

REPRESENTATION OF UNITED STATES TERRITORIES ON THE FEDERAL COURTS OF APPEALS

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Many aspects of the relationship between the United States and its territories are inherently undemocratic. This Essay draws attention to one: the continued and systematic discrimination against United States territories in the appointment of judges to the federal courts of appeals. This failure not only contributes to the well-known diversity crisis within the federal judiciary but also to the stagnation in the development of the law of the territories as well as the persistent second-class treatment of the territories and their people under the United States Constitution as interpreted by the federal courts. Unlike larger and more difficult issues such as voting rights, territorial representation on the federal courts of appeals could be achieved through a simple amendment to 28 U.S.C. § 44(c) or by the president exercising his discretion to reject the unofficial custom of filling vacant circuit court judgeships with judges who hail from the same state as their prior occupants.

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INTRODUCTION

In 2005, Gregorio Igartúa, a United States citizen residing in the territory of Puerto Rico, brought a series of lawsuits seeking the

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constitutional right to vote in presidential elections for people residing in this U.S. territory.¹

The U.S. Court of Appeals for the First Circuit, sitting en banc, rejected his claim for electoral college representation for what it viewed as a very simple and straightforward reason: Puerto Rico is not a “state” within the meaning of the Constitution and therefore is not entitled to electoral college representation.² However, not everyone on the court agreed with this conclusion.

Six of the seven judges serving on the en banc court resided in First Circuit states: Maine, Massachusetts, New Hampshire, and Rhode Island.³ The seventh judge was Juan R. Torruella. He did not live in a state; his home was Puerto Rico.

Judge Torruella served on the First Circuit from 1984 until his death in 2020, and between 1994 and 2001, served as its chief judge.⁴ In his thirty-six year tenure, he was the first and only federal court of appeals judge to not only be born and raised in a U.S. territory, but also to reside full-time in the territory while serving.⁵

Judge Torruella issued a lengthy and vigorous dissent from the court’s decision in *Igartúa-De La Rosa*. While his dissent focused almost exclusively on the law, he also took the opportunity to note in a paragraph his own personal circumstances:

Puerto Rico is part of the First Circuit. An Article III District Court sits there, providing nearly one-third of the appeals filed before this court, which sits in Puerto Rico at least twice a year, also in the exercise of Article III power. One active judge of this court resides in Puerto Rico and participates in cases that are often of national importance, but is nonetheless disenfranchised from voting for national offices. How can the Constitution be applied in such a Balkanized, arbitrary and irrational manner?⁶

That Judge Torruella could wield the immense power vested in him as an Article III judge and yet lack the right to vote for both president and voting

¹ *Igartúa-De La Rosa v. United States*, 417 F.3d 145, 146–47 (1st Cir. 2005) (en banc). In the context of residential voting, residence is significant, in that a U.S. citizen born in Puerto Rico who moves to Arizona may vote for federal officers in Arizona, while a U.S. citizen born in Arizona who moves to Puerto Rico would lose such a right. *See Segovia v. United States*, 880 F.3d 384, 391 (7th Cir. 2018).

² *Igartúa-De La Rosa*, 417 F.3d at 147.

³ *See U.S. Court of Appeals for the First Circuit: Judges*, FED. JUD. CTR., <https://www.fjc.gov/history/courts/u.s.-court-appeals-first-circuit-judges> [<https://perma.cc/AU64-9FPV>].

⁴ *Juan R. Torruella*, U.S. CT. APP. FOR THE FIRST CIR., <https://www.ca1.uscourts.gov/juan-torruella> [<https://perma.cc/BRF6-7G65>].

⁵ Sam Roberts, *Juan Torruella, Groundbreaking U.S. Appeals Judge, Dies at 87*, N.Y. TIMES (Oct. 28, 2020), <https://www.nytimes.com/2020/10/28/us/juan-torruella-groundbreaking-us-appeals-judge-dies-at-87.html> [<https://perma.cc/6B4U-S8MH>].

⁶ *Igartúa-De La Rosa*, 417 F.3d at 169 (Torruella, J., dissenting).

members of Congress illustrates the absurdity of Puerto Rico's constitutional status. Its anomalous status—and that of other U.S. territories—illustrates the inappropriateness of the majority's curt rejection of Igarúa's claims.

Though Judge Torruella's views did not carry the day in that particular case, they were, however, repeated in other important cases implicating the constitutional rights of the people of Puerto Rico. In fact, in the two years immediately preceding his death, Judge Torruella authored the majority opinions in two of the most significant territorial rights cases, both of which later reached the U.S. Supreme Court.⁷

But the substantial influence of Judge Torruella on issues of concern to Puerto Rico was not limited only to his cases. Justice Stephen Breyer, who served with Judge Torruella on the First Circuit, noted that Judge Torruella's very presence on the court certainly contributed to fellow judges' greater understanding of the issues facing the territories, who would frequently talk with him about Puerto Rico's status.⁸ And as Judge José Cabranes 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,” and did so “in a respectful academic form that aligned his argument with that of the American civil-rights movement.”⁹ Although Judge Torruella did not live to see the *Insular Cases* overturned,¹⁰ he “helped to disinter the Insular Cases

⁷ *United States v. Vaello Madero*, 956 F.3d 12, 32 (1st Cir. 2020) (holding residents of Puerto Rico are entitled to Supplemental Security Income benefits), *rev'd*, 142 S. Ct. 1539 (2022); *Aurelius Inv. v. Puerto Rico*, 915 F.3d 838, 863 (1st Cir. 2019) (holding appointments to PROMESA Board to be unconstitutional), *rev'd sub nom.* Fin. Oversight & Mgmt. Bd. for P.R. v. *Aurelius Inv.*, 140 S. Ct. 1649 (2020).

⁸ See Stephen G. Breyer, *A Dedication to Judge Juan Torruella*, 130 YALE L.J.F. 308, 308 (2020) (describing Justice Breyer's memories of serving with Judge Torruella on the First Circuit).

⁹ José A. Cabranes, *Closing Remarks on Judge Juan Torruella*, 130 YALE L.J.F. 852, 853 (2020).

¹⁰ The term *Insular Cases* typically refers to a series of six opinions issued by the Supreme Court during its 1901 term, including *De Lima v. Bidwell*, 182 U.S. 1 (1901) (holding Puerto Rico is no longer a foreign country for the purposes of U.S. tariff law), *Goetze v. United States*, 182 U.S. 221 (1901) (same), *Dooley v. United States*, 182 U.S. 222 (1901) (upholding duties collected prior to ratification), *Armstrong v. United States*, 182 U.S. 243 (1901) (invalidating duties collected after ratification), *Downes v. Bidwell*, 182 U.S. 244 (1901) (holding Congress is not always bound by the Constitution when regulating territories), and *Huus v. N.Y. & P.R. S.S. Co.*, 182 U.S. 392 (1901) (holding trade with Puerto Rico to be domestic trade). However, some jurists and scholars include additional cases within the *Insular Cases*, such as *Dooley v. United States*, 183 U.S. 151 (1901) (upholding a tax on imports to Puerto Rico), *Fourteen Diamond Rings v. United States*, 183 U.S. 176 (1901) (holding that items purchased in Puerto Rico after ratification are not subject to customs duties), *Kepner v. United States*, 195 U.S. 100 (1904) (holding protection against double jeopardy applies in the territories), *Dorr v. United States*, 195 U.S. 138 (1904) (holding there is no constitutional right to jury trial in territories), and *Balzac v. Porto Rico*, 258 U.S. 298 (1922) (distinguishing between incorporated and unincorporated territories in denying full Sixth Amendment protections to the latter). For purposes of this Essay, the term *Insular Cases* encompasses all cases involving the territories decided by the Supreme Court prior to the transition of the insular territories from direct federal control to democratically elected local governments.

from the graveyard of American historical memory” and at least ensure that the territorial perspective was given voice.¹¹

The purpose of this Essay is not to serve as a remembrance of Judge Torruella—though he certainly deserves recognition for his decades of distinguished service to the United States and its territories. Rather, it is to draw attention to a stunning failure in the administration of the federal courts: the continued and systematic discrimination against U.S. territories in the appointment of judges to the federal courts of appeals. This failure contributes not only to the well-known diversity crisis within the federal judiciary but also to the stagnation in the development of the law of the territories. This stagnation exacerbates the persistent second-class treatment of the territories and their people under the U.S. Constitution as interpreted by the federal courts.

