected such exceptionalism, Justices Breyer and Sotomayor and others have posited that the adoption of a constitution by the popular vote of the people of Puerto Rico altered its political status, in effect transforming it from a mere territory into a separate and independent sovereign, akin to a Native American tribe.[236]

As a threshold matter, the effect—or any lack thereof—of the ratification of the Constitution of Puerto Rico on Puerto Rico's political status should have no bearing on the question of whether other territories such as the U.S. Virgin Islands possess the authority to definitively interpret their territorial organic acts. As discussed earlier, the issue of whether a particular United States jurisdiction—whether state, territory, or tribe—is a sovereign is ultimately irrelevant to that question.[237] Yet while Justices Breyer and Sotomayor have thus far relied on the popular ratification of the Constitution of Puerto Rico to effectively elevate Puerto Rico to the same status as the fifty states, others—such as the Government of Puerto Rico—have invoked it to argue that Puerto Rico should be treated on a more favorable basis than territories without a popularly-ratified constitution, such as the U.S. Virgin Islands and Guam.[238]

The argument that popular ratification of a Constitution of Puerto Rico somehow elevates Puerto Rico above its sister territories not only elevates form over substance but does so without any historical or legal basis. To begin with, approval of a state or territorial constitution through popular vote of the entire electorate *in addition* to approval by Congress is a relatively new practice.[239] In fact, the original constitutions of twelve of the original thirteen states, as well as the United States Constitution and its predecessor, the Articles of Confederation, were adopted without popular ratification, and new constitutions were not routinely submitted to the electorate for its direct approval until the mid-nineteenth

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236. *See* P.R. v. Sanchez Valle, 579 U.S. 59, 90–92 (2016) (Breyer, J., dissenting); *see also* Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., 140 S. Ct. 1649, 1677 (Sotomayor, J., concurring).

237. *See* discussion *supra* Part III.B.

238. *See, e.g.,* Brief for Petitioner at 38 n.4, Puerto Rico v. Sanchez Valle, 579 U.S. 59 (2016) (No. 15-108).

239. In fact, the historical record contains strong evidence that the approval of Congress is not even necessary for adoption of a territorial constitution. In 1796, the then-Territory of Tennessee adopted a new "state" constitution to displace its territorial constitution, and immediately dissolved its then-territorial government and replaced it with the new government provided for in its new constitution – several months before Congress approved the constitution and admitted Tennessee as a state. *See* Joseph Blocher & Mitu Gulati, *Puerto Rico and the Right of Accession*, 43 YALE J. INT'L L. 229, 260-61 (2018).

century.[240] Rather, the typical practice had been for either the legislature or a constitutional convention to draft the constitution, which would then be approved by Congress. Yet not even the most ardent advocate of Puerto Rico exceptionalism has argued that popular ratification of the Constitution of Puerto Rico somehow places it on a higher level than, for example, the Constitution of Delaware.

The practice utilized by the early states—approval by Congress after adoption by the local legislature—is precisely the procedure followed to adopt the Virgin Islands Organic Act of 1936. Although Congress enacted the Virgin Islands Organic Act, it is often overlooked that the Organic Act was not imposed on the U.S. Virgin Islands unilaterally by Congress. Rather, the Organic Act "had been drafted and approved by the two democratically-elected Virgin Islands legislatures, with only minor changes."[241] Not only that, but prior to approving the Organic Act jointly proposed by the local legislatures, Congress had in fact "previously rejected a draft version prepared by the Presidentially-appointed governor," on grounds that it had not originated from the territory's elected representatives.[242]

B. Hesitancy of Litigants to Choose the Territorial Courts as a Forum

The authorities cited in the prior section provide exceptionally strong support for the proposition that territorial courts possess the power to interpret territorial constitutions and organic acts independently of the federal courts and Congress and may do so to provide greater individual rights and liberties to the people of their territories than the minimum required by the United States Constitution. But, as has often been asked in other contexts, "[w]hat good is a grant of power if attorneys do not think the court will actually use it?"[243] Or, even more fundamentally, how can a territorial court exercise its power under a territorial constitution or organic act if attorneys never ask a court to do so?

The failure of attorneys to bring civil rights and other public interest litigation in territorial court is not unique to that forum, but frequently occurs in state courts as well. Why the reluctance of attorneys to assert state constitutional claims in state courts? One federal judge posits two likely reasons:

> The first is a function of time. Because it took until the 1960s for the U.S. Supreme Court to complete the individual rights revolution by incorporating most of the Bill of Rights into the Fourteenth Amendment, it was not until then that American lawyers, law schools, and state courts had any reason to think about using state and federal court systems, and state and federal constitutions, to vindicate civil

240. William B. Fisch, *Constitutional Referendum in the United States of America*, 54 AM. J. COMP. L. 485, 485 (2006) (citing WALTER F. DODD, THE REVISION AND AMENDMENT OF STATES CONSTITUTIONS (1910)).

241. Balboni v. Ranger Am. of the V.I., Inc., 70 V.I. 1048, 1062 n.10 (2019) (citing WILLIAM W. BOYER, AMERICA'S VIRGIN ISLANDS: A HISTORY OF HUMAN RIGHTS AND WRONGS 185–86 (2d ed. 2010)).

242. *Id.*

243. Eric B. Miller, *Lawyers Gone Wild: Are Depositions Still a "Civil" Procedure?*, 42 CONN. L. REV. 1527, 1553 (2010).

> rights. We thus are not talking about a set of litigation opportunities, a litigation strategy, that existed for most of American history. It's been roughly fifty years since the U.S. Supreme Court completed much of this transformation. That's not a long time, less than a fourth of American legal history. . . .
>
> The second reason emerges from a central explanation for the success of the federal rights revolution: the States' relative underprotection of individual rights. Who could blame lawyers and their clients for being reluctant to develop a strategy built in part on state constitutional rights? The U.S. Supreme Court recognized many of the rights it did between the 1940s and the 1960s because many state courts (and state legislatures and state governors) resisted protecting individual rights, most notably in the South but hardly there alone. One can forgive lawyers from this era for hesitating to add state constitutional claims to their newly minted federal claims. Why seek relief from institutions that created the individual rights vacuum in the first place?[244]

Certainly, this first reason—time—applies with even greater force to the territories. Most territorial court systems are extraordinarily young; for instance, the Supreme Court of the Virgin Islands did not assume jurisdiction until 2007[245] and did not obtain full independence from the United States Court of Appeals for the Third Circuit until 2018.[246] And while the legal community's interest in the territories has certainly increased in the last several years, most of this interest has focused on the *Insular Cases* and other matters of federal law, with the laws of the territories themselves being "casually disregarded" and in effect "a footnote within a footnote" of an already niche field.[247] It should come as no surprise, then, that a substantial number of lawyers—particularly stateside counsel not intimately familiar with the legal culture of the individual territories[248]—are simply not aware

244. SUTTON, *supra* note 5, at 14.

245. Hypolite v. People, 51 V.I. 97, 101 (2009).

246. Vooys v. Bentley, 901 F.3d 172, 175 (3d Cir. 2018) (en banc) (overturning precedent that wrongfully extended the certiorari jurisdiction of the Third Circuit beyond the oversight period).

247. J.M. Balkin, *The Footnote*, 83 N.W. U. L. REV. 275, 302 n.65 (1989).

248. This same principle of unfamiliarity with local legal culture and the greater community often applies to other national civil rights activists as well. For instance, in the early years of the movement to obtain judicial recognition of same-sex marriage and similar rights, many attorneys favored bringing such claims in federal court, out of a belief that federal judges possess an "ivory tower mentality" that makes them more likely to safeguard individual freedoms and the rights of minority groups. But contrary to this popular wisdom, when "adjudicating federal constitutional issues . . . state tribunals resolved lesbian and gay rights claims 56.3 percent more positively than federal courts," and that state judges who were elected were even more likely to do so than state judges who were appointed. DANIEL R. PINELLO, GAY RIGHTS AND AMERICAN LAW 110 (2003). It is likely that this occurred, in part, precisely because federal judges are more cloistered in that state judges were more likely to have "regularly interact[ed]

of the changes that have occurred in the territorial courts over the last several years.

Yet one would think that the second reason—perceptions of which courts are willing and unwilling to safeguard individual rights—would serve as a compelling reason to *avoid* the federal courts as a forum for territorial rights litigation. Although the federal courts in the mid-twentieth century certainly played a significant role in eliminating segregation and other abuses of the Jim Crow era perpetuated by state governments and state courts, the opposite is true of territorial rights.[249] The racist reasoning of the *Insular Cases* and the doctrine of territorial incorporation were products of the Supreme Court of the United States.[250] While that Court has certainly retreated from that reasoning and instructed lower courts not to extend the *Insular Cases*, the lower federal courts to this very day continue to do just that: extend the *Insular Cases* to justify differential treatment of the territories in a wide variety of contexts that were never addressed in the *Insular Cases* themselves.[251] And though territorial rights litigation has seen some limited success in federal court, virtually all those victories occurred in cases where the federal district judge or one of the federal circuit judges on the panel was a resident of a United States territory, only for the victory to then be largely erased after reassignment or appeal to a stateside judge or stateside appellate panel.[252]

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professionally with gay people" in their local communities than their federal counterparts. John F. Preis, *Reassessing the Purposes of Federal Question Jurisdiction*, 42 WAKE FOREST L. REV. 247, 290 (2007).

