CLINIC-ING THE TERRITORIES

Joseph T. Gasper II*

I. INTRODUCTION

Until recently, most attorneys were "the products of an era in legal education that focused, sometimes exclusively, on a classroom-centered, less experience-based, pedagogy founded upon appellate case review and the Socratic method."[1] In fact, clinical programs at American law schools and experiential-based legal education are a fairly recent development,[2] even though "unstructured apprenticeship and mentoring relationships were once the primary route to becoming a lawyer."[3] But the trend at most law schools moved steadily toward giving students more

 Staff Master, Complex Litigation Division, Superior Court of the Virgin Islands. The Author wishes to express his gratitude to the organizers of the Symposium for their invitation and appreciation to the student editors of the *Stetson Law Review*, including Riley A. Lazzara, for their invitation and assistance in assisting in preparing this Article for publication. The opinions expressed herein are the Author's alone and should not be attributed to any member of the Virgin Islands Judiciary. This Article was prepared for the Symposium entitled "Territorial Law Across the Curriculum," hosted by the *Stetson Law Review* on March 22, 2024, at the Stetson University College of Law.

1. Margaret Moore Jackson & Daniel M. Schaffzin, *Preaching to the Trier: Why Judicial Understanding of Law School Clinics Is Essential to Continued Progress in Legal Education*, 17 CLINICAL L. REV. 515, 520 (2011); *see also, e.g.*, Vincent R. Johnson, *The End of the Golden Age of American Legal Education: My Year as Interim Dean*, 52 UNIV. TOL. L. REV. 289, 291–303 (2021) (describing the prior 150 years of American legal education as the Golden Age and declaring its end following the COVID-19 pandemic).

2. *See, e.g.*, Steven R. Smith, *Financing the Future of Legal Education: "Not What It Used to Be,"* 2012 MICH. STATE L. REV. 579, 581 (2012) ("Clinical programs were once rare, but they are now a standard part of law schools."); *see also, e.g.*, Sue Bentch, *A History of the Law Clinics at St. Mary's University School of Law*, 46 ST. MARY'S L.J. 285, 286 (2015) ("Prior to Dean Aldave's arrival at St. Mary's [in 1989], experiential learning by law students was primarily accomplished the old-fashioned way: some law students worked part-time for practicing attorneys or in offices, such as the District Attorney's office.").

3. Jackson & Schaffzin, *supra* note 1, at 521 ("Still, while most clinical programs feature a very close mentoring relationship between student and faculty, any perception of modern clinical legal education as resembling the historical use of unstructured job shadowing would be considerably off-target."). A few states still allow people to become lawyers either with minimal or no law school training. *See generally State-by-State Guide to Apprenticeships*, LIKE LINCOLN, http://likelincoln.org/state-by-state-guide-to-apprenticeships/ (last visited Jan. 2, 2025).

opportunities for hands-on experience through clinical programs,[4] trial advocacy courses, and moot court teams, even though clinics and experiential legal education toiled for years as the "red-headed stepchild" of the academy. Law school academics and the profession would look down their noses at practical training.[5] "Indeed, it [wa]s not uncommon to see doctrinal faculty publicly questioning the value of clinical education."[6] Much of this changed ten years ago when the American Bar Association ("ABA") amended its standards to require additional experiential learning in law schools.[7] Now every law student must complete "one or more experiential course(s) totaling at least six credit hours."[8] Experiential education has come full circle and is now the "new normal."[9] What was old is new again—and a requirement to graduate law school.

Students at Boston University School of Law can enroll in a Legislative Policy and Drafting Clinic where they can expect to "learn about the law-making process through coursework and

4. *See, e.g.*, Am. Bar Ass'n, *Public Interest Clinics*, WAYBACK MACHINE, https://web.archive.org/web/20240519014656/https://www.americanbar.org/groups/center-pro-bono/resources/directory_of_law_school_public_interest_pro_bono_programs/definitions/pi_pi_clinics/ (last visited Jan. 2, 2025) (listing hundreds of public intertest clinics in law schools across the country).

5. *See* Jackson & Schaffzin, *supra* note 1, at 519, 522–23 (describing how clinical education is generally viewed less favorably than "traditional" approaches to education and how law students and clinical law professors are likewise seen as "second-class" or lower-tier professors, with judges and practicing lawyers not ascribing much importance to practical experience).

6. *Id.* at 522.

7. Stephanie A. Vaughan, *Experiential Learning: Moving Forward in Teaching Oral Advocacy Skills by Looking Back at the Origins of Rhetoric*, 59 S. TEX. L. REV. 121, 131 (2017). "The current set of Standards was extensively reviewed by the Council of the Section of Legal Education and Admissions to the Bar, first from 1996 to 2000, then again from 2003 to 2006, and finally in 2008." Mary Beth Beazley, *Finishing the Job of Legal Education Reform*, 51 WAKE FOREST L. REV. 275, 275 n.1 (2016) (citing ABA STANDARDS & RULES OF PROC. FOR APPROVAL OF L. SCHS. 2015–2016, at vii (AM. BAR ASS'N 2015)). The Standards have gone through multiple approvals, evaluations, and reviews:

> The Standards were approved in their current form in June 2014 by the Council and approved by the House of Delegates two months later. Separately, the Rules were evaluated by the Rules Revision Committee, first from 2004 to 2006, and were thoroughly reviewed again from 2008 to 2014 before their adoption by the House of Delegates.

Id. (citation omitted).

8. ABA STANDARDS AND RULES OF PROC. FOR APPROVAL OF L. SCHS. 2023–2024 § 303(a)(3) (AM. BAR ASS'N 2023).

9. This "new normal" for law schools after the 2008 recession includes a curriculum with both clinical and experiential learning. It makes for a more attractive law school environment for qualified applicants, and more law students graduate with a greater basis in experiential learning. *See generally* Minna J. Kotkin, *Clinical Legal Education and the Replication of Hierarchy*, 26 CLINICAL L. REV. 287, 287 (2019).

hands-on experience working with a client seeking to advance a bill or project through the state legislature[,]"[10] while students at Yeshiva University's Benjamin N. Cardozo School of Law could, until recently, "investigat[e] and pursu[e] claims made by [Holocaust survivors and their heirs,]" as part of the law school's Holocaust Claims Restitution Practicum.[11] Students at Washington & Lee University's School of Law can "assist[] coal miners and survivors who are pursuing federal black lung benefits[,]"[12] while students at Wake Forest University Law School "get to negotiate the pervasive ethical issues that arise when working with older clients," as part of the school's Elder Law clinic and can "practice calibrating their interview styles based on a client's education, mental capacity, and physical limitations."[13] And yet, of the hundreds of clinics at the nation's law schools, none focus on the challenges faced by the Territories of the U.S.—Guam, American Samoa, Puerto Rico, the Northern Mariana Islands, and the U.S. Virgin Islands—each of whom, except for Puerto Rico, does not have a law school of its own. Law school's "new normal" presents a real opportunity for the Territories.

Considering the legal academy's slow and begrudging acceptance of experiential education,[14] it is no surprise that the Territories, and their unique challenges, have never been the focus of any clinic at any law school anywhere in the country.[15] In fact, to most Americans—and, regrettably, most attorneys—the

10. *Legislative Policy & Drafting Clinic*, B.U. SCH. L., https://www.bu.edu/law/experiential-learning/clinics/policy-drafting-clinic (last visited Jan. 2, 2025).

11. Victoria Rivkin, *Cardozo Opens Holocaust Claims Restitution Clinic*, 223 N.Y. L.J. 1, 1 (2000); *see also* Irina Tarsis, *15 Years Later: Marking a Milestone for the Holocaust Claims Restitution Practicum*, 26 N.Y. STATE BAR ASS'N ENT. ARTS & SPORTS L.J., 44, 44–45 (2015).

12. *Advanced Administrative Litigation Clinic (Black Lung)*, WASH. & LEE U. SCH. L., https://law.wlu.edu/clinics/advanced-administrative-litigation-clinic-(black-lung) (last visited Jan. 2, 2025).

13. Kate Mewhinney, *The Human Touch: Clinical Teaching of Elder Law*, 40 STETSON L. REV. 151, 153–55 (2010).

14. *See* Kotkin, *supra* note 9, at 287 (noting the 40-year push by "clinicians" took root and lead to Standard 303's adoption) (citing ABA STANDARDS AND RULES OF PROC. FOR APPROVAL OF L. SCHS. 2018–2019 (AM. BAR ASS'N 2018)).

15. Technically, the District of Columbia is also a territory of the United States. And the push for statehood for the District highlights its own struggles and challenges as a territory. But Washington, D.C., being the capital of the nation and the seat of the federal government, is as about as far from invisible as a territory can get, especially when talking about the challenges of territoriality or territory-ness. For this reason, the District is excluded from this Article, especially as it boasts no fewer than six law schools itself, with several others in nearby Maryland and Virginia.

