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THE CONSTITUTIONALITY OF CRIMINAL LAW IN THE UNITED STATES' TERRITORIES AS COMPARED TO THE STATES AND FOREIGN COUNTRIES

Mary A. Shahverdian*

INTRODUCTION

In the adolescence of the nation, the Constitution of the United States of America was created as a framework for our government, granting powers—and restrictions on those powers—to the branches of government, while also guaranteeing some universal rights to the constituents of the United States that may not be infringed upon by the government. Across a series of cases, the question of the extraterritorial force of the Constitution was, and continues to be, encountered. These are the *Insular Cases*, a series of Supreme Court opinions in the 1900s about the status of territories the United States had recently acquired in the Spanish-American War.¹ As the United States continued to grow, the issue relating to the governance of unincorporated United States Territories was one of the most highly-litigated problems of American constitutional law.²

Although these cases were decided more than a century ago, they are still an important ongoing issue to Judge José Cabranes, Circuit Court Judge of the United States Court of Appeals for the Second Circuit.³ Cabranes

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¹ See generally *Balzac v. Porto Rico*, 258 U.S. 298 (1922); *De Lima v. Bidwell*, 182 U.S. 1 (1901); *Goetze v. United States*, 182 U.S. 221 (1901); *Grossman v. United States*, 182 U.S. 221 (1901); *Dooley v. United States*, 182 U.S. 222 (1901); *Armstrong v. United States*, 182 U.S. 243 (1901); *Downes v. Bidwell*, 182 U.S. 244 (1901); *Huus v. N.Y. & P.R. Steamship Co.*, 182 U.S. 392 (1901); *Dooley v. United States*, 183 U.S. 151 (1901); *Fourteen Diamond Rings v. United States (The Diamond Rings)*, 183 U.S. 176 (1901).

² Juan R. Torruella, *Ruling America's Colonies: The Insular Cases*, 32 YALE L. & POL'Y REV. 57, 59 (2013).

³ JOSÉ A. CABRANES, <http://www.ca2.uscourts.gov/judges/bios/jac.html> (last visited Mar. 11, 2019).

posits that an significant element of the *Insular Cases* has been circumventing “irreparable injustice” in the extraterritorial function of constitutional rights.⁴ One constitutional right at issue in the *Insular Cases* is the power for individual states and territories to govern within their borders without the arm of the federal government overextending itself through the implied powers of the Commerce Clause.

In this paper, I argue that the Dormant Commerce Clause has an unfair impact on criminal law in the United States Territories, which do not obtain the same level of benefits under the federal government as the states under the precedent of the *Insular Cases*, and therefore violates the Due Process Clause of the Fifth Amendment. As a solution, I argue that either the application of the Commerce Clause should be reduced to accommodate the unique needs of the territories, or the United States Territories should be fully absorbed as states to protect some semblance of federalism in a time when the enumerated powers of the Commerce Clause are only expanding. I recommend allowing the members of the legislative branch, who represent the U.S. Territories, to become voting members, just as other states, so they have a voice in the federal laws that control them.

I. THE *INSULAR CASES*

The United States obtained sovereignty over what they termed “insular” territories as a result of the Spanish-American War of 1898.⁵ These insular areas remain under U.S. sovereignty today.⁶ The five nonstate territories discussed in this argument are Puerto Rico, Guam, the U.S. Virgin Islands (USVI), American Samoa, and the Commonwealth of the Northern Mariana Islands (CNMI).⁷ These territories are areas which do not share a physical border with mainland United States so lawmakers at the time could not envision a future wherein those detached areas would become fully absorbed

⁴ José A. Cabranes, *Our Imperial Criminal Procedure: Problems in the Extraterritorial Application of U.S. Constitutional Law*, 118 YALE L.J. 1660, 1704–06 (2009) (discussing case law demonstrating “[c]onstraints set forth by the Constitution on the power of the government are more likely to be enforced when the risk of irreparable injustice is high”).

⁵ See generally Torruella, *supra* note 2.

⁶ See generally STANLEY K. LAUGHLIN, JR., *THE LAW OF UNITED STATES TERRITORIES AND AFFILIATED JURISDICTIONS* §§ 3:3–3:6 (1995).