249.*See* discussion *supra* Section I.

250. *See* cases cited *supra* notes 31–33 and accompanying text.

251. *See* discussion *supra* Section I.B. The question of *why* the lower federal courts remain hostile to territorial rights, including continuing to apply and extend the *Insular Cases* despite the Supreme Court's express instruction for them not to do so, is an important matter that requires further study and examination. However, it appears highly significant that the federal judicial circuits with precedents most hostile to territorial rights are those that (1) do not have a resident of that territory serving on its respective federal court of appeals, and (2) have federal district judges serving in the territories who lack Article III protections, such as life tenure. *See generally* James T. Campbell, *Island Judges*, 129 YALE L.J. 1888 (2020).

252. *Compare* Ballentine v. United States, Civ. No. 1999-130, 2001 WL 1242571 (D.V.I. Oct. 15, 2001) (unpublished mem. written by Moore, D.J.), *and* Aurelius Inv., LLC v. Puerto Rico, 915 F.3d 838 (1st Cir. 2019) (written by Torruella, Cir. J.), *with* Ballentine v. United States, 486 F.3d 806 (D.V.I. Sept. 21, 2006) (unpublished decision written by Thompson, D.J.), *aff'd*, 486 F.3d 806 (3d Cir. 2007), *and* Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC, 140 S. Ct. 1649 (2020) (written by Breyer, J.), *rev'g* 915 F.3d 838. As the district judge that originally heard *Ballentine*, Judge Moore grew up in Idaho and moved to the Virgin Islands in 1976. *On Island Profile: Judge Thomas K. Moore*, THE ST. THOMAS SOURCE (Mar. 27, 2007), https://stthomassource.com/content/2007/03/27/island-profile-judge-thomas-k-moore/. As the district judge that heard *Ballentine* on reassignment, Judge Thompson is a New Jersey native. 486 F.3d 806, 808 (3d Cir. 2007); David Wildstein, *Trailblazer: Judge Anne Thompson*, NEW JERSEY GLOBE (Jan. 27, 2022, 12:02 AM), https://newjerseyglobe.com/trailblazer/trailblazer-judge-anne-thompson-4/. As the circuit judge that originally heard *Aurelius*, Judge Torruella was a Puerto Rico native.

Of course, there are some claims where only a federal court could likely exercise jurisdiction, such as those that require suing the United States as a defendant. But many—if not most—lawsuits seeking to vindicate territorial rights could certainly be filed in a territorial court. In fact, there are certain claims that, as a practical matter, can only be adjudicated on the merits in a territorial court since it is unlikely that a litigant could establish Article III standing to maintain the claim in federal court. Why, then, do those bringing public interest litigation on behalf of the people of the territories almost universally insist on bringing such lawsuits in federal court and predicating the claims exclusively on the United States Constitution?

As with state constitutional claims, the unwillingness of attorneys to bring such litigation in territorial courts appears based on a misperception—not that territorial courts would be hostile to such claims, but that the territories lack the power to improve their situation on their own. During this period of renewed interest in the territories, some legal elites have proposed what they describe as "new" solutions to the status question. These proposals essentially concede that the *Insular Cases* were wrongly decided but ultimately recommend against efforts to formally overturn the *Insular Cases* or achieve equality. Rather, these proposals argue that achieving change is too hard and that the people of the territories and their allies should just accept their second-class status and instead focus on achieving what the proponents believe are more "workable" or "pragmatic" goals. These "workable" and "pragmatic" goals consist of things such as lobbying the federal government for additional funding,[253] establishing a "different but equal" regime in which territories would be permitted to enact legislation that discriminates against "mainlanders,"[254] and persuading the federal courts to "actively scrutinize"—but not actually prohibit—"congressional intervention in territorial self-governance."[255] While given different names by their proponents, all of these proposals urge the people of the territories to acquiesce to what is best described as a territorial paternalism.

Why do these scholars urge that the residents of the territories and their allies abandon the quest for full equal rights? Because the Americans who call the territories home are "politically powerless,"[256] live in "geographic isolation"[257] on

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Lauren Eckenroth, *Honoring Judge Juan R. Torruella*, THE RECORD: B.U. SCH. L. (Oct. 27, 2020), https://www.bu.edu/law/record/articles/2020/honoring-judge-juan-r-torruella/. And Justice Breyer, author of the Supreme Court's decision in *Aurelius*, was born in California and later moved to Washington, D.C. Wolf Blitzer & Ariane de Vogue, *Supreme Court Justice Stephen Breyer Plans to Retire*, CNN (Jan. 26, 2022, 5:29 PM), https://www.cnn.com/2022/01/26/politics/stephen-breyer/index.html.

253. Lin, *supra* note 21, at 1253.

254. Rennie, *supra* note 21, at 1708–09.

255. *Territorial Federalism*, *supra* note 21, at 1653–54.

256. Lin, *supra* note 21, at 1252.

257. Lin, *supra* note 21, at 1264.

"crumbling island[s]"[258] with "simple econom[ies]"[259] that are "generally stagnant,"[260] have "problems securing safe drinking water,"[261] live in fear of being "prime targets for enemies of the United States,"[262] and generally live their lives with "a sense of hopelessness"[263] because of the "cauldron of burdens that their fellow citizens in the States do not have to carry."[264] The people of the territories should not make achieving equal rights their primary focus, because any victories achieved would "seem like pyrrhic victories when juxtaposed with the grim long-term outlooks of storm-torn neighborhoods, shuttered businesses, bombing threats, dilapidated schools, and mass exoduses of family and friends."[265] Because the people of the territories lack the ability to "meaningfully advocate on [their] behalf via the normal political process," they must be "protect[ed]" by the federal courts—but only to a certain point.[266] And because the people of the territories cannot be trusted to preserve their culture, "territorial residents, to coexist meaningfully—to be equal, in a sense—in the American republican system requires a different set of rights and obligations for locals," such as allowing them to enact race- or ancestry-based restrictions on alienation of land to "mainlanders."[267]

This reasoning is no different from the *Insular Cases* and the scholarship written to support unequal treatment, except words like "savage," "half-civilized," and "ignorant" have been replaced with words like "powerless," "isolated," and "hopeless."[268] While purporting to take a moderate or pragmatic position,[269] these proposals effectively use softer language to embrace the reasoning and result of the *Insular Cases*[270]: that residents of the territories are unable to care for themselves and should be treated differently by the federal government. The

258. Lin, *supra* note 21, at 1252.

259. Lin, *supra* note 21, at 1260.

260. Lin, *supra* note 21, at 1261.

261. Lin, *supra* note 21, at 1272.

262. Lin, *supra* note 21, at 1276.

263. Lin, *supra* note 21, at 1271.

264. Lin, *supra* note 21, at 1281.

265. Lin, *supra* note 21, at 1284.

266. *Territorial Federalism*, *supra* note 21, at 1653–54.

267. Rennie, *supra* note 21, at 1709–10.

268. *See* cases cited *supra* note 31; Lin, *supra* note 21, at 1252, 1264, 1271.

269. Interestingly, Professor Lowell, whose article in the *Harvard Law Review* provided the reasoning for the holdings of the *Insular Cases*, had also portrayed his proposal as a moderate one, as evidenced by the very title of his article as proposing a "Third Way" to resolve the question of territorial incorporation. *See generally* Lowell, *supra* note 30.

270. Juan R. Torruella, *Why Puerto Rico Does Not Need Further Experimentation with its Future: A Reply to the Notion of "Territorial Federalism,"* 131 HARV. L. REV. F. 65, 66 (2018) ("[T]his 'new' scheme is not only not new, but is in fact a repackaging of the same unequal colonial relationship that has been in place since American troops landed in Guánica in 1898.").

proponents of territorial paternalism, while publicly professing support for the people of the territories, have crossed the line from ally to white savior.[271]

Although it would be quite easy to do so, it is beyond the scope of this Article to deconstruct every one of these offensive stereotypes and misconceptions.[272] For

271. The "white savior" is a common trope in literature and film in which the hero of the story—typically a white man portrayed by the author as enlightened or even Christ-like—serves as a champion of a marginalized group, such as blacks in the Jim Crow South or the indigenous people of what is portrayed as a "foreign" land, but in the process reinforces the oppression by providing validation that the marginalized group is not able to take care of itself. A well-known example of the white savior trope is Atticus Finch in *To Kill a Mockingbird*. *See* Sarah Gerwig-Moore, *To Outgrow a Mockingbird: Confronting Our History—As Well as Our Fictions—About Indigent Defense in the Deep South*, 54 GA. L. REV. 1297, 1302 (2020).

Recently, however, authors and other content creators have begun to recognize the narcissistic and offensive nature of the characters exhibiting this trope. In many ways, the below scene from the pilot episode of Star Trek Deep Space Nine encapsulates the white savior mentality through which otherwise well-meaning legal scholars and lawyers view America's territories:

BASHIR: This'll be perfect . . . real . . . frontier medicine . . .

