

JUDICIAL ANTIFEDERALISM

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The United States has a colonies problem. The more than 3.5 million Americans who live in the U.S. territories of American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands lack some of the most fundamental rights and protections, such as the right to vote. This is due to a series of decisions decided more than a century ago, collectively known as the Insular Cases, in which the U.S. Supreme Court held that the “half-civilized,” “savage,” “ignorant and lawless” “alien races” that inhabited America’s overseas territories were not entitled to the same constitutional rights and protections afforded to Americans residing in the mainland United States, based on the idea of the white man’s burden and similar, then prevalent theories of white supremacy.

For decades, the Insular Cases have had “nary a friend in the world,” with even the Supreme Court repeatedly imploring that they “should not be further extended.” Yet despite their firm placement within the constitutional anticanon and having “long been reviled” by all corners of the legal community for several decades, the Insular Cases have never been overruled by the Supreme Court. Perhaps most surprisingly, the lower federal courts in recent years have ignored the Supreme Court’s admonition and extended the Insular Cases to cover a whole host of new situations.

The failure of the Supreme Court to overrule the Insular Cases—and the lower federal courts’ extension of them even after the Supreme Court instructed them to the contrary—is unprecedented. Why, then, do the Insular Cases not only persist, but thrive, despite virtually unanimous condemnation from all sides of the political and legal spectrums? This Essay attributes the longevity of the Insular Cases to an unlikely source: the failure of Congress to timely extend the well-known principle of judicial federalism, operative in all fifty states, to the five presently unincorporated territories.

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INTRODUCTION

The United States has a colonies problem. The more than 3.5 million Americans who live in the U.S. territories of American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands lack some of the most fundamental rights and protections, such as the right to vote.¹ This deprivation is due to a series of decisions decided more than a century ago, collectively known as the *Insular Cases*.² In these cases, the U.S. Supreme Court held that the “half-civilized,”³ “savage,”⁴ “alien races”⁵ that inhabited America’s overseas territories were not entitled to the same constitutional rights and protections afforded to Americans residing in the mainland United States, based on the idea of the white man’s burden and similar, then prevalent theories of white supremacy.

For decades, the *Insular Cases* have had “nary a friend in the world,”⁶ with even the Supreme Court repeatedly imploring that they “should not be further extended.”⁷ Justice Gorsuch recently acknowledged:

The flaws in the *Insular Cases* are as fundamental as they are shameful. Nothing in the Constitution speaks of “incorporated” and “unincorporated”

1. See Amber L. Cottle, *Silent Citizens: United States Territorial Residents and the Right to Vote in Presidential Elections*, 1995 U. CHI. LEGAL F. 315, 315.

2. The *Insular Cases* typically refer to a series of six opinions issued by the U.S. Supreme Court 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 *Pepke v. United States (In re Fourteen Diamond Rings)*, 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. Porto Rico*, 258 U.S. 298 (1922). For purposes of this Essay, the *Insular Cases* encompass all cases decided by the Supreme Court prior to the transition of the insular territories from direct federal control to democratically elected local governments.

3. *De Lima*, 182 U.S. at 138.

4. *Id.* at 219.

5. *Downes*, 182 U.S. at 287.

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

7. *Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC*, 140 S. Ct. 1649, 1665 (2020); see also *Reid v. Covert*, 354 U.S. 1, 14 (1957) (plurality opinion).

Territories. Nothing in it extends to the latter only certain supposedly “fundamental” constitutional guarantees. Nothing in it authorizes judges to engage in the sordid business of segregating Territories and the people who live in them on the basis of race, ethnicity, or religion.⁸

Despite their firm placement within the constitutional anticanon and having “long been reviled” by all corners of the legal community for several decades,⁹ the *Insular Cases* have never been overruled, and litigants and courts continue to cite to them as positive authority and binding precedent.¹⁰

How can this possibly be the case? As Justice Gorsuch himself acknowledged, it is not enough for the Supreme Court to overrule the *Insular Cases*, for doing so would raise a host of difficult new questions that “may prove hard to resolve.”¹¹ And since the legal regime established by the *Insular Cases* permeates nearly every aspect of the relationship between the United States and the overseas territories of American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands, the policy concerns that underlie the doctrine of *stare decisis* may caution against overruling nearly a century’s worth of precedent.¹²

These, and other considerations, may explain the reluctance to overrule the *Insular Cases* today. But the legal community did not suddenly discover in 2022 that the *Insular Cases* were wrongly decided and the product of naked racism rather than principled legal reasoning—on the contrary, “[t]he *Insular Cases*’ departure from the Constitution’s original meaning has never been much of a secret.”¹³ In fact, the Supreme Court’s first admonishment that the *Insular Cases* “should [not] be given any further expansion” occurred in 1957,¹⁴ only thirty-five years after the last of the *Insular Cases* had been decided.¹⁵

Why, then, were the *Insular Cases* not overruled in 1957 or shortly thereafter? Certainly, the Supreme Court punted by “devis[ing] a workaround” in “declar[ing] ‘fundamental’—and thus applicable even to ‘unincorporated’ Territories—more and more of the Constitution’s guarantees.”¹⁶ And Congress, to its credit, extended numerous constitutional

8. *United States v. Vaello Madero*, 142 S. Ct. 1539, 1554 (2022) (Gorsuch, J., concurring).

9. Christina Duffy Burnett, *A Convenient Constitution?: Extraterritoriality After Boumediene*, 109 COLUM. L. REV. 973, 982 (2009); see also Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 437 (2011).

10. See *infra* note 96 and accompanying text.

11. *Vaello Madero*, 142 S. Ct. at 1556 (Gorsuch, J., concurring).