Territories are an afterthought at best,[16] or invisible at worst.[17] But some ten years on from the move to mandate experiential learning in law school education, why shouldn't we expect to see a law school clinic focused on a particular territory or the Territories as a whole? As Professor Lauren Carasik observed nearly twenty years ago, "many clinicians espouse the pivotal role of a social justice mission in law school clinics. . . . Law school clinics are ideally situated to serve at the vanguard of this social justice mission."[18]

Part II of this Article gives a brief history of clinical legal education. This area has been covered at length elsewhere, and anything other than a brief survey would be beyond the scope of this short Article. But the history of clinical education is important for two reasons. Clinics "grew out of law students' growing political involvement and desire for a more relevant experience [during the 1960s.]"[19] Any clinic that focuses on the Territories will fit well

16. *See, e.g.*, Joseph T. Gasper II, *Visible and Invisible: The Case for a Territorial Reporter*, 91 FORDHAM L. REV. 1711, 1717 (2023) (footnotes omitted) ("West Publishing Company initially included the decisions of territorial supreme courts within its National Reporter System, occasionally reprinting previously reported decisions within the appropriate regional reporter. One example stands out—decisions of the Supreme Court of the Territory of Arizona were included within the Pacific Reporter from the very first volume published in 1884, even though Arizona would not become a state for another thirty years. . . . However, even though West went on to publish several topic-based reporters—such as West's Bankruptcy Reporter and West's Military Justice Reporter, and even West's American Tribal Law Reporter—West eventually ceded the reporting of territorial court decisions to other publishers.").

17. *See, e.g.*, Neil Weare & Rodney Cruz, *Guam, America's Forgotten Front Line*, N.Y. TIMES (Aug. 14, 2017), https://www.nytimes.com/2017/08/14/opinion/guam-north-korea-american-ally-.html ("A few days ago, North Korea said it was developing plans to fire four test missiles into waters near Guam. But some Americans seemed less alarmed by Kim Jong-un's saber-rattling than surprised to learn that Guam, the small Pacific territory 4,000 miles west of Hawaii, is a part of the United States."). An anecdote is also illuminating here. The second annual District Court Conference held by the District Court of the Virgin Islands on January 18, 2011, on St. Thomas, United States Virgin Islands, featured then-retired Supreme Court Justice Sandra Day O'Connor. *Former Justice O'Connor Featured at V.I. Court Conference*, ST. THOMAS SOURCE U.S.V.I. (Jan. 19, 2011), https://stthomassource.com/content/2011/01/19/former-justice-oconnor-featured-vi-court-conference/. I attended the conference. One of the panels discussed the *Insular Cases*. *Id.* Justice O'Connor was asked her thoughts about the *Insular Cases* and told the audience she was unfamiliar with them. That a Justice of the Supreme Court of the United States was not familiar with the *Insular Cases* was shocking to say the least and illuminates how invisible the *Insular Cases* are in law school curriculum, something that Stetson University College of Law seeks to change through its March 22, 2024, Symposium, "Territorial Law Across the Curriculum."

18. Lauren Carasik, *Justice in the Balance: An Evaluation of One Clinic's Ability to Harmonize Teaching Practical Skills, Ethics and Professionalism with a Social Justice Mission*, 16 REV. L. & SOC. JUST. 23, 24–25 (2006) (footnotes omitted).

19. Kotkin, *supra* note 9, at 289 (footnote omitted).

within this background. However, the profession's lukewarm embrace of experiential education might present challenges to a clinic that focuses on something so seemingly amorphous as "the Territories." Part III will provide a brief history of the nation's territories. Except for Texas and the original thirteen colonies, thirty-one of our States were at some point a territory or part of a territory.[20] While the challenges of the current Territories are unique, many struggles, like the struggle for attention, are the same. Part IV will delve deeper into hypothetical territorial clinic programs and how law students might help shine a light on the struggles of our nation's Territories.

II. OLD IS NEW AGAIN: CLINICAL EDUCATION OVER THE PAST FIFTY YEARS

Nearly thirty years ago, Professor James E. Moliterno observed that, while "they are receiving renewed interest, experiential education and experiential learning are not new to legal education or professional education in general."[21] This still rings true today even as law schools, law students, and legal practitioners embark on a new normal: an increased focus on students learning how to do what lawyers do, not just think how lawyers think.[22] In many ways, the legal profession has been shifting toward giving students skills lawyers need to practice law: drafting contracts, wills, and legislation; writing letters, motions, and briefs; counseling clients; and communicating with attorneys and non-attorneys.

The realm of legal education underwent a dramatic shift in the 20th century, particularly "[b]etween 1875 and 1910" when "cases replaced treatises, classrooms replaced law offices and courtrooms;

20. *See D.C., Puerto Rico, and the U.S. Territories: An Explainer*, ROCK VOTE, https://www.rockthevote.org/explainers/washington-d-c-puerto-rico-and-the-u-s-territories/ (last visited Jan. 2, 2025).

21. James E. Moliterno, *Legal Education, Experiential Education, and Professional Responsibility*, 38 WM. & MARY L. REV. 71, 78 (1996) (footnotes omitted).

22. This is not meant to downplay the importance of learning how to think like a lawyer. *Cf.* J. Ryann Peyton, *Mentoring Professional Identity: Expanding What It Means to Be a Lawyer*, 49 COLO. LAW 14, 14 (2020) (footnotes omitted) ("Becoming a lawyer changes us. Research shows that simply preparing for the LSAT changes our brain structure, and the methodology of legal education changes the way our brains process fear and anxiety. At a psychological level, accepting the immense responsibility of solving the problems of others and protecting the rule of law means we must embody a new self upon entering the profession."). But lawyers do much more than think.

ordered, planned materials replaced a haphazard course of instruction; academic-led education replaced practitioner-led education; [and] academic analytical skills replaced practical client and interpersonal skills."[23] Before 1875, lawyers learned their trade through an apprenticeship.[24] But starting in the 1870s, Charles W. Eliot, then-President of Harvard University, underwent major university reforms as part of what is now referred to as "the 'scientification' of higher education in general" that "coincided with a more general move toward professionalization and institutionalization in America."[25] Initially, "[w]hen Eliot became President of Harvard, he found [Christopher Columbus] Langdell in New York and brought him to Cambridge to further [his] reform agenda."[26]

Christopher Columbus Langdell, dean of Harvard Law School from 1870 to 1895, is credited as the source of the shift from a more passive, lecture style of legal education to what all lawyers have come to know as the Socratic method.[27] But more than that, Langell is credited as having stripped all experience from legal education "save one, that of reading appellate cases to learn doctrine, theory, and skills relative to legal analysis."[28] To Eliot, the law library was to the law student what the hospital was to the medical student.[29] Langdell concurred, and "is credited, among other things, with replacing the lecture method of instruction with the case method and rigorous class discussion; with replacing the

23. Moliterno, *supra* note 21, at 73.

24. *See* Jackson & Schaffzin, *supra* note 1, at 521 ("Most may know that unstructured apprenticeship and mentoring relationships were once the primary route to becoming a lawyer.").

25. Moliterno, *supra* note 21, at 83.

26. *Id.* at 86.

27. *See* Beth H. Wilensky, *Dethroning Langdell*, 107 MINN. L. REV. 2701, 2707 (2023) (brackets and citation omitted) ("Before Christopher Columbus Langdell got his hands on the curriculum, law school classes primarily consisted of lecture, during which professors would 'summarize legal rules and even read aloud from textbooks and treatises,' and provide 'an authoritative-seeming answer' to the occasional student question."); *accord* Jackson & Schaffzin, *supra* note 1, at 520 n.13 ("Much credit for the adoption of classroom lectures and dialogues focused solely on legal theory and appellate opinions as the foundational components of legal education is given to Harvard Law School Professor C.C. Langdell." (citing David S. Romantz, *The Truth About Cats and Dogs: Legal Writing Courses and the Law School Curriculum*, 52 U. KAN. L. REV. 105, 112 (2003))).

28. Moliterno, *supra* note 21, at 83.

29. *See id.* at 86 ("The law library, and not the court or the law office, is the real analogue of the hospital." (quoting Charles W. Eliot, President's Annual Report for 1873–74, *reprinted in* 2 CHARLES WARREN, HISTORY OF THE HARVARD LAW SCHOOL AND OF EARLY LEGAL CONDITIONS IN AMERICA 392 (1908))).

treatise or legal textbook with the casebook; and with introducing law school entrance examinations, the three-year curriculum, and final examinations."[30] With both Eliot's support and "the vantage point of the deanship of the law school, Langdell ushered in a sea of changes at the law school that within twenty years would redefine the parameters of legal education in America."[31]

Many lawyers, judges, and law students are "products" of this "era in legal education that focused, sometimes exclusively, on a classroom-centered, less experience-based, pedagogy founded upon appellate case review and the Socratic method."[32] While many law students, particularly those who matriculated within the past twenty years, may have had some experience practicing to be a lawyer while in law school, "it was not until 1993 that law schools were under any mandate to teach practical skills or to offer students opportunities to engage in supervised clinical practice."[33] And, as noted at the outset, it was not until 2014 that law students were under any mandate to actually practice being a lawyer in order to graduate.[34]

This tension between scholar and practitioner, between academy and profession, dates back years, centuries even, certainly back to Langdell's efforts to reshape the legal profession.[35] Langdell's approach "presupposed that the law was built on universal truths that were discoverable to the same extent that the hard sciences, like physics and chemistry, were discoverable."[36] Many law students, after becoming lawyers, soon realize how non-scientific the law is, and how little law school prepared them for practice.

But this is not the origin of clinical education. Rather, the origin of clinical education began with a different source of

30. Romantz, *supra* note 27, at 112.

31. *Id.* at 113–14.