I BACKGROUND

A. *The Insular Cases*

At the end of the 19th century and the start of the 20th century, the United States became a colonial power. In 1898, the United States acquired Guam, the Philippines, and Puerto Rico from Spain at the conclusion of the Spanish-American War.¹² The following year, after over a decade of contention, Germany, England, and the United States signed a tripartite agreement partitioning the islands comprising the Samoan archipelago between Germany and the United States, resulting in the transfer of sovereignty over the islands of Tutuila, Aunu`u, and Manu`a to the United States. These islands would collectively become known as American Samoa.¹³ A few years later, in 1903, the United States acquired the Panama Canal Zone from Panama through the Hay-Bunau-Varilla Treaty.¹⁴ And in 1917 the United States purchased the islands of St. Croix, St. John, and St. Thomas from Denmark, as well as many surrounding minor islands, which collectively became the U.S. Virgin Islands.¹⁵

¹¹ Cabranes, *supra* note 9, at 855.

¹² Treaty of Peace Between the United States of America and the Kingdom of Spain, Spain-U.S., Dec. 10, 1898, 30 Stat. 1754.

¹³ Jeffrey B. Teichert, *Resisting Temptation in the Garden of Paradise: Preserving the Role of Samoan Custom in the Law of American Samoa*, 3 GONZ. J. INT'L L. 35 (1999); *History*, NAT'L MARINE SANCTUARY OF AM. SAMOA, <https://americansamoa.noaa.gov/learn/history.html> (last visited June 10, 2023) [<https://perma.cc/95A6-Z3HG>].

¹⁴ Convention Between the United States and the Republic of Panama for the Construction of a Ship Canal to Connect the Waters of the Atlantic and Pacific Oceans, Pan.-U.S., Nov. 18, 1903, 33 Stat. 2234.

¹⁵ Convention Between the United States and Denmark for Cession of the Danish West Indies, Den.-U.S., Aug. 4, 1916, 39 Stat. 1706.

Unlike other territories previously acquired by the United States in the late 18th and early-to-mid 19th century, these new territories both were noncontiguous with the mainland United States and considerably more populated.¹⁶ The legal academy, including prominent scholars of the time such as Abbott Lawrence Lowell and Christopher Columbus Langdell, openly advocated for separate and unequal treatment of the territories acquired after the Spanish-American War based on conceptions of racial inferiority.¹⁷

Unfortunately, those efforts were successful. In a series of decisions collectively known as the *Insular Cases*,¹⁸ the Supreme Court relied on these now-discredited theories of racial inequality and the “white man’s burden” to interpret the Territorial Clause of the Constitution as permitting Congress to treat the “savage,”¹⁹ “half-civilized,”²⁰ “ignorant and lawless,”²¹ “alien races”²² inhabiting America’s territories in the Caribbean Sea and the Pacific Ocean differently than the white Americans in the states and mainland territories.²³ In doing so, the Supreme Court invented the doctrine of territorial incorporation—a way to draw distinctions between “incorporated” and “unincorporated” territories—reversing the Court’s previous position that the rights and privileges guaranteed by the Constitution follow the flag to U.S. territories.²⁴

Consistent with the legal profession’s evolving views on race, the reasoning of the *Insular Cases* has been repudiated by all corners of the legal community, to the point where they have been described as having “nary a

¹⁶ Juan R. Torruella, *Ruling America’s Colonies: The Insular Cases*, 32 YALE L. & POL’Y REV. 57, 62–63 (2013).

¹⁷ See, e.g., C.C. Langdell, *The Status of Our New Territories*, 12 HARV. L. REV. 365, 386 (1899) (“[The Bill of Rights is] so exclusively English that an immediate and compulsory application of them to ancient and thickly settled Spanish colonies would furnish as striking a proof of our unfitness to govern dependencies, or to deal with alien races”); Simeon E. Baldwin, *The Constitutional Questions Incident to the Acquisition and Government by the United States of Island Territory*, 12 HARV. L. REV. 393, 415 (1899) (“Our Constitution was made by a civilized and educated people. It provides guaranties of personal security which seem ill adapted to the conditions of society that prevail in many parts of our new possessions.”); James Bradley Thayer, *Our New Possessions*, 12 HARV. L. REV. 464, 485 (1899) (advocating for a constitutional amendment to restrict statehood to contiguous territories); Abbott Lawrence Lowell, *The Status of Our New Possessions—A Third View*, 13 HARV. L. REV. 155, 176 (1899) (distinguishing between territories acquired for the purpose of becoming states and territories “acquired as to not form part of the United States,” and arguing that “constitutional limitations, . . . [like uniform] taxation and trial by jury, do not apply” to the latter category).

¹⁸ See cases cited *supra* note 10.

¹⁹ Thayer, *supra* note 17, at 475.

²⁰ Baldwin, *supra* note 17, at 415.

²¹ *Id.*

²² *Downes v. Bidwell*, 182 U.S. 244, 287 (1901).

²³ See Tom C.W. Lin, *Americans, Almost and Forgotten*, 107 CALIF. L. REV. 1249, 1265 (2019) (“The Territorial Clause of the Constitution imposes very few limitations on Congress’s plenary powers.”).

²⁴ *Id.* at 1285.

friend in the world.”²⁵ But although rhetoric has changed, perceptions of the law have not. The Supreme Court has cautioned that “neither the [*Insular Cases*] nor their reasoning should be given any further expansion,”²⁶ and “that the Constitution has independent force in these territories, a force not contingent upon acts of legislative grace.”²⁷ But the Court has never formally overturned the *Insular Cases*, despite receiving several invitations to do so.²⁸ While their racist reasoning may have been disavowed, the *Insular Cases* thus nevertheless hover as a specter over the territories, and continue to serve as a justification for treating some Americans differently from other Americans based on the part of the United States they call home.

B. Territorial Representation on the Federal Courts of Appeals

All fifty states, the District of Columbia, and the territories of Puerto Rico, the U.S. Virgin Islands, Guam, and the Northern Mariana Islands are assigned to one or more of ninety-four federal district courts. Each district court, in turn, is assigned to one of twelve regional federal courts of appeals which hear appeals from the district courts located within their circuit.²⁹

Although individual seats on the courts of appeals are ostensibly not assigned to any specific state or territory, it has been a long-standing practice for the President to consult with “home-state” senators when a vacancy arises.³⁰ This tradition started as an informal senatorial courtesy, but later became institutionalized through the “blue-slip” procedure, in which the Senate Committee on the Judiciary typically takes no action on a judicial nominee unless both “home-state” senators return a slip of paper certifying that they do not object to the nomination.³¹ For purposes of this procedure,

²⁵ Luis Fuentes-Rohwer, *The Land that Democratic Theory Forgot*, 83 IND. L.J. 1525, 1536 (2008).

²⁶ Reid v. Covert, 354 U.S. 1, 14 (1957).

²⁷ Boumediene v. Bush, 553 U.S. 723, 757 (2008).

²⁸ Most recently, the Supreme Court declined to do so in *United States v. Vaello Madero*, 142 S. Ct. 1539 (2022). See *id.* at 1557 (Gorsuch, J., concurring) (“[T]he *Insular Cases* rest on a rotten foundation. And I hope the day comes soon when the Court squarely overrules them.”). It also expressly declined the request of the Virgin Islands Bar Association and other amici curiae to “overrule the much-criticized ‘*Insular Cases*’ and their progeny,” in *Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv.*, 140 S. Ct. 1649, 1665 (2020), although it reiterated that “whatever their continued validity we will not extend them in these cases.” *Id.*

²⁹ *Geographic Boundaries of United States Courts of Appeals and United States District Courts*, U.S. CTS., https://www.uscourts.gov/sites/default/files/u.s._federal_courts_circuit_map_1.pdf [<https://perma.cc/6B4U-S8MH>].

³⁰ See Orrin G. Hatch, *At Last a Look at the Facts: The Truth About the Judicial Selection Process: Each Is Entitled to His or Her Own Opinion, But Not to His Own Facts*, 11 GEO. MASON L. REV. 467, 474–77 (2003) (explaining the historical role of “home-state” senators in federal judicial nominations).

