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# TERRITORIAL PATERNALISM

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## I. BACKGROUND

The words "Equal Justice Under Law" are etched above the main entrance to the building of the Supreme Court of the United States.[1] Yet we know that this ideal has not been achieved for all Americans. Our society celebrates seminal Supreme Court cases like *Brown v. Board of Education*[2] and *Loving v. Virginia*,[3] but we cannot forget that such decisions were only necessary because of earlier decisions like *Dred Scott v. Sandford*[4] and *Plessy v. Ferguson*[5]—cases which gave their blessing to slavery, Jim Crow laws, and other horrific injustices.

Today, most Americans support racial equality and claim they would have opposed slavery or marched for civil rights if they were alive during those periods. However, the historical record reflects that a large majority of Americans opposed these movements, with public support only growing decades later.[6] Such attitudes were not limited to members of the public. For instance, it is often overlooked that the Supreme Court in *Brown* had reversed the decision of a three-judge panel of the United States District Court for the District of Kansas that entered judgment in favor of the Topeka Board of Education after holding that segregated school systems were not unconstitutional.[7]

It may be tempting to simply dismiss the judges who authored or joined decisions affirming slavery, segregation, and similar horrors as openly and unabashedly racist. While they certainly were racist, these opinions mimicked the so-called "Southern Strategy," utilizing abstract reasoning and concepts to reach the result rather than simply citing to racist rhetoric.[8] For instance, the district court opinion in *Brown* did not state that it was upholding school segregation because African-Americans were an inferior race; rather, the opinion follows the traditional structure and form of a judicial opinion, purporting to reach the result based on

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[1] *About the Court*, SUPREME COURT OF THE UNITED STATES, http://www.supremecourt.gov/about/about.aspx (last visited June 16, 2021).

[2] 349 U.S. 294 (1955).

[3] 388 U.S. 1 (1967).

[4] 60 U.S. 393 (1857).

[5] 163 U.S. 537 (1896).

[6] *See* David Sirota, *Polls Showed Many Americans Opposed to Civil Rights Protests in the 1960s. But That Changed*, JACOBIN (June 12, 2020), https://www.jacobinmag.com/2020/06/polls-george-floyd-protests-civil-rights-movement.

[7] Brown v. Bd. of Educ., 347 U.S. 483, 487 (1954).

[8] Rick Perlstein, *Exclusive: Lee Atwater's Infamous 1981 Interview on the Southern Strategy*, THE NATION (Nov. 13, 2012), https://www.thenation.com/article/exclusive-lee-atwaters-infamous-1981-interview-southern-strategy/.

legal analysis and application of precedent. Moreover, the lower court highlighted some of the purported benefits of the segregated system, such as how "the school district transports colored children to and from school free of charge," while "[n]o such service is furnished to white children."[9]

For the people who reside in America's territories, the phrase "Equal Justice Under Law" remains an illusion. More than one-hundred years ago, the Supreme Court relied on now-discredited theories of racial inequality and the white man's burden to hold in the *Insular Cases* that the United States Constitution does not follow the flag.[10] The Supreme Court denied these constitutional protections to residents of America's insular territories with the support of the legal academy, with prominent scholars of the time publishing articles in the leading law review supporting separate and unequal treatment of the territories acquired after the Spanish-American War based on conceptions of racial inferiority.[11] In effect, the legal elites of American society determined that the overwhelmingly non-white residents of these territories were simply unable to be governed in accordance with the United States Constitution.

Today, any judge or lawyer who used the same racist rhetoric relied upon in the *Insular Cases* would face professional discipline,[12] and any law professor who promoted such ideas would be immediately removed from the classroom.[13] Clearly, it is no longer acceptable to

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[9] Brown v. Bd. of Educ., 98 F. Supp. 787, 798 (D. Kan. 1951).

[10] 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. New York & Porto Rico Steamship Co., 182 U.S. 392 (1901). However, some jurists and scholars include additional cases within the *Insular Cases*, such as Dooley v. United States, 183 U.S. 151 (1901); Fourteen Diamond Rings v. United States, 183 U.S. 176 (1901); Kepner v. United States, 195 U.S. 100 (1904); Dorr v. United States, 195 U.S. 138 (1904); and Balzac v. Puerto Rico, 442 U.S. 465 (1922). For purposes of this Essay, 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.

[11] *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).

[12] *See* AM. BAR ASS'N MODEL RULE OF PRO. CONDUCT 8.4(g).

[13] *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/.

profess that rights should be withheld from the residents of American territories because they are "alien races," "savage," "half-civilized," or "ignorant and lawless."[14]

Although rhetoric has changed, the law has not. Unlike *Dred Scott* and *Plessy*, the *Insular Cases* have not been expressly overturned, and in fact are still cited by judges, lawyers, and Presidential administrations of all parts of the ideological spectrum as grounds for treating certain American territories less favorably.[15] While their racist reasoning may have been disavowed,[16] the *Insular Cases* continue to serve as a justification for treating some Americans differently because of where they call home.

The continued vitality of the *Insular Cases* more than a century later—combined with high profile events such as the Puerto Rican debt crisis and Hurricane Irma—has drawn renewed attention to the political and legal statuses of America's insular territories. Organizations such as the American Bar Association have publicly called for territorial equality in many areas such as voting rights.[17] Leading law reviews such as the *Yale Law Journal* and the *Harvard Law Review*, in an apparent attempt to atone for their role in the *Insular Cases*, have published special issues with scholarship calling for their overturn. Law schools including Yale Law School and Columbia Law School have offered courses focused on the *Insular Cases* and the law of the territories.

Unfortunately, during this period of renewed interest, some legal elites have proposed what they describe as "new" solutions to the status question.[18] These proposals essentially concede that the *Insular Cases* were wrongly decided, but ultimately push against efforts to formally overturn the *Insular Cases*. Instead, 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 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,[19] establishing a "different but equal" regime in which territories would be permitted to enact legislation

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[14] *See* Thayer, *supra* note 11, at 475; Baldwin, *supra* note 11, at 415; *Downes*, 182 U.S. at 287.

[15] Adriel I. Cepeda Derieux & Neil C. Weare, *After Aurelius: What Future for the Insular Cases?*, 130 YALE L. J. FORUM 284 (2020).

[16] *Id.*

[17] *See, e.g.*, Am. Bar Ass'n Resolution 10C (Aug. 2020).

[18] *See, e.g., Territorial Federalism*, 130 HARV. L. REV. 1632 (2017); 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 CAL. L. REV. 1249 (2019).

[19] Lin, *supra* note 18, at 1253.

which discriminates against "mainlanders,"[20] and persuading the federal courts to "actively scrutinize" (but not prohibit) "congressional intervention in territorial self-governance."[21] Though they are given different names by their proponents, all of these proposals urge the territorial peoples to acquiesce to what is best described as a territorial paternalism.

