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AMERICAN BAR ASSOCIATION

ADOPTED BY THE HOUSE OF DELEGATES

2024 MIDYEAR MEETING
LOUISVILLE, KENTUCKY
FEBRUARY 5, 2024

RESOLUTION

RESOLVED, That the American Bar Association supports the principle that the supreme court or other court of last resort of each United States territory serves as the final arbiter of its respective territorial laws in the same manner as each state's supreme court or other court of last resort is the final arbiter of that state's laws; and

FURTHER RESOLVED, That the American Bar Association supports the principle that each territory's laws are not laws of the United States, and that actions arising solely under such territory's laws do not alone establish federal-question jurisdiction, but provided that there is no conflict with the Supremacy clause of the U.S. Constitution or with Federal pre-emption.

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REPORT

I. BACKGROUND

The past few decades have seen the growing emergence of a movement described as "a state constitutional law renaissance" or a "new judicial federalism."[1] The proponents of this approach recognize the importance of state constitutions and believe that state courts should pay more than mere "lip service" to long forgotten or overlooked state constitutional provisions and instead interpret them to confer greater rights than those required by the United States Constitution – even if the text of the state constitution is word-for-word identical.[2]

While scholars and jurists invoke case law, historical sources, and various jurisprudential theories to support this approach, they also make no secret that they believe state supreme courts should rely on state constitutions to insulate their decisions from review and potential reversal by the Supreme Court of the United States.[3] In effect, state constitutions and the state courts interpreting them serve as a check on the Supreme Court of the United States and the lower federal courts by recognizing rights, liberties, and protections for the citizens of a state that the federal courts are unwilling or unable to recognize nationally.[4] This constitutes a radical departure from the once-common belief that federal courts are more likely to safeguard such rights than state courts.[5]

But the United States consists of more than just the federal government and the fifty states. Article IV of the United States Constitution recognizes that territories are part of the United States as well. For the first 125 years of our constitutional republic, territorial status was generally accepted as a temporary phase on a path to eventual statehood. However, the last 125 years have seen the annexation of new insular territories consisting of largely non-white populations geographically distant from the mainland United States, which remain in territorial status indefinitely without a meaningful prospect of statehood.

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

[2] Thomas M. Hardiman, *New Judicial Federalism and the Pennsylvania Experience: Reflections on the Edmunds Decision*, 47 DUQ. L. REV. 503, 505-07 (2009); *see also* Brennan, *supra* note 6, at 500-01; SUTTON, *supra* note 1, at 8-10.

[3] *See, e.g.,* Hardiman, *supra* note 2, at 507.

[4] *See* Darryl K. Brown, *The Warren Court, Criminal Procedure Reform, and Retributive Punishment*, 59 WASH. & LEE L. REV. 1411, 1413 (2002) (noting that the state constitutional law revolution represented "a sustained, systemic reaction against" the jurisprudence of the United States Supreme Court); *see also* Brennan, *supra* note 6 at 491; Hardiman, *supra* note 7, at 506.

[5] *See* Burt Neuborne, *The Myth of Parity,* 90 HARV. L. REV. 1105, 1116-17 (1977) (recognizing the widely-held assumption that "persons advancing federal constitutional claims against local officials will fare better, as a rule, in a federal, rather than a state, trial court" and that "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").

When initially annexed, these insular territories typically lacked meaningful self-government, and in certain cases even operated under military rule for prolonged periods of time. But while those territorial governments may have only exercised limited power in the past, this is certainly no longer the case today. Puerto Rico became self-governing in 1952 with the ratification of the Constitution of Puerto Rico, which provided for a locally elected Governor, locally elected Legislature, and a Judicial Branch consisting of local judges appointed by the Governor with the advice and consent of the Puerto Rican Senate. American Samoa also achieved nearly equivalent local control over its internal affairs upon the adoption of the Constitution of American Samoa in 1967. The U.S. Virgin Islands and Guam achieved self-governance in a more piecemeal fashion, with a locally elected Legislature authorized, respectively, in 1936 and 1950, a locally elected Governor granted in 1968, and a completely locally appointed Judicial Branch authorized in 1984, although the territories chose not to establish the local supreme courts so authorized until later. And the Commonwealth of the Northern Mariana Islands has always been self-governing, having voluntarily joined the United States as a territory in 1986 with a constitution authorizing a locally elected Governor, a locally elected Legislature, and a locally appointed Judicial Branch.