32. Jackson & Schaffzin, *supra* note 1, at 520.

33. *Id.* at 520–21.

34. *See* Mary Beth Beazley, *Finishing the Job of Legal Education Reform*, 51 WAKE FOREST L. REV. 275, 275 (2016) ("The Standards were approved in their current form in June 2014 by the Council and approved by the House of Delegates two months later." (citing ABA STANDARDS & RULES OF PROC. FOR APPROVAL OF L. SCHS. 2015–2016, *supra* note 7, at vii)).

35. *See* Kotkin, *supra* note 9, at 290–92 (discussing tension between established tenured professors and law schools and efforts of clinical teachers to obtain more respect); *see also* Romantz, *supra* note 27, at 114–16 (discussing student and colleague objections to Langdell's methods); *cf.* Moliterno, *supra* note 21, at 83 n.51 (discussing contemporary resistance to Langdell among Harvard law professors).

36. Romantz, *supra* note 27, at 116.

dissatisfaction. Like many other changes, clinical education traces its roots back to the 1960s, where it "grew out of law students' growing political involvement and [a] desire for a more relevant experience."[37] As Professor Minna J. Kotkin explains:

> Spurred by the civil rights movement, young people flocked to law school hoping to work for social change and were discouraged to find a calcified curriculum having little to do with their aspirations. Law school faculties also felt the need for change. At the same time, as part of President Johnson's "war on poverty," federally funded civil legal services offices were first established. These fledging enterprises, staffed by idealistic and overworked young lawyers, began to look to law students as a means of leveraging their impact. Clinical education began with students volunteering at local legal services offices, where they were thrown into the thick of poverty law practice without much guidance from the only marginally more experienced staff attorneys. Nevertheless, many politically minded students were thrilled with the opportunity to get out of the stuffy law school environment and help real clients.[38]

Professor Kotkin then details how clinical instructors within the legal academy eventually and simultaneously both embraced and resisted the system, pushing back against their second-tier status and towards parity with their scholarly counterparts.[39]

Alongside the efforts of clinicians to achieve parity were several reports that detailed deficiencies and shortfalls in American legal education and called for reforms: the Crampton Report in 1979, and the MacCrate Report in 1992, both published by the ABA; and a Carnegie Foundation report published in 2007.[40]

---

37. Kotkin, *supra* note 9, at 289.

38. *Id.* at 289–90 (footnotes omitted).

39. *See id.* at 290:

> Once in the academy, however, the former legal services lawyers, usually titled "staff attorneys," went through a transformation in the 1970s. They began to adopt the values of the academy, moving from an emphasis on lawyering to teaching. And they became conscious of the huge disparity in status and pay compared to the traditional faculty. The greater emphasis on teaching made it necessary to significantly decrease caseloads, as well as student-supervisor ratios, and to develop theories of lawyering that could be articulated and taught rather than just observed. The resulting scholarship on lawyering gave clinical teachers more legitimacy in the academy and bolstered their argument for pay and status parity. Staff attorneys became "instructors" and still later professors.

Id.

40. *See id.* at 292 & nn.13 & 16–17.

Arguably, the MacCrate Report garnered the most attention—and pushback:

> The report was largely viewed as a call for the expansion of clinical education with a focus on poverty law. It speaks at length about law school's obligation to instill social justice values as well as skills. It was widely discussed within the academy, with many schools organizing MacCrate task forces and committees. But the change was incremental and measured. And there was a mounting backlash, with the deans of over 100 schools organizing against the call for more skills education and improved status for clinical teachers.[41]

The scholastic, scientific approach to legal education prevailed once again, however, over efforts to transition to a more practical, skills-based approach. But not completely. To be sure, "students at virtually every ABA-approved law school are able to enroll in in-house clinical courses, externships, or both."[42] Until recently, however, "these courses" were "categorized as optional electives, neither required for graduation nor for admission to the bar."[43] But that changed in 2014, when the ABA revised its standards for accrediting law schools.[44]

Previously, Standard 302, which set curriculum requirements, required only that law schools offer "substantial opportunities for . . . live-client or other real-life practice experiences."[45] Offering live-client or real-life experiences could be "accomplished through clinics or field placements[,]" but law schools did not have to "offer these experiences to every student nor must a law school accommodate every student requesting enrollment in any particular live-client or other real-life practice experience."[46] But in 2014, the ABA mandated that law schools "offer a curriculum that requires each student to satisfactorily complete . . . one or

41. *Id.* at 292.

42. Jackson & Schaffzin, *supra* note 1, at 521–22.

43. *Id.* at 522.

44. *See* Jeffrey E. Lewis, *The Revised ABA Standards for Approval of Law Schools: An Overview of the Major Changes*, BAR EXAMINER (Mar. 2015), https://thebarexaminer.ncbex.org/article/march-2015/the-revised-aba-standards-for-approval-of-law-schools-an-overview-of-the-major-changes/.

45. ABA STANDARDS & RULES OF PROC. FOR APPROVAL OF L. SCHS, 2012–2013, §302(b)(1) (AM. BAR ASS'N 2013).

46. *Id.* § 302–05.

more experiential course(s) totaling at least six credit hours" that "must be a simulation course, a law clinic, or a field placement."[47]

Professor Kotkin credits the Great Recession as the catalyst.[48] With the collapse to the economy, and the impacts on law firms, law school applications dropped.[49] "Faced with these economic realities, law schools finally embraced experiential learning for real, heeding the virtually unanimous call of the bench, the bar, and students to produce more 'practice-ready' graduates. . . . [And] now bill themselves as centers of clinical excellence, and regularly tout their expanding programs."[50] With the COVID-19 pandemic following not long afterward, and the changes it brought to the profession,[51] experiential education may now have some time in the sun.[52]

III. SAME BUT DIFFERENT: STRUGGLES OF OUR TERRITORIES

The word "territory" appears three times in the Constitution of the United States of America: first in Article IV,[53] next in the Eighteenth Amendment,[54] and finally in the Twenty-First Amendment.[55] Of course, it is Article IV that we are concerned with here, specifically Section 3 which provides that "Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."[56] Looking to the text of the Clause, it "affords Congress broad authority to legislate with respect to the U.S.

47. ABA STANDARDS & RULES OF PROC. FOR APPROVAL OF L. SCHS, § 303(b)(3) (AM. BAR ASS'N 2014–2015).

48. Kotkin, *supra* note 9, at 293 ("Then came the recession of 2008, which most experts believe has changed the legal profession for good. It has had a far-reaching effect on legal education, well beyond that of various reports and committee efforts.").

49. *See id.*

50. *Id.*

51. *See generally* Johnson, *supra* note 1.

52. "Before the six hours were adopted, there was a proposal that students needed to earn fifteen hours of experiential course credits." Alyson M. Drake, *The Need for Experiential Legal Research Education*, 108 LAW LIBR. J. 511, 524 n.111 (2016) (citing CLINICAL LEGAL EDUCATION ASS'N, COMMENT ON DRAFT STANDARD 303(A)(3) & PROPOSAL FOR AMENDMENT TO EXISTING STANDARD 302(A)(4) TO REQUIRE 15 CREDITS IN EXPERIENTIAL COURSES (July 1, 2013)).

53. U.S. Const. art. IV, § 3.

54. *Id.* amend. XVIII.

55. *Id.* amend. XXI.

56. *Id.* art. IV, § 2.

Territories."[57] And Congress has often exercised this authority in haphazard and inconsistent ways.[58]

The U.S. Territories presently include American Samoa, Puerto Rico, Guam, the Northern Mariana Islands, and the U.S. Virgin Islands.[59] Previously, the United States included many territories; except for the original Thirteen Colonies, all but five of the other thirty-seven States began as a territory,[60] which causes many constitutional historians to "recognize that the United States has exhibited, during much of its history, a three-part structure. Besides the Union with its own Constitution and sphere of action, and the states with theirs, a third component has usually been in evidence—the territories."[61] Despite the omnipresence of territories throughout our nation's history, "we seem to have been unable to settle on 'a coherent territorial system.'"[62] Governors,

57. United States v. Vaello Madero, 596 U.S. 159, 162 (2022).

58. *See id.* ("Exercising that authority, Congress sometimes legislates differently with respect to the Territories . . . ."); *see also, e.g.*, William Wirt Blume & Elizabeth Gaspar Brown, *Territorial Courts and Law: Unifying Factors in the Development of American Legal Institutions-Part I*, 61 MICH. L. REV. 39, 43 (1962) ("Congress did not, however, undertake to serve as the sole or principal legislative agency, except for Alaska 1867-1912; Indian Territory 1889-1907; and the Canal Zone 1903[-1979]. Instead, it enacted a 'charter' for each territory, and passed occasional statutes to regulate the affairs of a particular territory, or of all the territories as a group."). Professors Blume and Brown then list the various officers and agencies to whom Congress delegated its authority to make rules and regulations for territories, which includes governors, with judges or councils, and local legislatures. *See* Blume & Brown, *supra*; *cf.* Earl S. Pomeroy, *Election of the Governor of Puerto Rico*, 23 S.W. SOC. SCI. Q. 355, 355 (1943) [hereinafter *Election of the Governor of Puerto Rico*] ("The appointive governorship is not peculiar to Puerto Rico among American territories and insular possessions, nor are the grievances of the Puerto Ricans unique. Governor St. Clair of Northwest Territory was appointed by the Congress; all others have been appointed by the President. During the first century of territorial government, most governors were not only appointees, but non-residents when appointed.").