Why do these scholars urge that territorial residents and their allies abandon the quest for equal rights? The reason, they claim, is that the Americans who call the territories home are "politically powerless."[22] They live in "geographic isolation"[23] on "crumbling island[s]"[24] with "simple econom[ies]"[25] that are "generally stagnant."[26] They have "problems securing safe drinking water."[27] They are "prime targets for enemies of the United States,"[28] and generally live their lives with "a sense of hopelessness"[29] because of the "cauldron of burdens that their fellow citizens in the States do not have to carry."[30] The people of the territories, these scholars maintain, should not make 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."[31] 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.[32] And because the people of the territories cannot be trusted to preserve their culture, "territorial residents, to co-exist meaningfully—to be equal, in a sense—in the American republican system require a different set of rights and obligations," such as the allowance to enact ancestry-based restrictions on alienation of land to "mainlanders."[33]

This reasoning is no different from the *Insular Cases* and the scholarship written to support unequal treatment; the only difference is

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[20] Rennie, *supra* note 18, at 1708-09.
[21] *Territorial Federalism*, *supra* note 18, at 1653-54.
[22] Lin, *supra* note 18, at 1252.
[23] *Id.* at 1264.
[24] *Id.* at 1252.
[25] *Id.* at 1260.
[26] *Id.* at 1261.
[27] *Id.* at 1272.
[28] *Id.* at 1276.
[29] *Id.* at 1271.
[30] *Id.* at 1281.
[31] *Id.* at 1284.
[32] *Territorial Federalism*, *supra* note 18, at 1653-54.
[33] Rennie, *supra* note 18, at 1709-10.

that words like "savage," "half-civilized," and "ignorant" have been replaced with words like "powerless," "isolated," and "hopeless." Despite purporting to take a moderate position,[34] these proposals effectively use soft language to embrace the reasoning and result of the *Insular Cases*:[35] namely, that residents of the territories are unable to care for themselves and should be treated differently by the federal government. The proponents of territorial paternalism, while publicly professing support for the people of the territories, have crossed the line going from ally to "white savior." [36]

Had these articles been ignored by the courts and other decision-makers—as is the case with much legal scholarship[37]—it would be simple to dismiss these theories as well-meaning but misguided. However, just as the Supreme Court of the United States made Lowell's "Third Way" into the law of the land a century ago, some courts have accepted the invitation to purportedly "repurpose" the *Insular Cases*. Most prominently and recently, the United States Court of Appeals for the Tenth Circuit expressly invoked the *Insular Cases* to withhold birthright citizenship from the people of American Samoa and other territories:

> Notwithstanding its beginnings, the approach developed in the *Insular Cases* and carried forward in recent Supreme Court decisions can be repurposed to preserve the dignity and autonomy of the peoples of America's overseas territories . . . The flexibility of the *Insular Cases*' framework gives federal courts significant latitude to

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[34] 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. Lowell, *supra* note 11.

[35] Hon. 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 (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.").

[36] The "white savior" is a common trope in literature 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).

[37] *See generally* Mark Cooney, *What Judges Cite: A Study of Three Appellate Courts*, 50 STETSON L. REV. 1 (2020).

> preserve traditional cultural practices that might otherwise run afoul of individual rights enshrined in the Constitution. This same flexibility permits courts to defer to the preferences of indigenous peoples, so that they may chart their own course.[38]

Ultimately, the Tenth Circuit utilized this "flexibility" to defer to the wishes of the Executive Branch of the Government of American Samoa, which argued that birthright citizenship under the Citizenship Clause should be denied not just to all American Samoans, but to those born in other United States territories as well.

This Article strives to deconstruct and dismantle the most prominent misconceptions and outright lies being used to justify the continued withholding of constitutional rights and liberties from American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands. Part II addresses the claim that territories are not self-governing or are otherwise effectively ruled from Washington, D.C., by a Congress that is completely unresponsive to any of their concerns. Part III examines the portrayal of the territories as geographically isolated, crumbling, lacking safe drinking water, and otherwise substantially underdeveloped compared to the mainland United States. Finally, Part IV proposes several empowering strategies that the territories and their allies could pursue to improve their current status-quo, which are not grounded in paternalism and would not require surrendering the long-term struggle for equal rights.

## II. TERRITORIAL SELF-GOVERNMENT AND POLITICAL POWER

Proponents of a "pragmatic" solution describe America's territories as "colonies of bygone eras," representing that "[t]he Territories have various forms of limited, local self-governance," and "are subject to the plenary powers of Congress" through the Territorial Clause of the United States Constitution, which "imposes very few limitations on Congress's plenary powers."[39] Congress is purportedly not responsive to the needs of the territories because "the Territories do not have a voting representative in the House or Senate that can advocate on their behalf" and "also do not have an electoral vote in the Electoral College for presidential elections."[40]

To describe America's five insular territories as "colonies" having

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[38] Fitisemanu v. United States, 1 F.4th 862, 870-71 (10th Cir. 2021).
[39] Lin, *supra* note 18, at 1265.
[40] *Id.*

only "limited, local self-governance" is, of course, inaccurate. It is 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.[41] This was also the case with the U.S. Virgin Islands after its annexation in 1917,[42] 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.[43]

But while territorial governments may have only exercised "limited" power in the past, today that is no longer the case. Puerto Rico became self-governing in 1952 with the ratification of the Constitution of Puerto Rico, which provided for a locally elected Governor, a 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.[44] American Samoa also achieved nearly equivalent local control over its internal affairs with 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.[45] The U.S. Virgin Islands and Guam achieved self-governance in a more piecemeal fashion, with a locally elected Legislature ultimately authorized in 1950, a locally-elected Governor granted in 1968, and a locally appointed Judicial Branch authorized in 1984, although the territories chose not to establish the local supreme courts until later.[46] The Commonwealth of the Northern Mariana Islands has always been self-governing, having joined the United States as a territory in 1986 with a constitution authorizing a locally elected Governor, a locally elected Legislature, and a locally appointed Judicial Branch.[47]

The modern-day territorial governments of American Samoa, Guam, Puerto Rico, the Northern Mariana Islands, and the U.S. Virgin Islands are the equivalent of a state government in virtually every way. Their territorial governors exercise the same powers with the same

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[41] *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).

[42] *Id.* at 494-96.

[43] *Id.* at 472-96.

[44] *Id.* at 472-73.

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

[46] *See* In re Camacho, 2004 Guam 10 ¶¶ 28-30 (Guam 2006); Jackson v. West Indian Co., 944 F. Supp. 423, 429 (D.V.I. 1996).

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

limitations as their counterparts in the fifty states. Their territorial legislatures may pass laws on any subject upon which a state legislature would be permitted to do the same. 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.[48]

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 indistinguishable from the governments of the fifty states. To describe this as only "limited, local self-governance" diminishes the work of the Americans who serve in our territorial governments and minimizes the accomplishments of the territorial residents who fought for these rights over the course of a century.

Of course, America's territories remain subject to the powers of Congress vested through the Territorial Clause, whatever they may be.[49] But when in recent memory has Congress *actually* exercised this power to nullify territorial legislation? Congress has not nullified legislation duly enacted by a territorial government pursuant to its powers under the Territorial Clause since those territorial governments began to operate as the equivalent to state governments. Even in American Samoa—where the territorial constitution reserves certain rights to the Secretary of the Interior—such interference has not occurred, and the Secretary of Interior declines to exercise any authority out of a "desire to foster autonomy and self-governance . . ."[50]

Moreover, placing such heavy emphasis on the powers that Congress may exercise over the territories under the Territorial Clause

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[48] *See, e.g.*, MRL Development I, LLC v. Whitecap Inv. Corp., 823 F.3d 195, 201-202 (3d Cir. 2016); Davison v. Gov't of P.R.-P.R. Firefighters Corps., 471 F.3d 220, 223 (1st Cir. 2006).