⁷ *Id.*

as incorporated states.⁸ The constitutionality of federal law as applied to these U.S. Territories was determined in the *Insular Cases*, a series of Supreme Court decisions in the early twentieth century. These cases set a precedent for American paternalism over its extended territories strongly influenced by racial undercurrents of American policy that still linger today.⁹

In *Downes v. Bidwell*, a key *Insular Case*, Justice White of the Supreme Court held the majority view that the procedural protections for criminal defendants specified in the Bill of Rights do not uniformly apply to defendants in those territories that had not yet been “incorporated” into the United States.¹⁰ *Downes* is a crucial case in territorial history because it determined that the Constitution as a whole would not apply to Puerto Rico¹¹ By imposing duties on goods imported from Puerto Rico to the continental United States, the Court decided that certain constitutional provisions within the revenue clauses could not confine the federal government’s actions in controlling these areas automatically.¹² Specifically, the Court held that Puerto Rico did not fall under the Tax Uniformity Clause, which requires that “all Duties, Imposts, and Excises shall be uniform throughout the United States.”¹³

It is from the *Downes* case that the position of Puerto Rico and other territories in the federal landscape is decided.¹⁴ I argue that to apply constitutional protections only partially, yet expand federal policing powers through the Commerce Clause, represents a constitutional offense to the people of the U.S. Territories.

⁸ Zachary S. Price, *Dividing Sovereignty in Tribal and Territorial Criminal Jurisdiction*, 113 COLUM. L. REV. 657, 681 (2013) (citing Christina Duffy Burnett, *United States: American Expansion and Territorial Deannexation*, 72 U. CHI. L. REV. 797 (2005)).

⁹ RUBIN FRANCIS WESTON, RACISM IN U.S. IMPERIALISM: THE INFLUENCE OF RACIAL ASSUMPTIONS ON AMERICAN FOREIGN POLICY, 1893–1946, at 15 (1972).

¹⁰ Price, *supra* note 8, at 683 (citing *Downes v. Bidwell*, 182 U.S. 244, 287 (“We are therefore of opinion that the Island of Porto [sic] Rico is a territory appurtenant and belonging to the United States, but not a part of the United States within the revenue clauses of the Constitution)).

¹¹ Torruella, *supra* note 2, at 69.

¹² *Downes*, 182 U.S. 244, 341–42 (White J., concurring).

¹³ U.S. CONST. art 1, § 8, cl. 1.

¹⁴ Torruella, *supra* note 2, at 70.

II. THE DORMANT COMMERCE CLAUSE

The Commerce Clause grants Congress the power “to regulate commerce . . . among the several states.”¹⁵ By its explicit text, the Commerce Clause provides Congress the right to regulate interstate commerce.¹⁶ But, it also impliedly grants a “dormant” power. There is no actual “Dormant Commerce Clause” found in the Constitution. Rather, the Supreme Court created the right to create restrictions on state action through inferences made in analysis of the Commerce Clause.¹⁷ The Dormant Commerce Clause is a constitutional law doctrine that extends congressional authority beyond the explicit power to “regulate commerce *among* the several states,” meaning federal commerce between states¹⁸ into an implicit right to restrict *state* power over the same area.¹⁹ It restricts state power in favor of isolating this power to the federal government.²⁰

There is no textual support for the doctrine of the Dormant Commerce Clause in the Constitution.²¹ Instead, the doctrine has been explained by the federal courts as to forbid states from unduly interfering with interstate commerce.²² The pivotal case of *Gibbons v. Ogden* initiated an expansion of the Commerce Clause’s interpretation though the implied dormant powers that are within the lines of the original text. In this case, a New York state law was at issue because it tolerated a monopoly over navigational waters in the state, preventing a steamboat operator from navigating from New York to New Jersey.²³ Justice Marshall concluded that the interstate navigation could not be interfered with by the laws of one state because that power is reserved for Congress under the Commerce Clause.²⁴ Justice Marshall wrote

¹⁵ U.S. CONST. art. 1, § 8, cl. 3.

¹⁶ *Id.*

¹⁷ See *Gibbons v. Ogden*, 22 U.S. 1 (1824).

¹⁸ U.S. CONST. art. 1, § 8, cl. 3 (emphasis added).

¹⁹ Paul E. McGreal, *The Flawed Economics of the Dormant Commerce Clause*, 39 WM. & MARY L. REV. 1191, 1191 (1998).

²⁰ *Id.*

²¹ *Id.* at 1203 (citing Richard B. Collins, *Economic Union as a Constitutional Value*, 63 N.Y.U. L. REV. 43, 51 (1988) (“The dormant commerce power doctrine has no direct support in the text of the Constitution.”)).