12. See Adriel I. Cepeda Derieux & Rafael Cox Alomar, *Saying What Everyone Knows to Be True: Why Stare Decisis Is Not an Obstacle to Overruling the Insular Cases*, 53 COLUM. HUM. RTS. L. REV. 721, 728 (2022) (arguing for the overruling of the *Insular Cases* but conceding that “experience shows that however ill-reasoned the *Insular Cases* may be, judicial reverence (or inertia) might be a powerful counterweight to their repeal”).

13. *Vaello Madero*, 142 S. Ct. at 1555 (Gorsuch, J., concurring).

14. *Reid v. Covert*, 354 U.S. 1, 14 (1957) (plurality opinion).

15. See generally *Balzac v. Porto Rico*, 258 U.S. 298 (1922).

16. *Vaello Madero*, 142 S. Ct. at 1555 (Gorsuch, J., concurring) (citing Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 241–43 (2002)).

rights—even some deemed nonfundamental in the *Insular Cases*, such as the right to a jury trial—to many or all of the territories through organic acts and other legislation.

But this does not tell the whole story. After all, the lower federal courts have, as recently as this decade, *extended* the *Insular Cases* in a host of new contexts, including withholding constitutional citizenship from the people of American Samoa,¹⁷ permitting warrantless searches without probable cause (or even reasonable suspicion) at the so-called “border” between the U.S. Virgin Islands and the mainland United States,¹⁸ and allowing the Northern Mariana Islands to prohibit those who are not of Marianas descent from owning land.¹⁹

Significantly, it is the prospect of overruling these subsequent extensions of the *Insular Cases* by lower federal courts, and not overruling the *Insular Cases* themselves, that may cause disruptions to the operations of territorial governments. Contrary to popular belief, the questions raised in many of the cases that now comprise 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 “foreign countr[ies]” for purposes of tariff laws,²⁰ whether customs duties applied to imports from Puerto Rico,²¹ whether vessels traveling between Puerto Rico and New York were engaged in trade under federal maritime laws,²² and whether residents of Puerto Rico qualified as “aliens” under a federal immigration statute.²³ These cases typically 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.²⁴ And while some of the *Insular Cases* certainly implicated federal constitutional issues, they were typically of a relatively modest scope. For instance, although the Supreme Court held in *Hawaii v. Mankichi*²⁵ that the then territory of Hawaii could prosecute a criminal defendant in its local courts by information without an indictment by a grand jury—and obtain a conviction from a nonunanimous jury—it recognized in its opinion that Congress had adopted the Hawaiian Organic Act²⁶ on April 30, 1900, which extended those rights to that territory.²⁷ Thus,

17. *See generally* *Fitisemanu v. United States*, 1 F.4th 862 (10th Cir. 2021).

18. *See generally* *United States v. Baxter*, 951 F.3d 128 (3d Cir. 2020).

19. *See generally* *Wabol v. Villacrusis*, 898 F.2d 1381 (9th Cir. 1990).

20. *See* *De Lima v. Bidwell*, 182 U.S. 1, 1 (1901); *Pepke v. United States (In re Fourteen Diamond Rings)*, 183 U.S. 176, 177 (1901).

21. *See* *Downes v. Bidwell*, 182 U.S. 244, 247–48 (1901); *Armstrong v. United States*, 182 U.S. 243, 244 (1901); *Dooley v. United States*, 182 U.S. 222, 233–34 (1901); *Goetze v. United States*, 182 U.S. 221, 221 (1901).

22. *See* *Huus v. N.Y. & Porto Rico S.S. Co.*, 182 U.S. 392, 395–96 (1901).

23. *See* *Gonzales v. Williams*, 192 U.S. 1, 7 (1904).

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

25. 190 U.S. 197 (1903).

26. Ch. 339, 31 Stat. 141 (1900), *repealed by* Act of Mar. 18, 1959, Pub L. No. 86-3, 73 Stat. 4 (codified as amended in scattered sections of the U.S.C.) (admitting Hawaii as a state).

27. *Mankichi*, 190 U.S. at 214–16.

as a practical matter, its decision only applied retrospectively to criminal cases tried during the two-year period between annexation in 1898 and adoption of the organic act in 1900.

The failure of the Supreme Court to overrule the *Insular Cases*—and the lower federal courts’ extension of them *even after* the Supreme Court instructed them to the contrary—is unprecedented. Even *Korematsu v. United States*,²⁸ an anticanon not formally overruled until seventy-four years after its issuance,²⁹ had not been considered “good law” for decades and certainly had not been expanded on by the lower federal courts.³⁰

This Essay posits that the *Insular Cases* survived while other anticanons withered due to changes in territorial court structures that occurred contemporaneously with or shortly after those cases were decided. Part I provides a brief overview of the judicial federalism that operates in the fifty states, including the allocation of authority between federal and state courts. Part II examines the two wholly different systems of judicial antifederalism imposed by Congress on the territories—one that elevated territorial courts over federal courts from the time of the Founding to 1900 and another in the form of a new judicial antifederalism operative from 1900 to the present that rendered territorial courts wholly subordinate to the federal courts, even on issues of territorial law. Part III then considers the underappreciated role of this new judicial antifederalism in perpetuating the *Insular Cases* and their progeny to the present day, ultimately predicting that the actions of newly federalized territorial courts, and not the lower federal courts, will ultimately spur the Supreme Court to reconsider the *Insular Cases*.

I. JUDICIAL FEDERALISM IN THE UNITED STATES

Federalism defines the American system of government. The national government and the governments of the fifty states serve as independent sovereigns, who—at least in theory—each “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.”³¹ Although this system may sacrifice efficiency, it does so on the altar of values such as checks and balances, greater governmental accountability and transparency, and interjurisdictional innovation and competition.³²

28. 323 U.S. 214 (1944), *overruled by* Trump v. Hawaii, 138 S. Ct. 2392 (2018).