³¹ See Caprice L. Roberts, *Discretion & Deference in Senate Consideration of Judicial Nominations*, 51 U. LOUISVILLE L. REV. 1, 12 (2012) (explaining the blue slip procedure and how it can “effectuate a one-senator veto power”).

the home-state senators are often determined by the residency of the court of appeals judge who previously held the seat. Occasionally, this has led to conflict when a judge moved their chambers after confirmation.³² Thus, attempts to transfer a court of appeals judgeship from one state to another are politically challenging, although not unprecedented.³³

This difficulty in transferring an existing court of appeals judgeship to another state has correspondingly made it even more difficult for a new state or territory to receive representation on its assigned court of appeals.

1. *The Historical Representation of Territories on Federal Courts of Appeals*

The Evarts Act established the modern precursor to the federal appellate system by creating the original nine U.S. Courts of Appeals and giving them jurisdiction over most appeals.³⁴ At the time the Act was adopted, the United States only consisted of forty-four states—Utah, Oklahoma, New Mexico, Arizona, Alaska, and Hawaii remained territories and were only slowly incorporated into the union in the coming years.³⁵ These territories were excluded from the selection pool of federal appellate judges—all appointments to the newly created courts of appeals were from the forty-four states.³⁶ The reason for this omission was simple: The Act did not assign the territories to a geographic circuit.³⁷

Not surprisingly, when a judge serving on a circuit court died, retired, or resigned, home-state senators insisted that the successor judge also hail from their state.³⁸ As a result, the states admitted into the union after the passage of the Evarts Act³⁹ and subsequently assigned to a circuit were not

³² Ninth Circuit Judge Stephen Trott created such a conflict involving the filling of the vacancy when he took senior status in 2004, with senators from both California and Idaho claiming “ownership” to the seat because Judge Trott had been a resident of California when confirmed but subsequently moved his chambers to Idaho. *See Hearing on Ninth Circuit Nominee Owens Postponed*, METRO. NEWS-ENTER. (Oct. 23, 2013), <http://www.metnews.com/articles/2013/owen102313.htm> [<https://perma.cc/4APP-R4DJ>].

³³ *See* Rachel Brand, *Judicial Appointments: Checks and Balances in Practice*, 33 HARV. J.L. & PUB. POL’Y 47, 51 (2010) (“[S]uch inter-state shifts normally meet with stiff resistance, and presidents do not attempt them lightly.”).

³⁴ Judiciary (Evarts) Act of 1891, ch. 517, 26 Stat. 826.

³⁵ Samuel Shipley, *List of U.S. States’ Dates of Admission to the Union*, ENCYC. BRITANNICA (Aug. 15, 2018), <https://www.britannica.com/topic/list-of-U-S-states-by-date-of-admission-to-the-Union-2130026> [<https://perma.cc/PB6K-PU3Y>].

³⁶ *See* Anthony M. Ciolli, *Territorial Paternalism*, 44 MISS. COLL. L. REV. 103, 119–21 (2022) (noting that it took additional congressional action to ensure representation from each state in a circuit).

³⁷ At the time, the territories lacked federal district courts that were part of the United States federal judiciary, and territorial courts in effect exercised the combined jurisdiction of a federal court and a state court.

³⁸ *See supra* note 33 and accompanying text.

³⁹ Judiciary (Evarts) Act of 1891, ch. 517, 26 Stat. 826.

guaranteed representation on their geographic circuit court when a seat became vacant. Although Oklahoma entered the union in 1907, the first Oklahoma judge, John Cottaral, did not become a member of the U.S. Court of Appeals for the Eighth Circuit until 1929, when Congress created an additional judgeship on that court.⁴⁰ Similarly, despite the fact that Arizona became a state in 1912, the first Arizona judge, William Henry Sawtelle, was not appointed to the U.S. Court of Appeals for the Ninth Circuit until 1931.⁴¹

Alaska and Hawaii, however, lacked representation on the Ninth Circuit for even longer. Both states achieved statehood in 1959, but Hawaii was unrepresented on the Ninth Circuit until 1971, when Herbert Choy was appointed by President Richard M. Nixon.⁴² Alaska had no representation on the Ninth Circuit until 1980, when Robert Boochever was appointed by President Jimmy Carter.⁴³

Further, unlike the other states that were admitted into the union after 1891, Alaska and Hawaii's representation on the Ninth Circuit was not permanent. In 1986, when Judge Boochever assumed senior status, President Ronald Reagan appointed an Oregon attorney, Diarmuid O'Scannlain, to succeed him.⁴⁴ But Alaska's lack of representation was relatively brief. President George H.W. Bush subsequently nominated Alaskan judge Andrew Jay Kleinfeld to the Ninth Circuit in 1991.⁴⁵ Hawaii, however, was without a Ninth Circuit judge for more than two decades. When Judge Choy assumed senior status in 1981, President Reagan appointed Melvin Brunetti, a Nevada attorney, to replace him,⁴⁶ and no attempt was made to appoint another resident of Hawaii to the Ninth Circuit at the time.

The long absence of a Hawaiian judge from the Ninth Circuit was at least one, if significant, motivator of Congress changing the requirements

⁴⁰ See Act of Feb. 28, 1929, ch. 363, 45 Stat. 1346, 1347 (setting the number of circuit judges authorized for the Eighth Circuit to five).

⁴¹ Notably, Judge Sawtelle was not originally from the Arizona Territory. But born in Alabama, he moved to the territory in 1903, nine years before it was admitted as a state. He was appointed and confirmed as a judge on the U.S. District Court for the District of Arizona in 1913. *Sawtelle, William Henry*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/sawtelle-william-henry> [<https://perma.cc/UW6N-28JV>].

⁴² *Judges of the United States Court of Appeals for the Ninth Circuit*, 29 GOLDEN GATE U. L. REV., 1999, at 6.

⁴³ *Judge Robert Boochever*, ALASKA CT. SYS., <https://public.courts.alaska.gov/web/media/docs/boochever.pdf> [<https://perma.cc/2JDW-ZF2R>].

⁴⁴ *O'Scannlain, Diarmuid Fionntain*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/oscannlain-diarmuid-fionntain> [<https://perma.cc/PZ9B-FCQX>].

⁴⁵ Notably, Judge Kleinfeld's nomination to the Ninth Circuit is credited, at least in part, to the fact that Judge Boochever immediately moved his chambers from Alaska to California upon assuming senior status, which provided "Alaska senators a compelling argument for a new judge in their state during the Bush administration." Jennifer E. Spreng, *The Icebox Cometh: A Former Clerk's View of the Proposed Ninth Circuit Split*, 73 WASH. L. REV. 875, 941 n.314 (1998).

⁴⁶ *Brunetti, Melvin T.*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/brunetti-melvin-t> [<https://perma.cc/M4GE-S3LM>].

regarding the composition of judges in each circuit court.⁴⁷ Congress amended 28 U.S.C. § 44(c) to specify that within each circuit, there must be at least one active federal court of appeals judge from each state the circuit represents.⁴⁸ As a result of that legislation, Hawaii attorney Richard Clifton became the second resident of Hawaii to serve on the Ninth Circuit upon his appointment by President George W. Bush and confirmation by the senate in 2002.⁴⁹

2. *Modern-Day Representation of the United States Territories*

The situation for modern-day United States territories is even bleaker. Except for American Samoa, which still lacks even a federal district court,⁵⁰ the inhabited territories are each assigned to a geographic circuit. Puerto Rico belongs to the First Circuit, the Virgin Islands to the Third Circuit, and Guam and the Northern Mariana Islands both to the Ninth Circuit.⁵¹

Each territory, however, has been grossly underrepresented on its respective court of appeals. To date, Guam and the Northern Mariana Islands have never had any representation on the Ninth Circuit bench.⁵² Meanwhile, the U.S. Virgin Islands can—at best—claim only partial representation. Legendary civil rights leader William H. Hastie, a former judge of the United States District Court of the Virgin Islands and Governor of the Virgin Islands, was appointed in 1949 by President Harry Truman to a newly created seat on the Third Circuit,⁵³ but Hastie was neither born nor raised in the U.S. Virgin Islands. Rather, he first moved to the territory when he was appointed judge of the district court by President Franklin D. Roosevelt in 1937 at age thirty-two.⁵⁴ He then left the U.S. Virgin Islands two years later to become the dean of Howard University School of Law, and only returned to the U.S. Virgin Islands in 1946 when President Truman appointed him as governor.⁵⁵ More significantly, immediately after his appointment to the

⁴⁷ See 143 CONG. REC. 3223 (1997) (statement of Rep. Neil Abercrombie).