²² McGreal, *supra* note 19, at 1192.

²³ *Gibbons v. Ogden*, OYEZ, <https://www.oyez.org/cases/1789-1850/22us1> (last visited Mar. 9, 2019).

²⁴ *Id.*

that the authority to regulate interstate commerce “can never be exercised by the people themselves, but must be placed in the hands of agents, or lie dormant.”²⁵ This case created the language used still today to describe the implied congressional power over interstate commerce, and ultimately, the *Gibbons* case established that congressional power under the Commerce Clause is very expansive, and incorporates all commercial interaction between and among states.²⁶ This holding from 1824 still carries weight in modern judicial decisions. As recently as 2008, the federal courts relied on *Gibbons* to permit congressional authority over matters of interstate commerce.²⁷

The Dormant Commerce Clause can be violated by state statute in several ways. The first kind of violation occurs when the state statute obviously favors in-state commerce over interstate commerce.²⁸ When this happens, the statute is clearly in violation of the Dormant Commerce Clause powers of Congress.²⁹ This means the statute “discriminates against interstate commerce” without “advanc[ing] a legitimate local purpose that cannot be adequately served by reasonable non-discriminatory alternatives.”³⁰ Second, if the statute is invalid under the *Pike* balancing test derived from *Pike v. Bruce Church*,³¹ then the Dormant Commerce Clause is implicated.³² The *Pike* balancing test makes a statute invalid if the supposed local benefits are significantly outweighed by the state statute’s burden on interstate commerce.³³ If the state statute regulates intrastate commerce fairly and impartially to bring about a legitimate interest of the local public, and its

²⁵ *Gibbons v. Ogden*, 22 U.S. 1, 189 (1824).

²⁶ See generally *Gibbons*, 22 U.S. at 189.

²⁷ *Grand River Enterprises Six Nations, Ltd. v. Beebe*, 574 F.3d 929, 941 (8th Cir. 2009) (“Where Congress fails to legislate on a matter concerning interstate commerce, a dormant implication of the Commerce Clause prohibits state regulation that discriminates against or unduly burdens interstate commerce and thereby impedes free private trade in the national marketplace.”).

²⁸ *Jones v. Gale*, 470 F.3d 1261, 1267 (8th Cir. 2006); see also *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978) (deciding that New Jersey’s law “block[ing] the importation of waste” from outside the state was impermissible under the Commerce Clause.).

²⁹ *Id.*

³⁰ *Dep’t of Revenue v. Davis*, 553 U.S. 328, 338 (2008) (quoting *Or. Waste Sys., Inc. v. Dep’t of Env’tl Quality*, 511 U.S. 93, 101 (1994)).

³¹ *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

³² *Id.*

³³ *Dep’t of Revenue v. Davis*, 553 U.S. 328, 338–39 (2008) (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)).

consequence on interstate commerce is fairly minor, then the state legislation is valid under *Pike*.³⁴ Under these circumstances, the statute will be upheld as valid under the Commerce Clause unless its impact on interstate commerce is “clearly excessive in relation to putative local benefits.”³⁵ The third way the Dormant Commerce Clause can be implicated by a state statute is when an application of the statute has a practical impact on extraterritorial control of interstate commerce.³⁶ This type of implication is demonstrated in *Gibbons v. Ogden*, above, because the New York statute blocked avenues to New Jersey.³⁷ These three limitations on state authority granted by the dormant commerce clause may be relaxed by congressional action which “authorizes state regulations . . . that burden or discriminate against interstate commerce.”³⁸

A. Criminal Law

The federal government’s covert power is only derived from case law regarding trade, yet it is formidable enough to attempt to extend into criminal law.³⁹ In *United States v. Lopez*, arguments made to the Supreme Court revealed an application of the congressional Commerce Clause power in terms of enacting criminal law under the Dormant Commerce Clause doctrine.⁴⁰ However, that argument failed. The Court ultimately decided that the power of Congress to regulate state activities extends only to specific actions that affect interstate commerce quite considerably.⁴¹ This stance was reaffirmed in *United States v. Morrison*, wherein the court opined that “[t]he Constitution requires a distinction between what is truly national and what is truly local.”⁴² Congress lacked the authority to enact a statute under the

³⁴ *Pike*, 397 U.S. at 142.

³⁵ *Id.*; see also *R&M Oil*, 307 F.3d at 735.

³⁶ See *Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989).