KIRA: Frontier medicine?

BASHIR: Major. . . I had my choice of any job in the fleet . . .

KIRA: Did you . . .

BASHIR: I didn't want some cushy job . . . or a research grant . . . I wanted this. The furthest reaches of the galaxy. One of the most remote outposts available. This is where the adventure is. This is where heroes are made. Right here. In the wilderness.

KIRA: This wilderness is my home.

BASHIR: I didn't mean . . .

KIRA: The Cardassians left behind a lot of injured people, Doctor . . . you can make yourself useful by bringing some of your Federation Medicine to the "natives" . . . you'll find them a friendly, simple folk . . .

Star Trek Deep Space Nine: Emissary (Paramount Television Jan. 4, 1993).

272. To give just one example, the characterization of the territories' delegates to the House of Representatives as being "powerless" simply because they lack a floor vote ignores the practical reality that all meaningful legislative work occurs within the House's committees—on which the territorial delegates are eligible to serve and even chair—and that legislation will rarely be brought to a floor vote by Speaker of the House unless passage is expected. As a result, representatives who have a floor vote but are not permitted to serve on committees are said to be "in exile" and "kind of just a hitchhiker" with "very little influence." *E.g.*, Melanie Zanona, *'They Basically Have Nothing To Do': Trio of Republicans Face Life in Exile*, POLITICO (Feb. 4, 2019, 6:02 PM), https://www.politico.com/story/2019/02/04/congress-house-republicans-committee-assignments-stripped-1145320. For instance, Delegate Stacey Plaskett of the U.S. Virgin Islands sits on the powerful House Committee on Ways and Means, and as a result exercises substantially more influence in the House of Representatives than most voting representatives. *See* Daniel Shaviro, *Beyond Public Choice and Public Interest: A Study of the Legislative Process as Illustrated by Tax Legislation in the 1980s*, 139 U. PA. L. REV. 1, 82 (1990) (summarizing empirical studies of Congress).

present purposes, the only relevant consideration is whether territorial courts may utilize territorial constitutional law to grant more meaningful relief to litigants seeking to vindicate territorial rights than federal courts. As the prior sections illustrate, the territorial courts certainly possess that power. Yet even more importantly, territorial courts have demonstrated that when given the opportunity they will exercise that power and enforce provisions of territorial constitutions and organic acts in instances where federal courts are unable or unwilling to do so.

C. A Case Study in Judicial Federalism: The U.S. Virgin Islands

That territorial courts may use territorial constitutional law to safeguard individual rights and promote local autonomy and self-governance is not an untested hypothetical. Over the last several years, one territorial court—the Supreme Court of the Virgin Islands—has not only asserted its constitutional powers but done so *successfully* despite significant opposition and interference, including from the federal courts. Yet while these decisions often dealt with weighty questions regarding federal-territorial relations and brought about substantial and meaningful change in the U.S. Virgin Islands with the potential for similar change elsewhere, they remain largely unknown to the greater legal community. This section highlights these largely invisible cases to demonstrate both the viability of territorial courts and territorial constitutional law as a means for effectuating change in our federalist system.[273]

i. Constitutional Jurisdiction

The Case or Controversy Clause of Article III of the United States Constitution, as it has been interpreted by the Supreme Court of the United States, establishes significant constitutional limits on the subject-matter jurisdiction of the federal

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273. Discerning readers may notice the failure to refer to the federalist relationship between the federal courts and the courts of the five territories as "territorial federalism." As alluded in the prior section, the phrase "territorial federalism" has recently and regrettably been misappropriated to refer to a proposed legal regime that is quite the opposite of federalism, where the territories voluntarily cede equal rights and accept their second-class status in exchange for the federal courts applying higher levels of scrutiny to congressional legislation relating to the territories. *See Territorial Federalism*, *supra* note 21, at 1653–54.

But even if writing on a blank slate, the use of the word "territorial" to modify "federalism" necessarily implies that territorial federalism is somehow distinct or different from traditional concepts of federalism to warrant use of this modifier. As the entirety of this Article has sought to demonstrate, the relationship between federal courts and territorial courts is—or at least should be—completely identical in every way to the relationship between federal courts and state courts. To characterize the relationship between federal courts and territorial courts as "territorial federalism" would thus be akin to analyzing "the law of the horse." *See generally* Frank H. Easterbrook, *Cyberspace and the Law of the Horse*, 1996 U. CHI. LEGAL F. 207 (1996). This is unlike the study of "territorial constitutional law," which, as this Article has hopefully demonstrated, departs in many significant ways from both federal constitutional law and state constitutional law.

courts, to wit, that a federal court cannot issue an advisory opinion, and that a party must have standing to sue.[274] While ostensibly "built on a single basic idea—the idea of separation of powers,"[275] as a practical matter the federal courts frequently utilize Article III as "an ingenious mechanism to avoid declaring statutes unconstitutional" or to otherwise avoid issuing controversial decisions.[276] In other words, the federal courts often invoke "jurisdictional or justiciability principles to avoid deciding a case on its merits," particularly cases which may be viewed as "political."[277] As a result, certain provisions of the United States Constitution have become "effectively unenforceable" due to the refusal of the federal courts to adjudicate disputes which implicate them.[278] Such "[p]olitical monasticism" ultimately "works against the disadvantaged and powerless classes" by making it exceptionally difficult to use the federal courts as a means to vindicate civil rights.[279]

Like the rest of Article III, however, the Case or Controversy Clause applies only to the federal courts; as with other laws, "[s]tates have developed their own justiciability rules defining the authority of their judiciaries."[280] While some states have essentially adopted the federal doctrines of standing, mootness, and ripeness, "[o]ther states allow greater access to their courts than is available under the federal doctrines," with "[t]hose latter states hav[ing] . . . establish[ed] a broader role for the courts in their governmental system."[281] In fact, some states have concluded that these doctrines are "not jurisdictional at all" and can be waived by the parties or by the courts.[282] Importantly, the Supreme Court of the United States has held that state supreme courts are not required to apply federal standing law or other federal jurisdictional doctrines even in cases where a party has brought a federal cause of action in state court.[283]

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274. U.S. CONST. art. III, § 2, cl. 1.

275. Allen v. Wright, 468 U.S. 737, 752 (1984).

276. Laveta Casdorph, *The Constitution and Reconstitution of the Standing Doctrine*, 30 ST. MARY'S L.J. 471, 546 (1999); *see also* Heather Elliott, *Balancing as Well as Separating Power: Congress's Authority to Recognize New Legal Rights*, 68 VAND. L. REV. EN BANC 181, 181 (2015).

277. Laura A. Smith, *Justiciability and Judicial Discretion: Standing at the Forefront of Judicial Abdication*, 61 GEO. WASH. L. REV. 1548, 1549 (1993).

278. Clark D. Cunningham, *After* Grutter *Things Get Interesting! The American Debate Over Affirmative Action is Finally Ready for Some Fresh Ideas from Abroad*, 36 CONN. L. REV. 665, 665 (2004).

279. Nancy Levit, *The Caseload Conundrum, Constitutional Restraint and the Manipulation of Jurisdiction*, 64 NOTRE DAME L. REV. 321, 363–64 (1989).

280. F. Andrew Hessick, *Cases, Controversies, and Diversity*, 109 NW. U. L. REV. 57, 65 (2014).

281. *Id.*

282. *See, e.g.*, Chubb Lloyds Ins. Co. v. Miller Cnty. Cir. Ct., 361 S.W.3d 809, 815 (Ark. 2010) ("[S]tanding is not a component of subject-matter jurisdiction . . . ."); Lebron v. Gottlieb Mem'l Hosp., 930 N.E.2d 895, 916 (Ill. 2010) ("[L]ack of standing is an affirmative defense . . . ."); Harrison v. Leach, 323 S.W.3d 702, 707–08 (Ky. 2010) ("[A] trial court's subject-matter jurisdiction is distinct from standing . . . ."); *see also* Hessick, *supra* note 280, at 65–72; Patrick W. Maraist, *A Statutory Beacon in the Land Use Ripeness Maze: The Florida Private Property Rights Protection Act*, 47 FLA. L. REV. 411, 419 n.40 (1995) ("[S]tate courts apply ripeness . . . under prudential concerns.").