29. See Trump v. Hawaii, 138 S. Ct. 2392, 2423 (2018).

30. See, e.g., David Alan Sklansky, *Japanese Internment Case Not “Good Law,”* STAN. L. SCH. BLOGS (Nov. 18, 2016), <https://law.stanford.edu/2016/11/18/korematsu-is-not-good-law> [<https://perma.cc/Q8RU-6R63>].

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

32. See Erin Ryan, *Secession and Federalism in the United States: Tools for Managing Regional Conflict in a Plurality Society*, 96 OR. L. REV. 123, 154–55 (2017); see also Justin Weinstein-Tull, *The Structures of Local Courts*, 106 VA. L. REV. 1031, 1090 (2020).

The allocation of authority between federal and state courts under the U.S. Constitution is commonly called judicial federalism.³³ Although the precise contours of this division of power remain subject to some debate, the Supreme Court established certain bright-line, black letter rules over the course of nearly two-and-a-half centuries. State supreme courts or equivalent courts of last resort possess the absolute authority to definitively interpret the laws of their states, and no federal court—not even the Supreme Court—may reverse or otherwise disturb such pronouncements.³⁴ State courts share concurrent authority to interpret federal law with the lower federal courts, and no state court is bound to follow a determination of federal law by any federal court other than the Supreme Court.³⁵ And federal courts not only lack the authority to create common law that is binding on the states, but they must also actively predict how a state supreme court would decide a question of state law, and apply that prediction even if they would otherwise decide the issue differently.³⁶

Judicial federalism is so well established that many forget—or do not even realize—that it has not always been part of the American legal system. Our first constitution, the Articles of Confederation, did not create a freestanding federal judiciary.³⁷ Rather, with limited exceptions, state courts staffed by state judges heard cases for which jurisdiction would today be vested exclusively in the federal courts.³⁸ In fact, numerous delegates to the Constitutional Convention questioned whether any federal courts should exist at all, with the language of Article III—providing that “the judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish”—being the result of a compromise proposed by James Madison and James Wilson to provide for a federal supreme court while shifting the debate about whether to establish lower federal courts to Congress.³⁹

Those who opposed the establishment of lower federal courts did so for two primary reasons. First, they largely saw no benefit to a federal court system coexisting with state court systems due to the belief that state courts were more than capable of applying federal law.⁴⁰ If they functioned as their

33. See Jeff Hicks, *The Effler Shot Across the Bow: Developing a Novel State Constitutional Claim Under the Threat of Ineffective Assistance of Counsel*, 59 *DRAKE L. REV.* 931, 940 (2011); see also Daniel B. Rodriguez, *State Constitutionalism and the Domain of Normative Theory*, 37 *SAN DIEGO L. REV.* 523, 526 n.5, 526–27 (2000).

34. See, e.g., *California v. Greenwood*, 486 U.S. 35, 43 (1988).

35. See, e.g., *ASARCO, Inc. v. Kadish*, 490 U.S. 605, 617 (1989).

36. See, e.g., *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

37. See James Martin, *The Articles of Confederation: The First Constitution of the United States*, *LIBR. OF CONG. BLOGS* (Sept. 16, 2011), <https://blogs.loc.gov/law/2011/09/the-articles-of-confederation-the-first-constitution-of-the-united-states/> [<https://perma.cc/G3LP-3VRC>].

38. See James E. Pfander, *Federal Supremacy, State Court Inferiority, and the Constitutionality of Jurisdiction-Stripping Legislation*, 101 *NW. U. L. REV.* 191, 208 (2007).

39. See Martin H. Redish & Curtis E. Woods, *Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and Synthesis*, 124 *U. PA. L. REV.* 45, 54 (1975).

40. See 1 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 124–25 (Max Farrand ed., 1911).

proponents asserted, the federal courts would be redundant at best, performing the same duties as state courts but at a substantial additional expense to the fledgling nation.⁴¹ Perhaps their greatest fear, however, was that the federal courts would not only be redundant, but also actively harmful, and would exercise their jurisdiction to encroach on state sovereignty and the jurisdiction of state courts.⁴²

Today, all fifty states operate their own court systems. With limited exceptions, state courts are generally structured as a pyramid.⁴³ The state supreme court or similar court of last resort sits at the apex and exercises the supreme judicial authority of the state, hearing only a relatively small number of cases.⁴⁴ State trial courts serve as the base, exercising general jurisdiction over all civil and criminal matters.⁴⁵ In most states, an intermediate state appellate court sits in the middle, hearing direct appeals from the state trial courts subject to ultimate review by the state supreme court.⁴⁶ However, states may organize their state court systems however they see fit, with some states establishing lower trial courts—such as municipal or county courts, specialty courts such as mental health or veterans courts, and the like.⁴⁷

Each state's court system is separate and wholly independent from the federal court system. No state court—not even the lowest court in the state's judicial pyramid—is bound to follow decisions of the corresponding federal court of appeals or federal district court in the jurisdiction.⁴⁸ Nor are state courts bound by the provisions of Article III of the Constitution.⁴⁹ As such, many states do not establish judgeships with life tenure, and state courts are often not limited only to adjudicating “Cases” and “Controversies.”⁵⁰ In fact, several states expressly permit their state supreme court to issue advisory opinions.⁵¹

41. *See id.*

42. *See id.*

43. Richard K. Greenstein, *Why the Rule of Law?*, 66 LA. L. REV. 63, 71 (2005) (“[W]ithin every judicial system in the United States, courts are arranged in a pyramid,” with “trial courts at its base” and “a single court at the top with ultimate authority.”).

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *See, e.g., ASARCO, Inc. v. Kadish*, 490 U.S. 605, 617 (1989).