⁴⁸ 28 U.S.C. § 44(c).

⁴⁹ Clifton, Richard R., FED. JUD. CTR., <https://www.fjc.gov/history/judges/clifton-richard-r> [<https://perma.cc/FVK3-75Q3>].

⁵⁰ See Uilison Falemanu Tua, *A Native's Call for Justice: The Call for the Establishment of a Federal District Court in American Samoa*, 11 ASIAN-PAC. L. & POL'Y J. 246, 255 (2009).

⁵¹ 28 U.S.C. § 41.

⁵² See *Biographical Directory of Article III Federal Judges, 1789-present*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/search/advanced-search> [<https://perma.cc/HVR2-QRVW>] (providing a directory of all judges, former and presiding, of the Ninth Circuit).

⁵³ Hastie, William Henry, FED. JUD. CTR., <https://www.fjc.gov/history/judges/hastie-william-henry> [<https://perma.cc/8ZZM-NBMJ>].

⁵⁴ William Henry Hastie, Jr., PENNSYLVANIANS FOR MOD. CTS., <https://www.pmconline.org/william-henry-hastie-jr> [<https://perma.cc/469L-2KCW>].

⁵⁵ *Id.* The President of the United States appointed the Governor of the Virgin Islands until Congress amended the Revised Organic Act of 1954 to provide for a democratically elected governor beginning with the November 3, 1970 election. 48 U.S.C. § 1591; see also Revised Organic Act of the Virgin Islands, Pub. L. No. 517, § 11, 68 Stat. 497, 503 (1954).

Third Circuit, Judge Hastie left the U.S. Virgin Islands for Philadelphia—where he resided until his death in 1976. While Hastie may have expressed more concern about the rights of Virgin Islanders than his predecessors, he “nonetheless served as a colonial administrator”⁵⁶ who had no connection to the U.S. Virgin Islands prior to his appointment as district judge and governor.

But as with Judge Boochever and Judge Choy, no one with any connection to the U.S. Virgin Islands was appointed to succeed Judge Hastie on the Third Circuit bench when he died in 1971. Rather, President Richard M. Nixon appointed a New Jersey judge, James Rosen, to the position.⁵⁷ Today, the U.S. Virgin Islands remains without representation on the Third Circuit, even though the number of appeals originating in the U.S. Virgin Islands is roughly comparable to the number originating from Delaware,⁵⁸ a jurisdiction which has two active and two senior judges on the Third Circuit.⁵⁹

Puerto Rico remains the only territory with any modicum of meaningful representation on its court of appeals. Although cases appealed from Puerto Rico have historically accounted for approximately thirty to forty percent of the First Circuit’s traditional appellate case load,⁶⁰ Judge Torruella was the only Puerto Rican on the First Circuit during his tenure. But perhaps more importantly, because 28 U.S.C. § 44(c) only mandates that there “be at least one circuit judge in regular active service appointed from the residents of each state in that circuit,” there was no guarantee that Judge Torruella, upon

⁵⁶ John Hayakawa Torok, *Freedom Now!—Race Consciousness and the Work of De-Colonization Today*, 48 HOW. L.J. 351, 386 & n.230 (2004).

⁵⁷ *Rosen, James*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/rosen-james> [https://perma.cc/L8F4-R5UL].

⁵⁸ See ADMIN. OFF. OF THE U.S. CTS., U.S. COURTS OF APPEALS JUDICIAL BUSINESS 2010, 97 tbl.B-3, https://www.uscourts.gov/sites/default/files/statistics_import_dir/B03Sep10.pdf [https://perma.cc/8UFW-7UYC] (showing that, in the five years preceding September 30, 2010, the Virgin Islands contributed 462 appeals to the Third Circuit, compared to 772 from Delaware; the next smallest state, New Jersey, contributed 3,594).

⁵⁹ Delaware is currently represented on the Third Circuit by active judges Thomas L. Ambro and Kent A. Jordan, as well as senior judges Walter Stapleton and Jane Roth. See *Ambro, Thomas L.*, U.S. CTS. OF APPEALS FOR THE THIRD CIR., <https://www.fjc.gov/history/judges/ambro-thomas-l> (last visited September 14, 2023) [https://perma.cc/9NW8-GEF7]; *Jordan, Kent A.*, U.S. CTS. OF APPEALS FOR THE THIRD CIR., <https://www.fjc.gov/history/judges/jordan-kent> (last visited September 14, 2023) [https://perma.cc/R39L-K7X9]; *Stapleton, Walter King*, U.S. CTS. OF APPEALS FOR THE THIRD CIR., <https://www.fjc.gov/history/judges/stapleton-walter-king> (last visited September 14, 2023) [https://perma.cc/75GF-4XKJ]; *Roth, Jane Richards*, U.S. CTS. OF APPEALS FOR THE THIRD CIR., <https://www.fjc.gov/history/judges/roth-jane-richards> (last visited September 14, 2023) [https://perma.cc/Z48Q-PPC2].

⁶⁰ See U.S. CTS. FOR THE FIRST CIR., 2019 ANNUAL REPORT 15 (2019), <https://www.ca1.uscourts.gov/sites/ca1/files/2019%20Annual%20Report%20Final.pdf> [https://perma.cc/H3VY-LNHS] (demonstrating that, for the eight-year period leading up to September 30, 2019, Puerto Rico accounted for 35% of the First Circuit’s appellate caseload from its states and territories).

his death or retirement, would be replaced by another resident of Puerto Rico.⁶¹ And in fact, the day after Judge Torruella died, a law professor on a popular libertarian legal blog emphasized that President Donald J. Trump could nominate someone outside of Puerto Rico to fill the vacancy, since section 44(c) does not specify that there be at least one resident judge in the territories.⁶² While President Trump and President Joseph Biden both nominated Puerto Ricans to the seat—with President Biden’s nominee, Judge Gustavo Gelpí, ultimately confirmed⁶³—Puerto Rico’s continued future representation on the First Circuit remains tenuous and rooted in presidential discretion rather than legal mandate.

II

WHY REPRESENTATION MATTERS

Virtually all scholarship focused on the second class, or worse, treatment of the people of the territories by the federal government addresses either the withholding of fundamental individual rights—such as the right of citizenship or right to vote—or discrimination in funding and eligibility for social welfare and other programs.⁶⁴ These are certainly important topics that warrant further study and attention. One may wonder, then, why an issue that is seemingly minor in comparison—the lack of a statutory mandate requiring that at least one resident of each territory serve on its respective federal court of appeals—deserves immediate consideration.

Some may even believe that the lack of such a statutory mandate is not a problem at all. After all, every federal judge must swear or affirm that they “will administer justice without respect to persons, and do equal right to the poor and to the rich, and . . . faithfully and impartially discharge and perform

⁶¹ See 28 U.S.C. § 44(c).

⁶² Josh Blackman, *Judge Torruella, the Lone First Circuit Judge in Puerto Rico, Passed Away*, VOLOKH CONSPIRACY (Oct. 27, 2020, 10:00 AM), <https://reason.com/330olokh/2020/10/27/judge-torruella-the-lone-first-circuit-judge-in-puerto-rico-passed-away> [<https://perma.cc/QG9Q-MAKV>].

⁶³ *Judge Raúl Arias Marxuach Nominated to First Circuit Court of Appeals*, PUERTO RICO REPORT (Nov. 23, 2020), <https://www.puertoricoreport.com/judge-raul-arias-marxuach-nominated-to-first-circuit-court-of-appeals/> [<https://perma.cc/F7UN-9XVU>]; Nate Raymond & Mike Scarcella, *U.S. Senate Confirms Puerto Rican Judge Gelpi to 1st Circ. Seat*, REUTERS (Oct. 18, 2021), <https://www.reuters.com/legal/legalindustry/us-senate-confirms-puerto-rican-judge-gelpi-1st-circ-seat-2021-10-18/> [<https://perma.cc/XQ6P-5Y7C>].