The modern-day territorial governments of American Samoa, Guam, Puerto Rico, the Northern Mariana Islands, and the U.S. Virgin Islands are thus in virtually every way the equivalent of a state government. Their territorial governors routinely exercise the same powers with the same limitations as their counterparts in the fifty states. Their territorial legislatures may usually legislate on any subject that a state legislature would be permitted to do so. The territorial judicial branches typically exercise the same jurisdiction as a state court system and are treated by the federal courts as if they were state courts, including application of the *Erie* doctrine, *Rooker-Feldman* abstention, and other limitations on the power of the federal courts vis-à-vis the state courts.[6] But perhaps most importantly, these territorial governments are ultimately accountable to the people of the territory, just as state governments answer to the people of their state. For all intents and purposes, the governments of American Samoa, Guam, Puerto Rico, the Northern Mariana Islands, and the U.S. Virgin Islands are largely indistinguishable from the governments of the fifty states.

II. TERRITORIAL CONSTITUTIONS AND ORGANIC ACTS

Today, every territory is governed either by a territorial constitution that forms the charter of government, or a territorial organic act that serves as a *de facto* territorial constitution. Like state constitutions, these territorial constitutions and organic acts establish certain first principles with respect to the structure of government and its relationship with its people, such as setting forth a local bill of rights.[7]

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

[7] *See, e.g., Vanhorne's Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304, 308-09 (C.C.D. Pa. 1795); Frederick Douglass, *The Constitution of the United States: Is It Pro-Slavery or Anti-Slavery?* (Mar. 26, 1860), in 2 THE LIFE AND WRITINGS OF FREDERICK DOUGLASS 467, 468-69 (Philip S. Foner ed., 1950); David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 877, 879 (1996); Christopher R. Green,

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The development of democratically elected territorial governments that operate pursuant to territorial constitutions and organic acts gave rise to new legal questions about the legal effect of those documents. Because the Territorial Clause of the United States Constitution has been interpreted to vest plenary authority over the territories to Congress, some have questioned whether territorial constitutions and organic acts are *real* constitutions, that territorial supreme courts may definitively interpret as they see fit just as state supreme courts interpret their state constitutions. And because territorial constitutions and organic acts typically require the approval of Congress—and in some cases are codified in the U.S. Code—some have contended that they can establish the basis for federal question jurisdiction, which would in effect grant litigants the authority to bypass territorial courts with respect to questions of territorial constitutional law,

Courts have, for the most part, answered these questions in favor of territorial sovereignty and the authority of territorial courts. More than a century ago, the Supreme Court of the United States rejected the idea that territorial criminal statutes—even those enacted by Congress—are laws of the United States that give rise to federal-question jurisdiction.[8] It also held, in a line of cases, that federal courts must defer to the construction of territorial organic acts by territorial courts and that the invalidation of territorial statutes pursuant to an organic act was not a situation where a statute of the United States is drawn into question.[9] And while the *Insular Cases* may have granted the newly-acquired insular territories fewer rights than provided to earlier territories that were part of the mainland United States, the U.S. Supreme Court nevertheless still flatly and unequivocally rejected the proposition that the Organic Act of Puerto Rico was a federal law and held that a provision of that Organic Act that "is peculiarly concerned with local policy" had to be adjudicated in the local courts of Puerto Rico and not in the federal courts.[10] Even in the context of the District of Columbia—which possesses significantly less self-governance than the territories—the Supreme Court of the United States has held that statutes enacted by Congress for the District are not laws of the United States and that the local courts of the District of Columbia are owed deference "with respect to their interpretation of Acts of Congress directed toward the local jurisdiction."[11]

Despite this seemingly overwhelming support, some federal courts have in recent years issued contrary decisions. The United States Court of Appeals for the Ninth Circuit, in *Guam v. Guerrero*, 290 F.3d 1210 (9th Cir. 2002), held that the Supreme Court of Guam lacked the authority to interpret the Guam Organic Act in a way so as to confer greater

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"This Constitution": Constitutional Indexicals as a Basis for Textualist Semi-Originalism, 84 NOTRE DAME L. REV. 1607, 1615-17 (2009).