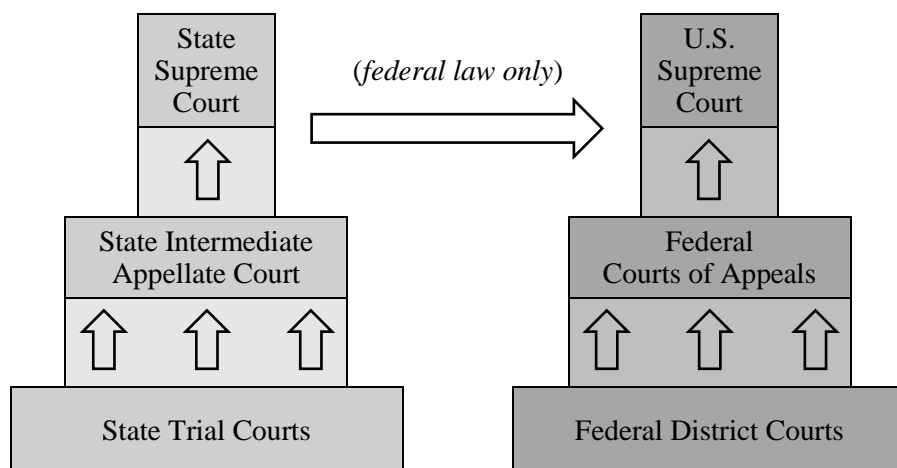
49. M. Ryan Harmanis, *States' Stances on Public Interest Standing*, 76 OHIO ST. L.J. 729, 739–740 (2015) (“Unlike the federal system, the judicial power of the state . . . is not constitutionally restricted by the language of Article III of the United States Constitution requiring ‘cases’ and ‘controversies,’ since no similar requirement exists in the [state’s] Constitution.’ This is an unquestionable tenet of state law, and one firmly supported by the Supreme Court of the United States.” (alterations in original) (quoting *Gregory v. Shurtleff*, 299 P.3d 1098, 1102 (Utah 2013))).

50. Helen Hershkoff, *State Courts and the “Passive Virtues”*: *Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1844–76, 1887 (2001) (describing how the judicial practice in the states differs from the federal model in that state courts engage in a range of activities beyond adjudicating “cases” and “controversies” and most state judges lack life tenure).

51. *See* Lucas Moench, Note, *State Court Advisory Opinions: Implications for Legislative Power and Prerogatives*, 97 B.U. L. REV. 2243 (2017) (summarizing the practice of state courts issuing advisory opinions).

The U.S. Supreme Court may review final judgments of all state supreme courts by writ of certiorari. However, the lower federal courts possess no jurisdiction to directly review state court decisions.⁵² In fact, even the Supreme Court lacks unrestricted authority to review state court judgments.⁵³ Although the Supreme Court may reverse a state court judgment that is inconsistent with federal law, it is completely powerless to reverse the judgment of a state supreme court based exclusively on an independent interpretation of its state constitution or other state law.⁵⁴

Figure 1: Relations Between State and Federal Courts



Because of this unique relationship, state courts—and particularly state supreme courts—provide a check against the reluctance of federal courts to remedy infringements on individual rights and liberties.⁵⁵ In fact, history is replete with instances of open state court resistance to federal court precedents that ultimately pushed the Supreme Court to overturn precedents on issues such as interracial marriage,⁵⁶ same-sex marriage,⁵⁷ and compulsory flag salutes.⁵⁸

52. *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923).

53. *Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590 (1874).

54. *Id.*

55. See Robert K. Fitzpatrick, *Neither Icarus nor Ostrich: State Constitutions as an Independent Source of Individual Rights*, 79 N.Y.U. L. REV. 1833, 1838–40 (2004).

56. See *Perez v. Sharp*, 198 P.2d 17, 29 (Cal. 1948); *Loving v. Virginia*, 388 U.S. 1, 6 n.5 (1967).

57. See *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d. 941, 972–73 (Mass. 2003); *Obergefell v. Hodges*, 576 U.S. 644, 662 (2015).

58. See *State v. Smith*, 127 P.2d 518, 523 (Kan. 1942); *W. Va. Sch. Bd. v. Barnette*, 319 U.S. 624, 642 (1943).

II. JUDICIAL ANTIFEDERALISM IN THE TERRITORIES

A. *From the Founding to 1900: The Traditional Antifederalist Judiciaries*

Today, the executive and legislative branches of the territorial governments of American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands are in many ways indistinguishable from those of the fifty states. But this is not a new development unique to these insular territories—from the time of the Founding, Congress delegated its lawmaking powers over the territories to locally elected territorial legislatures in lieu of legislating for the territories directly.⁵⁹ The very first act of Congress to govern an American territory—the Northwest Ordinance of 1787⁶⁰—created the precedent that not only established a republican form of territorial government, but also conferred individual rights and liberties to the residents of the Northwest Territory that were *greater* than those afforded to residents of the thirteen states, such as a prohibition on slavery and a right to public education.⁶¹ This federalist arrangement, however, has been described as administrative rather than constitutionally mandated and a matter of congressional discretion.⁶²

Yet while embracing the federalist model for lawmaking, the court systems crafted by Congress for the territories largely repudiated the idea of judicial federalism in favor of various antifederalist approaches. Congress first had occasion to establish a court system for a territory when it enacted the Northwest Ordinance to administer America's first territory, the Northwest Territory. But although Congress—through the Judiciary Act of 1789⁶³—assigned all thirteen original states to a total of fifteen federal judicial districts, it did not do so with the Northwest Territory; rather, Congress established a territorial court system like the state court systems found in the thirteen states.⁶⁴

This territorial court system possessed concurrent jurisdiction to hear both federal claims and claims arising under territorial law.⁶⁵ Surprisingly, the Northwest Territory's local court system retained greater autonomy than those of state court systems, in that Congress never passed any law that explicitly granted the Supreme Court jurisdiction to review judgments of the

59. See Robert J. Reinstein, *The Limits of Congressional Power*, 89 TEMP. L. REV. 1, 36–37 (2016).

60. Act of Aug. 7, 1789, ch. 8, 1 Stat. 50 (no longer in force).

61. *Id.*

62. See, e.g., *Hodge v. Bluebeard's Castle, Inc.*, 62 V.I. 671, 686 (V.I. 2015); *Parrott v. Virgin Islands*, 230 F.3d 615, 621 (3d Cir. 2000).