59. *Vaello Madero*, 596 U.S. at 161.

60. *See* Willie Santana, *Incorporating the Lonely Star: How Puerto Rico Became Incorporated and Earned a Place in the Sisterhood of States*, 9 TENN. J.L. & POL'Y 433, 437 n.12 (2014). For an understanding of what states joined the Union:

> Thirty one-states [sic] joined the Union following the process set out by the Northwest Ordinance, the most recent being the former Territory of Hawaii. In fact, only the original thirteen colonies and the states of Kentucky (ceded from Virginia), Vermont (independent), Maine (ceded from Massachusetts), West Virginia (ceded from Virginia), Texas (independent) and California (U.S. Military rule post-Mexican American War) joined the Union through a process other than that established by the Northwest Ordinance.

Id.

61. Arthur Bestor, *Constitutionalism and the Settlement of the West: The Attainment of Consensus,* 1754-1784, *in* THE AMERICAN TERRITORIAL SYSTEM 13 (John Porter Bloom ed., 1973).

62. Gasper, *supra* note 16, at 1712 (quoting EARL S. POMEROY, THE TERRITORIES AND THE UNITED STATES 1861-1890, at 1 (1947)) [hereinafter THE TERRITORIES AND THE UNITED STATES].

initially with judges and later with councils or legislatures, were first given legislative authority in many of the early territories, with proper legislatures being authorized in later ones.[63] "Final control over territorial legislation remained with Congress, which reserved the power to annul any law that might be passed."[64]

Territorial government frameworks were modeled after "an 'organic act' made along the lines of the Ordinance of July 13, 1787[,]"[65] commonly known as the Northwest Ordinance. As the late Professor Earl S. Pomeroy explained:

> Under the Constitution, Congress retained supreme power over the territories, however confused and ineffective its exercise of it. It organized new territories and admitted new states, developing (after 1820) a striking degree of detail in the progress of admission. The total volume of congressional legislation increased rather than diminished over the years. By other acts Congress made appropriations for certain salaries and overhead expenses charged to the national government in the organic acts (eventually formularized in amount) as well as for occasional extraordinary purposes. The Senate examined presidential nominations for territorial offices, thereby controlling policy, as well as patronage, in its confirmations and rejections. In practice, however, Congress renounced, by delegation and by default, the direct administration of continuing affairs which under the Articles of Confederation might have gone to congressional committees. The adoption of the Constitution scattered the business of territorial control among several departments and agencies; with the passage of years and the creation of new departments, there was more rather than less scattering.[66]

With time, federal oversight over territories increased and yet somehow diminished as well, with Washington D.C. functioning more and more like an absentee landlord.[67] Few resources were

63. *See* Blume & Brown, *supra* note 58, at 43–44.

64. *Id.* at 44–45.

65. THE TERRITORIES AND THE UNITED STATES, *supra* note 62, at 3.

66. *Id.* at 4–5.

67. Pomeroy references a few examples that bring this "absentee landlord" aspect to light:

> [I]nstructions on the general conduct of [the territorial] office were so infrequent as to be exceptional. The department [of state, who initially had responsibility for territorial affairs,] did not expect officers to come to Washington for consultation upon their appointment, nor did it send any general written instructions. Governor William A. Pile of New Mexico, who requested such advice, was told that "no special

provided, and territorial officers were expected to make do with what they found upon arriving in the territory.[68] "The theory upon which the various governments for portions of the territory of the United States have been organized, has ever been that of leaving to the inhabitants all the powers of self-government consistent with the supremacy and supervision of National authority, and with certain fundamental principles established by Congress."[69]

Understandably, resentment grew with time, directed largely at the East and federal appointees from the East, most of whom were nonresidents. In the years following the Civil War, criticisms of the territorial system grew:[70] "From comparing an unpopular

---

> instructions are necessary in regard to your official duties." An officer was expected to refer to the law rather than a department superior. To discover the functions of his office, he might have to make use of a private library, as the department did not furnish the published laws. An Idaho officer complained that "not one of the laws . . . which you cited . . . is to be found in this place."

Id. at 11 (footnotes and ellipses omitted).

Non-intervention and deference to self-governance by the territories seems to have been a federal policy, at least as far back as the 1870s. *See id.* at 12. But non-intervention and self-governance without sufficient resources or an understanding on the part of federal officials of the unique challenges territories faced was a recipe for disaster.

68. *See* Blume & Brown, *supra* note 58, and accompanying text; *see also* THE TERRITORIES AND THE UNITED STATES, *supra* note 62, at 64:

> Low salaries, frontier discomforts, and the endless administrative difficulties discouraged most newcomers. According to former delegate [to Congress] Charles D. Poston, Arizona had been "a tarrying post for every political tramp for many years." All the governors had left the territory, but they were "not much to blame," for Arizona had "been a poor goose to pluck." None was more enthusiastic about the mountain country than William Gilpin . . . but as governor of Colorado, he complained of having "the *legislature*, the *Indians*, the *military*, the *courts*, and this *wonderful population*—30,000 (all *Males*)—to manage without a single, skilled assistant." Not a few regarded territorial service as exile, a political and physical Siberia. Some refused to serve even after the Senate had confirmed their nominations; many more resigned after brief periods in office.

THE TERRITORIES AND THE UNITED STATES, *supra* note 62 (footnotes and italics omitted).

69. Clinton v. Englebrecht, 80 U.S. 434, 436 (1871).

70. The federal government took what could best be called an "absentee landlord" approach to its western territories that contributed directly to local discontent with Washington, D.C. For example, most judges appointed by the president to territorial courts did not reside in the territories. *See, e.g.*, Michael Kirkham, *Judge Stegner: A Model of Idaho's Self-Restrained Judiciary*, 60 IDAHO L. REV. 13, 22–23 (2024) ("Federal appointees to the Idaho territory were, more often than not, from the east, unfamiliar with Idaho's laws, and uninterested in staying put. Indeed judicial turnover was so commonplace that some judicial appointees never even arrived to sit in a courtroom and hear a case." (footnotes omitted)); *see also* Kent. D. Richards, *Comment on Justice in the Territories*, *in* THE AMERICAN TERRITORIAL SYSTEM 136 (John Porter Bloom ed., 1973) (observing that "of the fifty-two men appointed to the Utah [territorial] supreme court between 1850 and 1890 . . . only five . . . resided in the territory at the time of appointment"). This dissatisfaction, even animosity, to federal officials is unique to the territories. *Cf.* THE TERRITORIES AND THE UNITED STATES, *supra* note 62, at 61 ("The important differences (and grievances) were that territorial judges were selected with no more deference to local feeling than territorial

governor with an agent of George III, it was natural to go on to describe the territories as 'mere colonies, occupying much the same relation to the General Government as the colonies did to the British government prior to the Revolution.'"[71] Often the further a territory was from the "General Government," the stronger the resentment—citizens "resented the territorial system not only because they were Westerners, but also because recently they had been Easterners."[72] Many, having moved from a state to a territory, resented what they found there and the state in which Uncle Sam kept his "tenants." But many also failed to appreciate that territories have always been political for Uncle Sam.[73] It is not surprising, then, that similar if not the very same resentments would spread to the other territories even further away from Washington, D.C., to our noncontiguous territories.

The United States acquired Alaska from Russia in 1867 but "[t]he territory of Alaska was largely ignored by the United States in the 19th Century."[74] Seventeen years later, "[i]n 1884, Congress

governors and secretaries, and that the whole system failed to allow for distances, costs, and other peculiarities of the high plain and mountain wests."). It even continues today, something reflected in Utah's 2012 enactment of the Transfer of Public Lands Act, "demanding that the federal government turn millions of acres of public lands over to the state." John C. Ruple, *The Transfer of Public Lands Movement: The Battle to Take "Back" Lands That Were Never Theirs*, 29 COLO. NAT. RES. ENERGY & ENVTL. L. REV. 1, 3 (2018); *see also id.* at 64–65 (explaining that the "transfer movement" has roots directly in "perceived injuries" and "distrust" from territorial days that "*are still felt*" today) (emphasis added). As argued further below, clinics can help to shine light on the challenges that are unique to our current territories but also endemic to all territories because of this "absentee-landlord" approach by the federal government to its territories.

71. THE TERRITORIES AND THE UNITED STATES, *supra* note 62, at 103–04.

72. *Id.* at 106.

73. *Cf., e.g.*, Earl S. Pomeroy, *Lincoln, the Thirteenth Amendment, and the Admission of Nevada*, 12 PAC. HIST. REV. 362, 364 (1943) [hereinafter *Admission of Nevada*] (footnotes and paragraph break omitted) ("By 1864 there was little question of the Radical attitude toward new Republican states. When Nevada appeared as a candidate for statehood, it appeared not alone . . . but in company with Colorado and Nebraska. . . . Colorado and Nebraska failed to become states in 1864 because of divisions in intraterritorial rather than Congressional politics. When citizens of the two territories changed their minds in 1865 and 1866, Congress overrode a presidential veto to admit Nebraska, but not Colorado."); *see also, e.g.*, C. C. Langdell, *The Status of Our New Territories*, 12 HARV. L. REV. 365, 371 (1899) ("Two peculiarities have, however, hitherto characterized the territory held by the United States outside the limits of any State: first, such territory has been virtually a wilderness; secondly, it has been *looked upon merely as material out of which new States were to be carved* just as soon as there was sufficient population to warrant the taking of such a step; and hence the need of a single term which would embrace territories as well as States has not been greatly felt. At all events, no such new term has been adopted; and hence 'United States' is the only term we have had to designate collectively either the States alone, or the States and Territories . . . ." (emphasis added)).