[8] *United States v. Pridgeon*, 153 U.S. 48 (1894).

[9] *Santa Fe Central Ry. Co. v. Friday*, 232 U.S. 694 (1914); *Linford v. Ellison*, 155 U.S. 503, 508 (1894),

[10] *People v. Rubert Hermanos, Inc*., 309 U.S. 543 (1940); *People of Puerto Rico v. Russell & Co*., 288 U.S. 476, 483 (1933).). *See also Succession of Tristani v. Colon*, 71 F.2d 374, 375-76 (1st Cir. 1934) (denying federal question jurisdiction when appellant claimed that a decision of the Supreme Court of Puerto Rico was inconsistent with Section 2 of the Puerto Rico Organic Act, which provided that no law shall deprive any person of life, liberty, or property without due process of law).

[11] *Pernell v. Southall Realty*, 416 U.S. 363, 368 (1974); *Whalen v. United States*, 445 U.S. 684, 688 (1980); *Key v. Doyle*, 434 U.S. 59 (1977).

religious freedom protections than provided for in the First Amendment. It did so without citing to any legal authority or distinguishing prior contrary case law, but only based on a seeming dismissal of the Organic Act of Guam as a mere "federal statute."[12] Similarly, the United States Court of Appeals for the Third Circuit—again, without citing to any legal authority or distinguishing contrary authority—held that the United States District Court of the Virgin Islands may exercise federal-question jurisdiction because the Virgin Islands Revised Organic Act of 1954 is a federal statute.[13] While these decisions have been either rejected or criticized by other courts such as the Supreme Court of the Virgin Islands and the District Court of Guam,[14] to date neither the Ninth nor Third Circuits have overruled such decisions, and the U.S. Supreme Court has denied at least one certiorari petition requesting that the split be resolved.[15]

III. THE ROLE OF THE AMERICAN BAR ASSOCIATION

It is the mission of the American Bar Association ("ABA") to increase public understanding and respect for the rule of law and the legal process, to hold governments accountable under the law, to promote the highest quality legal education, promote full and equal participation in the profession by all persons, to eliminate bias in the legal profession, and to work for just laws, including human rights.[16] As the voice of the legal profession in the United States and in furtherance of its mission, the ABA is particularly well-suited to advocate for the authority of territorial courts to exercise the same authority as their state court counterparts to determine the law of their territories, without unwarranted intrusion by federal courts. This resolution continues the legacy of many other resolutions that the ABA has enacted in recent years to further the rights of the people of the territories and other indigenous peoples, including its recent resolution to restore the rights, liberties, and protections provided by the United States Constitution to the people of the territories.[17]

Respectfully submitted,

Marjorie Whalen, Esq., President
Virgin Islands Bar Association

Jacqueline Terlaje, Esq., President
Guam Bar Association

February 2024

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[12] 290 F.3d at 1217.
[13] *Thorstenn v. Barnard*, 883 F.2d 217, 218 (3d Cir. 1989).
[14] *Balboni v. Ranger Am. of the V.I., Inc.,* 70 V.I. 1048 (V.I. 2019); *Law Offices of Phillips and Bordallo, P.C. v. Guerrero*, 2023 WL 5075374 (D. Guam Aug. 9, 2023).
[15] *Ranger Am. of the V.I., Inc., v. Balboni*, 140 S.Ct. 651 (2019) (denying certiorari).
[16] *See* 2008A121.
[17] *See, e.g.*, 22AM404 (.