283. ASARCO Inc. v. Kadish, 490 U.S. 605, 617–18 (1989).

As a technical matter, the United States District Court of the Virgin Islands, like most other district courts in the territories, is not an Article III court, but an Article IV court.[284] Nevertheless, the United States Court of Appeals for the Third Circuit has held that Congress intended for the Case or Controversy Clause to apply to cases brought in that court, based on the premise that Congress vested it with the authority to exercise "the jurisdiction of a District Court of the United States"[285] which is limited to only adjudicating cases or controversies.[286] As a result, the District Court of the Virgin Islands, like its Article III counterparts, routinely dismisses cases that raise serious federal and local constitutional issues for lack of standing.[287]

The territorial courts of the U.S. Virgin Islands, however, have chosen a different path. In its earliest decisions, the Supreme Court of the Virgin Islands initially followed the Third Circuit and the District Court in both applying the Case or Controversy Clause to the territorial court system and treating it as jurisdictional.[288] It quickly retreated from that position, holding that the Revised Organic Act of 1954 did not extend Article III to the local courts of the U.S. Virgin Islands or impose a similar limitation on the jurisdiction of the territorial courts, and that concepts such as standing, ripeness, and mootness are not jurisdictional, but are therefore at best claims-processing rules subject to waiver by the parties or the court.[289] While not invoked in the decisions embracing this principle, this approach has a textual basis in the Virgin Islands Bill of Rights in the Revised Organic Act, which provides that "[n]o law shall be passed abridging . . . the right of the people . . . to . . . petition the government for the redress of grievances."[290] This rejection of federal jurisdictional concepts, when combined with an exceptionally broad taxpayer suit statute adopted by the Virgin Islands Legislature,[291] effectively permits any citizen to obtain meaningful redress in the territorial courts for any violation of any right—whether federal or territorial; constitutional or statutory—by the government of the Virgin Islands or any of its officers, employees, or agents.[292]

It is unnecessary to create hypotheticals to illustrate the practical effects of this decision. For example, during the 2014 gubernatorial election, a citizen who sought to challenge the eligibility of a candidate for lieutenant governor to serve in that position if elected initially filed his lawsuit in the United States District Court of the Virgin Islands on August 18, 2014.[293] The district court dismissed the citizen's

284. Am. Ins. Co. v. 356 Bales of Cotton*,* 26 U.S. (1 Pet.) 511, 512 (1828).

285. 48 U.S.C. § 1612(a).

286. Russell v. DeJongh, 491 F.3d 130, 133, n.3 (3d Cir. 2007).

287. *See, e.g.*, Legislature of the V.I. v. DeJongh, 645 F. Supp. 2d 452 (D.V.I. App. Div. 2009); Bryan v. Turnbull, 291 F. Supp. 2d 386 (D.V.I. 2003).

288. *See, e.g.*, Arlington Funding Servs., Inc. v. Geigel, 51 V.I. 118, 125–26 (V.I. 2009).

289. *See, e.g.*, Benjamin v. AIG Ins. Co. of P.R.*,* 56 V.I. 558, 564–65 (V.I. 2012); Farrell v. People, 54 V.I. 600, 607–08 (V.I. 2011); Vazquez v. Vazquez, 54 V.I. 485, 489 n.1 (V.I. 2010).

290. 48 U.S.C. § 1561.

291. V.I. CODE ANN. tit. 5, § 80 (2021).

292. *See* V.I. Taxi Ass'n v. W. Indian Co., 66 V.I. 473, 483–84 (V.I. 2017).

293. Haynes v. Ottley, No. 2014-70, 2014 WL 5469308 (D.V.I. Oct. 28, 2014).

complaint for lack of subject-matter jurisdiction based on an inability to establish Article III standing.[294] Rather than appeal that decision to the Third Circuit, the citizen re-filed his complaint in the Superior Court of the Virgin Islands, which held that it was not necessary for the citizen to establish Article III standing, but that the taxpayer statute did not authorize the challenge.[295] In an appeal decided after the challenged candidate had already lost the election, the Supreme Court of the Virgin Islands declined to dismiss the case as moot due to the public importance of the question presented, and proceeded to reverse the Superior Court's decision, holding that the taxpayer statute authorized the challenge, and to hold otherwise would "deprive Virgin Islands voters of their right to vote for an eligible combined governor / lieutenant governor ticket."[296]

ii. Relations Between Territorial and Federal Courts

The legal relationship between the federal courts and the courts of the fifty states is well established. The interpretation of state laws, including state constitutions, by state supreme courts is unreviewable even by the Supreme Court of the United States.[297] State courts are not bound by decisions of the lower federal courts interpreting federal law and are certainly not bound by decisions of the lower federal courts applying state law.[298] Rather, state courts are only bound to follow

294. *Id.*

295. Haynes v. Ottley, 61 V.I. 547, 556–57 (V.I. 2014).

296. *Id.* at 575.

297. *See, e.g.*, Murdock v. City of Memphis*,* 87 U.S. (20 Wall.) 590 (1874); Herb v. Pitcairn, 324 U.S. 117, 125–26 (1945); Black v. Cutter Lab'ys, 351 U.S. 292 (1956); Wilson v. Loew's, Inc., 355 U.S. 597 (1958).

298. *See, e.g.,* State v. Montano, 77 P.3d 1246, 1247 n.1 (Ariz. 2003) (finding the court was not bound by the Ninth Circuit's interpretation of the United States Constitution); People v. Dunlap, 975 P.2d 723, 748 (Colo. 1999) (explaining that the court was not bound by the Tenth Circuit's interpretation of federal constitutional requirements); Stratos v. Dep't of Pub. Welfare, 439 N.E.2d 778, 786 n.8 (Mass. 1982) (finding that although the calculation of an award under § 1988 was governed by federal law, the court was not bound to follow the method adopted by the First Circuit); Cash Distrib. Co. v. Neely, 947 So. 2d 286, 294 (Miss. 2007) ("While this Court often defers to Fifth Circuit decisions interpreting federal law, we are under no obligation to do so."); State v. Robinson, 82 P.3d 27, 30 (Mont. 2003) (refusing to follow the Ninth Circuit's interpretation of federal law, stating that the Courts of Appeals "do not have appellate jurisdiction over the state courts and their decisions are not conclusive on state courts, even on questions of federal law"); *In re* Lincoln Elec. Sys. v. Neb. Pub. Serv. Comm'n, 655 N.W.2d 363, 371 (Neb. 2003) (noting that while state courts are bound by the United States Supreme Court's interpretation of federal law, they are not bound by circuit courts' interpretations); Commonwealth v. Cross, 726 A.2d 333, 338 n.4 (Pa. 1999) (holding that the court was not bound by the Third Circuit decisions interpreting United States Supreme Court jurisprudence); Lundborg v. Keystone Shipping Co., 981 P.2d 854, 862–63 (Wash. 1999) (refusing to follow the Ninth Circuit's interpretation of a federal maritime law issue).

decisions of the Supreme Court of the United States to the extent they interpret federal law.[299]

But even though "state supreme courts are coordinate (not inferior) to the federal courts of appeals on matters of federal law" and thus "have no obligation to harmonize their interpretative choices with the decision of their local federal courts of appeals,"[300] this theory does not always align with actual practice. "A few state courts appear to believe that they are bound to follow the decisions of the federal courts of appeals on questions of federal law, and many others have issued inconsistent opinions on that question."[301] Moreover, several federal courts of appeals have themselves declared that state courts are or should be bound by their decisions.[302] Additionally, federal courts often pay lip service to deferring to state courts but actually do not do so, instead applying federal rules of statutory construction and other federal doctrines to interpret state laws in a manner that essentially perpetuates the status quo or homogenizes the law,[303] even when doing so is squarely at odds with state rules of statutory construction.[304] The practical effect of this, besides "encourag[ing] forum shopping," is "the stagnation of state-law development because the federal court's narrow decision is not reviewable by the state's high court" and by the time a similar case works its way through the state system the costs to the state supreme court in rejecting the federal interpretation of the state law would be highly disruptive due to litigants' reliance on it.[305]

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299. *See* Three Affiliated Tribes of Fort Berthold Rsrv. v. Wold Eng'g, P.C., 467 U.S. 138, 156–58 (1984).

300. Abbe R. Gluck, *Intersystemic Statutory Interpretation: Methodology as "Law" and the Erie Doctrine*, 120 YALE L.J. 1898, 1904 (2011).

301. Amanda Frost, *Inferiority Complex: Should State Courts Follow Lower Federal Court Precedent on the Meaning of Federal Law?*, 68 VAND. L. REV. 53, 56 (2015).

302. *See, e.g.*, Fretwell v. Lockhart, 946 F.2d 571, 577 (8th Cir. 1991) (assuming that an Arkansas state trial court would be obligated to follow its precedent on a question of federal constitutional law), *rev'd on other grounds*, 506 U.S. 364 (1993); Yniguez v. Arizona, 939 F.2d 727, 736 (9th Cir. 1991) ("Despite the authorities that take the view that state courts are free to ignore decisions of the lower federal courts on federal questions, we have serious doubts as to the wisdom of this view.").

303. *See, e.g.*, Mark C. Weber, *Forum Allocation in Toxic Tort Cases: Lessons from the Tobacco Litigation and Other Recent Developments*, 26 WM. & MARY ENVTL. L. & POL'Y REV. 93, 102–03 (2001) ("[F]ederal judges tend to homogenize state law by citing to federal sources for the underlying law even in diversity cases in which they should be applying the law a state court would apply to the case."); Douglas M. Branson, *Collateral Participant Liability Under State Securities Laws*, 19 PEPP. L. REV. 1027, 1065 (1992) ("Failure[] of federal judges to truly educate themselves about state law when sitting as an *Erie* court . . . is documented."); Note, *Piercing the Corporate Law Veil: The Alter Ego Doctrine Under Federal Common Law*, 95 HARV. L. REV. 853, 856 n.18 (1982) ("In spite of the *Erie* doctrine, many diversity cases have used federal alter ego standards rather than the applicable state law.").