74. Robert T. Anderson, *Alaska Native Rights, Statehood, and Unfinished Business*, 43 TULSA L. REV. 17, 17 (2007).

took its first real step toward governance of Alaska when it passed an Organic Act, and established a civil government for the district of Alaska with the laws of Oregon made applicable."[75] Almost fifteen years later, "in 1898, the United States took possession of Puerto Rico, Guam, and the Philippines."[76] The aforementioned "acquisitions, hard on the heels of the annexation of Hawaii, soon ignited a fierce debate."[77] Two years later, in 1900, "the traditional leaders of the Samoan Islands of Tutuila and Aunu'u voluntarily ceded their sovereign authority to the United States Government."[78] Seventeen years after that, the United States purchased the former Danish West Indies, later renamed the U.S. Virgin Islands, from Denmark.[79] In a span of roughly twenty years, the United States found itself in charge of multiple island territories stretching from the South Pacific Ocean to the Caribbean Sea.[80] Two decades later, following the end of the Second World War, under the direction of the United Nations, the United States took responsibility for "[t]he islands of Micronesia, formerly known as the Trust Territory of the Pacific Islands, consist[ing] of '2,000 small islands that span an ocean area roughly the size of the continental United States.'"[81] The Northern Mariana Islands are among the islands that were formerly part of the Trust Territory.

The differences between our insular territories and our contiguous territories, while beyond the scope of this Article, should not be discounted. "Before 1898 statehood was usually so near at hand that reformation of the territorial system and

75. *Id.* at 21 (footnotes omitted).

76. United States v. Vaello Madero, 596 U.S. 159, 181 (2022) (Gorsuch, J., concurring).

77. *Id.*

78. Tuaua v. United States, 788 F.3d 300, 302 (D.C. Cir. 2015).

79. Joseph T. Gasper II, *Too Big to Fail:* Banks *and the Reception of the Common Law in the U.S. Virgin Islands*, 46 STETSON L. REV. 295, 296 (2017) [hereinafter *Too Big to Fail*] (footnotes omitted) ("The United States of America had agreed to purchase the Danish West Indies from the Kingdom of Denmark on August 4, 1916. On March 31, 1917, the islands of St. Thomas, St. John, St. Croix (and the adjacent cays) formally changed sovereignty when Robert Lansing, Secretary of State of the United States, tendered payment (twenty-five million dollars in gold coin) to Constantin Brun, extraordinary envoy and minister plenipotentiary of the King of Denmark, in Washington D.C.").

80. Daniel Immerwahr, *The Greater United States: Territory and Empire in U.S. History*, 40 DIPLOMATIC HIST. 373, 386 (2016).

81. Hon. Robert J. Torres, Jr., *Jon'd at the Hip: Custom and Tradition in Island Decision Making*, 35 U. HAW. L. REV. 921, 923 (2013) (ellipsis and brackets omitted) (quoting Arnold H. Leibowitz, DEFINING STATUS: A COMPREHENSIVE ANALYSIS OF UNITED STATES TERRITORIAL RELATIONS 482 (1989)).

consolidation of administration were not pressing."[82] But even before 1989, Western territories struggled because of their distance from Washington, D.C., something echoed by insular territories given their distance from the mainland and each other. For example, "the trust area encompassed 2,141 islands spread over 5% of the Pacific Ocean—a zone equivalent in size to the continental United States."[83] In 1945, a flight from Miami to the Virgin Islands took eight hours.[84] The makeup of the residents in our insular territories is yet another difference that explains much of why the "fierce debate" ignited by the United States reached outside the continent. Puerto Rico had been under Spanish rule for centuries; its people spoke Spanish, were Catholic, and traced their heritage to European, Taino, and African peoples.[85] Virgin Islanders, by contrast, spoke English, were mostly Protestant, and the majority traced their roots to Africa and the forced importation of African peoples to the Caribbean as slaves.[86] At the time of their acquisition, annexation, or purchase, each of our insular territories were majority-minority jurisdictions.

Regrettably, geographical differences have prevailed. Langdell, expressing the sentiment of the time, wrote:

> With the acquisition of Hawaii and the Spanish islands, however, all these conditions are radically changed. None of these islands have been acquired with a view to their being admitted as States, and it is to be sincerely hoped that they never will be so admitted, i.e., that they will never be permitted to share in the government of this country, and especially to be represented in the United States Senate.[87]

Langdell's views—like those of his Harvard colleagues—prevailed and preceded the *Insular Cases*.[88] The questions Langdell and

82. *Election of the Governor of Puerto Rico*, *supra* note 58, at 359.

83. Michael J. Kelly, *Quiescent Sovereignty of U.S. Territories*, 105 MARQ. L. REV. 501, 522 (2022).

84. *See* Hon. Herman E. Moore, *The Virgin Islands and its Judicial System*, 3 NAT'L BAR J. 349, 359 (1945).

85. Rachel J. Trotter, *Puerto Rican Culture – Rich with History and Tradition*, FAMILYSEARCH (Nov. 6, 2020), https://www.familysearch.org/en/blog/puerto-rican-culture-tradition.

86. Luther Harris Evans, *The People of the Virgin Islands*, BRITTANICA (Aug. 19, 2024), https://www.britannica.com/place/Virgin-Islands/The-people.

87. Langdell, *supra* note 73, at 391.

88. *See generally* United States v. Vaello Madero, 596 U.S. 159, 180–83 (2022) (Gorsuch, J., concurring).

others asked also became law.[89] Echoing the *Dred Scott* decision, Langdell sought to define the "United States" and offered three meanings: the states united, the sovereign nation, and territory.[90] Langdell found support only for the first two meanings and even acknowledged that, technically, "there is but one known mode of incorporating newly acquired territory into the United States, namely, by admitting it as a State."[91] Remarkably, Langdell did not engage Section 3 of Article IV at all. The words "dispose of" or "Rules and Regulations" do not appear in the article,[92] and one reference to "territory or other property belonging to the United States" appears in a series as support for "United States" as sovereign.[93] Langdell's textual approach may have been attractive, but theoretical questions often lack concrete answers. If an amendment was necessary to answer the citizenship questions *Dred Scott* raised, an amendment might be necessary to answer the territorial questions the *Insular Cases* raised.

Questions raised by territorial law—can we acquire territories and hold them in perpetuity without admitting them as states; does the constitution follow the flag; does the constitution apply of its own force in the territories; are persons born in a territory citizens by birth, entitled to all the rights and privileges of citizens—are some of the most fundamental to our nation. Perhaps by accident of history these questions often come up within the context of the Territories,[94] but not exclusively so.[95] There are, of

89. *See id.* at 182 ("The debate over American colonialism made its first appearance in this Court in the form of a tax dispute in *Downes v. Bidwell*. . . . To answer the question whether the Act complied with the Constitution, the Court resolved that it first had to decide whether the Constitution applied at all in Puerto Rico. Ultimately, a fractured set of opinions emerged. Employing arguments similar to those advanced by Professors Langdell and Thayer, Justice Brown saw things in the starkest terms. . . . Justice White offered a different theory that drew on Professor Lowell's thinking.").

90. Langdell, *supra* note 73, at 365, 368, 370.

91. *Id.* at 388.

92. *Id.*

93. *Id.* at 373–74.

94. For example, in a very succinct opinion, the Supreme Court of the Arizona Territory held in 1886, that the right to indictment by grand jury could not be denied by a territory. *See* Territory v. Blomberg, 11 P. 671, 627 (Ariz. Terr. 1886) ("Prosecution for infamous offenses by indictment by a grand jury is as firmly guaranteed by the constitution as the right of trial by jury. Congress may not take away this right; a fortiori, the territories may not."). The United States Court of Appeals for the Third Circuit held the opposite with respect to the Virgin Islands in *Soto v. United States*. 273 F. 628, 633 (3d Cir. 1921).

95. In *United States v. Burney*, some of these questions were raised in a case regarding a civilian conviction outside the United States by a court martial. 21 C.M.R. 98, 113 (Mil. Ct. App. 1956) (citations omitted) ("While only obliquely germane to our problem, it has been held by the Supreme Court that Congress may assume complete sovereignty over a

course, other differences between our contemporary territories and our historical territories, many unique to the times we now live in. The Great Depression ushered in the modern regulatory state and inspired social insurance programs like Social Security, Medicare, and Medicaid. Yet, as enacted, the Social Security Act of 1935 defined "state" to include Alaska, Hawai'i, and the District of Columbia but not Guam, the Virgin Islands, Puerto Rico, American Samoa, or the Northern Mariana Islands.[96] Florida, for example, did not have to face bureaucratic challenges accessing aid from the Federal Emergency Management Agency ("FEMA") as the Virgin Islands has because FEMA (and other modern administrative agencies) did not exist in the early 1800s when Florida was a territory.[97] Similarly, residents of the Territory of Oregon were never denied access to Supplemental Security Income ("SSI") like residents of Puerto Rico are now, again, because SSI did not exist when Oregon was a territory.[98] Commerce and trade have changed dramatically, certainly in the years since Hawai'i ceased being a territory. Yet the governors of Guam, the Virgin Islands, and Puerto Rico are elected by the residents of those Territories, something the residents of Western territories only dreamt of. So, what does all of this have to do with clinics specifically and experiential education in law schools in general?