⁶⁴ See, e.g., Andrew Hammond, *Territorial Exceptionalism and the American Welfare State*, 119 MICH. L. REV. 1639, 1639 (2021) (highlighting discrepancies in the delivery of public benefits between states and territories); Tom C.W. Lin, *Americans, Almost and Forgotten*, 107 CALIF. L. REV. 1249, 1252–81 (2019) (describing the lack of political equality, weak social services, economic distress, and harmful geographic isolation from the mainland that characterize the territories); Carlos Iván Gorrín Peralta, *Past, Present, and Future of U.S. Territories: Expansion, Colonialism, and Self-Determination*, 46 STETSON L. REV. 233, 234 (2017) (illustrating the power that Congress, the presidency, and the federal courts have over people in the territories, despite a lack of political processes available to territorial residents).

all the duties . . . under the Constitution and laws of the United States.”⁶⁵ If a federal judge abides by that oath, why should it matter whether that judge resides in the U.S. Virgin Islands or Delaware? As shall be explained below, direct representation matters—significantly.

A. Diversity of Experience

It has been said that citizenship is unique because it is not just a right, but “the right to have rights.”⁶⁶ If that is the case, the right to bring a case in court represents the right to have rights vindicated. But having one’s rights vindicated in court is not so simple as the judge “call[ing] balls and strikes” like a baseball umpire, mechanistically applying “the rules” and then “matching facts against those rules.”⁶⁷ “[A] strike zone is not a constant thing and is dependent upon the observation and decision-making skills of the umpire.”⁶⁸ It is for this reason that we do not hire ordinary citizens or recent law graduates to serve as judges but rather seek to appoint lawyers who are not only extraordinary competent but also possess the requisite professional and life experiences to effectively preside over the judgment of others.

The need for such experience is most pronounced in the federal courts, given the serious nature of the cases filed. Numerous empirical studies have shown the profound impact the life experiences of judges have on case outcomes.⁶⁹ This remains true even at the appellate level, where, for death row cases involving black defendants, a panel with even “a single African-American judge is about 23 percentage points more likely to grant relief than an all-nonblack panel.”⁷⁰ Numerous scholars have argued persuasively that the enhanced diversity of perspectives brought to the bench by minority and women judges influences, and perhaps improves, judicial decisionmaking.⁷¹

⁶⁵ 28 U.S.C. § 453.

⁶⁶ *Gonzalez-Alarcon v. Macias*, 884 F.3d 1266, 1277 (10th Cir. 2018) (quoting *Perez v. Brownell*, 356 U.S. 44, 64 (1958) (Warren, C.J., dissenting)).

⁶⁷ Chad M. Oldfather, *Umpires, Judges, and the Aesthetics of the Infield Fly*, 13 FIU L. REV. 957, 957 (2019).

⁶⁸ ANNA MCKIM, STATE BAR OF TEX., PRACTICAL PERSUASION: HOW TO TELL A JUDGE THEY ARE WRONG (2019).

⁶⁹ See Jeffrey J. Rachlinski & Andrew J. Wistrich, *Judging the Judiciary by the Numbers: Empirical Research on Judges*, 13 ANN. REV. L. & SOC. SCI. 203, 207–08 (2017) (finding that the demographic characteristics of judges affect judges’ decisions); see also Jennifer L. Peresie, *Female Judges Matter: Gender and Collegial Decisionmaking in the Federal Appellate Courts*, 114 YALE L.J. 1759, 1761 (2005) (finding that, in a sample of 556 appellate cases over three years, plaintiffs were twice as likely to prevail when a female judge was on the panel).

⁷⁰ Jared Ham & Chan Tov McNarrara, *Queer Eyes Don’t Sympathize: An Empirical Investigation of LGB Identity and Judicial Decision Making*, 105 CORNELL L. REV. 589, 601 (2020) (quoting Jonathan P. Kastellec, *Race, Context, and Judging on the Courts of Appeals: Race-Based Panel Effects in Death Penalty Cases*, 42 JUST. SYS. J. 394, 396 (2016)).

⁷¹ See Kevin R. Johnson, *How Political Ideology Undermines Racial and Gender Diversity in Federal Judicial Selection: The Prospects for Judicial Diversity in the Trump Years*, 2017 WIS. L. REV. 345, 352 (2017) (citing articles for this proposition); see also Sherrilyn A. Ifill, *Racial*

At least one former Supreme Court Justice has pointed to specific examples where her unique experiences have had such an impact.⁷²

B. Effects of Judicial Residency on Case Adjudication

While much of the literature on how a judge's life experiences can come to bear on her decisionmaking has focused on judicial decisionmaking based on a judge's race, gender, sexual orientation, and other immutable characteristics, the residence of a judge is also a highly significant influence. Judge Kleinfeld, in written testimony to the Commission on Structural Alternatives for the Federal Courts of Appeals, explained how the homogeneity of the composition of the Ninth Circuit—the vast majority of whom hail from California—adversely affects the quality of appellate decisions:

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 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. . . .

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 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

Diversity on the Bench: Beyond Role Models and Public Confidence, 57 WASH. & LEE L. REV. 405, 453–54 (2000) (“[B]lack federal judges regardless of political party affiliation decide cases in favor of plaintiffs in race discrimination cases at statistically significantly higher levels than white male and female judges”) (emphasis omitted).

⁷² Justice Ruth Bader Ginsburg explained how her experiences affected the Supreme Court proceedings in *Safford Unified School District #1 v. Redding*, 557 U.S. 364 (2009), in that her male colleagues “have never been a 13-year-old girl” and that as a woman she “can be sensitive to things that are said in draft opinions that (male justices) are not aware can be offensive.” Joan Biskupic, *Ginsburg: Court Needs Another Woman*, USA TODAY (May 6, 2009, 1:25 AM), <https://abcnews.go.com/Politics/332insburg-court-woman/story?id=7513795> [<https://perma.cc/34DY-5E8D>].

know it.⁷³

Judge Kleinfeld's keen observations apply with even greater force to the territories. Because Judge Torruella has been the only resident of a territory to serve for any meaningful time on a court of appeals, it is impossible to conduct an empirical study on the effect that the presence of a judge residing in a territory has on judicial decisionmaking. However, it is likely no coincidence that the First Circuit became one of the federal appellate courts most supportive of territorial rights after Judge Torruella joined the bench, while during the same period, the Third Circuit—hearing cases from the U.S. Virgin Islands, a mere fifty miles from Puerto Rico—ruled against expanding the rights of the people of the U.S. Virgin Islands and the sovereignty of the territory's local government in virtually every case of significance that has come before it.⁷⁴

Perhaps most notable, however, is not the case outcomes themselves, but the reasoning used to justify those divergent holdings. Even the most cursory review of opinions issued by these two circuits in cases implicating territorial rights or applications of the Constitution to the territories highlights drastically different jurisprudential approaches. Such a difference can only be explained by a greater awareness of and sensitivity to issues affecting the territories by the First Circuit.

The Supreme Court of the United States has since directed that the *Insular Cases* should not receive any further expansion or be used as further justification for treating the territories and their peoples differently.⁷⁵ Notably, while the Supreme Court has, in recent years, issued rulings that were unfavorable to territorial governments or individual territorial citizens,

⁷³ Letter from Andrew J. Kleinfeld, J., U.S. Ct. of Appeals for the Ninth Cir., to the Comm'n on Structural Alts. for the Fed. Cts. of Appeals (May 22, 1998), <http://www.library.unt.edu/gpo/csafca/hearings/submitted/kleinfel.htm> [<https://perma.cc/47FV-GMY9>].