63. Ch. 20, 1 Stat. 73 (no longer in force).

64. See James T. Campbell, Note, *Island Judges*, 129 YALE L.J. 1888, 1903–04 (2020) (discussing how Congress did not establish federal courts in the Northwest Territory).

65. 1 LEANDER J. MONKS, *COURTS AND LAWYERS OF INDIANA* 6–7 (1916) (explaining that the courts possessed “original as well as appellate jurisdiction in all civil and criminal cases” and “[e]ven the Supreme Court of the United States could not review [its] decisions”).

territorial court system.⁶⁶ In fact, a mere three weeks before issuing its seminal opinion in *Marbury v. Madison*,⁶⁷ the Supreme Court dismissed an appeal from the courts of the Northwest Territory for lack of jurisdiction,⁶⁸ rejecting the argument that constitutional jurisdiction existed because the courts of the Northwest Territory were purportedly “federal” courts created by Congress.⁶⁹ Notably, Congress subsequently declined to provide for such jurisdiction by statute on the basis that “it would be inappropriate to grant the Supreme Court jurisdiction to review the decisions of territorial courts adjudicating territorial rights under the Northwest Ordinance.”⁷⁰

For the next 125 years, Congress would establish similarly structured antifederalist judicial systems in each future territory—with the exceptions of the Territory of Orleans and the Territory of Hawaii, where separate federal and territorial court systems coexisted—albeit with some modifications, such as permitting review of territorial court decisions by the Supreme Court if they implicated a federal question.⁷¹ These antifederalist judiciaries, however, were temporary: every time Congress admitted a territory as a state, it would establish Article III federal courts in the new state.⁷² Moreover, these antifederalist judiciaries were fully formed, consisting not just of territorial trial courts, but also of territorial appellate courts.⁷³ And while federal district courts possessed jurisdiction to adjudicate claims arising under state law based on diversity jurisdiction, this was not the case with the territories, in that prior to 1940, both federal statutory law and Supreme Court precedent precluded federal courts from exercising diversity jurisdiction in cases in which a party was a citizen of a territory or of the District of Columbia.⁷⁴

66. See Gregory Ablavsky, *Administrative Constitutionalism and the Northwest Ordinance*, 167 U. PA. L. REV. 1631, 1633 n.12 (2019) (asserting that there was no system through which to appeal decisions from territorial courts until 1805).

67. 5 U.S. (1 Cranch) 137 (1803).

68. See *Clarke v. Bazadone*, 5 U.S. (1 Cranch) 212, 214 (1803).

69. See *id.*; see also Anthony M. Ciolli, *United States Territories at the Founding*, 35 REGENT U. L. REV. 73, 85 (2022).

70. Ciolli, *supra* note 69, at 86 (citing James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 HARV. L. REV. 643, 709–11 (2004)).

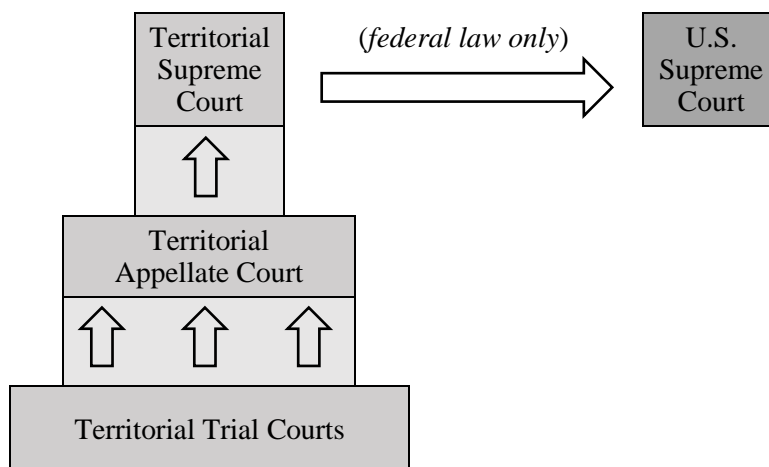
71. See generally Erwin C. Surrency, *Federal District Court Judges and the History of Their Courts*, 40 F.R.D. 139 (1966) (summarizing the history of the federal and territorial court systems of each state).

72. See *id.*

73. See generally *id.*

74. See *O'Donoghue v. United States*, 289 U.S. 516 (1933) (citizen of the District of Columbia); *Corp. of New Orleans v. Winter*, 14 U.S. 91 (1816) (citizen of a territory); see also 28 U.S.C. § 1332(e).

Figure 2: Relations Between Territorial and Federal Courts:
Traditional Model



As a result of this unusual structure, the lower federal courts possessed little meaningful input in the development of the law as it pertained to U.S. territories. And although the Supreme Court nominally exercised jurisdiction to review territorial decisions that implicated federal questions, it interpreted this jurisdiction narrowly, characterizing many purportedly federal issues—such as the interpretation of provisions of territorial organic acts—as territorial questions and not federal ones.⁷⁵

B. *The New Judicial Antifederalism: 1900 to 2012*

This traditional antifederalist judicial structure—in effect precluding the lower federal courts from reviewing territorial court decisions or interpreting territorial law—strongly favored territorial autonomy. In some ways, territorial courts possessed greater power to enforce territorial law than state courts did, in that litigants could not escape the reach of the territorial court system by commencing an action in federal court. As such, during this period, territorial supreme courts were largely free to determine the laws of their respective territories with little interference from the federal courts.