---

territory . . . yet not grant unto its citizens those rights and privileges of the Constitution providing for indictment by grand and trial by petit juries. This doctrine . . . has inaccurately been described as the notion that the Constitution does not follow the flag. . . .").

96. *See* Social Security Act, § 1101(a)(1), 49 Stat. 640, 647 (Aug. 14, 1934).

97. *See* FEMA, *Mission, Value and History*, https://www.fema.gov/about#:~:text=FEMA%20was%20officially%20created%20in,the%20Department%20of%20Homeland%20Security (last visited Jan. 6, 2025) (explaining that FEMA was not created until an executive order by President Jimmy Carter in 1979); *see also* Greg Allen, *Virgin Islands Still Recovering from 2017 Hurricanes as New Season Begins*, NPR (June 2, 2018), https://www.npr.org/2018/06/02/615309394/virgin-islands-still-recovering-from-2017-hurricanes-as-new-season-begins. Some challenges Virgin Islanders faced post hurricane include:

> In the months after the hurricanes, FEMA found that temporary housing programs that were effective in Florida and Texas made little sense in the Virgin Islands. Mobile homes were impractical and the few hotels that reopened weren't available for housing because they were filled with relief crews. It wasn't until March, *six months after the hurricanes hit*, that FEMA launched this program on the island.

Id. (emphasis added) (paragraph break omitted).

98. United States v. Vaello Madero, 596 U.S. 159, 164 (2022) ("Congress may distinguish the Territories from the States in tax and benefits programs such as Supplemental Security Income, so long as Congress has a rational basis for doing so.").

IV. CLINICS TO THE RESCUE?

Recall that law school clinical programs trace their roots back to the civil rights movement of the 1960s and student frustration with rigid curriculum. Recall also that Langdell is one of the architects of law school pedagogy and the *Insular Cases*. Additionally, the ABA adopted a resolution in 2021, urging:

> law schools to offer courses on the law of United States territories and to teach the *Insular Cases*—a series of decisions issued by the Supreme Court of the United States in the early 20th century which held that the people inhabiting America's insular territories were not entitled to the same constitutional rights and protections afforded to Americans residing in the fifty states—as part of existing courses on constitutional law.[99]

Marry these points with the new standards adopted by the ABA—each law student must complete at least six credits of experiential education to graduate[100]—and a wonderful opportunity arises to develop clinical programs focused on the unique challenges of the Territories.

Again, each law student must complete a total of 270 hours of experiential courses to graduate.[101] "Experiential courses" is defined as a simulation course, a law clinic, or field placement. While field placement could be helpful to the Territories, especially as four of the five insular territories do not have their own law school, this Part will focus on clinics. To qualify for credit, clinics must "provide substantial lawyering experience that involves advising or representing one or more actual clients or serving as a third-party neutral."[102] Clinics must also provide direct supervision, opportunities for student performance, feedback, and self-evaluation, and include classroom instruction.[103]

Arguably, one of the initial challenges might be the "actual client" requirement. The "Territories" could not qualify as a client, certainly not an "actual" client, but territorial bar associations,

99. ABA Res. 300, H.D. 2021.

100. ABA STANDARDS AND RULES OF PROC. FOR APPROVAL OF L. SCHS. 2023–2024, *supra* note 8, § 303(a)(3).

101. Standard 310 defines a credit hour "as not less than one hour of classroom or direct faculty instruction and two hours of out-of-class student work per week for fifteen weeks, or the equivalent amount of work over a different amount of time." *Id.* § 310(b)(1).

102. *Id.* § 304(c).

103. *Id.* § 304(a).

congressional delegates, federal and territorial government commissions, departments, and agencies, as well as nonprofit organization and civil rights-focused groups certainly could be actual clients. And the opportunities it presents would stretch from Point Udall to Point Udall.[104]

First, the "lofty" complex, even existential, questions raised by the *Insular Cases* should be examined, [105] particularly as they are in the national spotlight once more due in no small part to scholars and activists fighting inequality. We need think tanks to engage these questions. One refrain often heard at conferences on *Insular Cases* as to why the U.S. Supreme Court has not overruled them yet is that the Justices may not know what vacuum it would create. Recall that before 1898, statehood was the ultimate destination of a territory; accusations of "colonialism" were ignored because statehood would eventually moot them. The insular territories, however, except for Hawai'i, have remained in "territoryhood" for over a century.[106] If the artifice of dividing territories into incorporated and unincorporated evaporates,[107] the courts and Congress will have to address the complications that arise. They will need a comprehensive understanding of the issues. For example, if it is "'beyond question' that the Constitution's jury-trial guarantee reache[s] 'the territories of the United States[,]'"[108] does it also mean that the right to indictment by grand jury is also

104. The westernmost point in the United States is at a place called Point Udall, named after Morris Udall, a congressman from Arizona, on Guam. *Point Udall Monument, US Virgin Islands, US Territories*, CTR. FOR LAND USE INTERPRETATION, https://clui.org/ludb/site/point-udall-monument-us-virgin-islands#:~:text=The%20westernmost%20point%20of%20the,map%2C%20then%20drag%20the%20map (last visited Jan. 2, 2025). The easternmost point in the United States is on St. Croix, U.S. Virgin Islands, also called Point Udall, named after Stuart Udall, a former Secretary of the interior. *Id.*

105. *See* Puerto Rico v. Sanchez Valle, 579 U.S. 59, 65 (2016) (describing questions concerning Puerto Rican self-determination as being within the "lofty sphere of constitutionalism").

106. *United States Territorial Acquisitions*, BALLOTPEDIA, https://ballotpedia.org/United_States_territorial_acquisitions (last visited Jan. 2, 2025).

107. *See* United States v. Vaello Madero, 596 U.S. 159, 184–85 (2022) (Gorsuch, J., concurring) ("Nothing in the Constitution speaks of 'incorporated' and 'unincorporated' Territories. Nothing in it extends to the latter only certain supposedly 'fundamental' constitutional guarantees."); *see also id.* ("The Insular Cases' departure from the Constitution's original meaning has never been much of a secret. Even commentators at the time understood that the notion of territorial incorporation was a thoroughly modern invention.").

108. *Id.* (quoting Thompson v. Utah, 170 U.S. 343, 346–47 (1898)); *see also Thompson*, 170 U.S. at 344 ("By *an indictment* returned in the district court of the Second judicial district of the territory of Utah . . . ." (emphasis added)).

beyond question?[109] Congress took a significant step when it provided for the direct election of territorial governors, something other territories had pushed for.[110] One could argue, however—if territories have no right to govern themselves, being mere instrumentalities of the federal government[111]—that the direct election of territorial governors could violate the Appointments Clause.[112] And what of birthright citizenship for persons born in

109. *See Vaello Madero*, 596 U.S. at 186–87 (Gorsuch, J., concurring) (discussing "workarounds" the Supreme Court has adopted for "fundamental rights" as "no solution," "in-effectual," and "inappropriate").

110. *See* THE TERRITORIES AND THE UNITED STATES, *supra* note 62, at 106 (ellipsis and footnote omitted) ("The Washington legislature asked Congress [in 1859] 'to establish an act authorizing American citizens . . . to choose their own Governors and Judges.'").

111. *Cf.* Guam v. Guerrero, 290 F.3d 1210, 1214 (9th Cir. 2002) ("Congress has the power to legislate directly for Guam or to establish a government for Guam subject to congressional control, and except as Congress may determine, Guam has no inherent right to govern itself."); *see id.* at 1217 ("Guam is a federal instrumentality, enjoying only those rights conferred to it by Congress . . . .").

112. *Cf.* Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC, 590 U.S. 448, 464 (2020) ("[W]hile the Appointments Clause *does* restrict the appointment of 'Officers of the United States' with duties in or related to the District of Columbia or an Article IV entity, it *does not* restrict the appointment of local officers that Congress vests with primarily local duties under Article IV, § 3 . . . ."). *But see id.* at 480–81 (Thomas, J., concurring) (rejecting the "amorphous" primarily local versus primarily federal test); *id.* at 481 ("Resolving this unnecessary issue is especially problematic because the original meaning of the phrase 'Officers of the United States' arguably includes all officers exercising the powers of the National Government, even if those officers also exercise power vested under Article IV."). Justice Thomas criticized the majority's "fail[ure] to engage with" the instances when territorial governors, for example, did exercise "primarily local duties" yet Congress believed them subject to the Appointments Clause. *See id.* Governors of territories have always been in charge of military forces. *See, e.g.*, 23 V.I. CODE ANN. tit. 23 § 1506 (2024) ("The Governor of the Virgin Islands shall be the Commander-in-Chief of the National Guard."). And the Governor of the Virgin Islands appoints, and can delegate authority to, an Adjutant General of the Virgin Islands. *See id.* §§ 1507(a), (h). However, unlike States, "U.S. territories . . . are not sovereigns distinct from the United States." Puerto Rico v. Sanchez Valle, 579 U.S. 59, 71 (2016). A governor of a State who refuses to activate the national guard cannot be removed from office by the President. But a governor of a Territory could have, at least before recent changes providing for the direct election of a territorial governors by residents, been subject to removal because territorial governors served at the pleasure of the President. *See* THE TERRITORIES AND THE UNITED STATES, *supra* note 62, at 355:

> The appointive governorship is not peculiar to Puerto Rico among American territories and insular possessions, nor are the grievances of the Puerto Ricans unique. Governor St. Clair of Northwest Territory was appointed by the Congress; all others have been appointed by the President. During the first century of territorial government, most governors were not only appointees, but non-residents when appointed.