⁷⁴ See, e.g., *United States v. Baxter*, 951 F.3d 128, 128 (3d Cir. 2020) (holding that warrantless searches of packages mailed to the Virgin Islands were permissible under the Fourth Amendment's border-search exception); *United Indus., Serv., Transp., Pro. & Gov't Workers of N. Am. Seafarers Int'l Union ex rel. Bason v. Gov't of the V.I.*, 767 F.3d 193, 193 (3d Cir. 2014) (affirming federal judicial oversight over the Supreme Court of the Virgin Islands), *overruled on other grounds by* *Vooyo v. Bentley*, 901 F.3d 172 (3d Cir. 2018); *United States v. Gillette*, 738 F.3d 63, 72 (3d Cir. 2013) (upholding the federal court's jurisdiction over territorial crimes); *Kendall v. Russell*, 572 F.3d 126, 136–37 (3d Cir. 2009) (depriving the local legislature of the authority to remove local judges on separation-of-powers grounds); *Ballentine v. United States*, 486 F.3d 806, 811 (3d Cir. 2007) (holding that Virgin Islands citizens have no constitutional right to vote for the president or members of Congress); *United States v. Hyde*, 37 F.3d 116, 118 (3d Cir. 1994) (holding that the Fourth Amendment does not prohibit routine customs searches for persons leaving the Virgin Islands for the mainland United States, even absent suspicion of wrongdoing); *JDS Realty Corp. v. Gov't of the V.I.*, 824 F.2d 256, 260 (3d Cir. 1987) (holding that the Commerce Clause applies to the Virgin Islands), *vacated as moot*, 484 U.S. 999 (1988), *remanded to* 852 F.2d 66 (3d Cir. 1988).

⁷⁵ See, e.g., *Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv.*, 140 S. Ct. 1649, 1665 (2020) (quoting *Reid v. Covert*, 354 U.S. 1, 14 (1957) (plurality opinion)).

it has not once used the *Insular Cases* as the basis for a decision.⁷⁶ On the contrary, the Supreme Court has gone out of its way to use language and adopt reasoning that respect and acknowledge territorial autonomy, even going so far as to decline invitations by litigants to exercise supervisory authority over territorial courts,⁷⁷ or to adopt a plenary standard of review with respect to legal questions of purely local concern.⁷⁸

What is perhaps more significant, however, is what the Supreme Court has *not* done. Unlike *Plessy v. Ferguson*⁷⁹ and similar “anticanon” precedents,⁸⁰ the *Insular Cases* have never been expressly overturned by the Supreme Court. This is not for lack of opportunity. In addition to rejecting explicit overtures to overturn the *Insular Cases* in the cases in which it granted certiorari—always on the basis that the *Insular Cases* are irrelevant to the question being resolved by the Court⁸¹—the Supreme Court has largely avoided granting certiorari in cases where lower courts relied on the *Insular Cases* to support their holdings.⁸² Because the Court does not explain why it denies certiorari, it is impossible to say with any certainty why this has been the case. However, the refusal of the Court to do so renders the decisions of the courts of appeals significantly more important, in that they then represent the final word on many important questions involving the rights of the people of the territories.

The First Circuit has followed in the footsteps of the Supreme Court and has not cited the *Insular Cases* as authority—binding or persuasive—in any case since Judge Torruella became a member of that court. While the

⁷⁶ See, e.g., *Fin. Oversight & Mgmt. Bd. for P.R.*, 140 S. Ct. at 1665 (declining to discuss the *Insular Cases* because the analysis was unnecessary, given that the method for appointing officials to the Financial Oversight and Management Board did not violate the Appointments Clause); *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1873 (2016) (relying on *Grafton v. United States*, 206 U.S. 333 (1908) and *Puerto Rico v. Shell Co. (P.R.), Ltd.*, 302 U.S. 253 (1937) to establish that Puerto Rico is not a sovereign distinct from the United States); *Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 136 S. Ct. 1938, 1947 (2016) (justifying its holding that Puerto Rico is a “state” for purposes of the Bankruptcy Code’s preemption provision based on the “plain text” of the statute); *Limtiaco v. Camacho*, 549 U.S. 483, 491–92 (2007) (giving no deference to the Supreme Court of Guam’s interpretation of the Organic Act because the U.S. Supreme Court is bound to construe federal statutes “according to [their] terms,” and holding that the interpretation of the Organic Act is not a matter of “purely local concern,” which would warrant deference).

⁷⁷ See *Barnard v. Thorstenn*, 489 U.S. 546, 551–52 (1989) (declining to apply the Supreme Court’s supervisory power over the District Court of the Virgin Islands).

⁷⁸ See *Limtiaco*, 549 U.S. at 491–92 (acknowledging that, in matters of local concern, the Supreme Court of Guam is to be accorded deference).

⁷⁹ 163 U.S. 537 (1896), *overruled by* *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954).

⁸⁰ The term “anticanon” refers to a set of Supreme Court cases, including *Plessy*, whose reasoning or result is so egregious that their central propositions must be rejected by all legitimate decisions. See Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 386–87 (2011).

⁸¹ See, e.g., *Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv.*, 140 S. Ct. 1649, 1665 (2020); *United States v. Vaello Madero*, 142 S. Ct. 1539, 1545 (2022) (Gorsuch, J., concurring).

⁸² See, e.g., *Fitisemanu v. United States*, 1 F.4th 862, 878 (10th Cir. 2021), *cert. denied*, 143 S. Ct. 362 (2022); *Tuaua v. United States*, 788 F.3d 300, 307 (D.C. Cir. 2015).

First Circuit has on occasion—such as in the *Igartúa* case—issued rulings against territorial rights, it has not relied on the *Insular Cases* in reaching decisions.⁸³ It instead has rested its holdings on the plain and unambiguous text of the Constitution itself, or cases decided prior to the *Insular Cases*.⁸⁴ Not only that, but one recent opinion issued by a First Circuit panel plainly described the *Insular Cases* as “discredited,” “reviled,” a “relic from a different era,” a product of “colonialism,” and “historically and juridically, an episode of the dead past.”⁸⁵ In fact, beyond the right to vote in presidential elections, the First Circuit has extended many other rights to the people of Puerto Rico.⁸⁶

The Third Circuit, however, has done precisely the opposite during this same period. It has cited to the *Insular Cases* as legal authority for withholding from residents of the U.S. Virgin Islands rights which are plainly conferred by the Bill of Rights,⁸⁷ and relied on the *Insular Cases* as the sole authority for setting aside the Fourth Amendment and authorizing the warrantless searches of all individuals traveling from the U.S. Virgin Islands to the mainland United States.⁸⁸ In a 2007 opinion issued in *Ballentine v. United States*, a case virtually identical to *Igartúa*, in which a resident of the U.S. Virgin Islands sued for the right to vote in presidential elections, the Third Circuit did not follow the lead of the First Circuit and adjudicate the case based on the original meaning of the Constitution.⁸⁹ Rather, it expressly held that “[t]he *Insular Cases* control the decision here,” and summarily rejected the argument on that basis alone.⁹⁰ And while the First Circuit expressly disavowed the *Insular Cases* in *Igartúa*, the Third Circuit only expressed its “regret[.]” for their “enduring ‘vitality’” and—perhaps most shockingly—observed that “the wider implications of the continued applicability of these cases *are only recently coming to light*.”⁹¹ It is difficult to conceive of a greater disconnect between federal judges and the people of a community they purportedly serve than this panel of Third Circuit judges believing—in 2007—that the negative implications of the

⁸³ *Igartúa v. United States*, 626 F.3d 592, 600–02 (1st Cir. 2010).

⁸⁴ *Id.*

⁸⁵ *Aurelius Inv. v. Fin. Oversight & Mgmt. Bd. for P.R.*, 915 F.3d 838, 854–55 & n.12 (1st Cir. 2019).

⁸⁶ *See, e.g.*, *United States v. Vaello Madero*, 956 F.3d 12 (1st Cir. 2020); *Lopez v. Aran*, 844 F.2d 898, 902 (1st Cir. 1988); *United States v. Lopez Andino*, 831 F.2d 1164, 1167–68 (1st Cir. 1987); *Ramirez v. Puerto Rico Fire Serv.*, 715 F.2d 694, 697 (1st Cir. 1983).

⁸⁷ *See United States v. Ntreh*, 279 F.3d 255, 256–57 (3d Cir. 2002) (withholding the right to indictment by a grand jury from residents of the Virgin Islands).

⁸⁸ *See United States v. Hyde*, 37 F.3d 116, 120 (3d Cir. 1994) (holding that individuals leaving the Virgin Islands may be subject to a customs search prior to departure even in absence of any suspicion of wrongdoing).

⁸⁹ 486 F.3d 806 (3d Cir. 2007).

