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## TRYING TO FIT AN OVAL SHAPED ISLAND INTO A SQUARE CONSTITUTION: ARGUMENTS FOR PUERTO RICAN STATEHOOD

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# TRYING TO FIT AN OVAL SHAPED ISLAND INTO A SQUARE CONSTITUTION: ARGUMENTS FOR PUERTO RICAN STATEHOOD

## **Cover Page Footnote**

Jose D. Roman is a J.D. candidate at Fordham University School of Law. He received a B.S. with honors in Administration of Justice and Political Science from Rutgers College in 1998. I would like to thank Professor James Fleming for his guidance and criticism on the original version of this Comment. I also take this opportunity to thank the editors and staff members of the Fordham Urban Law Journal for their insight and diligence. I give special thanks to the loves of my life: Jennifer, Angela and Alex Roman. I dedicate this work to my parents, Zenida M. Vega and Jose L. Roman.

# TRYING TO FIT AN OVAL SHAPED ISLAND INTO A SQUARE CONSTITUTION: ARGUMENTS FOR PUERTO RICAN STATEHOOD

*José D. Román\**

## INTRODUCTION

The presidential election between Albert Gore and George W. Bush in 2000 provided an interesting lesson on voting in America. The closeness of the race<sup>1</sup> highlighted the importance of the right to vote and gave some truth to the phrase “every vote counts.”<sup>2</sup> In addition, a recount prompted by Gore in Florida yielded varying results, illustrating the surprising fact that every election has its share of uncounted votes.<sup>3</sup> While the nation’s attention was fo-

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1. Former Vice President Al Gore contested the results of the election in Florida, where it was estimated that Texas Governor George W. Bush won by less than 2000 votes. See Rick Bragg, *Florida, Amid Recount, Learns the Power of One*, N.Y. TIMES, Nov. 9, 2000, at A7 (chronicling the reactions of voters in Florida following the election). Although it is estimated that Gore won the popular vote by more than 500,000, Bush took the presidency by defeating Gore in the Electoral College with 271 votes, just one more than he needed for the required majority. See David Stout, *Gore’s Lead in the Popular Vote Now Exceeds 500,000*, N.Y. TIMES, Dec. 30, 2000, at A11. Bush’s win in the Electoral College was secured only after the U.S. Supreme Court, by a vote of five to four, ordered a halt to the recounting of the disputed votes in Florida. See Linda Greenhouse, *By Single Vote, Justices End Recount, Blocking Gore After 5-Week Struggle*, N.Y. TIMES, Dec. 13, 2000, at A1 (commenting on the final outcome of the election).

2. See Bragg, *supra* note 1, at A7 (noting that children are taught that every vote counts in civics class).

3. John Lewis, *Now We Know That Not All Votes Count*, N.Y. TIMES, Dec. 2, 2000, at A19 (expressing concern over the uncounted votes in Florida). “Nationwide statistics reveal that an estimated 2% of ballots cast do not register a vote for president for whatever reason, including deliberately choosing no candidate at all or some voter error, such as voting for two candidates or insufficiently marking a ballot.” *Bush v. Gore*, 531 U.S. 98, 103 (2000) (per curiam).

cused on the historic spectacle in the Sunshine State, few were aware of the noteworthy events also unfolding in Puerto Rico.<sup>4</sup>

Many Americans are aware that Puerto Rico joined the United States in 1898<sup>5</sup> and that the Puerto Rican people became citizens in 1917.<sup>6</sup> Most Americans outside of Puerto Rico are nevertheless unaware that the U.S. citizens who live on the island have never had the right to vote in presidential elections.<sup>7</sup> This puzzling circumstance was challenged in anticipation of the 2000 presidential election in *Igartua de la Rosa v. United States II*.<sup>8</sup> The Federal District Court of Puerto Rico held that the 3.8 million people residing on the island,<sup>9</sup> 2.4 million of whom are registered voters,<sup>10</sup> had a fundamental right to vote in presidential elections based on their American citizenship.<sup>11</sup> The First Circuit quickly reversed this bold ruling, holding that Article II of the Constitution grants the power to elect the president only to the states, and not to the people.<sup>12</sup>