Id.

The urge to say "that will never happen," i.e., that future presidents would never attempt to reclaim their appointment authority over governors of territories, may be strong when some of these "loftier" and "hypothetical" constitutional questions are posed. *But see* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).

the Territories?[113] Clinics can help with the lion's share of the research needed to determine whether, in fact, "[h]istory confirms what the Constitution's text and structure suggest."[114]

Territories can also benefit from specialized clinics like the legislative policy and drafting clinic at Boston University School of Law,[115] or the Veterans Legal Services Clinic at Yale Law School.[116] Territories are routinely overlooked when Congress legislates.[117] Same for federal agencies, which prompted Representative Raúl Grijalva of Arizona to introduce the "Special Advisors for Insular Areas Act" on July 27, 2023.[118] Clinics focused on state, federal, and territorial legislation can help to reduce the invisibility of the Territories.[119] Clinics can also partner with

113. Michael D. Ramsey, *Originalism and Birthright Citizenship*, 109 GEO. L.J. 405, 426 (2020) ("One might say, from the Clause's literal language, that 'in the United States' meant only 'in' one of the component states whose union forms 'the United States'—that is, that territories were not fully 'in' the United States until they were 'admitted . . . into this Union' as states pursuant to the Constitution's Article IV."). While Professor Ramsey then proceeds to discredit this reading, it could find support in Langdell's approach to defining the United States to exclude territories until they become states.

114. *Aurelius Inv., LLC*, 590 U.S. at 461; *see also* Alyson M. Drake, *The Need for Experiential Legal Research Education*, 108 LAW. LIBR. J. 511, 533 (2016) ("Experiential courses are the ABA's answer for increasing students' practice skills; as such, law schools need to embrace the experiential legal research course so more students have the opportunity to strengthen their research skills and the chance to enter the profession as practice-ready professionals.").

115. *Legislative Policy & Drafting Clinic*, *Getting an Insider's Perspective on the Legislative Process*, B.U. SCH. L., https://www.bu.edu/law/files/2022/02/Legislative-Policy-and-Drafting-Clinic_2022-FINAL-1.pdf (last visited Jan. 2, 2025).

116. *Veterans Legal Services Clinic*, *About the Clinic*, YALE L. SCH., https://law.yale.edu/clinics/vlsc (last visited Jan. 2, 2025).

117. Anthony M. Ciolli, *Microaggressions Against United States Territories and Their People*, 50 S.U. L. REV. 54, 64 (2022) (explaining one remarkable example where "residents of the U.S. Virgin Islands were expressly exempt from the Affordable Care Act's individual mandate and the territorial government 'opted out of establishing a health care exchange,' with no insurers willing to offer policies to individuals and small businesses in such a small jurisdiction").

118. *See* Special Advisors for Insular Areas Act, H.R. 5001, 118th Cong. (2023).

119. *See, e.g.*, Eduardo Medina, *Why Puerto Rico Is Adding 'USA' to Its Driver's Licenses*, N.Y. TIMES (Oct. 10, 2023), https://www.nytimes.com/2023/10/08/us/puerto-rico-drivers-license-usa.html. Medina explains that Puerto Ricans travelling stateside would encounter difficulties using their Puerto Rican driver's license. *See also, e.g.*, Christine Hauser, *Hertz Apologizes After U.S. Citizen From Puerto Rico Is Denied Car Rental*, N.Y. TIMES (May 15, 2023), https://www.nytimes.com/2023/05/15/us/hertz-puerto-rico-american-passport.html#:~:text=Hertz%2C%20the%20rental%20car%20chain,island%20instead%20of%20a%20passport. I recently experienced similar difficulties attempting to purchase a car in Pennsylvania this past February. I was repeatedly told by multiple car dealerships that I did not live in America and that my U.S. Virgin Islands driver's license was not an American driver's license (even though it is Real ID compliant). One dealership refused to sell me a vehicle because they were not able to register the car or title it in the U.S. Virgin Islands. Another refused because the dealership would have to give me the vehicle's title and feared that, if I did not record it in the U.S. Virgin Islands, the lender would go after them as the

nonprofit organizations like the Veterans Legal Services Clinic, who partnered with the National Veterans Legal Service Program to publish a white paper documenting evidence that veterans who served on Guam between 1958 and 1980 were exposed to Agent Orange.[120] The clinic's efforts have led to calls for legislation covering civilians on Guam who may have been exposed to Agent Orange.[121]

But there are also bread-and-butter issues that the Territories face. Just as in the past, when "[r]esistance to outside authority was practical, not doctrinal[,]"[122] most people living in the Territories are not concerned, day-to-day, with lofty constitutional questions but with commonplace struggles, struggles made more difficult because of corporate America's ignorance of the Territories. Anthony M. Ciolli recently shined a light on "microassaults against the territories."[123] He observed that "[t]he federal government . . . is not the only entity that engages in microassaults . . . . A plethora of private actors voluntarily withhold benefits to the territories simply because they are territories, even though they are not legally compelled to do so."[124]

---

dealership having let me leave with the vehicle and the title. I reached out to the Pennsylvania Department of Motor Vehicles and, though initially met similar sentiments, was able to convey my challenge to the agent who looked into it and told me the dealerships were "overthinking it." Perhaps. But Congress did fail to include the Territories in the definition of "State" when it enacted the National Motor Vehicle Title Information System. 49 U.S.C. § 30501(9) ("'State' means a State of the United States or the District of Columbia.").

120. *See generally NVLSP and VLSC White Paper Confirming That Veterans Who Served in Guam from 1958-1980 Were Likely Exposed to Dioxin-Containing Herbicide Agents Including Agent Orange*, NVLSP (Feb. 11, 2021), https://law.yale.edu/sites/default/files/area/clinic/2021.02.11_-_nvlsp_white_paper_-_clean.pdf.

121. *See* John O'Connor, *Delegate: Compensating Civilians for Agent Orange Exposure Will Take Time*, GUAM DAILY POST (Aug. 7, 2023) (paragraph break omitted), https://www.postguam.com/news/local/delegate-compensating-civilians-for-agent-orange-exposure-will-take-time/article_6d4c712a-3026-11ee-9444-8360cec812c5.html. Because exposure to Agent Orange has likely caused civilians on Guam to develop various diseases:

> [I]n May 2020, the Veterans Legal Services Clinic at Yale Law School published a white paper stating the weight of evidence strongly showed that veterans who served on Guam from 1958 to 1980 likely were exposed to herbicides containing dioxin, including Agent Orange. A bipartisan group of local lawmakers introduced Resolution 29-37, urging Congress and the federal executive branch to "treat Guam residents and nonveterans in the manner equal to the treatment now given to military veterans in providing funding and compensation to those who are suffering from ailments as a result of exposure to Agent Orange on Guam."

Id. (citations omitted) (paragraph break omitted).

122. THE TERRITORIES AND THE UNITED STATES, *supra* note 63, at 100.

123. Ciolli, *supra* note 117, at 59.

124. *Id.*

While certainly not the same as the inequalities he writes of, private actors do engage in a form of economic microassaults that clinics, at the intersection of business, commerce, and law, can help address.

Most Territories do not have access to extensive libraries, particularly not with vast collections of older titles. Google Books fills that gap, but Google will change the domain address of search results from google.com to google.co.vi., and Internet Corporation for Assigned Names and Numbers ("ICANN") does allow country code top-level domains ("ccTLDs") to be different from the home country for overseas territories.[125] The problem is that access can differ based on the region. A book available on Google.com to a user based in the mainland may not be available to a user based in the Virgin Islands solely because of the user's IP address. Manually deleting "co.vi" and replacing it with "com" within the browser address bar has worked, sometimes; sometimes, it has not. ccTLDs "are the responsibility of the respective country[,]" and "[e]very country has the right to determine its own guidelines for assigning its domain."[126] But why must access change based on IP location?