⁹⁰ *Id.* at 812–13.

⁹¹ *Id.* at 813 (emphasis added).

century-old *Insular Cases* were only a recent development.

Unfortunately, the Third Circuit is not alone in its failure to recognize the residents of the United States territories as coequal to state-residing citizens, deserved of the same constitutional protections. In fact, the First Circuit is the outlier in disavowing the *Insular Cases* and adjudicating issues of territorial rights in a civil rights-recognizing manner.

The Ninth Circuit hears appeals from the federal district courts of Guam and the Northern Mariana Islands and formerly exercised temporary certiorari jurisdiction over their territorial supreme courts—yet territorial residents have never sat on the Ninth Circuit’s bench. In a case exercising that temporary certiorari jurisdiction, the Ninth Circuit held that it would not defer to the Supreme Court of Guam’s construction of a provision in the Guam Bill of Rights, but instead exercise plenary review.⁹² It did so despite longstanding precedent from the Supreme Court of the United States and other courts holding that territorial supreme courts must receive substantial deference in interpreting territorial organic acts on issues of local concern; these interpretations cannot be set aside merely because a federal court disagrees with them.⁹³

Like the Third Circuit, the Ninth Circuit has not only repeatedly cited favorably to the *Insular Cases* and applied them as substantive law,⁹⁴ but also has extended their rationale to other contexts, even using them as the basis to withhold the right to a jury trial in the Northern Mariana Islands as late as 1984.⁹⁵ And while the Third Circuit expressed its “regret[]” for the “enduring vitality” of the *Insular Cases*,⁹⁶ the Ninth Circuit has not even taken that tepid step. Rather, the Ninth Circuit’s only acknowledgement of the racist underpinnings of the *Insular Cases* can be found in a footnote in a case from 2015. The court wrote that the *Insular Cases* “ha[ve] been the subject of extensive judicial, academic, and popular criticism,” but failed to explain the basis of that criticism, let alone disavow the cases’ racist reasoning.⁹⁷

This same failure to condemn the *Insular Cases* has been true of other courts of appeals. While the District of Columbia Circuit and the Tenth Circuit do not hear cases involving the territories with any regularity—given

⁹² *Guam v. Guerrero*, 290 F.3d 1210 (9th Cir. 2002).

⁹³ *See, e.g.*, *Puerto Rico v. Shell Co.*, 302 U.S. 253, 266 (1937) (providing for substantial deference); *Puerto Rico v. Russell & Co.*, 288 U.S. 476, 483 (1933); *Santa Fe Cent. Ry. Co. v. Friday*, 232 U.S. 694 (1914); *Hall v. C&P Tel. Co.*, 793 F.2d 1354 (D.C. Cir. 1986); *Succession of Tristani v. Colon*, 71 F.2d 374, 375–76 (1st Cir. 1934).

⁹⁴ *See, e.g.*, *Friend v. Reno*, 172 F.3d 638 (9th Cir. 1999) (relying on the *Insular Cases* to deny United States citizenship to individuals born in the Philippines when it was a United States territory); *Rabang v. I.N.S.*, 35 F.3d 1449 (9th Cir. 1994) (same); *Sakamoto v. Duty Free Shoppers, Ltd.*, 764 F.2d 1285 (9th Cir. 1985) (applying the *Insular Cases* to the question of whether the dormant Commerce Clause applies to Guam).

⁹⁵ *Northern Mariana Islands v. Atalig*, 723 F.2d 682 (9th Cir. 1984).

⁹⁶ *Ballentine*, 486 F.3d at 813.

⁹⁷ *Paeste v. Gov’t of Guam*, 798 F.3d 1228, 1231 n.2 (9th Cir. 2015).

that no territories fall within their geographic boundaries—they both recently had occasion to reject claims that those born in American Samoa are entitled to birthright citizenship under the Citizenship Clause of the Constitution.⁹⁸ A panel of the District of Columbia Circuit applied the *Insular Cases* as substantive law and expanded them to hold that Congress may withhold constitutional birthright citizenship from people born in the territories.⁹⁹ And also unlike the Third Circuit, the panel failed to even express regret for doing so, only labelling the *Insular Cases* as “sometimes contentious,” as if to imply that their result and reasoning remain broadly accepted.¹⁰⁰

Perhaps even more shockingly, the Eleventh Circuit panel went even further, relying on reasoning strikingly similar to judicial decisions that upheld segregation. Over a vehement dissent, not only did the majority apply the *Insular Cases* to reject birthright citizenship, but it expressly stated that the *Insular Cases* benefit the territories and their people. Because, as the court held, “the *Insular Cases*’ framework gives federal courts significant latitude to preserve traditional cultural practices that might otherwise run afoul of individual rights enshrined in the Constitution,” the logic of these cases “can be repurposed to preserve the dignity and autonomy of the peoples of America’s overseas territories.”¹⁰¹ This argument is extraordinarily reminiscent of outrageous claims that Black Americans benefited from slavery or Jim Crow laws. For instance, the lower court decision in *Brown v. Board of Education*, famously reversed by the United States Supreme Court, that upheld school segregation did so not on grounds that Black Americans were an inferior race, but because of the purported benefits that Black Americans received from segregation and the separate-but-equal regime.¹⁰²

C. *The Collateral Effects of Denying Representation*

The presence of a resident of Puerto Rico on the First Circuit, and the absence of appointed residents of the other territories on their respective courts of appeals, have had a profound effect on how circuit courts adjudicate matters involving the territories. But there are other noticeable collateral effects that go beyond the nature or quality of decisionmaking in those courts.

One such effect is an impaired relationship between the federal courts,

⁹⁸ See *Tuaua v. United States*, 788 F.3d 300, 300 (D.C. Cir. 2015); *Fitisemanu v. United States*, 1 F.4th 862, 862 (10th Cir. 2021).

⁹⁹ *Tuaua*, 788 F.3d at 375.

¹⁰⁰ *Id.*

¹⁰¹ *Fitisemanu*, 1 F.4th at 870–71.

¹⁰² *Brown v. Bd. of Educ. of Topeka*, 98 F. Supp. 797, 798 (D. Kan. 1951), *rev'd*, 349 U.S. 294 (1955) (“[T]he school district transports colored children to and from school free of charge [while] [n]o such service is furnished to white children.”). Of course, the majority fails to adequately explain how depriving the people of American Samoa of United States citizenship—in effect leaving them stateless—is in any way necessary to preserve their culture.

the territorial courts, and the legal community within the respective territory. As Judge Kleinfeld observed, one of the most important benefits of having circuit court judges reflect the geographic diversity of the states and territories they serve is the ability to have someone at the court who is familiar with unique aspects of not just local law, but local culture.¹⁰³ The failure to represent geographic diversity on courts “produces a disconnect between litigants and judges that can cost courts not only legitimacy but nuanced and just decisions.”¹⁰⁴ For instance, if an appellate court sitting in a predominantly rural state is largely comprised of judges who reside in an urban enclave, there is a high probability that there will be misunderstandings—perhaps due to unconscious bias—given the substantial cultural divide between rural and urban America.¹⁰⁵

The deterioration in the relationship between federal courts, territorial courts, and the legal community within a respective territory, has been most readily seen in the U.S. Virgin Islands, where the Third Circuit is particularly notorious among the members of the Virgin Islands Bar Association for its lack of knowledge of the territory and its customs,¹⁰⁶ as well as its misunderstanding of certain fundamental aspects of Virgin Islands law.¹⁰⁷

In fact, one Third Circuit judge, in a conversation with a former President of the Virgin Islands Bar Association, noted her surprise when for the first time ever she learned that residents of the U.S. Virgin Islands were unable to vote for president.¹⁰⁸ Such anecdotal accounts are supported by research. Outside scholars that have studied the judicial system of the U.S. Virgin Islands have noted that the “increased tension between the Virgin

¹⁰³ Letter from Andrew J. Kleinfeld, *supra* note 73 and accompanying text (noting common misunderstandings by non-Alaskan native judges and law clerks with respect to Alaskan native culture, such as with respect to guns and Native American settlements).

¹⁰⁴ Nathaniel M. Fouch, *The Case for Districts: Descriptive Rural Representation on State Supreme Courts*, 16 UNIV. ST. THOMAS L.J. 279, 290 (2020).