304. Gluck, *supra* note 300, at 1936–39.

305. *Id.* at 1939; Charles E. Clark, *State Law in the Federal Courts: The Brooding Omnipresence of* Erie v. Tompkins, 55 YALE L.J. 267, 292–93 (1946).

The territories are even more susceptible than the states to the homogenization or improper construction of their local laws by the federal courts. For instance, the U.S. Virgin Islands did not have a fully autonomous judicial branch—where decisions of the territorial trial court would be appealed to a territorial supreme court consisting of local justices appointed pursuant to local law—until the Supreme Court of the Virgin Islands assumed its jurisdiction in 2007.[306] Rather, for much of its history, decisions of the Superior Court of the Virgin Islands were appealable as of right to the United States District Court of the Virgin Islands—sitting in a special capacity as an appellate tribunal—and then further appealable as of right to the Third Circuit.[307] The effect of this unusual arrangement was that the Third Circuit served as the "*de facto* court of last resort for the Virgin Islands" prior to 2007.[308] During this period, the District Court and the Third Circuit placed a federal gloss on many of the laws of the U.S. Virgin Islands, such as its workers compensation statute, its civil rights act, and its novel statute abolishing employment-at-will.[309]

The Third Circuit readily held after the establishment of the Supreme Court of the Virgin Islands that it was no longer vested with the judicial power of the territory, and that the District Court had likewise been divested of its former role in shaping Virgin Islands jurisprudence.[310] Specifically, the Third Circuit stated that "[g]oing forward," the U.S. Virgin Islands would "begin developing indigenous jurisprudence," and that the federal courts would extend the *Erie* doctrine to the

306. *See* Hypolite v. People, 51 V.I. 97 (V.I. 2009) (summarizing the history of the Virgin Islands court system).

307. *See id.*

308. Rawlins v. People, 61 V.I. 593, 610 n.10 (V.I. 2014). Particularly diligent readers may have noticed that throughout this Article, citations to decisions of the Supreme Court of the Virgin Islands have departed from traditional *Bluebook* rule that "when a decision is rendered by the highest court in a particular jurisdiction and the name of the reporter is the same as the name of that jurisdiction, neither the name of the court nor the name of the state need be given." THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION R. 10.4, at 106 (Columbia L. Rev. Ass'n et al. eds., 21st ed. 2020). The inclusion of "V.I." in the parenthetical following the citation to the *Virgin Islands Reports* is the style utilized in decisions of the Supreme and Superior Courts of the Virgin Islands. *See* V.I.S.CT. I.O.P. App'x I § G. The reason for this departure from the *Bluebook* rule is that the *Virgin Islands Reports* is not a publication created with the assistance of or otherwise authorized by the Judicial Branch of the Virgin Islands, and that reporter has published—and continues to publish—federal decisions as well, such as decisions of the United States Court of Appeals for the Third Circuit. The need for the Virgin Islands courts to require inclusion of "V.I." in citations to the Virgin Islands Supreme Court published in the *Virgin Islands Reports* is thus one of many unfortunate side effects caused by the decades of influence of the Third Circuit and the District Court of the Virgin Islands on the laws of the U.S. Virgin Islands.

309. *See, e.g.*, Tavarez v. Klingensmith, 372 F.3d 188 (3d Cir. 2004); Miller v. V.I. Hous. Auth., 46 V.I. 623, 630–31 (D.V.I. 2005); Rajbahadoorsingh v. Chase Manhattan Bank, NA, 168 F. Supp. 2d 496 (D.V.I. 2001).

310. Edwards v. HOVENSA, LLC, 497 F.3d 355, 359 (3d Cir. 2007).

U.S. Virgin Islands by being "required to predict how the Supreme Court of the Virgin Islands would decide an issue of territorial law."[311]

Unfortunately, this did not occur in practice. The District Court simply disregarded certain precedents of the Virgin Islands Supreme Court, such as its holding that the Federal Rules of Evidence did not apply to proceedings in the Superior Court of the Virgin Islands[312] and its seminal decision that title 1, section 4 of the Virgin Islands Code[313] had been implicitly repealed in 2004.[314] Although the Supreme Court of the United States has long recognized that territorial organic acts constitute local law which does not form the basis for federal question jurisdiction, the District Court and the Third Circuit continued to take the position that they could exercise jurisdiction over any question implicating the Revised Organic Act of 1954 because of its purported status as a federal statute.

Surprisingly, this even included accepting jurisdiction to adjudicate issues involving the internal operations of the Judicial Branch of the Virgin Islands based purely on the Revised Organic Act and other territorial laws. In 2008 the District Court declined to abstain from a case challenging the legality of the Virgin Islands Commission on Judicial Disabilities and struck down the commission as violative not of federal law but the Revised Organic Act, with the Third Circuit affirming both aspects of that decision on appeal.[315] Even as late as 2016, the District Court and the Third Circuit both asserted jurisdiction over a dispute as to which superior court judge possessed the authority to serve as presiding judge of that court—an issue not even directly impacting the Revised Organic Act but relating only to local statutes—again bypassing the Supreme Court of the Virgin Islands entirely.[316] Significantly, in neither case did either the District Court or the Third Circuit make any attempt to predict how the Supreme Court of the Virgin Islands would interpret the territorial laws at issue.[317] And perhaps most egregiously, a panel of the Third Circuit disregarded the plain language and intent of Public Law 112-226—which terminated the temporary certiorari jurisdiction of the Third Circuit to review final

311. *Id.* at 361 n.3.

312. *Compare* Phillips v. People, 51 V.I. 258 (V.I. 2009) (holding that the statutory rules of evidence codified in the Virgin Islands Code apply to the exclusion of the Federal Rules of Evidence), *with* Thompson v. People, No. 2005-100, 2013 WL 5923653 (D.V.I. App. Div. Nov. 1, 2013) (applying the Federal Rules of Evidence without any mention of Phillips), *and* Bellot v. Gov't of the V.I., No. 2003-130, 2010 WL 3118660 (D.V.I. App. Div. July 30, 2010) (same).

313. 1 V.I.C. § 4 ("The rules of the common law, as expressed in the restatements of the law approved by the American Law Institute, and to the extent not so expressed, as generally understood and applied in the United States, shall be the rules of decision in the courts of the Virgin Islands in cases to which they apply, in the absence of local laws to the contrary.").

314. *Compare* Banks v. Int'l Rental & Leasing Corp., 55 V.I. 967 (V.I. 2011), *and* Gov't of the V.I. v. Connor, 60 V.I. 597 (V.I. 2014), *with* Dorval v. Fitzsimmons, Civ. No. 18-15, 2020 WL 376989 (D.V.I. Jan. 23, 2020) (citing 1 V.I.C. § 4 as authority despite its implicit repeal), *and* V.I. Taxi Ass'n v. V.I. Port Auth., Civ. No. 08-142, 2015 WL 5535237 (D.V.I. Sept. 16, 2015) (same).

315. Kendall v. Russell, 572 F.3d 126 (3d Cir. 2009).

316. Dunston v. Mapp, 672 Fed.Appx. 213 (3d Cir. 2016).

317. *Id.*

judgments of the Supreme Court of the Virgin Islands—and held that it could continue to exercise such jurisdiction effectively indefinitely.[318]

The courts of the Virgin Islands, however, have vigorously asserted their constitutional, statutory, and inherent authority despite this continued federal encroachment. In one of its earliest decisions, the Supreme Court of the Virgin Islands held that decisions of the District Court and the Third Circuit would not serve as binding precedent.[319] The Virgin Islands Supreme Court has declined to blindly follow erroneous interpretations of territorial law adopted by the federal courts, believing that the need to faithfully apply the laws enacted by the people of the U.S. Virgin Islands through their elected representatives was of paramount importance.[320] Rather than homogenize territorial law with the rest of the United States, it has not hesitated to adopt the best rule for the U.S. Virgin Islands, even when doing so required it to reject federal practices or follow a minority rule.[321] And most recently, the Virgin Islands Supreme Court has recognized that the Revised Organic Act constitutes territorial law and not federal law, and that it possesses the authority as the highest court of the U.S. Virgin Islands to definitively interpret the Virgin Islands Bill of Rights to provide greater protections than the United States Constitution.[322]

Even with respect to perhaps the most direct encroachment on its authority—the Third Circuit's erroneous interpretation of Public Law 112-226—the Virgin Islands Supreme Court actively asserted its rights through filing an *amicus curiae* brief on rehearing.[323] While unsuccessful in persuading the Third Circuit panel at the time, the position of the Supreme Court of the Virgin Islands would ultimately carry the day, with the Virgin Islands Bar Association assuming the *amicus curiae* mantel and successfully persuading the *en banc* Third Circuit to overturn the panel decision in a subsequent case.[324]

Perhaps the most significant conflict between the federal and territorial courts of the U.S. Virgin Islands occurred amid the 2014 election to the Legislature of the Virgin Islands with respect to the eligibility of incumbent Senator Alicia "Chucky" Hansen to hold that office. On appeal from the territorial trial court, the Supreme Court of the Virgin Islands held that Senator Hansen did not meet the qualifications for holding that office under the Virgin Islands Revised Organic Act, which provides that "[n]o person shall be eligible to be a member of the legislature . . . who has been convicted of a felony or of a crime involving moral turpitude and has not received a pardon restoring his civil rights."[325] The Virgin Islands Supreme

318. United Indus., Serv., Transp., Pro. & Gov't Workers of N. Am. Seafarers Int'l Union *ex rel.* Bason v. Gov't of the V.I., 767 F.3d 193, 200–01 (3d Cir. 2014).