³⁷ See generally *Gibbons v. Ogden*, 22 U.S. 1 (1824).

³⁸ *Hillside Dairy Inc. v. Lyons*, 539 U.S. 59, 66 (2003).

³⁹ See, e.g., *USA Recycling, Inc. v. Town of Babylon*, 66 F.3d 1272, 1282 (2d Cir. 1995); *Pic-a-State PA, Inc. v. Pennsylvania*, 42 F.3d 175, 180 (3d Cir. 1994) (holding state criminal law that “complements a federal statute” does not violate the dormant commerce clause).

⁴⁰ Brandon L. Bigelow, *The Commerce Clause and Criminal Law*, 41 B.S. L. REV. 913, 913 (2000) (citing *United States v. Lopez*, at 556–57, 561).

⁴¹ *Id.*

⁴² *United States v. Morrison*, 529 U.S. 598, 617–18 (2000).

Commerce Clause since the state criminal statute at issue did not control an activity that substantially affected interstate commerce.⁴³

III. THE STRUGGLE TO APPLY UNIFORM LAW IN THE TERRITORIES

Territories have no inherent authority under the Constitution.⁴⁴ In the territories, all governmental power is federal in character and stems from a delegation from Congress either directly or indirectly.⁴⁵ Congress has “plenary” authority over the territories, even though territorial governments have some statutory authority to exercise considerable sovereignty over their own jurisdiction.⁴⁶ Plenary authority means that Congress can “revise, alter, or revoke” any established system of government that controls the territories,⁴⁷ even if it seems doubtful that Congress will actually make changes to those arrangements in a style essentially oppositional to the local wishes of people in those territories.⁴⁸ Commerce of the District of Columbia and of the United States Territories do not constitute interstate commerce under the Commerce Clause of the U.S. Constitution.⁴⁹ Plenary congressional authority over the territories textually results from the Territory Clause of the Constitution, which proclaims that Congress has the “Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.”⁵⁰ The Supreme Court has not understood the Territory Clause to offer plenary authority over any incorporated State or over the District of Columbia, but rather only all *other* areas subject to U.S. sovereignty.⁵¹ This essentially

⁴³ *Id.*

⁴⁴ Price, *supra* note 8, at 679.

⁴⁵ *Id.* at 680. (citing *Boumediene*, 553 U.S. at 755 (noting Congress’ constitutional power over territories); *United States v. Wheeler*, 435 U.S. 313, 321 (1978) (“[A] territorial government is entirely the creation of Congress . . .”).

⁴⁶ Price, *supra* note 8, at 679.

⁴⁷ *United States v. Sharpnack*, 355 U.S. 286, 296 (1958).

⁴⁸ Price, *supra* note 8, at 680.

⁴⁹ 15 AM. JUR. 2D COMMERCE § 3, citing *Atlantic Cleaners & Dyers v. United States*, 286 U.S. 427, 434–35 (1932); *see also* *Milton S. Kronheim & Co., Inc. v. District of Columbia*, 91 F.3d 193 (D.C. Cir. 1996) (courts should apply the same analysis over interstate analysis to the District of Columbia as to state laws).

⁵⁰ U.S. CONST. art. IV, § 3, cl. 2.

⁵¹ *See, e.g.,* *District of Columbia v. Carter*, 409 U.S. 418, 430 (1973) (recognizing plenary congressional power over the territories).

means that plenary authority is reserved for only unincorporated territories such as Puerto Rico, the USVI and Guam.

The plenary authority over the territories has significant constitutional impacts on the citizens of these areas. A key impact exists to criminal defendants in the territories, who lose procedural protections because territorial governments do not have to provide them with equivalent procedural guarantees applicable in federal prosecutions.⁵²

The *Insular Cases* held that certain constitutional protections were inappropriate in the U.S. Territories.⁵³ However, the Supreme Court allowed them to maintain merely the basic constitutional protections of personal rights. For example, the fundamental right that no person could be deprived of life, liberty, or property without due process of law” was to remain a right of the citizens of the U.S. Territories.⁵⁴ Though early federal policy covering the nonstate territories was initially invasive to the local governance, by the 1950’s Congress adopted the “organic” statutes, which were created to encourage adoption of local governance and legislatures.⁵⁵ The outcome of the organic statutes included the locally drafted constitution for Puerto Rico,⁵⁶ and the authorization of the drafting of similar constitutions for Guam and the USVI.⁵⁷ However, neither territory has implemented an analogous constitution.⁵⁸

As a result of the organic statutes, all five of the major insular U.S. Territories enforce locally legislated criminal prohibitions and procedures in a method very similar to that of a state government.⁵⁹ In recent years, the Supreme Court of the United States has begun to re-examine the

⁵² Price, *supra* note 8, at 679.