This Comment highlights Puerto Rico's continuing political troubles under the U.S. Constitution and argues that the island must become the United States' fifty-first state. Part I explores the history of Puerto Rico's relationship with the United States. The *In-sular Cases* are discussed to illustrate Puerto Rico's peculiar status

4. Edda Ponsa-Flores, *Citizens Who Can't Vote for President*, N.Y. TIMES, Dec. 8, 2000, at A39 (describing the legal battle that took place in Puerto Rico over whether its people could vote in presidential elections).

5. Treaty of Paris, Dec. 10, 1898, U.S.-Spain, 30 Stat. 1754, reprinted in DOCUMENTS ON THE CONSTITUTIONAL HISTORY OF PUERTO RICO 47 (Office of the Commonwealth of P.R. ed., 2d ed. 1964). The Treaty of Paris of 1898 formally ended the Spanish-American War and legitimized the acquisition of Puerto Rico.

6. Jones Act § 5, ch. 145, 39 Stat. 951, 953 (1917) (current version at 48 U.S.C. §§ 731 *et seq.* (2002)).

7. See Ponsa-Flores, *supra* note 4, at A39 (noting that the Constitution does not guarantee citizens the right to vote).

8. *Igartua de la Rosa v. United States II*, 113 F. Supp. 2d 228 (D.P.R.), *rev'd*, 229 F.3d 80 (1st Cir. 2000). Note, the district court adopted and incorporated its prior opinion denying the government's motion to dismiss. *Id.* at 231. Therefore, *Igartua de la Rosa v. United States II*, 107 F. Supp. 2d 140 (D.P.R. 2000), must be read as part of the district court's final opinion.

9. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2001 812 (121st ed. 2001). See Michael Hedges, *Census Gives Texas Two New House Seats: State Displaces N.Y. as No. 2 In Population*, HOUSTON CHRONICLE, Dec. 29, 2000, at A1 (commenting on 2000 census figures).

10. Ponsa-Flores, *supra* note 4, at A39.

11. *Igartua de la Rosa II*, 107 F. Supp. 2d at 145.

12. *Igartua de la Rosa II*, 229 F.3d at 83-4. The Court of Appeals relied substantially on *Igartua de la Rosa v. United States I*, 842 F. Supp. 607, *aff'd*, 32 F.3d 8 (D.P.R. 1994). Article II provides: "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress." U.S. CONST. art. II, § 1, cl. 2.

under the Constitution. In addition, the legal insignificance of the island's evolution to commonwealth status will be discussed, leading to the conclusion that Puerto Rico must choose statehood to remedy its constitutional status problems.

Part II reviews *Igartua de la Rosa II* and other relevant cases. This Part highlights the basis for limiting the right to vote in presidential elections to citizens who reside in the fifty states. It argues that the First Circuit was correct in denying this right to the people of Puerto Rico in *Igartua de la Rosa II*. Part II further asserts that the First Circuit's ruling is a clear signal to the people of Puerto Rico that statehood is necessary to fully legitimize their political status in the United States. Part II then considers whether the people of Puerto Rico are entitled to vote in presidential elections by virtue of their citizenship and discusses whether the Constitution grants any citizens the right to vote. This Part concludes that, at best, the Supreme Court has only recognized a limited right to vote based on the Equal Protection Clause of the Constitution.<sup>13</sup> The argument for statehood is then revisited in light of these voting rights issues.

## I. PUERTO RICO'S STATUS IN THE UNITED STATES

A discussion of Puerto Rico's status within the United States is necessary before discussing the constitutional rights of the citizens who live on the island. Specifically, the constitutional distinctions between Puerto Rico and the fifty states must be drawn out. This area of constitutional law has been largely ignored by academics, but fiercely criticized by those affected.