[49] Professor Lin describes the power of Congress under the Territorial Clause as a "plenary" power with "very few limitations." Lin, *supra* note 18, at 1265-66. However, even the United States Supreme Court has not described the Territorial Clause in such terms, having emphasized that the power of Congress was plenary only with respect to establishing temporary governments. Reid v. Covert, 354 U.S. 1, 14 (1957). Because the temporary governments in existence at the time the *Insular Cases* were decided no longer exist and have been replaced with permanent territorial governments that function in all meaningful respects as state governments, it is arguable—and perhaps even likely—that Congress can no longer exercise complete and unfettered plenary control over the internal affairs of American Samoa, Guam, Puerto Rico, the Northern Mariana Islands, and the U.S. Virgin Islands.

[50] Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Hodel, 637 F. Supp. 1398, 1417 (D.D.C. 1986).

wrongfully implies that the fifty states may operate independently without Congressional interference. Yet, under the Supremacy Clause, Congress possesses plenary authority over the states in all areas in which federal power exists, including the enactment of federal laws that "curtail or prohibit the States' prerogatives to make legislative choices respecting subjects the States may consider important."[51] Such federal powers include the power to regulate interstate commerce under the Commerce Clause—a power so broad that it has been described as authorizing Congress to regulate virtually anything.[52] Despite this reality, no one would seriously contend that the residents of the fifty states may only exercise "limited, local self-governance."[53]

Proponents of territorial paternalism are correct about one thing: none of the five inhabited United States territories possesses electoral votes or representatives with a floor vote in Congress. The failure of the United States to provide such representation to the peoples of American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands is "a gross civil rights violation perpetrated for over a century against several million U.S. citizens," and as a matter of policy it is completely indefensible that "geographic location should make any difference or have any relevance to a determination of such fundamental questions as the rights to which a citizen is entitled."[54]

It is a far cry to say that the lack of electoral votes or congressional representatives with a floor vote renders the territories completely powerless with no say in shaping national policy. The characterization of the territories' House delegates as "powerless" 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 the Speaker unless passage is expected. As a result, representatives who have a floor vote but are not permitted to serve

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

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

[53] In fact, territorial governments may in certain instances exercise even greater powers than their counterparts in the fifty states. The United States Court of Appeals for the Ninth Circuit has held that because territorial governments are instrumentalities of the federal government, the restraints of the Dormant Commerce Clause do not apply, and Guam and the Northern Mariana Islands may therefore adopt laws that discriminate against non-local commerce that would be unconstitutional if enacted by a state. *See* Sakamoto v. Duty Free Shoppers, Ltd., 764 F.2d 1285 (9th Cir. 1985); *see also* 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 LAW 1223 (2010).

[54] Torruella, *supra* note 35, at 97.

on committees are said to be "in exile" and "kind of just a hitchhiker" with "very little influence."[55] Delegate Stacey Plaskett of the U.S. Virgin Islands, for example, 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.[56]

The practical effect of the lack of electoral votes allocated to the territories is substantially overstated. It is common knowledge that in today's polarized political climate, presidential campaigns ignore states they view as "safe" for their political party or that of their opponent, instead focusing only on so-called swing states.[57] Not surprisingly, a substantially disproportionate amount of federal funds are typically steered to swing states by the Executive Branch in the years prior to a presidential election.[58] While it is certainly true that excluding the territories from the general election for President of the United States constitutes a gross violation of civil rights for the people of those territories (given that all five territories would likely be "safe" for a political party), it is not readily apparent that any of the territories would be in a greater position to influence national legislation if they were to receive electoral votes through constitutional amendment or otherwise.[59]

## III. LIFE IN THE TERRITORIES

Proponents of territorial paternalism typically juxtapose the territories' lack of political power with a portrayal of life in those territories as significantly worse than life in the fifty states. Such

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[55] *See, e.g.*, Melanie Zanona, *'They Basically Have Nothing To Do': Trio of Republicans Face Life in Exile*, POLITICO (Feb. 4, 2019), https://www.politico.com/story/2019/02/04/congress-house-republicans-committee-assignments-stripped-1145320.

[56] *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).

[57] *See* Geoffrey Calderaro, *Promoting Democracy While Preserving Federalism: The Electoral College, the National Popular Vote, and the Federal District Popular Vote Allocation Alternative*, 82 MISS L. J. 287, 299-300 (2013) (noting that during the 2012 presidential election, the Romney and Obama campaigns both only campaigned in ten states, with forty states failing to host a single campaign event by either candidate).

[58] JOHN HUDAK, PRESIDENTIAL PORK: WHITE HOUSE INFLUENCE OVER THE DISTRIBUTION OF FEDERAL GRANTS 55-59 (2014).

[59] In fact, it would appear that providing the territories with formal representation in the United States Senate—even if it were non-voting—would likely do substantially more to further the goal of influencing appropriations and national policy than anything else.

proponents often emphasize the "geographic isolation" of the territories[60] and describe them as "crumbling island[s]"[61] with "simple econom[ies]"[62] that are "generally stagnant."[63] They paint territorial inhabitants as having "problems securing safe drinking water,"[64] living in fear of being "prime targets for enemies of the United States,"[65] and proceeding with "a sense of hopelessness"[66] because of the "cauldron of burdens that their fellow citizens in the States do not have to carry."[67]

From these descriptions, one might get the impression that life in the U.S. Virgin Islands, Guam, Puerto Rico, American Samoa, and the Northern Mariana Islands is more akin to life in war-torn Burundi or South Sudan than life in the fifty states. Fortunately, this is not remotely the case. What is unfortunate is that these outrageous descriptions—typically made by individuals who have never lived in a territory—are often used as justification for treating the people of the territories as second-class citizens, or worse.

Of course, life in the territories is not perfect. Like other parts of the United States, territorial governments and their people struggle with certain challenges. But each territory is unique, and not every territory experiences the same issues as the other territories. For example, one of the leading articles proposing a paternalist solution to the territories alleges that territorial inhabitants live in fear of terrorism.[68] Yet, the sole authority given to support this proposition is a law review article—published during the height of the global war on terror—speculating that "some" in Guam may fear that its United States military bases may be attacked.[69] The article cites no data and, more importantly, it fails to recognize that this concern is unique to Guam since the other five inhabited territories lack a significant military presence.

This is also the case for the claim that the territories are geographically isolated. This may well be the case for American Samoa, Guam, and the Northern Mariana Islands, which are between 2,500 and 4,000 miles from Hawaii and between 7,000 and 8,000 miles from

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[60] Lin, *supra* note 18, at 1264.
[61] *Id.* at 1252.
[62] *Id.* at 1260.
[63] *Id.* at 1262.
[64] *Id.* at 1272.
[65] *Id.* at 1276.
[66] *Id.* at 1271.
[67] *Id.* at 1281.
[68] *Id.* at 1276.
[69] *Id.* at 1276 n.5 (citing Juan M. Rapadas, *Transmission of Violence: The Legacy of Colonialism in Guam and the Path to Peace*, 1 J. PAC. RIM PSYCHOL. 33, 35 (2007)).