⁵³ See, e.g., *Balzac*, 258 U.S. at 312–13 (1922) (discussing inapplicability of grand jury indictment requirements in Puerto Rico); *Dorr v. United States*, 195 U.S. 138 at 148–49 (concluding “power to govern territory . . . given to Congress in the Constitution . . . does not require that body to enact for ceded territory not made a part of the United States . . . a system of laws which shall include the right of trial by jury”).

⁵⁴ *Balzac*, 258 U.S. at 312–13.

⁵⁵ See generally GARY LAWSON & GUY SEIDMAN, *THE CONSTITUTION OF EMPIRE: TERRITORIAL EXPANSION AND AMERICAN LEGAL HISTORY* 121–38 (2004) (describing the transition from elected to appointed governors in territories).

⁵⁶ 48 U.S.C. § 731d (2006).

⁵⁷ 48 U.S.C. §§ 1421–1424-4 (2006).

⁵⁸ GUAMPEDIA, *Guam Constitutional Conventions (ConCon)*, <https://www.guampedia.com/guam-constitutional-conventions-concon/> (last visited Mar. 11, 2019).

⁵⁹ Price, *supra* note 8, at 681–82.

constitutional exceptionalism originally permitted to the territories in the *Insular Cases*. The flexible application of the United States Constitution and Bill of Rights to citizens of the unincorporated territories may no longer be applicable to the most noteworthy territories of the United States.⁶⁰ Eventually, Congress implemented most, but not all, Bill of Rights obligations on local territorial governments.⁶¹

However, this quasi-applicability of constitutional protections over criminal defendants remains today as a major conflict in the court systems of the U.S. Territories. The U.S. Territories are treated neither exactly as states nor as foreign nations. For example, there is no local statutory right to a trial by jury for defendants in American Samoa, due to a conflict of powers in the lawmaking authority over the island.⁶² Congress has never ratified an organic statute inaugurating a local Samoan government. Instead, Congress merely decided that the Constitution of American Samoa could not be changed without the approval of Congress.⁶³ American Samoa also faces the problem of not falling into the territorial jurisdiction of any federal court.⁶⁴ To rectify these problems, the U.S. District Court for the District of Columbia had to interpret the *Insular Cases* to resolve that the American Constitution compels the right to jury trials for criminal cases in local American Samoan courts, despite their own local constitution not providing that protection.⁶⁵ Although this change did resolve issues within the American Samoa criminal procedure, this decision did not occur until 1975.⁶⁶ The gap in resolution demonstrates that constitutional protection over citizens of American Samoa and other territories has long been overlooked.

⁶⁰ Price, *supra* note 8, at 680 (citing *Boumediene v. Bush*, 555 U.S. 723, 758 (2008) (noticing connections of unincorporated territory to the United States may “strengthen in ways that are of constitutional significance.) *cf.* *Examining Bd. of Eng’rs, Architects & Surveyors v. Flores de Otero*, 426 U.S. 572, 599–600 (1976) (observing “[t]he Court’s decisions respecting the rights of the inhabitants of PR have been nether unambiguous nor exactly uniform” but deeming equal protection requirements applicable to governmental action in Puerto Rico).

⁶¹ *See Territory of Guam v. Inglett*, 417 F.2d 123, 124–25 (9th Cir. 1969) (“[W]e are inclined to agree . . . that Congress did not intend by enacting section 10(u) of the Guam elective Governor Act to repeal 48 U.S.C. § 1424(b) and thus deprive the Guam legislature of the power to determine whether offenses should be prosecuted by indictment or information.”).

⁶² Price, *supra* note 8, at 684.

⁶³ 48 U.S.C. § 1662a.

⁶⁴ Price, *supra* note 86, at 706.

⁶⁵ *Id.* at 684–85; *see also King v. Morton*, 520 F.2d 1140, 1147–48 (D.C. Cir. 1975).