319. *In re* People of the V.I., 51 V.I. 374, 389 n.9 (V.I. 2009).

320. *See, e.g.*, Rennie v. Hess Oil V.I. Corp., 62 V.I. 529, 543–45 (V.I. 2015); Hodge v. Bluebeard's Castle, Inc., 62 V.I. 671, 676–77 (V.I. 2015); Defoe v. Phillip, 56 V.I. 109, 118–20 (V.I. 2012).

321. *See, e.g.*, Antilles School, Inc. v. Lembach, 64 V.I. 400, 418–19 (V.I. 2016).

322. Balboni v. Ranger Am. of the V.I., Inc., 70 V.I. 1048, 1061 (V.I. 2019).

323. *See Bason*, 767 F.3d at 200 n.1.

324. Vooys v. Bentley, 901 F.3d 172, 173–75 (3d Cir. 2018) (en banc).

325. Bryan v. Fawkes, 61 V.I. 201, 239 (V.I. 2014); 48 U.S.C. § 1572(b).

Court interpreted this provision as including Senator Hansen's conviction for willful failure to file an income tax return and ordered her stricken from the ballot.[326]

The reasoning behind the territorial supreme court's decision is itself highly significant in that, in the process of interpreting the territorial organic act, the territorial supreme court determined that it and not the District Court possessed jurisdiction over the matter and declined to uncritically import several federally created doctrines to the Virgin Islands court system, such as rejecting the political question doctrine and *Chevron* deference.[327] However, it is the series of events that occurred after the territorial supreme court issued the decision that led some Virgin Islands attorneys to identify the case as the territorial equivalent of *Marbury v. Madison*.

Shortly after the Virgin Islands Supreme Court reached its decision, and while a petition for rehearing remained pending with that court, Senator Hansen received a pardon from the Governor of the Virgin Islands, thus restoring her civil rights.[328] Yet rather than await a ruling on the rehearing petition or otherwise ask for relief from the Virgin Islands Supreme Court, Senator Hansen and five voters filed a complaint in the District Court, requesting that she be placed back on the ballot.[329] Shockingly, the District Court exercised jurisdiction to grant this relief notwithstanding ongoing litigation on the very same subject in the territorial court system, and in effect created two contradictory judgments for the same disputed question.[330] After numerous proceedings in both the District Court and the territorial courts, the Supreme Court of the Virgin Islands issued a seminal opinion holding that the District Court lacked jurisdiction to insert itself into the dispute, that neither the Supremacy Clause nor any other provision of the United States Constitution or other federal or territorial laws elevates decisions of the District Court over those of the local courts—let alone on questions of local law—and reaffirmed its earlier holding striking Senator Hansen from the ballot.[331]

iii. Separation of Powers

Both territorial and federal courts agree that the Virgin Islands Revised Organic Act of 1954, as the *de facto* constitution of the U.S. Virgin Islands, "implicitly incorporate[s] the principle of separation of powers into the law of the territory."[332] Nevertheless, for most of its history, the Judicial Branch of the U.S. Virgin Islands, while nominally co-equal with the legislative and executive branches, lacked substantial authority over its own affairs. This is because until the Virgin Islands

326. Bryan v. Fawkes, 61 V.I. 201, 239 (V.I. 2014).

327. *See id.* at 218–20, 218 n.6, 225.

328. *Id.*

329. *Id.*

330. Payne v. Fawkes, Civ. Nos. 2014–053, 055, 2014 WL 4499559, at *2 (D.V.I. Sept. 12, 2014) (unpublished).

331. Bryan v. Fawkes, 61 V.I. 416, 437–38 (V.I. 2014).

332. Gerace v. Bentley, 65 V.I. 289, 301 (V.I. 2016) (quoting Kendall v. Russell, 572 F.3d 126, 135 (3d Cir. 2009)).

Supreme Court assumed jurisdiction in 2007, "the Virgin Islands lacked a fully developed local judiciary, with the District Court—a federal court established by Congress rather than the Legislature and consisting of judges selected by the President of the United States rather than the Governor of the Virgin Islands—possessing jurisdiction over most civil actions, and local courts only exercising jurisdiction over only relatively minor civil claims."[333] And "even though the Virgin Islands local judiciary continued to expand and receive greater jurisdiction over local matters in the decades that followed," it remained a lesser branch of government because prior to 2007 "all decisions rendered by the Superior Court and its predecessor courts continued to be reviewed on appeal by the District Court, which made it 'very difficult to attain' the goal of establishing 'an indigenous Virgin Islands jurisprudence' given that local judges lacked the ability to issue decisions that would constitute binding precedent in the territory."[334] In fact, the Virgin Islands Judiciary could not even fully exercise the inherent authority to regulate admission to the practice of law, since even the denial of a bar admissions decision could be appealed as of right to the District Court, which asserted plenary review over the subject.[335]

Unsurprisingly, the effect of the Virgin Islands Judiciary lacking meaningful autonomy for the first ninety years under the United States flag led to usurpation of many aspects of judicial power by other branches of government. Although promulgation of the rules of general applicability governing practice within a court system, such as rules of evidence and of civil and criminal procedure, are regarded as an inherent power of a jurisdiction's court of last resort,[336] the Virgin Islands Legislature codified numerous court rules as statutes in title 5 of the Virgin Islands Code.[337] While state and territorial court systems possess the inherent authority to shape the common law within their jurisdiction, the Legislature enacted a statute that, although bearing some resemblance to a reception statute, also provided that the Restatements approved by the American Law Institute would serve as the laws of the U.S. Virgin Islands in the absence of local laws to the contrary.[338] And like the District Court, the Legislature also inserted itself into attorney regulations, enacting laws granting the Virgin Islands Department of Licensing and Consumer Affairs the authority to license attorneys.[339]

The negative effects of these actions by the Legislature on the development of Virgin Islands law cannot be overstated. As one scholar observed, "the wholesale adoption of the Restatements might fairly be described as an invasion" and the

333. Banks v. Int'l Leasing & Rental Corp., 55 V.I. 967, 978 (V.I. 2011).

334. *Id.* (quoting BA Props. Inc. v. Gov't of the United States Virgin Islands, 299 F.3d 207, 212 (3d Cir. 2002)).

335. *See, e.g.*, In re Application No. 00017, 50 V.I. 594, 595 (D.V.I. App. Div. 2008); In re Adornato, 301 F. Supp. 2d 416, 418–19 (D.V.I. App. Div. 2004).

336. *Gerace*, 65 V.I. at 304–05 (collecting cases).

337. *See, e.g.*, 5 V.I.C. §§ 1–590 (civil procedure); 5 V.I.C. §§ 651–956 (evidence); 5 V.I.C. §§ 3501–4645 (criminal procedure).

338. 1 V.I.C. § 4.

339. Smith v. Magras, 124 F.3d 457, 466 (3d Cir. 1997).

resulting "interruption of the normal common-lawmaking process may actually be affirmatively harmful" to the U.S. Virgin Islands.[340] Rather than clarify the common law or provide for a uniform starting point for its development, courts "struggled" with applying it, resulting in significant litigation focused not on determining the best rule for the U.S. Virgin Islands, but on deciding collateral issues such as whether a tentative draft of a Restatement is binding or whether a new Restatement erases prior decisions applying an older Restatement.[341] Similarly, the statutory codification of court procedures—which were then rarely revisited after their initial enactment—did not serve to simplify court proceedings, but created significant uncertainty and litigation over what procedures governed, with courts issuing highly contradictory rulings on the question.[342] Likewise, the patchwork of rules and statutes governing admission to the Virgin Islands Bar, as well as differing courts purporting to exercise plenary authority over admission decisions, resulted in substantial confusion over what would ordinarily be a simple question—whether someone is or is not licensed to practice law in the U.S. Virgin Islands—some of which continues to persist even to this day.

As it did with federal precedents erroneously interpreting territorial law, the Supreme Court of the Virgin Islands declined to take the path of least resistance and permit these practices to stand. The Virgin Islands Supreme Court recognized that under the Revised Organic Act—the *de facto* Constitution of the U.S. Virgin Islands—it possessed the authority to determine the common law, and that the Legislature did not "possess[] the authority to adopt a statute which not completely deprives this Court of the ability to exercise its supreme judicial power to shape the common law, but delegates that power to the American Law Institute and to the governments of other jurisdictions."[343] While acknowledging that the Legislature could adopt some court procedures through statutes, it emphasized that its authority to do so was concurrent with that of the Virgin Islands Supreme Court, and "that conflicts between rules promulgated by the judiciary and rules promulgated by the legislature are resolved in favor of the judiciary."[344] And last, while certainly not least, the Virgin Islands Supreme Court vigorously asserted its inherent authority over regulation of the legal profession, including enforcing the prohibition on the unauthorized practice of law even against high-level government attorneys.[345]

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340. Kristen David Adams, *The Folly of Uniformity? Lessons From the Restatement Movement*, 33 HOFSTRA L. REV. 423, 456–57 (2004).