Washington, D.C. However, it is difficult to contend that the U.S. Virgin Islands and Puerto Rico are geographically isolated when they are only approximately 1,500 miles from Washington, D.C.—significantly closer than many states. And while such distances may have been significant one-hundred and twenty years ago, the proliferation of modern technologies such as air travel, television, and the Internet have reduced their impact.

The same is true of the claim that the people of the territories somehow live with a sense of hopelessness. The only authorities given to support this claim are cherrypicked studies showing a relatively high suicide rate in Guam, and anecdotal reports that young professionals leave Puerto Rico for school or employment opportunities in the fifty states.[70] But again, this is not true of all the territories; for instance, the suicide rate in the U.S. Virgin Islands is half the suicide rate in the United States.[71]

Nor are the claims of widespread emigration supported by actual data. While there certainly has been emigration of younger people from Puerto Rico to the mainland United States, studies on the demographics of those emigrants reveal that they are largely not professionals, and that the unemployment rate of those emigrants after reaching the mainland was more than double that of comparable individuals who remained in Puerto Rico.[72] Perhaps more importantly, the other territories are not experiencing any meaningful net emigration, let alone substantial emigration. While the population of Puerto Rico has declined precipitously, the populations of the U.S. Virgin Islands, Guam, and the Northern Mariana Islands have either remained constant or increased.[73] This is the case even though the global economic recession affected all territories, and the U.S. Virgin Islands, like Puerto Rico, suffered catastrophic destruction from Hurricanes Irma and Maria. That these territories did not experience meaningful emigration is strong evidence that the emigration of Puerto Ricans to the mainland United States is due to issues unique to Puerto Rico rather than issues experienced by the territories as a whole.

Of course, it is true that the five territories do lag behind the fifty states in various aggregate economic measures. Nevertheless, the differences in standards of living are significantly overstated. For

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[70] *Id.* at 1271.

[71] *Suicide Mortality in the Americas*, PAN AM. HEALTH ORG. (2014), https://www.paho.org/hq/dmdocuments/2014/PAHO-mortality-suicide--final.pdf.

[72] Kurt Birson, *Puerto Rican Migration in the 21st Century: Is There a Brain Drain?*, THE STATE OF PUERTO RICANS (Edwin Meléndez & Carlos Vargas-Ramos eds., 2013).

[73] *See* CENTRAL INTELLIGENCE AGENCY, THE WORLD FACTBOOK (2010).

instance, recent data reflects that Guam has a higher median household income than ten mainland states, and the U.S. Virgin Islands has a higher per-capita income than Mississippi.[74]

Reliance on such data, however, is also misleading because, given the substantial differences in size and population between the territories and the fifty states, it does not compare apples to apples. Every one of the fifty states consists of urban, suburban, and rural areas, with different areas within the state having different levels of economic development and various standards of living. This is not the case, however, for the territories, which, except for Puerto Rico, are geographically minute and do not have the same variance within their jurisdictions. For example, there are numerous communities throughout the fifty states with substantially lower incomes and other markers than the territories; but unlike the territories, those truly impoverished areas—typically rural—are offset by significantly wealthier areas in those states.[75]

Similarly, gaps between the rich and the poor tend to be greater in the fifty states—particularly in cities—than in the territories, which tends to paint a rosier picture for those areas than is actually the case. For instance, although twenty-two percent of the population of the U.S. Virgin Islands lives below the poverty line, that amount is considerably lower than the poverty rates for Detroit (42.3%), Cleveland (36.1%), Cincinnati (34.1%), Miami (31.7%), Fresno (31.5%), Buffalo (30.9%), Newark (30.4%), Toledo (30.1%), Milwaukee (29.9%), and St. Louis (29.2%).[76] While the per-capita incomes for those cities are admittedly larger than the per-capita income of the U.S. Virgin Islands, this does not mean that the standard of living for the typical Detroit resident is higher than that of the typical Virgin Islander. On the contrary, it simply reflects a larger disparity between the rich and the poor in Detroit relative to the U.S. Virgin Islands, not to mention Detroit's higher cost of living.

## IV. SHORT-TERM STRATEGIES TO EMPOWER THE TERRITORIES

As the preceding sections demonstrate, modern-day theories of territorial paternalism, despite using inclusive rather than racist language, are nearly indistinguishable from the white man's burden and other long-discredited theories. They are effectively two sides to the same coin: both would impose second-class citizenship indefinitely on the people of the territories and both, in effect, would normalize the territories as wards of the federal government.

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[74] *See* U.S. CENSUS BUREAU, AMERICAN COMMUNITY SURVEY, 2010-14.
[75] *Id.*
[76] *Id.*

Yet, proponents of territorial paternalism are correct about one thing: the territorial rights movement suffers greatly from the lack of goals both achievable and pragmatic. For instance, a substantial focus of the movement has been on advocating for the United States Supreme Court to overturn the *Insular Cases*. Even if one were to put aside the difficulty in persuading the Supreme Court, it is not clear what practical purpose this would serve. Virtually all the meaningful provisions of the Bill of Rights of the United States Constitution have already been extended to all or most of the territories either through Congress or the courts. Moreover, the most prominent injustice—that the people of the territories cannot vote for the President of the United States or obtain representation in Congress—was not caused by the *Insular Cases* at all. Rather, the systematic disenfranchisement of the people of the territories comes directly from the plain and unambiguous text of the United States Constitution itself. This injustice will ultimately need to be addressed either through statehood or a constitutional amendment, both of which are essentially unattainable in today's political climate.

Ultimately, any Supreme Court decision overturning the *Insular Cases* would almost certainly be nothing more than a symbolic *mea culpa*, issued a century after the damage has been done and more akin to *Trump v. Hawaii*'s overturning of *Korematsu v. United States* than *Brown v. Board of Education*'s overturning of *Plessy v. Ferguson*. But this does not mean that the people of the territories and their allies should not pursue this goal. On the contrary, "maintain[ing] a vision for long-term change" is a highly critical component of any social movement; this, however, must be balanced with some attempt at achieving "short-term victories."[77] Long-term goals are critical to sustaining a social movement because "[i]f the goals are finite and their achievement is discernable, there is a significant risk that the mobilization will . . . dissipate once its goals are met."[78] Similarly, achievable short-term goals are needed not just to maintain momentum, but also to begin a dialogue that can "change the knowledge base of the society" and move the proverbial Overton window to effect change in the long term.[79]

What sort of short-term goals should the territories and their allies prioritize? One common paternalist proposal is that the territories pursue greater federal funding from Congress, whether through direct appropriations or through indirect exemptions from generally applicable

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[77] Marc Mauer, *Voting Behind Bars: An Argument for Voting by Prisoners*, 54 HOW. L.J. 549, 566 (2011).

[78] Michael Diamond, *The Transposition of Power: Law, Lawyers, and Social Movements*, 24 GEO. J. ON POVERTY L. & POL'Y 319, 342 (2017).