⁶⁶ *Id.*

A second example exists in the Commonwealth of the Northern Mariana Islands (CNMI). Just as in American Samoa, criminal defendants do not have the right to a jury trial in CNMI.⁶⁷ The CNMI covenant, which is the establishing document by which the United States imposed its authority over the territory, posits that “neither trial by jury nor indictment by grand jury shall be required in any civil action or criminal prosecution based on local law, except where required by local law.”⁶⁸ CNMI’s covenant conflicts with the Fifth and Sixth Amendments of the United States. Contrasting the situation in American Samoa, where the practice of criminal jury trials is maintained due to 1975 federal case law despite the absence of such a local constitutional provision, the CNMI legislature does not require grand jury indictments for local offenses.⁶⁹ At the most, criminal procedure only provides jury trials for felonies punishable by more than five years of incarceration or a minimum \$2,000 fine.⁷⁰ In a 2004 local CNMI case, a court declared that “only the CNMI Legislature has the authority to make the right to a jury trial the same as in the continental United States.”⁷¹ This is a distinction from the rule in American Samoa, where a holding from the D.C. Circuit court was held applicable to the territory. Instead, the Ninth Circuit applied the *Insular Cases* to uphold the fractional application of the Fifth and Sixth Amendment Rights in CNMI.⁷²

A third example of the selective application of the American Constitution to the United States Territories exists in the United States Virgin Island (USVI). In the USVI, indictment by grand jury is entirely voluntary for cases involving violations of federal law and charged in the federal court in the territory.⁷³ For transgressions of local law, a grand jury indictment is

⁶⁷ 48 U.S.C. § 1801 note (Article V: Applicability of Laws).

⁶⁸ *Id.*

⁶⁹ Price, *supra* note 8, at 685; see CNMI R. CRIM. P. 7(a) (“All offenses except misdemeanors shall be prosecuted by information.”).

⁷⁰ Price, *supra* note 8, at 685; see also 7 N. MAR. I. CODE § 3101(a) (2011); CNMI R. CRIM. P. 23(b); see also 6 N. MAR. I. CODE § 2150(a)(8) (2011) (providing right to jury trial “in all cases in which the value of property subject to forfeiture under this subsection exceeds \$2,000”); Commonwealth v. Dermapan, No. 4-0006-GA, 2008 WL 3982060, at *3 (N. MAR. I. CODE Aug. 15, 2008) (displaying proper application of a jury trial for assault with deadly weapon conviction but not for lesser convictions).

⁷¹ Price, *supra* note 8, at 685 (citing Commonwealth v. Blas, No. 04-028-GA, 2004 WL 3704018 at *1 n.4 (N. MAR. I. CODE Dec. 10, 2004) (citing 48 U.S.C. § 1801)).

⁷² Price, *supra* note 8, at 685 (citing Northern Mariana Islands v. Atalig, 723 F.2d 682, 690 (9th Cir. 1984)).

⁷³ 48 U.S.C. §§ 1561, 1612 (2006).

only required where local legislation demands it, but because no such legislation exists, trial by grand jury is practically nonexistent in the USVI.⁷⁴ The Third Circuit buttressed these local provisions in 1980 through reasoning that the Fifth Amendment requirement of grand jury indictment is “not applicable” in this “unincorporated” territory, where “prosecutions have always been established by information rather than by grand jury indictment.”⁷⁵ However, it should be noted that the Third Circuit decision was not relied on in the 2013 case of *Phillip v. People*, a case in the Supreme Court of the Virgin Islands which decided that the part of the Third Circuit opinion relevant to grand jury indictments was not a holding of the case, but rather mere dicta.⁷⁶ This disparaging opinion in the local judicial system demonstrates the discrepancy between federal and local authority in the USVI.

As a whole, the *Insular Cases* have set a standard for chaos and disarray in the U.S. Territories under the Constitution. A combination of federal paternalism over the territories in an odd mix with discarding the same areas has created a criminal procedure that is unclear and hard to follow.

A. States

Officially, all dominion over the unincorporated territories is assigned to Congress under the Territory Clause.⁷⁷ Because of this, the Supreme Court has treated scenarios in which “double jeopardy” may come into question differently in territories than in states. The concept of double jeopardy generally protects a defendant from being tried twice for the same offense.⁷⁸ This is not all encompassing; however, because it only protects a defendant

⁷⁴ See V.I. CODE ANN. tit. 5, § 3581 (1997) (“Every felony and every criminal action in the district court shall be prosecuted by information.”); *United States v. Plaskett*, Crim. No. 2007-60, 2008 WL 444552, at *2 (D.V.I. Feb. 4, 2008) (finding “neither federal nor territorial crimes must be charged by indictment in the Virgin Islands” because “[n]o such local law . . . has been enacted” (citations omitted)).