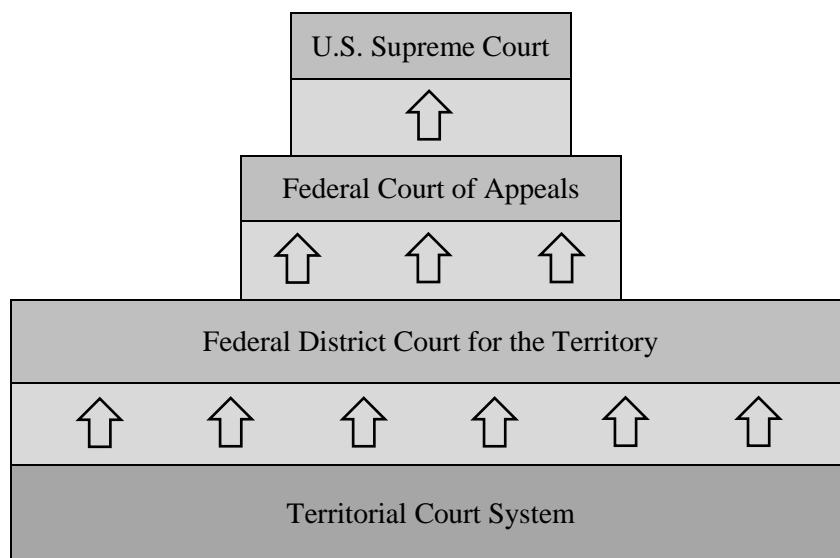
But when the United States government ceased expanding westward and instead turned to annexing overseas lands through conquest or purchase, Congress imposed a different form of judicial antifederalism on the new insular territories. Two years after Spain ceded Puerto Rico to the United States at the conclusion of the Spanish-American War in 1898, Congress enacted the Foraker Act⁷⁶ to establish a civilian government for the territory.

75. See, e.g., *Santa Fe Cent. Ry. Co. v. Friday*, 232 U.S. 694 (1914); *United States v. Pridgeon*, 153 U.S. 48 (1894); *Linford v. Ellison*, 155 U.S. 503 (1894); *Balt. & Potomac R.R. Co. v. Hopkins*, 130 U.S. 210 (1889).

76. Ch. 191, 31 Stat. 77 (1900) (codified as amended in scattered sections of 48 U.S.C.).

The Foraker Act established both a territorial court system and one federal district court, but nevertheless did not establish a federalist judicial system.⁷⁷ Rather, the Foraker Act continued the practice of judicial antifederalism by placing the territorial courts of Puerto Rico at the bottom of a single judicial hierarchy, below the newly established U.S. District Court for the District of Puerto Rico, which possesses appellate jurisdiction to review and overturn decisions by the Supreme Court of Puerto Rico.⁷⁸

Figure 3: Relations Between Territorial and Federal Courts:
Foraker Act



This new form of judicial antifederalism would later be exported to both Guam and the U.S. Virgin Islands, but with one additional indignity: unlike in Puerto Rico, a territorial supreme court or other local appellate court was not established, and so appeals of decisions by their territorial trial courts were taken, as of right, to the U.S. District Court of the Virgin Islands and the U.S. District Court of Guam.⁷⁹

This federal oversight of territorial courts was somewhat tempered in Puerto Rico in 1925, when Congress divested the district court of its appellate jurisdiction over the Supreme Court of Puerto Rico and provided for appeals to the U.S. Court of Appeals for the First Circuit largely as of right.⁸⁰ However, the U.S. District Courts of Guam and the Virgin Islands did not cede their supervisory roles over their territorial courts until 1996 and 2007,

77. See Campbell, *supra* note 64, at 1909–10.

78. See *id.*

79. See *id.* at 1921–28.

80. See *id.* at 1909–10; see also Act of Feb. 13, 1925, ch. 229, 43 Stat. 936 (no longer in force) (Judiciary Act of 1925).

respectively.⁸¹ And even after these federal district courts lost jurisdiction to review the judgments of the territorial courts, the oversight of the respective federal courts of appeals over territorial court systems did not end until 1961 for Puerto Rico, 2004 for Guam, and 2012 for the U.S. Virgin Islands.⁸²

III. JUDICIAL ANTIFEDERALISM, FEDERALISM, AND THE *INSULAR CASES*

This new judicial antifederalism in the three affected territories—in which territorial courts were in essence made wholly subordinate to federal courts for several decades—had a profound negative impact on the development of territorial law. For decades, the First Circuit—which at the time consisted entirely of judges who resided in New England and did not have a single active judge based in Puerto Rico—would routinely reverse the Supreme Court of Puerto Rico’s interpretations of Puerto Rican law by construing Puerto Rico’s statutes and other legal authorities through an Anglo-American lens without consideration of the civil legal system that it had developed as a Spanish colony.⁸³ The relationship between the local courts of the U.S. Virgin Islands, the District Court of the Virgin Islands, and the U.S. Court of Appeals for the Third Circuit has often been defined by the “tension” stemming from the federal courts’ misinterpretation of U.S. Virgin Islands law⁸⁴ as well as the wholesale imposition of the Federal Rules of Civil Procedure, Federal Rules of Criminal Procedure, and Federal Rules of Evidence on the territorial court system.⁸⁵ In fact, the U.S. Virgin Islands has even been described by one commentator as a “legal backwater”—not as a pejorative term to describe the legal system, but to recognize the reality that although “the Islands naturally may have tended to develop law diverging from that of the rest of the States in a manner narrowly tailored to serve the needs of the Islands’ population,” that process had not taken place because “the United States has imposed its own values and preferences in a number of ways” in its attempts to “Americanize the Virgin Islands.”⁸⁶