[79] *Id.* at 343-44.

federal legislation such as the Jones Act.[80] Another common paternalist proposal involves lobbying the federal courts to "actively scrutinize congressional intervention in territorial self-governance" to make up for the fact that "political decisionmakers lack the sort of firsthand experience . . . that would enable them to empathize with [the territories'] problems and needs."[81]

The goals proposed by paternalists are not the short-term goals needed to sustain a lasting territorial rights movement. They maintain the status quo instead of upending it. Rather than allow the territories to chart their own path, these proposals effectively concede the plenary authority of the federal government over the territories and simply urge it to exercise that power more benevolently. This strategy, if pursued by the territories and their allies, would be akin to civil rights activists not challenging the correctness of *Plessy v. Ferguson*, requesting instead that the governments of the Southern states appropriate more money to black-only schools and permit those schools to set their own curriculum. By accepting the status quo, the territories and their allies would not just legitimize it, they would make future attempts to deviate from it even more difficult due to the prospect that those benefits may disappear.[82]

Nevertheless, there are several short-term goals that the territories and their allies can realistically achieve without conceding the plenary authority of the federal government over their own affairs or otherwise furthering their second-class or unequal status. While it is not possible to summarize all of these initiatives, this Article highlights three short-term goals that, if adopted, would further the quest for ultimate equality.

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[80] Lin, *supra* note 18, at 1291-92.

[81] *Territorial Federalism*, *supra* note 18, at 1653-54.

[82] For instance, the special financial incentives Congress had given to Puerto Rico based on its territorial status, but which would terminate if Puerto Rico became a state, resulted in "many citizens vot[ing] to retain the current commonwealth status in order to continue to reap the benefits," which they considered more valuable than the right to vote for the President and voting representatives to Congress. Debora S. DiPiero, *Puerto Rico's Need for Corporate Incentives Following the 1996 Amendment to Section 936*, 15 B.U. INT'L L.J. 549, 556 (1997). In fact, the Government of American Samoa has actively litigated against birthright citizenship for its people in *Fitisemanu* and other litigation, not because it does not actually want citizenship, but out of a fear that extending birthright citizenship under the Citizenship Clause of the Fourteenth Amendment would result in incorporation of the entirety of the Fourteenth Amendment—including its Equal Protection Clause—and jeopardize the *fa'a Samoa*, including its racial restrictions on land ownership. Fitisemanu v. United States, 1 F.4th 862, 865-66 (10th Cir. 2021).

### *A. Representation in the Federal Judiciary*

Most propositions suggested by territorial paternalists rest on the assumption that the federal courts will engage in a "robust form of judicial review" as a check on the plenary power of Congress or in some way serve as the champions of the territories.[83] Such proposals, however, ignore the fact that federal courts have historically been hostile to territorial rights. After all, it was the Supreme Court of the United States, and not Congress, that decided the *Insular Cases* and placed the onus on Congress to serve as arbiter of the application of constitutional rights. Even in contemporary times, federal courts have rejected virtually all attempts to use the judicial system to achieve territorial parity,[84] often extending the *Insular Cases* despite being directed not to do so.[85]

Some may find the hostility of the federal courts to territorial-rights litigation surprising given the common wisdom that federal judges are more likely to issue rulings protecting marginalized groups and otherwise safeguard individual rights.[86] Putting aside for a moment whether this popular belief is anything but an example of cognitive bias in the legal profession,[87] the hostility of the federal courts to territorial-rights claims should not be surprising given the absence of the territories from the ranks of our nation's Article III judges.

It is well-known that geography plays a substantial role in judicial decision-making.[88] For years, the states of Alaska and Hawaii lacked any

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[83] *See, e.g.*, *Territorial Federalism*, *supra* note 18, at 1653-54; Rennie, *supra* note 18, at 1707-09.

[84] *See, e.g.*, *Fitisemanu*, 1 F.4th 862; United States v. Baxter, 951 F.3d 128 (3d Cir. 2020); Segovia v. United States, 880 F.3d 384 (7th Cir. 2018); Tuaua v. United States, 788 F.3d 300 (D.C. Cir. 2015); Ballentine v. United States, 486 F.3d 806 (3d Cir. 2007); Igartua De La Rosa v. United States, 32 F.3d 8 (1st Cir. 1994); Northern Mariana Islands v. Atalig, 723 F.2d 682 (9th Cir. 1984).

[85] Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC, 140 S. Ct. 1649, 1665 (2020) (quoting Reid v. Covert, 354 U.S. 1, 14 (1957) (plurality opinion)).

[86] *See, e.g.*, JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 14 (Oxford University Press 2018).

[87] As one federal judge has explained, the notion that federal courts are protective of individual rights and marginalized groups stems from the high-profile decisions the Supreme Court of the United States rendered between the 1940s and 1960s, such as *Brown v. Board of Education*. SUTTON, *supra* note 86, at 14. This ignores, however, not just the entirety of federal jurisprudence issued in the intervening decades, but that *Brown* and similar decisions were necessary because the lower federal courts had consistently rejected constitutional challenges to racial segregation. *See, e.g.*, Briggs v. Elliott, 98 F. Supp. 529, 537 (E.D.S.C. 1951); Brown v. Board of Educ., 98 F. Supp. 3d 797, 798 (D. Kan. 1951).

[88] *See generally.*, WAYNE D. BRAZIL, SETTLING CIVIL SUITS: LITIGATORS' VIEWS ABOUT APPROPRIATE ROLES AND EFFECTIVE TECHNIQUES FOR FEDERAL JUDGES

active judicial representation on the United States Court of Appeals for the Ninth Circuit due to the persistent failure of multiple presidential administrations to nominate lawyers from those states. As Judge Andrew Kleinfeld—the second Alaskan to serve on the Ninth Circuit—explained in written testimony before the Commission on Structural Alternatives for the Federal Courts of Appeals, the failure to provide balanced geographic representation on the federal courts of appeals adversely affects the quality of appellate decisions in cases originating from unrepresented areas:

> Much federal law is not national in scope. Quite a lot of federal litigation arises out of federal laws of only local applicability, such as the Bonneville Power Administration laws, the laws regarding Hopi and Navaho relations, the Alaska National Interest Lands Conservation Act, and the Alaska Native Claims Settlement Act. It is easy to make a mistake construing these laws when unfamiliar with them, as we often are, or not interpreting them regularly, as we never do.
>
> Much federal procedure mirrors state procedure in the particular district. For example, Federal Rule of Civil Procedure 4 imports state procedure. Where law is not specified, bar and bench customs in the different localities often fill it in. It is very helpful for judges to know how releases, attorney's fees contracts, and other documents for common transactions, are typically written in a state, so that they know when something is suspicious and when it is ordinary. In diversity cases, we are required to apply state law in federal court.
>
> Yet on our court, ordinarily no judge on the panel has intimate familiarity with the law and practices of the state in which the case arose, unless

(1985) (finding that there are regional differences in lawyer preferences for judicial intervention in settlement, often based on state-court practices); THOMAS CHURCH ET AL., JUSTICE DELAYED: THE PACE OF LITIGATION IN URBAN TRIAL COURTS (1978) (finding that the local legal culture is the strongest explanatory factor in understanding patterns of case processing in different courts); PAMELA J. UTZ, SETTLING THE FACTS: DISCRETION AND NEGOTIATION IN CRIMINAL COURT (1978) (finding significant differences in criminal case types in two districts in the same state, resulting in different patterns of plea bargaining and case processing).