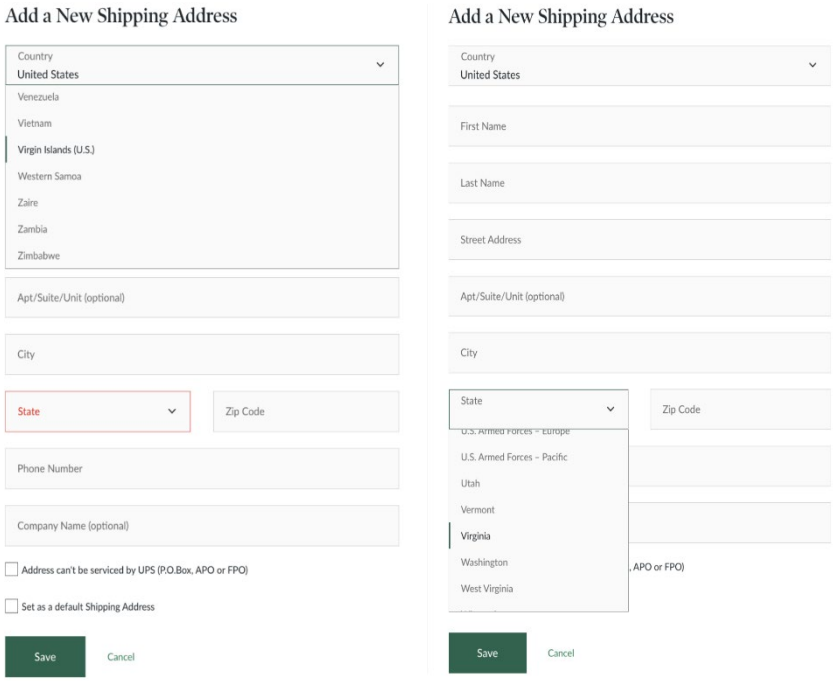
Another example: It is quite common for people in the Virgin Islands, looking to purchase a product online or to sign up for an online service, to encounter a digital roadblock in the form of the dropdown menu of "state" abbreviations in the address field. "DC" is always included, but "VI" or "PR" rarely, and "GU" less so. Instead, one must change the "Country" from United States to "Virgin Islands (U.S.)." In the two examples shown here, taken from BarnesandNoble.com, "VI" is not an option within the "State" dropdown menu (neither are PR, GU, AS, or MP).[127] Instead, the customer must change "Country" from "United States" to "Virgin Islands (U.S.)" to create an address, the same address that may have to be used as the billing address, which may cause a problem for online credit card use.[128]

125. *See generally What Are ccTLDs (County Code Top-Level Domain Names)?*, IONOS (Feb. 17, 2021), https://www.ionos.com/digitalguide/domains/domain-extensions/cctlds-all-you-need-to-know-about-country-code-domains/.

126. *Id.*

127. BARNES & NOBLE, https://www.barnesandnoble.com/checkout/guest-checkout.jsp?_requestid=1925967 (last visited Jan. 2, 2025).

128. *Id.* Some websites do not list the territory abbreviation codes within the state dropdown field and further do not give the option to change the country, which, anecdotally, has led some customers in the Virgin Islands, for example, to use VT or VA because of their likeness to VI.



As another example of microaggression towards the Territories, following Hurricanes Irma and Maria in 2017, AT&T announced that it was selling off its operations in the U.S. Virgin Islands and Puerto Rico because "hurricanes will get worse and Maria is the new normal."[129] AT&T sold its operations to Liberty Latin America, a Bermuda-based company. The transition has been anything but smooth.[130] Yet AT&T did not abandon California after successive wildfires caused widespread destruction to infrastructure in that State, nor Florida after the same hurricane season devastated much of the infrastructure there. It is also doubtful that AT&T will leave the North Carolina

129. Matt Kapko, *AT&T Abandons Puerto Rico and US Virgin Islands*, SDX CENTRAL (Oct. 9, 2019), https://www.sdxcentral.com/articles/news/att-abandons-puerto-rico-and-us-virgin-islands/2019/10/.

130. *See Liberty VI Assures Superior Service Post-Migration*, V.I. CONSORTIUM (Feb. 28. 2024), https://viconsortium.com/vi-technology/virgin-islands-liberty-vi-assures-superior-service-post-migration ("The company has been facing severe backlash for what many deem a botched migration process away from AT&T's network, with some customers leaving the company for other services such as T-Mobile. . . . Liberty is also being investigated by the V.I. Public Services Commission.").

market after the damage Hurricane Helene caused in 2024. The idea that a nationwide company like AT&T might exit a market like New York, for example, is unfathomable. Yet for islands distant from the mainland, it is simple to just cut-and-run.

Amazon has been steadily building up its own delivery service, seeking to depend less on the U.S. Post Office. But Amazon still accounts for a lion's share of the Post Office's business.[131] One of the perks of Prime membership is free shipping. People living in Puerto Rico enjoy it, but those in the other Territories do not.[132] If the U.S. Post Office charged more for postage depending on the distance a parcel traveled, it might make sense. After all, Prime Membership costs the same, and free shipping is factored into the annual fee.[133] But Amazon does not pay the Post Office more to ship a package from a warehouse in Kentucky to an address in Guam than it pays to ship the same package from Kentucky to Maine because postage costs the same regardless of distance traveled. Yet, Amazon allows residents in Guam, Virgin Islands, American Samoa, and the Northern Mariana Islands to subscribe to Prime without giving them the same benefits.[134]

V. CONCLUSION

It is not practical to expect territorial legislatures or congressional delegates to investigate and challenge the inconsistent, inadequate, and inequal treatment of the Territories and their residents. It also is not practical to expect an Average Joe living in the Territories to make much progress on challenges to our Territories. After all, our last acquired territory, the U.S.

131. *See, e.g.*, Tony Romm et al., *Newly Revealed USPS Documents Show an Agency Struggling to Manage Trump, Amazon and the Pandemic*, WASH. POST (Sept. 18, 2019), https://www.washingtonpost.com/us-policy/2020/09/17/usps-trump-coronavirus-amazon-foia ("The Postal Service delivered 1.54 billion packages on Amazon's behalf last year, about 30 percent of the company's total volume in 2019, and deliveries and revenue increased this year, the documents also indicate.").

132. *See Amazon Prime Delivery Benefits*, AMAZON, https://www.amazon.com/gp/help/customer/display.html?nodeId=GRPQFCNVUDYCBG24 (last visited Jan. 2, 2025) ("Prime delivery benefits are not available in U.S. territories, possessions, protectorates (other than Puerto Rico).").

133. *See, e.g.*, Christian de Looper*, Here's How Much a Prime Membership Costs, and How to Make the Most of Its Benefits*, AMAZON (Aug. 27, 2024), https://www.aboutamazon.com/news/retail/prime-membership-cost-benefits.

134. One resident tried to take matters into her own hands, starting a Change.org petition. *See* Bridget Dawson, *US Virgin Islanders Against Amazon Prime Discrimination*, CHANGE.ORG (May 19, 2022), https://www.change.org/p/us-virgin-islanders-against-amazon-prime-discrimination.

Virgin Islands, just recently commemorated 100 years under American rule. In a hundred years, things have improved, but much has stayed the same. The challenges of the Territories are manifold, if not manifest. There are questions of such constitutional significance that they have stumped the best and brightest minds our nation has produced. There are also challenges so mundane that they do not lend themselves to legal solutions, particularly when many of the day-to-day frustrations residents encounter, frankly, are not legal. In other words, how Amazon ships to the Territories cannot be fixed by legislation or litigation. Courts and legislatures cannot mandate that AT&T continue to do business in any territory, including the Territories. Not all of the inequalities of the Territories can be legislated or litigated away.

But the new ABA standards require that students experience firsthand being a lawyer—not just thinking like a lawyer. And the practice of law often involves more than litigation and drafting agreements. Attorneys often counsel their clients on more than the law, particularly with an increase in the holistic approach to the practice of law.[135] An attorney may not be able to file a lawsuit to force FedEx to stop charging her client international rates to ship to the Virgin Islands. But a well-crafted letter to the general counsel on the client's behalf might bring the issue to the forefront. The challenges of the Territories are myriad. Clinics can help law students and the Territories to address them, beginning with documenting inequities and disparate treatment. One model is the approach taken by civil rights groups, documenting the

135. *See, e.g.*, Robert Rubinson, *The Model Rules of Professional Conduct and Serving the Non-Legal Needs of Clients: Professional Regulation in a Time of Change*, 2008 J. PROF. LAW. 119, 124 (2008) ("Some practitioners are increasingly extending their role beyond providing narrowly tailored legal expertise: they provide services to the 'whole person.'").

economic,[136] social, psychological,[137] and even health[138] consequences of inequality, in this instance the inequalities of a *de facto* permanent territoryhood. Clinics, having been inspired in part by the Civil Rights Movement, can help play a vital role in this regard.

136. *See, e.g.*, Tara Siegel Bernard & Ron Lieber, *The High Price of Being a Gay Couple*, N.Y. TIMES (Oct. 2, 2009), https://www.nytimes.com/2009/10/03/your-money/03money.html; Ben Furnas & Josh Rosenthal, *Benefits Denied*, CTR. FOR AM. PROGRESS (Mar. 3, 2009), https://www.americanprogress.org/article/benefits-denied/.

137. *See* José A. Cabranes, *Puerto Rico: Colonialism as Constitutional Doctrine*, 100 HARV. L. REV. 450, 463 (1986) (acknowledging the psychological impact of overruling the *Insular Cases*) ("It is unlikely . . . that a judicial rejection of the doctrine of territorial incorporation would have much practical effect on the lives of most Puerto Ricans. . . . The psychological implications . . . would be far more significant than would its economic and political implications.").

138. *See, e.g.*, Bethany G. Everett et al., *The Impact of Civil Union Legislation on Minority Stress, Depression, and Hazardous Drinking in a Diverse Sample of Minority Women: A Quasi-Natural Experiment*, 169 SOC. SCI. & MED. 180 (2016).