341. *See, e.g.*, In re Manbodh Asbestos Litig. Series, 47 V.I. 215, 225–26 (V.I. Super. Ct. 2005); *see also* Joseph T. Gasper, *Too Big to Fail: Banks and the Reception of the Common Law in the U.S. Virgin Islands*, 46 STETSON L. REV. 295, 337–44 (2016).

342. *See, e.g.*, Gov't of the V.I. v. Greenridge, 41 V.I. 200, 208 n.5 (D.V.I. App. Div. 1998); Gov't of the V.I. v. Sampson, 42 V.I. 247, 261 n.8 (D.V.I. App. Div. 2000); Enfield Green Homeowners Ass'n v. Francis, 46 V.I. 332, 337 n.4 (D.V.I. App. Div. 2004).

343. Banks v. Int'l Rental & Leasing Corp., 55 V.I. 967, 980 (2011).

344. *Gerace*, 65 V.I. at 302–03.

345. *See, e.g.*, *In re* Campbell, 59 V.I. 701, 709 (V.I. 2013).

IV. THE UNTAPPED POTENTIAL OF TERRITORIAL CONSTITUTIONAL LAW

As the above cases illustrate, territorial courts—and particularly the courts of the Virgin Islands—have not hesitated to exercise the full extent of their constitutional, statutory, and inherent authority, even in instances when doing so may be controversial or result in an uncertain outcome. In doing so, such courts have also not shied away from declining to incorporate unrelated federal laws into the jurisprudence of the territory. But what does this mean for the future of the nascent field of territorial constitutional law, and public interest litigation to secure the rights and liberties of the people of the territories?

While it may be cliché to say, the possibilities are truly endless. One need only look to how state supreme courts have interpreted state constitutions—including provisions with similar or identical language to provisions of the federal bill of rights—to imagine the sorts of protections for individual rights and liberties that a territorial supreme court could enact through interpretation of its territorial constitution or organic act. This includes, but is not necessarily limited to, more robust equal protection and due process guarantees;[346] a fundamental right to education;[347] or even a right to be forgotten.[348]

Territorial legislatures, however, are not the source of most frustrations about the legal rights of the territories and their people. Rather, the issues that have drawn the most attention from both public interest litigators and the media in recent years are of a seemingly federal nature.[349] Yet it is well established that the federal government is not bound by state laws—including state constitutions—unless it voluntarily acquiesces to such laws.[350] How, then, can territorial constitutions and organic acts play any role in ensuring that the people of the territories receive equal treatment vis-à-vis the federal government?

As a threshold matter, the federal government has in fact bound itself to the bill of rights provisions in the territorial organic acts of the U.S. Virgin Islands and Guam, at least in part. As the Supreme Court of the United States recognized in *Limtiaco*,[351] territorial organic acts often are hybrid documents in which some provisions may represent Congress acting in its capacity as a national legislature even if most of the legislation is directed only to a single territory.[352] This is the case with the last sentence of the Virgin Islands Bill of Rights, codified in the Virgin Islands Revised Organic Act through the 1968 amendments, which provides, in its entirety, as follows:

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346. *See* Balboni v. Ranger Am. of the V.I., Inc., 70 V.I. 1048, 1067–68 (2019).

347. *See, e.g.*, Horton v. Meskill, 376 A.2d 359, 373 (Conn. 1977).

348. *See* John W. Dowdell, *An American Right to be Forgotten*, 52 TULSA L. REV. 311 (2017).

349. *See, e.g.*, Tuaua v. United States, 788 F.3d 300 (D.C. Cir. 2015) (citizenship).

350. *See, e.g.*, U.S. Dep't of Energy v. Ohio, 503 U.S. 607 (1992); Dalehite v. United States, 346 U.S. 15 (1953); United States v. Summerlin, 310 U.S. 414, 417 (1940); United States v. Reid, 53 U.S. 361 (1851).

351. Limtiaco v. Camacho, 549 U.S. 483, 491–92 (2007).

352. *Id.*

> All laws enacted by Congress with respect to the Virgin Islands and all laws enacted by the territorial legislature of the Virgin Islands which are inconsistent with the provisions of this subsection are repealed to the extent of such inconsistency.[353]

The Bill of Rights provision included in the Organic Act of Guam contains virtually identical language.[354] The subsection containing this provision does not just include many enumerated rights, but also incorporates numerous provisions of the United States Constitution by reference—including "the first to ninth amendments inclusive; the thirteenth amendment; the second sentence of section 1 of the fourteenth amendment; and the fifteenth and nineteenth amendments"—which "shall have the same force and effect [in the U.S. Virgin Islands] as in the United States or in any State of the United States."[355]

Despite the extraordinary breadth of its language, this clause has received scant attention from litigants and courts. In fact, it appears that only one court has had an opportunity to construe it. In *Government of the Virgin Islands v. Ortiz*,[356] the United States Court of Appeals for the Third Circuit considered whether this repealer clause had repealed the federal Bail Reform Act as it pertained to the United States District Court of the Virgin Islands, given that the Bail Reform Act contained provisions inconsistent with one of the enumerated provisions in the Virgin Islands Bill of Rights providing that "[a]ll persons shall be bailable by sufficient sureties in the case of criminal offenses, except for first-degree murder or any capital offense when the proof is evident or the presumption great."[357] Somewhat surprisingly, it was the federal government which argued that the repealer clause had repealed the pertinent provisions of the Bail Reform Act.[358] Ultimately, the Third Circuit adopted a narrow construction of the repealer clause, and effectively engaged in judicial rewriting of the statute to construe the word "subsection" as "paragraph" to conclude "that Congress intended . . . that the repealer clause in the amendment to section 1561 should apply only to laws inconsistent with the constitutional provisions extended to the Virgin Islands by the same amendment, and not to laws inconsistent with other antecedent provisions of section 1561."[359]

Since the Third Circuit by its own admission interpreted the repealer clause in a manner directly contrary to its plain text, its holding that Congress did not repeal laws contrary to the enumerated provisions of the Virgin Islands Bill of Rights is inherently questionable.[360] In fact, the territorial courts of the U.S. Virgin Islands

353. 48 U.S.C. § 1561.

354. 48 U.S.C. § 1421b.

355. 48 U.S.C. § 1561.

356. Gov't of the Virgin Islands v. Ortiz, 427 F.2d 1043 (3d Cir. 1970).

357. *Id.* at 1045 (quoting 48 U.S.C. § 1561).

358. *See id.* at 1045–46

359. *Ortiz*, 427 F.2d at 1046.

360. In fact, the *Ortiz* court, perhaps recognizing this questionable reasoning, ultimately resolved its case by extending the federal Bail Reform Act to prosecutions in the United States District Court of the Virgin Islands pursuant to its supervisory powers. *Id*. at 1048.

have declined to treat the *Ortiz* decision as binding, and have held that the federal Bail Reform Act does not apply to prosecutions in the territorial courts.[361] Nevertheless, the Third Circuit expressly and unambiguously held in *Ortiz* that the repealer clause served to repeal all federal laws applicable to the U.S. Virgin Islands inconsistent with "the first to ninth amendments inclusive; the thirteenth amendment; the second sentence of section 1 of the fourteenth amendment; and the fifteenth and nineteenth amendments," with those provisions "hav[ing] the same force and effect [in the U.S. Virgin Islands] as in the United States or in any State of the United States."[362]

The profound effect of even such a highly limited interpretation of the repealer clause of the Virgin Islands Bill of Rights cannot be understated. At an absolute minimum, it means that all federal laws that exclude the U.S. Virgin Islands from federal assistance programs or provide lesser benefits to residents of the U.S. Virgin Islands than residents of the fifty states,[363] are invalid. This is not because the United States Constitution compels this result, even though that may very well be the case.[364] Rather, it is because Congress voluntarily chose to treat the U.S. Virgin Islands in the same manner as if it were a state for purposes of the Equal Protection Clause of the Fourteenth Amendment, and voluntarily elected to repeal all federal laws pertaining to the U.S. Virgin Islands that would be inconsistent with such treatment. That Congress intended for the federal government to be bound as this may further explain its otherwise curious decision to not expressly extend the Supremacy Clause of the United States Constitution to the U.S. Virgin Islands.[365]

But the existence of a repealer clause or other congressional action binding the federal government to the provisions of a territorial constitution or organic act, while certainly helpful, is not a prerequisite to the use of territorial constitutional law to safeguard federal rights. It is certainly true that courts have consistently held that the federal government is not bound by the provisions of territorial laws without its consent.[366] However, the United States government is not the only entity within our federalist system that possesses an obligation to follow the United States Constitution. Many rights, while certainly federal in nature, are in practice implemented by state and territorial governments. Although the right to be free from unreasonable searches and seizures is a federal right safeguarded by the Fourth Amendment to the United States Constitution, the right is rarely enforced by directly suing the federal government; rather, most Fourth

361. *See, e.g.*, Browne v. People, 50 V.I. 241, 253 (2008); People v. Dowdye, 48 V.I. 45, 59–68 (V.I. Super. Ct. 2006).