> that state is California. A judge on my court sits in Alaska perhaps once in ten years, and ordinarily never sits in Montana, Idaho, Nevada, or Arizona.
>
> Social conditions also vary, in ways that can color judges' reactions to facts, and disable them from understanding the factual settings of cases not arising in California. For example, judges from Los Angeles have different assumptions about what kind of people have guns than judges from Idaho, Montana, and Alaska, who tend to associate gun ownership with a high proportion, perhaps a considerable majority, of the longtime law-abiding residents of the state. Native Americans have reservations in most states in our circuit, but in Alaska reservations have generally been abolished. It is quite possible for Alaska lawyers not to point this out in a brief because it is so obvious and well known, and for Ninth Circuit judges on a panel and their law clerks, who have never been to Alaska, not to know it.[89]

For similar reasons, Congress, concerned about the effects of this lack of representation, amended Title 28, Section 44(c) of the United States Code to mandate that at least one active federal court of appeals judge be a resident of each state within the circuit.[90]

This congressional legislation did not, however, extend its requirement to residents of each territory within a circuit. No resident of the U.S. Virgin Islands, Guam, or the Northern Mariana Islands serves on their respective federal courts of appeals.[91] While Judge Juan Torruella served for nearly four decades as an active judge of the United States Court of Appeals for the First Circuit, his nomination was ultimately a matter of executive discretion. Moreover, shortly after Judge Torruella's death on October 26, 2020, some openly wondered whether the President would nominate a Puerto Rican resident as his successor or instead choose to nominate a resident of Massachusetts, New Hampshire, or Rhode

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[89] Letter from Andrew J. Kleinfeld, 9th Cir. Judge, to the Commission on Structural Alternatives for the Federal Courts of Appeals, (May 22, 1998) (on file with the University of North Texas Library).

[90] *See* 143 CONG. REC. 3223 (1997) (statement of Rep. Abercrombie).

[91] The fifth inhabited territory, American Samoa, is not assigned to a federal judicial circuit.

Island, leaving Puerto Rico with no representation on the First Circuit.[92]

The need for a resident judge from each of the territories to serve on their respective federal courts of appeals is highlighted by the effect Judge Torruella's lengthy service had on the First Circuit's treatment of Puerto Rico. While certainly a source of a few adverse rulings, especially with respect to voting rights,[93] over Torruella's tenure the First Circuit issued some of the most favorable rulings in favor of territorial rights and sovereignty yet seen.[94] This is not simply due to Judge Torruella's service on First Circuit panels. As his former colleagues noted, Judge Torruella's very presence on the court certainly contributed to a greater understanding of the issues facing the territories by the rest of the judges, who would frequently talk with him about Puerto Rico's status.[95] As one fellow federal judge put it, as "the first Puerto Rican to sit on a federal appeals court of any kind . . . [Judge Torruella] made it his business to describe and dismantle the doctrines that had made colonialism possible under the Constitution," but he did so "in a respectful academic form that aligned his argument with that of the American civil-rights movement."[96] Although he did not always succeed in persuading his colleagues, he nevertheless "helped to disinter the *Insular Cases* from the graveyard of American historical memory" and ensure that the territorial perspective was represented.[97]

But the impact of a resident judge from Puerto Rico serving on the First Circuit is perhaps best demonstrated by examining the decisions of the United States Court of Appeals for the Third Circuit, which exercises appellate jurisdiction over federal cases originating in the U.S. Virgin Islands—a mere 50 miles away from Puerto Rico. Unlike the First Circuit, the Third Circuit has ruled against expanding the rights of the

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[92] *See* Josh Blackman, *Judge Torruella, the Lone First Circuit Judge in Puerto Rico, Passed Away*, THE VOLOKH CONSPIRACY (Oct. 27, 2020 10:00 AM), https://reason.com/volokh/2020/10/27/judge-tourrella-the-lone-first-circuit-judge-in-puerto-rico-passed-away/. Ultimately, President Donald Trump nominated Raul Arias-Marxuach, a judge of the United States District Court for the District of Puerto Rico, to the vacancy, although he was not confirmed by the United States Senate prior to the adjournment of the 116th Congress. As of this writing, President Joe Biden has nominated Chief Judge Gustavo Gelpi, also of the United States District Court for the District of Puerto Rico, to the vacancy.

[93] *See, e.g.*, Igartua De La Rosa v. United States, 32 F.3d 8, 8 (1st Cir. 1994).

[94] *See, e.g.*, United States v. Vaello-Madero, 956 F.3d 12 (1st Cir. 2020); Aurelius Inv., LLC v. Puerto Rico, 915 F.3d 838 (1st Cir. 2019).

[95] Stephen G. Breyer, *A Dedication to Judge Juan Torruella*, 130 YALE L.J. FORUM 308, 308 (2020).

[96] Jose A. Cabranes, *Closing Remarks on Judge Juan Torruella*, 130 YALE L.J. FORUM 852, 853 (2020).

[97] *Id.* at 855.

people of the U.S. Virgin Islands and the sovereignty of the territory's local government in virtually every significant case that has come before it in the last three decades.[98] Moreover, within the Virgin Islands legal community the Third Circuit is notorious for its judges' ignorance of territorial customs[99] and its misunderstanding of certain fundamental aspects of Virgin Islands law.[100]

The lack of the U.S. Virgin Islands' representation on the Third Circuit—as well as the absence of jurists from Guam and the Northern Mariana Islands on the Ninth Circuit—is compounded by the fact that the United States District Courts of the Virgin Islands, Guam, and the Northern Mariana Islands are not Article III courts, but Article IV courts. Although these federal courts exercise the same jurisdiction as Article III district courts, Article III judges "shall hold their offices during good behaviour and not have their compensation diminished."[101] Courts established by Congress pursuant to Article IV, however, lack life tenure and most other protections afforded by Article III. For instance, Congress has provided that the federal district judges appointed to the United States District Courts of the Virgin Islands, Guam, and the Northern Mariana Islands shall hold office for a term of ten years unless sooner removed by the President for cause.[102]

Others have extensively examined the adverse effects of designating the federal district courts in these territories as Article IV courts, including the significant threat posed to judicial independence.[103] In fact, describing this as a threat is an understatement. There is documented evidence of a successful campaign to lobby a President to

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[98] *See, e.g.*, United States v. Baxter, 951 F.3d 128 (3d Cir. 2020); Bason v. Gov't of the V.I., 767 F.3d 193 (3d Cir. 2014); United States v. Gillette, 738 F.3d 63 (3d Cir. 2013); Kendall v. Russell, 572 F.3d 126 (3d Cir. 2009); Ballentine v. United States, 486 F.3d 806 (3d Cir. 2007); United States v. Hyde, 37 F.3d 116 (3d Cir. 1994); Polychrome Int'l Corp. v. Krigger, 5 F.3d 1522 (3d Cir. 1993); JDS Realty Corp. v. Gov't of the V.I., 824 F.2d 256 (3d Cir. 1987).