⁷⁵ Price, *supra* note 8, at 686; Gov’t of V.I. v. Dowling, 633 F.2d 660, 667 (3d Cir. 1980); see also *United States v. Ntreh*, 279 F.3d 255, 256–58 (3d Cir. 2002) (noticing that USVI residents have no constitutional or statutory right to indictment by grand jury).

⁷⁶ *Phillip v. People*, S. CT. CRIM. No. 2012-0086, 2013 WL 3293904, at *9 n.24 (V.I. June 26, 2013).

⁷⁷ Price, *supra* note 8, at 714.

⁷⁸ U.S. CONST. amend. VI.

from being tried twice in the same court.⁷⁹ Double jeopardy generally does not protect a defendant from facing trial in both federal and state courts if their crime violates both jurisdictions' laws.⁸⁰ However, unlike for states, in the U.S. Territories the Court has asserted that that double jeopardy blocks prosecutors from bringing two different cases for the same criminal act that violates both federal and territorial law.⁸¹ In *Grafton v. United States*, the Court expounded its rationale for the unique treatment of the territories compared to individual states.⁸²

[T]he government of the Philippines owes its existence wholly to the United States . . . so that the cases holding that the same acts committed in a State . . . may constitute an offense against the United States and also a distinct offense against the State, do not apply here⁸³

Furthermore, the *Shell Co.* Court reasoned that federal and Territorial laws are “creations emanating from the same sovereignty.”⁸⁴ By this, the Court opined that there is no distinction between the government of the territory and the government of the United States of America—they are one and the same.

These opinions are problematic as applied to the territories collectively because they are all on separate and various levels of independence from Congressional authority. Puerto Rico, for example, has a democratically elected local governance and constitution.⁸⁵ Historically, the First Circuit originally determined that, despite Puerto Rico's position as an unincorporated territory, it shall nonetheless be treated as a “separate sovereign” for double jeopardy purposes.⁸⁶ This is because Puerto Rico has its own established criminal laws, which “like those of a state, emanate from a different source than the federal laws.”⁸⁷ Meanwhile, the Eleventh Circuit

⁷⁹ Zak Goldstein, *Can I be Tried for the Same Crim in State and Federal Court?*, GOLDSTEIN MEHTA LLC, <https://goldsteinmehta.com/blog/can-i-be-tried-for-the-same-conduct-in-state-and-federal-court> (last visited Mar. 11, 2019).

⁸⁰ *Id.*

⁸¹ Price, *supra* note 8, at 682.

⁸² *Id.*

⁸³ *Grafton v. United States*, 206 U.S. 333, 354–55 (1907).

⁸⁴ *People of Puerto Rico v. Shell Co.*, 302 U.S. 253, 264 (1937).

⁸⁵ Price, *supra* note 8, at 682.

⁸⁶ *United States v. Lopez Andino*, 831 F.2d 1164, 1168 (1st Cir. 1987).

⁸⁷ *Id.*; see also *United States v. Bonilla Romero*, 836 F.2d 39, 42 & n.2 (1st Cir. 1987) (Following *Lopez Andino*).

rejected the First Circuit's *Lopez Andino* opinion, and instead held that Puerto Rico is still constitutionally its own separate sovereignty, and is merely a territory that belongs to the United States.⁸⁸ Ultimately, the First Circuit formally reversed its original holding and now agrees with the Eleventh Circuit.⁸⁹ However, the Supreme Court has remained silent on the issue. The lack of clarity and uniformity in the criminal proceedings of Puerto Rico is a product of the *Insular Cases*, which were decided nearly a century ago based on reasoning that is unfounded today.

B. Foreign Nations

The Federal Courts have supported the application of the Commerce Clause to American Citizens abroad.⁹⁰ In January 2006, the Ninth Circuit held in *United States v. Clark* that the power granted to Congress under the Foreign Commerce Clause supports criminal jurisdiction over United States citizens in Cambodia.⁹¹ In this case, the defendant was arrested for engaging in sexual acts with two minors while abroad.⁹² The court upheld the conviction of that defendant, a U.S. citizen, who was arrested violating the PROTECT Act, an American statute condoning "illicit sexual conduct" in foreign places, under penalty of a fine or imprisonment.⁹³ This criminal statute was not held to be in excess of congressional authority under the Commerce Clause.⁹⁴ This is because the Commerce Clause grants the right to regulate commerce with foreign nations, despite the legal presumption that Congress customarily creates federal criminal statutes with the intent that they only be applied domestically.⁹⁵ To determine whether an American criminal statute applies outside of domestic land, it is presumed that there is no congressional intent to violate the principles of international law that

⁸⁸ *United States v. Sanchez*, 992 F.2d 1143, 1151–52 (11th Cir. 1993).