¹⁰⁵ *See id.* at 289 (noting the concentration of wealth in urban centers and how “urbanites often mistrust the motives and ideas of rural-dwelling Americans”).

¹⁰⁶ 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) (emphasis added). Those familiar with the 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).

¹⁰⁷ *See, e.g., Vooyo v. Bentley*, 901 F.3d 172, 195 (3d Cir. 2018) (Bibas, J., dissenting) (misinterpreting the statute providing for direct review of the Virgin Islands Supreme Court by the United States Supreme Court); *Hughley v. Gov’t of the V.I.*, 536 Fed. App’x 278, 282–85 (3d Cir. 2013) (Hardiman, J., dissenting) (confusing the Virgin Islands habeas corpus statute with the federal habeas corpus statute).

¹⁰⁸ Pamela L. Colon, Remarks at the New York State Bar Association, *How You Can Lose Your Rights as an American with a Change of Address? Part 2* (Nov. 19, 2021), <https://nysba.org/products/how-you-can-lose-your-rights-as-an-american-citizen-part-2/> [<https://perma.cc/R7TU-U5V6>].

Islands Supreme Court and the Third Circuit” stems from the Third Circuit’s misinterpretation of Virgin Islands law, which has resulted in a relationship that “has become increasingly complex” and in conflicting opinions which could confuse lower courts.¹⁰⁹

In one case, the presiding judge of the Superior Court of the Virgin Islands issued an opinion identifying the Third Circuit, and not the Virgin Islands Supreme Court, as “the Court of last resort in this jurisdiction.”¹¹⁰ The Third Circuit, sitting en banc, has since overturned the decision that led to the presiding judge questioning the authority of the Virgin Islands Supreme Court to definitively determine Virgin Islands law. However, it did so only after permitting this uncertainty to stand for four years.¹¹¹ During that period, the authority of the Supreme Court of the Virgin Islands to decide local law was further put in question by the District Court of the Virgin Islands, which attempted, ultimately unsuccessfully, to usurp the Virgin Islands Supreme Court’s jurisdiction in a then-pending legal dispute involving the qualifications to serve in the Virgin Islands legislature.¹¹² While today the Supreme Court of the Virgin Islands is unquestionably recognized as the court of last resort for the territory, empowered to definitively determine Virgin Islands law without interference from federal courts, this outcome was far from certain.

Notably, none of the areas in which the Third Circuit and the Virgin Islands Supreme Court have disagreed can be attributed to differing judicial philosophies or methods of statutory or constitutional interpretation. Rather, the differences have largely been due to the Third Circuit’s failed attempts at ascertaining the intent of elected officials, including those within the territory’s legislature as well as its non-voting congressman.¹¹³ This has often occurred when the Third Circuit has interpreted Virgin Islands law through the lens of “mainland United States” values.¹¹⁴ For instance, in one case, the Third Circuit disregarded clear and obvious textual evidence that the Virgin Islands legislature intended to establish a complete no-fault divorce regime, holding instead that it could not have possibly intended to adopt a law

¹⁰⁹ 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, 466 (2017). While friction between a federal court of appeals and a state or territorial supreme court is often desirable, as friction between two coequal courts may ultimately improve the law, this tension between the Third Circuit and the Virgin Islands Supreme Court was unique in that the Third Circuit asserted that it possesses the power to review and reject decisions of the Virgin Islands Supreme Court. See *Bason v. Gov’t of the V.I.*, 767 F.3d 193 (3d Cir. 2014).

¹¹⁰ *Hodge v. V.I. Tel. Corp.*, 60 V.I. 105, 112 (V.I. Super. Ct. 2014).

¹¹¹ See *Vooy*, 901 F.3d at 172.

¹¹² See *Bryan v. Fawkes*, 61 V.I. 201 (V.I. 2014); *Payne v. Fawkes*, No. VC 2014-053, 2014 WL 4499559, at *2 (D.V.I. Sept. 12, 2014); *Bryan v. Fawkes*, 61 V.I. 416 (V.I. 2014).

¹¹³ See, e.g., *Garcia v. Garcia*, 59 V.I. 758 (V.I. 2013); *Defoe v. Phillip*, 56 V.I. 109 (V.I. 2012).

¹¹⁴ See, e.g., *United States v. Baxter*, 951 F.3d 128 (3d Cir. 2020) (following “mainland” laws in applying a border-search exception to the Fourth Amendment).

different from the overwhelming majority of states, which at the time permitted consideration of fault.¹¹⁵ In another case, the Third Circuit repeatedly refused to believe that the Virgin Islands legislature intended for the word “employer” in the Virgin Islands Workers Compensation Act to refer only to the actual employer, despite multiple contrary holdings from Virgin Islands courts and the passage of clarifying amendments by the legislature.¹¹⁶

Last, but certainly not least, due largely to its continued reliance on the *Insular Cases*, the Third Circuit has ruled against the autonomy of the territorial government and the extension of constitutional rights to the Virgin Islands in virtually every significant case brought in the last thirty years.¹¹⁷ As such, while it is a common belief that federal courts are more likely than state and local courts to safeguard constitutional rights and protect minority groups,¹¹⁸ that is certainly not true in the Virgin Islands. As a natural consequence, cases seeking expanded civil rights and liberties for the people of the Virgin Islands are now often filed in the territorial courts, where they have achieved some significant success.¹¹⁹

III

THE PATH FORWARD

Many aspects of the relationship between the United States and its territories are inherently undemocratic. Some of those inequities are unavoidable and likely cannot be remedied absent a constitutional amendment.¹²⁰ Most, however, can be fixed through ordinary legislative and judicial processes.

The United States Constitution does not prohibit residents of the territories from serving on the federal courts of appeals. Thus, the fact that there are no judges on the Third and Ninth Circuits hailing from the U.S. Virgin Islands, Guam, or the Northern Mariana Islands is a function of presidents declining to make such appointments and Congress failing to

¹¹⁵ See *Garcia*, 59 V.I. at 776–80 (discussing *Charles v. Charles*, 788 F.2d 960 (3d Cir. 1986)).

¹¹⁶ See *Defoe v. Phillip*, 56 V.I. 109 (V.I. 2012).

¹¹⁷ See *supra* note 74.

¹¹⁸ See Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1115–17 (1977) (recognizing the widely held understanding that “persons advancing federal constitutional claims against local officials will fare better, as a rule, in a federal, rather than a state, trial court” and that “federal district courts are institutionally preferable to state appellate courts as forums in which to raise federal constitutional claims,” yet acknowledging that there are “no empirical studies that prove (or undermine) those assumptions”).

¹¹⁹ See, e.g., *Balboni v. Ranger Am. of the V.I., Inc.*, 70 V.I. 1048 (V.I. 2019) (holding that the equal protection clause of the de facto Constitution of the Virgin Islands provides greater protections for the people of the Virgin Islands than does the United States Constitution).

¹²⁰ See, e.g., *Romeu v. Cohen*, 265 F.3d 118, 128 (2d Cir. 2001) (“It has been widely assumed . . . that U.S. citizens residing in Puerto Rico cannot be given a vote in the presidential election without . . . amending the Constitution in the manner of the Twenty-Third Amendment.”).

mandate them. Unlike larger and more difficult issues such as voting rights, territorial representation on the courts of appeals could be achieved through a simple amendment to 28 U.S.C. § 44(c) to also include the territories. History has shown that adoption of such a measure is a realistic possibility, and this Essay urges Congress to make this change.

It is ultimately through such representation on the courts of appeals that those who advocate for the civil rights and liberties of the people of the territories will achieve their long-term goals. To paraphrase an old adage, it is very easy to insult someone behind their back, and a lot harder to do so to their face. We may never truly know why the First Circuit has differed so markedly from other circuit courts in declining to apply or extend the *Insular Cases* over the past thirty years. It would be quite surprising, however, if Judge Torruella did not have something to do with it, whether through his proactive efforts to educate his colleagues or just his mere presence. Regardless of how it is achieved, ensuring that the people of each territory have at least one resident judge on their respective court of appeals is not only the right thing to do as a matter of basic fairness, but—and perhaps more than anything else—will help send the *Insular Cases* to their rightful place in the ashbin of history.