362. 48 U.S.C. § 1561.

363. For a summary of some of these programs, see DISABILITY RIGHTS CENTER OF THE V.I., SHADOW CITIZENS: CONFRONTING FEDERAL DISCRIMINATION IN THE U.S. VIRGIN ISLANDS, https://www.drcvi.org/documents/general/DRCVI-ShadownCitizens.pdf?downloadable=1.

364. *See* United States v. Vaello-Madero, 956 F.3d 12 (1st Cir. 2020).

365. *See* People v. Clark, 53 V.I. 183, 195–96 (V.I. Super. Ct. 2010) (holding that the Supremacy Clause has not been extended to the U.S. Virgin Islands).

366. *See, e.g.*, United States v. Acosta Martinez, 252 F.3d 13 (1st Cir. 2001); United States v. Quinones, 758 F.2d 40 (1st Cir. 1985); United States v. Lebron-Caceres, 157 F. Supp. 3d 80 (D.P.R. 2016).

Amendment law is developed in individual criminal cases, including cases in state and territorial courts where the United States is not a party. While United States citizenship is a federal right, state and territorial laws often restrict the right to vote in local elections to United States citizens, which requires state and territorial officials to determine if an individual is in fact a citizen. And although federal law establishes minimum standards for absentee voting by military and overseas voters, it is ultimately the responsibility of states and territories to apply those standards in the elections they oversee.

That territorial governments themselves are required to implement federal statutes or otherwise determine the existence of a federal right provides significant opportunities to utilize territorial constitutional law, both directly and indirectly. For example, although the United States Court of Appeals for the Third Circuit has extended the international border search exception of the Fourth Amendment to permit warrantless searches of passengers and goods entering and leaving the U.S. Virgin Islands,[367] the territorial courts of the U.S. Virgin Islands could interpret the search and seizure provisions of the Virgin Islands Bill of Rights to preclude the use of evidence obtained during such searches. Even if such a ruling were limited only to local prosecutions—which may not necessarily be the case in light of the repealer clause of the Virgin Islands Bill of Rights—such a decision may nevertheless modify the behavior of law enforcement officers so as to avoid evidence potentially being suppressed in local prosecutions. While challenges to the constitutionality of discriminatory federal statutes relating to voting rights that have been dismissed for lack of Article III standing in the federal courts—such as the constitutionality of the oversees voting provisions in the Uniformed and Overseas Absentee Voting Act as applied to Guam, Puerto Rico, and the U.S. Virgin Islands[368]—could be heard on the merits in territorial courts, since concepts such as standing, ripeness, and mootness, while jurisdictional in the federal courts, are often not jurisdictional in territorial courts due to territorial constitutions and organic acts containing different language than the Cases and Controversies Clause of the United States Constitution. Although the scope of such a decision would only apply to elections in the U.S. Virgin Islands, the existence of a decision declaring a federal statute unconstitutional substantially increases the likelihood of review by the Supreme Court of the United States, which would have the potential to then set a nationwide precedent.

Last, but certainly not least, the creation of a highly robust body of territorial constitutional law developed by territorial courts is critically necessary to further the development of *federal* constitutional law, particularly as it relates to the rights of territorial governments and their peoples. It is clear that "state courts, through their interpretation of state constitutional provisions, can contribute to the

367. *See, e.g.*, United States v. Baxter, 951 F.3d 128 (3d Cir. 2020); United States v. Hyde, 37 F.3d 116 (3d Cir. 1994).

368. *See, e.g.*, Segovia v. United States, 880 F.3d 384 (7th Cir. 2018).

safeguards of American federalism."[369] Throughout our nation's history, "state court decisions have shaped federal law in the areas of judicial review, substantive due process, freedom of speech and religion, eminent domain, the right to bear arms, and the rights of the accused."[370] This is particularly true in areas involving "social and economic rights," where state court decisions serve to indirectly "reorient federal constitutional doctrine" by "creat[ing] new understandings that 'presage' federal constitutional rights" ultimately recognized by the United States Supreme Court.[371] In other words, it is an underappreciated yet "essential constitutional function of state courts to engage federal courts in a dialogue about the scope of federally created rights."[372]

The influence of state courts on federal constitutional law has most recently been seen in the case of same-sex marriage. In an approximately 40-year period the Supreme Court of the United States shifted from holding in *Baker v. Nelson* that the exclusion of same-sex couples from marriage did not present a substantial federal question[373] to determining in *Obergefell v. Hodges* that inclusion of same-sex couples in the institution of marriage is constitutionally mandated.[374] This watershed change was facilitated by a series of state supreme court decisions finding such rights in their state constitutions,[375] which influenced the lower federal courts to take the rare step of in effect overturning.

The underdevelopment of territorial constitutional law over the past century has certainly contributed to the present status quo, where the lower federal courts continue to apply a bastardized misinterpretation of the *Insular Cases* to permit Congress to exercise plenary authority over the territories. Changes to federal constitutional law because of the ongoing dialogue between state supreme courts and the federal courts remains possible only because state supreme courts are not subservient or lower than the federal courts of appeals. This "dialectical federalism" successfully operates because the "courts [a]re required both to speak and listen as equals," engaging in an "open-ended dialogue [which] becomes the driving force for the articulation of rights," to be ultimately resolved by the United States Supreme Court.[376] Yet until relatively recently, territorial courts did not serve as the

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369. John Dinan, *State Constitutional Amendment Processes and the Safeguards of American Federalism*, 115 PENN ST. L. REV. 1007 (2011) (citing JAMES A. GARDNER, INTERPRETING STATE CONSTITUTIONS: A JURISPRUDENCE OF FUNCTION IN A FEDERAL SYSTEM (2005)).

370. Robert F. Utter, *Swimming in the Jaws of the Crocodile: State Court Comment on Federal Constitutional Issues When Disposing of Cases on State Constitutional Grounds*, 63 TEX. L. REV. 1025, 1030 (1985) (collecting cases).

371. Helen Hershkoff, *"Just Words": Common Law and the Enforcement of State Constitutional Social and Economic Rights*, 62 STAN. L. REV. 1521, 1530–31 (2010).

372. Jay Tidmarsh, *A Dialogic Defense of Alden*, 75 NOTRE DAME L. REV. 1161, 1167-68 (2000).

373. Baker v. Nelson, 409 U.S. 810 (1972), *overruled by* Obergefell v. Hodges, 576 U.S. 644 (2015).

374. Obergefell v. Hodges, 576 U.S. 644 (2015).

375. *See, e.g.*, Baehr v. Lewin, 852 P.2d 44 (Haw. 1993); Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003).

376. Harry L. Witte, *Rights, Revolution, and the Paradox of Constitutionalism: The Processes of Constitutional Change in Pennsylvania*, 3 WIDENER J. PUB. L. 383, 421 (1993) (internal citations omitted).

equals of the lower federal courts, in that for much of the past century the lower federal courts possessed appellate jurisdiction over even the highest court of a territory, in effect preventing the territories from developing their own indigenous jurisprudence to push-back against more restrictive interpretations of the United States Constitution.[377]

Today, the territorial supreme courts of all five territories are fully independent of the federal courts—or at least as independent as the supreme courts of the fifty states. And as summarized earlier, these territorial supreme courts—and the Supreme Court of the Virgin Islands in particular—have initiated dialogues with the lower federal courts on several important issues of both territorial and federal constitutional magnitude.[378] As territorial courts and federal courts continue to engage with each other as equals, with territorial courts utilizing territorial constitutional law to provide the protections that the federal courts have been unwilling to give, the result will at an absolute minimum be a more coherent and thoughtful body of the law of the territories, developed and refined by reasoned analysis rather than blind reliance on the *Insular Cases*.

V. CONCLUSION

The local courts of the five inhabited United States territories, as well as the judicial officers that serve on them, have accomplished much over a relatively short period of time. Despite continued challenges to their legitimacy and authority vis-à-vis the federal courts and other institutions, these territorial courts have established mature legal systems and a robust body of jurisprudence, including interpretation of their territorial constitutions and organic acts. Yet the work of these territorial courts remains overlooked even by those who believe that the courts must play a key role in ensuring equal rights for their territories and their people. Modern territorial courts not only possess the authority to develop their own body of binding territorial constitutional law, free of federal review, but have demonstrated time and time again that they will exercise this power if given the chance in appropriate cases.

It is difficult to predict with any certainty how the relationship between the United States and these five territories will develop over the next several decades. But as this Article has hopefully demonstrated, territorial constitutional law has the potential to play an important role in shaping that relationship, particularly in the face of a federal judiciary that is indifferent or even hostile to the rights of the territories and their people. While territorial courts have indicated their willingness to utilize territorial constitutional law to vindicate such rights, the future of territorial constitutional law will ultimately depend on whether territorial governments, territorial rights activists, and their attorneys choose to accept their invitation.

377. *See, e.g.*, Guam v. Guerrero, 290 F.3d 1210 (9th Cir. 2002).

378. *See* discussion *supra* Part III.C.