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GENERAL INFORMATION FORM

Submitting Entity: Virgin Islands Bar Association

Submitted By: Anthony M. Ciolli

1. Summary of the Resolution(s).

   This Resolution supports the principle that the supreme courts or other courts of last resort of the United States territories serve as the final arbiters of territorial law in the same manner as the supreme courts or other courts of last resort of the fifty states serve as the final arbiters of state law. It further supports the principle that territorial laws, including territorial constitutions and organic acts, are not laws of the United States but rather laws of the territory, and that actions arising under them cannot form the basis for the exercise of federal-question jurisdiction by the federal courts pursuant to title 28, section 1331 of the United States Code or any other law.

2. Indicate which of the ABA's Four goals the resolution seeks to advance (1-Serve our Members; 2-Improve our Profession; 3-Eliminate Bias and Enhance Diversity; 4-Advance the Rule of Law) and provide an explanation on how it accomplishes this.

   This Resolution furthers Goal 1 by advocating for an issue of concern to the members of the Association who practice or reside in the United States territories. It also furthers Goal 4 by taking a policy position that is consistent with well-established precedent from the Supreme Court of the United States and urging that such precedent be respected and followed by the lower federal courts.

3. Approval by Submitting Entity.

   Approved by the Virgin Islands Bar Association on November 15, 2023.
   Approved by the Guam Bar Association on November 16, 2023.

4. Has this or a similar resolution been submitted to the House or Board previously?

   None.

5. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?

   This Resolution builds on 22AM404, in which the ABA supported the efforts to restore the rights, liberties, and protections provided by the United States Constitution to the

people of the United States territories so that they are afforded the same rights, liberties, and protections as the people of the states.

6. If this is a late report, what urgency exists which requires action at this meeting of the House?

   None.

7. Status of Legislation. (If applicable)

   None.

8. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.

   If adopted, this policy would support the filing of an amicus curiae brief in an appropriate case (although no such case is anticipated in the near future). The ABA would also support the passage of appropriate legislation or adoption of appropriate federal or territorial court rules consistent with the policy.

9. Cost to the Association. (Both direct and indirect costs)

   None.

10. Disclosure of Interest. (If applicable)

    None.

11. Referrals.
    (List ABA entities and use proper names)

    Litigation Section
    Judicial Division
    Law Student Division
    Section of Civil Rights and Social Justice
    Section of State and Local Government Law
    Solo, Small Firm and General Practice Division
    Young Lawyers Division

12. Name and Contact Information (Prior to the Meeting. Please include name, telephone number and e-mail address). *Be aware that this information will be available to anyone who views the House of Delegates agenda online*.)

    Anthony M. Ciolli

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Delegate-at-Large
Past President, Virgin Islands Bar
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13. Name and Contact Information. (Who will present the Resolution with Report to the House?) Please include best contact information to use when on-site at the meeting. *Be aware that this information will be available to anyone who views the House of Delegates agenda online*.

Anthony M. Ciolli
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EXECUTIVE SUMMARY

1. **Summary of Resolution.**

This resolution supports the principle that the supreme courts or other courts of last resort of the United States territories serve as the final arbiters of territorial law in the same manner as the supreme courts or other courts of last resort of the fifty states serve as the final arbiters of state law. It further supports the principle that territorial laws, including territorial constitutions and organic acts, are not laws of the United States but rather laws of the territory, and that actions arising under such territorial laws cannot form the basis for the exercise of federal-question jurisdiction by the federal courts pursuant to title 28, section 1331 of the United States Code or any other law.

2. **Summary of the Issue which the Resolution addresses.**

While the U.S. Supreme Court has held that territorial statutes, constitutions, and organic acts constitute laws of the territory and not laws of the United States, some lower federal courts have recently held otherwise and determined that these laws provide the basis for federal-question jurisdiction or may be interpreted by federal courts without providing deference to territorial courts.

3. **An explanation of how the proposed policy position will address the issue.**

This Resolution addresses this issue by supporting the principle that territorial statutes constitutions, and organic acts are laws of the territory and not laws of the United States, and that they therefore cannot, standing alone, form the basis for federal-question jurisdiction, and territorial supreme courts may interpret them in the same manner as state supreme courts interpret state statutes and constitutions

4. **A summary of any minority views or opposition internal and/or external to the ABA which have been identified.**

None.