[99] For example, in a case originating in the Virgin Islands, the Third Circuit, in an appeal of a trial judge's decision to impose sanctions against an attorney, noted that the attorney "allegedly 'sucked her teeth' (whatever that means) at a witness during a deposition." Saldana v. Kmart Corp., 260 F.3d 228, 232 (3d Cir. 2001). Those familiar with the U.S. Virgin Islands, however, would be aware that sucking one's teeth "is a local custom which indicates feeling of disgust, anger, disbelief, or imitation." United States v. Canel, 569 F. Supp. 926, 931 n.3 (D.V.I. 1982).

[100] *See, e.g.*, Vooys v. Bentley, 901 F.3d 172 (3d Cir. 2018) (Bibas, J., dissenting); Hughley v. Gov't of the V.I., 536 F. App'x 278 (3d Cir. 2013) (Hardiman, J., dissenting).

[101] U.S. CONST. art. III § 1.

[102] *See* 48 U.S.C. §§ 1424b(a); 1614(a); 1821(b)(1).

[103] *See, e.g.*, James T. Campbell, *Island Judges*, 129 YALE L.J. 1888 (2020).

withhold renomination to federal district judges in these territories due to their rulings in particular cases.[104]

The effect of this threat, while difficult to measure, is very real and impacts the disposition of cases by those courts. Perhaps the most transparent example of this occurred in the case of *Ballentine v. United States*.[105] In that case, the presiding judge issued a significant interlocutory decision on the question of territorial-voting rights and appeared poised to issue the first federal decision recognizing such a right.[106] The judge failed to do so, however, denying reappointment and allowing a new judge—temporarily appointed by designation from the United States District Court for the District of New Jersey—to issue a decision applying the *Insular Cases* to dismiss the case for failure to state a claim.[107]

Despite the critical need for independent federal judges to posses a connection to, and understanding of, their local community, the territorial rights movement has failed to prioritize federal-court representation. Nevertheless, it appears that providing such representation is highly achievable. The American Bar Association's nearly five-hundred-member House of Delegates unanimously approved a resolution at its 2014 Annual Meeting, urging Congress to amend the United States Code to mandate territorial representation on the federal courts of appeals.[108] This shows that there is extraordinarily broad support—at least within the legal profession—for providing such representation, and even those opposed to territorial equality in other areas have no serious objection to proper representation in the federal courts. Even in the absence of legislation mandating equity, nothing precludes the President of the United States from voluntarily nominating a Virgin Islands attorney to the Third Circuit or an attorney from Guam and the Northern Mariana Islands to the Ninth Circuit. After all, President Reagan nominated Judge Torruella to the First Circuit without such a statutory mandate, and the United States Senate confirmed Judge Torruella to that post unanimously by voice vote.

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[104] *Id.* at 1942-44.

[105] *Compare* Ballentine v. United States, No. CIV. 1999-130, 2001 WL 1242571 (D.V.I. Oct. 15, 2001); *with* Ballentine v. United States, No. CIV. 1999-130, 2006 WL 3298270 (D.V.I. Sept. 21, 2006), aff'd, 486 F.3d 806 (3d Cir. 2007).

[106] *Id.*

[107] *Id.*

[108] *See* AM. BAR ASS'N RES. 10A (adopted August 11, 2014).

### *B. Full Utilization of Territorial Government Powers*

Years ago, people would use the idiom "don't make a federal case out of it" to object to something being blown out of proportion. Today, that expression has "fallen from fashion."[109] As the late Justice Antonin Scalia once said when reminiscing about his law school graduation, "in 1960 [there was] real meaning to the phrase 'don't make a federal case out of it,'" since "[t]he federal courts . . . were forums for the 'big case' . . . [and] were not the place where one would find many routine tort and employment disputes."[110] But this is no longer case. While the Founders conceived of a federal government of limited powers—with power decentralized in the states and further decentralized among local governments therein—the size and role of the federal government has expanded far beyond that original vision. In fact, the scope of federal law has become so broad and all-encompassing that "a recent book claims that the average American unknowingly commits three felonies a day due to vague federal laws."[111]

Although reasonable minds may differ as to the proper role of the federal government, it should be generally recognized that due to its size, the federal government is less responsive than state governments, which are in turn less responsive than local governments.[112] This principle is even more true for territories. Not only is the federal government generally less responsive to territorial concerns by virtue of the territories' underrepresentation in Congress, but territorial governments are significantly more accessible to the people of the territories than typical state governments.

It is no secret there is a significant lack of funding parity for the territories for many federal programs.[113] Although there is justifiable

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[109] Lynn N. Hughes, *Don't Make a Federal Case Out of It: The Constitution and the Nationalization of Crime*, 25 AM. J. CRIM. L. 151, 154 (1997).

[110] Justice Antonin Scalia, Address to the Fellows of the American Bar Foundation and the National Conference of Bar Presidents (Feb. 15, 1987), *reprinted in* 34 Fed. B. News & J. 252 (1987).

[111] David R. McAtee II & Jason E Wright, *Jeff Skilling's Constitutional Challenge to "Theft of Honest Services,"* 73 TEX. B.J. 640, 640 (2010) (citing HARVEY A. SILVERGATE, THREE FELONIES A DAY: HOW THE FEDS TARGET THE INNOCENT (2009)).

[112] *See* Hughes, *supra* note 109, at 152; *see also* THE FEDERALIST NO. 9 (Alexander Hamilton), NO. 10 (James Madison).

[113] *See Shadow Citizens: Confronting Federal Discrimination in the U.S. Virgin Islands*, DISABILITY RIGHTS CENTER OF THE V.I. (March 2021), https://www.drcvi.org/documents/general/DRCVI-ShadownCitizens.pdf?downloadable=1.

optimism that parity may soon be achieved through the federal courts[114] or the political process,[115] it is not guaranteed. This optimism could easily be derailed through an unfavorable judicial decision or a breakdown in the federal legislative process.

The territories, however, are not completely powerless on these matters. Even if federal programs such as Supplemental Security Income (SSI) are not extended to the people of the territories, there is absolutely nothing—other than funding—which precludes territorial governments from establishing identical, or even more robust, benefits programs for their citizens. Certainly, some of the territories—particularly Puerto Rico—are fiscally challenged and in no position to substitute a local program for a federal program. As a normative matter, they should not be expected to do so, at least so long as the federal government continues to fund such programs for the fifty states.

Yet, there are certain benefits—largely financial—to territorial status. To give just one prominent example, the United States Court of Appeals for the Ninth Circuit has held that the restraints of the Dormant Commerce Clause do not apply to Guam and the Northern Mariana Islands because they are not state governments. As such, the governments of those territories may adopt laws that discriminate against non-local commerce that would be unconstitutional if enacted by a state.[116] Some of these discriminatory taxes and fees may be quite high. For example, the Northern Mariana Islands charge a fee of five-thousand dollars for non-resident attorneys to obtain *pro hac vice* admission,[117] a sum substantially greater than similar admission costs in other United States jurisdictions.[118]

Of course, some territories—such as the U.S. Virgin Islands, where the United States Court of Appeals for the Third Circuit disagreed with the Ninth Circuit's analysis and held that the Dormant Commerce Clause limits actions of the territorial government—lack the capacity to do this.[119] Moreover, even the territories authorized to enact discriminatory taxes may have already directed such funds to other

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[114] *See, e.g.*, *Vaello-Madero*, 956 F.3d at 12.