Nevertheless, because of congressional actions divesting the federal courts of their jurisdiction over the territorial courts, today, the relationship between the federal and territorial courts of every territory in which such courts coexist has transitioned to a federalist model that is virtually identical to the relationship between federal and state courts. In light of these significant

81. See Campbell, *supra* note 64, at 1921–29.

82. See Act of Aug. 30, 1961, Pub. L. No. 87-189, 75 Stat. 417 (codified as amended at 28 U.S.C. § 1258); Act of Oct. 30, 2004, Pub. L. No. 108-378, 118 Stat. 2206 (codified as amended at 48 U.S.C. § 1424); Act of Dec. 28, 2012, Pub. L. No. 112-226, 126 Stat. 1606 (codified as amended 48 U.S.C. § 1613).

83. See *Federal Courts—Review by Circuit Courts of Appeals—Doctrine That Decisions of Territorial Courts upon Matters of Local Law Should Not Be Disturbed Unless “Inescapably Wrong” Reaffirmed.*, 53 HARV. L. REV. 1048 (1940) (collecting cases).

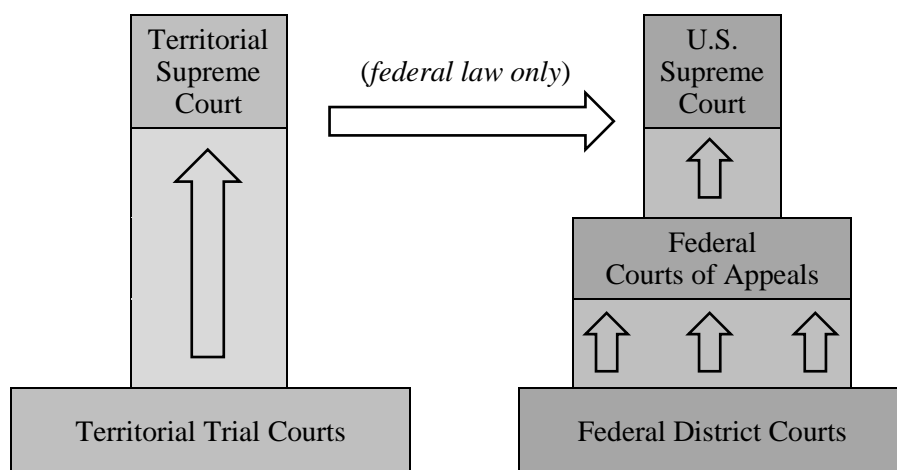
84. See Katy Womble & Courtney Cox Hatcher, *Trouble in Paradise?: Examining the Jurisdictional and Precedential Relationships Affecting the Virgin Islands Judiciary*, 46 STETSON L. REV. 441, 463–67 (2017).

85. See *Vanterpool v. Virgin Islands*, 63 V.I. 563, 577 (V.I. 2015).

86. Kristen David Adams, *The Folly of Uniformity?: Lessons from the Restatement Movement*, 33 HOFSTRA L. REV. 423, 451–58 (2004).

changes, a growing number of jurists, scholars, and attorneys—including myself—have begun to analyze both the structures of these territorial court systems as well as the jurisprudence they have begun to develop, now unbound from review by the lower federal courts.⁸⁷ These territorial courts—particularly in the U.S. Virgin Islands—have vigorously asserted their constitutional, statutory, and inherent authority, and have broken from the lower courts by rejecting continued efforts to homogenize territorial law by blindly incorporating federal or stateside practices into territorial jurisprudence.⁸⁸

Figure 4: Relations Between Territorial and Federal Courts:
Federalist Model



But what of the *Insular Cases*? As alluded to earlier in the discussion of judicial federalism, 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.”⁸⁹ This has been especially true in areas involving “social and economic rights,” an area in which state court decisions serve to indirectly “reorient federal constitutional doctrine” by “creat[ing]

87. See, e.g., Anthony M. Ciolli, *Territorial Constitutional Law*, 58 IDAHO L. REV. 206 (2022); Anthony M. Ciolli, *Territorial Paternalism*, 40 MISS. COLL. L. REV. 103 (2022); Anthony M. Ciolli & Dana M. Hrelac, *Third-Class Citizens: Unequal Protection Within United States Territories*, 55 SUFFOLK U. L. REV. 179 (2022); Joseph T. Gasper II, *Too Big to Fail: Banks and the Reception of the Common Law in the U.S. Virgin Islands*, 46 STETSON L. REV. 295 (2017); Kristen David Adams, *Living with Banks: Trends and Lessons from the First Five Years*, 46 STETSON L. REV. 391 (2017).

88. See, e.g., *Balboni v. Ranger Am. of the V.I., Inc.*, 70 V.I. 1048 (V.I. 2019); *Rennie v. Hess Oil V.I. Corp.*, 62 V.I. 529 (V.I. 2015); *Hodge v. Bluebeard’s Castle, Inc.*, 62 V.I. 671 (V.I. 2015); *Defoe v. Phillip*, 56 V.I. 109 (V.I. 2012).