⁸⁹ See generally *United States v. Santiago-Colón*, 917 F.3d 43 (1st Cir. 2019).

⁹⁰ John R. Schmertz et al., *As Matter of First Impression, Ninth Circuit Determines that Congress' Exercise of Power Under the Foreign Commerce Clause Supports Criminal Jurisdiction Over U.S. Citizen's Commercial Pedophilia in Cambodia*, 12 INT'L L. UPDATE 7 (2006).

⁹¹ *Id.*

⁹² *Id.*

⁹³ 18 U.S.C. § 2423(c) (2018).

⁹⁴ Schmertz et al., *supra* note 90.

⁹⁵ *Id.*

permit extraterritorial criminal jurisdiction.⁹⁶ The Ninth Circuit held in *Clark* that, regardless of where the crime is committed, the United States may exercise jurisdiction over Americans who are temporarily living in a different country, because merely the existence of their citizenship is enough of a nexus to conform to the Due Process Clause of the Fifth Amendment.⁹⁷ This is similar to the treatment of criminal defendants in U.S. Territories because they are subject to federal law; however, they are no subject to local or state laws.

IV. PROPOSED RESOLUTION

The U.S. Territories should be treated as States under the Constitution in all aspects of sovereignty. States are insulated by the Tenth Amendment, which reserves all power not granted to the federal government to the “States respectively, or to the people.”⁹⁸ Each of the 50 States holds plenary governmental authority within their own borders.⁹⁹ However, the federal Constitution can restrict their power, or pre-empt it by use of valid federal legislation which is enacted pursuant to legitimate congressional authority—including the Dormant Commerce Clause.¹⁰⁰

Although most states became absorbed into the United States the same manner as the territories, states have more rights and representation than territories in the formation of government policy. Unlike territories, who only have non-voting delegates,¹⁰¹ States are represented directly in the federal legislature.¹⁰² I suggest that this discrepancy between the States and the Territories be rectified. The U.S. Territories should be, if not fully incorporated, upgraded to voting delegates in the House of Representatives and should have representation in the Senate.

⁹⁶ See *United States v. Vasquez-Velasco*, 15 F.3d 833, 839 (9th Cir. 1994).

⁹⁷ Schmertz, *supra* note 90.

⁹⁸ U.S. CONST. amend. X (reserving to states and the people powers not conferred on federal government).

⁹⁹ Price, *supra* note 8, at 691.

¹⁰⁰ *Id.*

¹⁰¹ CHRISTOPHER M. DAVIS, DELEGATES TO THE U.S. CONGRESS: HISTORY AND CURRENT STATUS 1 (Congressional Research Service, 2015), <https://fas.org/sgp/crs/misc/R40555.pdf>.

¹⁰² Price, *supra* note 8, at 691.

In conclusion, the mistreatment of the sixteen territories of the United States that have still not been formally and completely incorporated is unfair, unfounded, and requires modernization. It is time to move past the close-minded mentality of the legislators at the time of the 1898 Spanish-American War. Those leaders could not foresee a time when the distant island territories could be absorbed into the United States because they were not geographically connected to the mainland.¹⁰³ Today, this reasoning cannot be followed, as travel and communication only gets easier with new technologies. It is also impossible to justify this mentality when neither of the last two states to join the Union—Hawaii and Alaska—share a border with a continental state. The United States, whose governmental framework rests on representational democracy, cannot continue to rest on the laurels of the *Insular Cases*—treating the citizens of the territories as second-class to states. In no state are the protections guaranteed by the Constitution deemed inapplicable, and the same treatment should be shown to the territories. Although Congress attempted to rectify these issues with the organic statutes,¹⁰⁴ this remedy is too much without structure and faces pitfalls in its application, as demonstrated by the problems in American Samoa, CNMI, and USVI. Thus, the Constitution as applied to the insular territories needs to be revisited.

¹⁰³ *Id.*

¹⁰⁴ See generally LAWSON & SEIDMAN, *supra* note 55.