[115] *See Statement of President Joseph R. Biden, Jr. on Puerto Rico*, THE WHITE HOUSE (June 7, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/06/07/statement-by-president-joseph-r-biden-jr-on-puerto-rico/.

[116] *See generally Sakamoto*, 764 F.2d at 1285; *see also* Ciolli, *supra* note 53, at 1249.

[117] *See* N. MAR. I. S. CT. R. 73-1.

[118] *See Pro Hac Vice Admission Rules*, AMERICAN BAR ASSOCIATION (June 2020), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/pro-hac-vice-admission-rules-chart.pdf.

[119] *See* Polychrome Int'l Corp. v. Krigger, 5 F.3d 1522, 1534 (3d Cir. 1993).

priorities; they may find it difficult to redirect those funds or enact new taxes, even those borne predominantly by non-residents.

But territorial governments already possess other powers which, perhaps indirectly, could force the hand of the federal government to provide equality in social-safety-net spending and other areas. The territories' respective Congressional delegates, while lacking a floor vote, play a vital and necessary role in advocating for the territories' interests in the House of Representatives.

One may wonder, then, why the territories have largely failed in their attempts to obtain funding parity with the states. Certainly, many factors contribute to the inability of legislation to pass in Congress. However, unlike the states—the smallest of which will always have at least three representatives in Congress—the territories are hamstrung by only having a single delegate each. It is often forgotten in discussions of the territories' representation in Congress that these delegates do not operate as mere liaisons for the territory. Functionally, each territory's Delegate to Congress possesses all the same powers and duties as an ordinary Representative, apart from a binding floor vote. As such, delegates are expected not just to advocate for the local interests of their territory, but also to fully participate in all the work of the House.

While each of the five territories currently sends one delegate, this has not always been the case. In 1796, the territory of Tennessee sent two "shadow" Senators to Congress in addition to their delegate, for the purpose of lobbying the United States Senate for the territory's interests, including statehood.[120] Since then, the territories of Michigan, Iowa, California, Oregon, Kansas, and Alaska made similar use of shadow Senators.[121] And since 1990, in addition to its Delegate to Congress, two "shadow" Senators, as well as a shadow Representative, have been continuously elected by the District of Columbia to advocate for its local interests.[122]

The success of this model has spurred Puerto Rico to recently send a shadow delegation to Congress, consisting of two shadow Senators and five shadow Representatives.[123] Significantly, two of Puerto Rico's first shadow Representatives were permitted to access the House floor due to their former status as members of Congress, providing them with

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[120] Jesse L. Jackson, *The State of New Columbia—A Call for Justice and Freedom*, 39 CATH. U.L. REV. 307, 308 (1990).

[121] *Id.*

[122] *See* Representative and Senators Term of Office, Duties, and Use of Private Funds for Public Purposes Amendment Act of 1990, 37 D.C. Reg. 2616 (1990).

[123] Rafael Bernal, *Puerto Rico Announces Shadow Congressional Delegation*, THE HILL (Jan. 10, 2018), https://thehill.com/latino/368433-puerto-rico-announces-shadow-congressional-delegation.

meaningful access to use their positions to lobby for the territory's interests.[124] It remains to be seen whether Puerto Rico's shadow delegation will reap tangible benefits for the territory, but Puerto Rico's Resident Commissioner—its equivalent of a delegate of Congress—welcomed the assistance.[125]

Another impediment to the territories'—or at least American Samoa, Guam, the Northern Mariana Islands, and the U.S. Virgin Islands—ability to achieve parity involves the demographics and backgrounds of high-level federal and territorial officials. To give just one example: those four territories do not have a local law school, yet their territorial supreme courts require that one earn a degree from a law school accredited by the American Bar Association. This means that all lawyers in those territories are effectively imported, regardless of whether they have previously resided in the territory or have left the territory for a three-year period to be indoctrinated into a legal culture that either ignores the territories or actively supports their second-class status. This necessarily results in a "pool" of qualified individuals that does not reflect the demographics of the territory—clearly, this is a problem.

### *C. Cooperation with State Governments and Other Stakeholders*

The federal government is not the only entity in a position to improve conditions for territorial residents. While most attention is focused on the inequities that federal law imposes on the territories—such as lack of funding parity for many federal programs[126]—there are laws and judicial precedents in place in the fifty states that actively discriminate against the territories. To give just one example: although the federal Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA) mandates that citizens of a state who move to a foreign country, American Samoa, or the Northern Mariana Islands retain their right to vote in that state by absentee ballot, there is nothing in that statute to prohibit states from extending the same rights to Puerto Rico, Guam, and the U.S. Virgin Islands.[127] Federal legislation, then, is clearly not the only solution—the governments of each state could be lobbied as well.

In addition to amending or repealing discriminatory laws, state governments can also make proactive efforts to improve conditions for the territories. The states that have enacted the National Popular Vote Interstate Compact could amend the agreement to include votes from the

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[124] *Id.*
[125] *Id.*
[126] *See* DISABILITY RIGHTS CENTER OF THE V.I., *supra* note 113, at 39.
[127] Segovia v. United States, 880 F.3d 384, 389 (7th Cir. 2018).

territories when determining the popular vote; if the compact is ever ratified by enough states to give it legal force, inclusion of the territories in this manner would provide the people of the territories with a meaningful vote for President of the United States without the need for a constitutional amendment. State governments could enter into reciprocity agreements with the territories to provide in-state tuition to territorial residents of their state universities. And, of course, state legislations could hold hearings on the *Insular Cases* and prohibit their attorneys general from citing them as legal authority, increasing the likelihood that they will eventually be overturned or, at the very least, that they will not receive further expansion.

## V. CONCLUSION

For the nearly four million Americans living in the U.S. Virgin Islands, Puerto Rico, American Samoa, the Northern Mariana Islands, and Guam, the words "equal justice under the law" may seem an unachievable ideal. But that does not mean that the territories and their people should just give up and accept second-class status. On the contrary, the failure of the United States to live up to this ideal should serve as even greater motivation to "go out every day and fight for the principles on which this country was founded."[128]

The people of the territories, like other oppressed or marginalized groups before them, face many obstacles in their path for equality. But these obstacles are certainly not insurmountable. The territories do not need to concede the plenary authority of the federal government over their own affairs. Nor do they need would-be saviors masquerading as allies and urging them to trade self-determination and human rights for a more benevolent colonial overseer. The path of progress may be difficult, but the territories and their peoples possess the wherewithal to walk it and achieve their goals without compromising their basic human rights and dignity.

[128] Erin Grotheer, *Speech by Justice Dickinson at the Access to Justice Commission Conference*, 6 DEPAUL J. FOR SOC. JUST. 51, 59 (2012) (quoting Mississippi Presiding Justice Jess H. Dickinson).