89. 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).

new understandings that ‘presage’ federal constitutional rights” ultimately recognized by the Supreme Court.⁹⁰ It is thus the “essential constitutional function of state courts . . . to engage federal courts in a dialogue about the scope of federally created rights.”⁹¹ In other words, it is state courts, through their interpretation of state laws and state constitutional provisions, that serve as one of the most important checks on the actions—or inactions—of the federal courts.⁹² In doing so, state courts are not engaging in “a revolution or a rebellion, or even a rejection of the U.S. Supreme Court,” but are rather operating within “the design of the system” which is intended to provide “double protection of constitutional rights” by both federal and state courts.⁹³

It is this extraordinarily important perspective—that of the territorial courts and the judicial officers that serve within them—that has been entirely absent from debates on overturning the *Insular Cases* and what legal framework should take their place. The transition to the new judicial antifederalism, with territorial courts subordinate to and subject to review by federal courts as part of a single unbroken judicial hierarchy, began contemporaneously with the *Insular Cases*. As such, unlike other controversial decisions of the Supreme Court that restricted individual rights and liberties, there was no “push back” from territorial courts to prevent federal overreach and no “double protections” or intermediate steps of nondeferential review to “protect personal liberty and promote the public’s welfare.”⁹⁴ After all, the lower federal courts are always bound to strictly follow Supreme Court precedent and “are not free to reconsider or refine or tweak” those precedents with which they may disagree.⁹⁵

It should come as no surprise, then, that the lower federal courts have continued to apply and extend the *Insular Cases* framework, and they have repeatedly ruled against affirming the autonomy of territorial governments and enhancing the constitutional rights and liberties of the people of the territories.⁹⁶ Because the Supreme Court considers itself to not be a “court

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

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

92. John Dinan, *State Constitutional Amendment Processes and the Safeguards of American Federalism*, 115 PENN ST. L. REV. 1007, 1007–08 (2011) (citing JAMES A. GARDNER, *INTERPRETING STATE CONSTITUTIONS: A JURISPRUDENCE OF FUNCTION IN A FEDERAL SYSTEM* (2005)).

93. Scott L. Kafker, *State Constitutional Law Declares Its Independence: Double Protecting Rights During a Time of Federal Constitutional Upheaval*, 49 HASTINGS CONST. L.Q. 115, 143–44 (2022).

94. *Id.* at 135.

95. *United States v. Duvall*, 740 F.3d 604, 611 n.2 (D.C. Cir. 2013) (per curiam) (Kavanaugh, J., concurring); see also Lee J. Strang, *State Court Judges Are Not Bound by Nonoriginalist Supreme Court Interpretations*, 11 FIU L. REV. 327, 332 (2016).

96. See, e.g., *Tuaua v. United States*, 788 F.3d 300 (D.C. Cir. 2015); *Fitisemanu v. United States*, 1 F.4th 862 (10th Cir. 2021); *United States v. Baxter*, 951 F.3d 128 (3d Cir. 2020); *Bason v. Virgin Islands*, 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); *Guam v. Guerrero*, 290 F.3d 1210 (9th Cir. 2002); *United States v. Hyde*, 37 F.3d 116 (3d Cir. 1994); *Polychrome Int’l Corp. v. Krigger*, 5 F.3d 1522 (3d Cir.

of error” but one that focuses on resolving circuit splits and issues of nationwide importance,⁹⁷ it is not remotely shocking that the Supreme Court has declined repeated invitations to overrule the *Insular Cases*, given that there is no circuit split on the issue and that the constitutional rights continuously withheld through judicial decisions relying on the *Insular Cases* affect only a relatively small number of people. This is especially true when, as Justice Gorsuch observed, the question of what comes next—i.e., what legal framework would replace the *Insular Cases*—“may prove hard to resolve” and may result in great harm to the very structure of territorial governments if answered incorrectly.⁹⁸

CONCLUSION

Today, the courts of the territories serve as equals to the federal courts for the first time in nearly 125 years. As the new era of judicial federalism begins in the territories, for the first time in the *Insular Cases* era, the federal and territorial “courts [will be] required both to speak and listen as equals,” engaging in an “open-ended dialogue [that] becomes the driving force for the articulation of rights,” to be ultimately resolved by the Supreme Court.⁹⁹ In fact, this dialogue has already begun, with the Supreme Court of the Virgin Islands departing from the precedents of certain lower federal courts by concluding that it possesses the inherent and statutory power to independently interpret the Revised Organic Act of the Virgin Islands¹⁰⁰—a power that the U.S. Court of Appeals for the Ninth Circuit previously withheld from the Supreme Court of Guam with respect to interpretation of the Organic Act of Guam.¹⁰¹

It is difficult to predict the eventual outcome of this “dialectical federalism”¹⁰² on the future relationship between the United States and its insular territories. What appears relatively certain, however, is that the Supreme Court will not revisit the *Insular Cases* unless required to resolve a split in authority, and it will not overrule the *Insular Cases* in the absence of a workable alternative framework. Both scenarios will become more likely to occur as the territories experiment with and embrace their newfound federalist court systems.

1993); *JDS Realty Corp. v. Virgin Islands*, 824 F.2d 256 (3d Cir. 1987); *Northern Mariana Islands v. Atalig*, 723 F.2d 682 (9th Cir. 1984).

97. STEPHEN BREYER, *MAKING OUR DEMOCRACY WORK: A JUDGE’S VIEW* 228–29 (2010).

98. *See United States v. Vaello Madero*, 142 S. Ct. 1539, 1556 (2021) (Gorsuch, J., concurring).

99. 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) (quoting Robert M. Cover & T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 *YALE L.J.* 1035, 1036, 1048 (1977)).

100. Ch. 558, 68 Stat. 497 (1954) (codified as amended in scattered sections of 48 U.S.C.); *see Balboni v. Ranger Am. of the V.I., Inc.*, 70 V.I. 1048, 1071 (V.I. 2019).

101. Ch. 512, 64 Stat. 384 (1950) (codified as amended in scattered sections of 48 U.S.C.); *see Guam v. Guerrero*, 290 F.3d 1210, 1216–17 (9th Cir. 2002).

102. Witte, *supra* note 99, at 421.