### A. The Acquisition of Puerto Rico

Prior to the Spanish American War, Puerto Rico was a province of the Spanish Kingdom, governed under the Spanish Constitution of 1876.<sup>14</sup> As Spanish citizens, Puerto Ricans enjoyed representation in the Spanish Parliament<sup>15</sup> and autonomy on matters of local concern.<sup>16</sup> When the war ended, Puerto Rico was ceded to the

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13. U.S. CONST. amend. XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

14. DOCUMENTS ON THE CONSTITUTIONAL HISTORY OF PUERTO RICO 2 (Office of the Commonwealth of P.R. ed., 2d ed. 1964).

15. *Igartua de la Rosa II*, 229 F.3d at 85 n.3 (Torruella, J., concurring) (citation omitted).

16. Automatic Charter of 1897, reprinted in DOCUMENTS ON THE CONSTITUTIONAL HISTORY OF PUERTO RICO 22 (Office of the Commonwealth of Puerto Rico ed., 2d ed. 1964) (reprinted under the heading Constitution Establishing Self-Govern-

United States under the Treaty of Paris of 1898.<sup>17</sup> The U.S. held the island under a military government until 1900.<sup>18</sup> During this period it was generally believed that Puerto Rico had been annexed into the Union and that Puerto Ricans were United States citizens.<sup>19</sup>

Before long, pressure from the domestic beet-sugar and tobacco industries, backed by other imperialist and racist influences, sparked political debate on Puerto Rico's status within the Union.<sup>20</sup> Some advocated the creation of a special status for Puerto Rico that justified governing the island without the usual constitutional restraints.<sup>21</sup> In particular, some lawmakers argued that the Constitution gave Congress plenary power over all newly acquired territory.<sup>22</sup> Despite significant opposition, this framework for unequal treatment became law when Congress passed the Foraker Act<sup>23</sup> and the United States Supreme Court decided the *Insular Cases*.

## B. The Insular Cases

The Foraker Act provided for the establishment of a civil government in Puerto Rico<sup>24</sup> and granted its people "Puerto Rican citizenship."<sup>25</sup> The most controversial feature of the Act was a section that imposed tariffs on goods imported and exported be-

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ment in the Island of Puerto Rico by Spain in 1897). Under the Automatic Charter of 1897, Spain gave Puerto Rico the power to: legislate on matters of civil administration and public health; formulate its local budget; and enter into commercial treaties. *Id.* at 36-9.

17. Treaty of Paris, *supra* note 5; DOCUMENTS ON THE CONSTITUTIONAL HISTORY OF PUERTO RICO, *supra* note 14, at 2.

18. DOCUMENTS ON THE CONSTITUTIONAL HISTORY OF PUERTO RICO, *supra* note 14, at 2.

19. Gabriel A. Terrasa, *The United States, Puerto Rico, and the Territorial Incorporation Doctrine: Reaching a Century of Constitutional Authoritarianism*, 31 J. MARSHALL L. REV. 55, 61 (1997) (discussing the political climate surrounding the acquisition of Puerto Rico).

20. *Id.* at 61-64.

21. ROGERS M. SMITH, CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY 432 (1997).

22. Terrasa, *supra* note 19, at 65.

23. Foraker Act, ch. 191, 31 Stat. 77 (1900) (current version at 48 U.S.C. §§ 731 *et seq.* (2002)).

24. Foraker Act §§ 6-40, 31 Stat. at 79-86.

25. Foraker Act § 7, 31 Stat. at 79; JAMES L. DIETZ, ECONOMIC HISTORY OF PUERTO RICO: INSTITUTIONAL CHANGE AND CAPITALIST DEVELOPMENT 87 (1986). Puerto Rican citizens were not eligible for any type of passport; thus they could not legally travel, even to the United States. *Id.*

tween the mainland and the island.<sup>26</sup> Many disagreed with these provisions<sup>27</sup> and argued that a tariff bill for Puerto Rico violated the Constitution's Uniform Taxation Clause.<sup>28</sup> The Republican majority rejected this argument and contended that a tariff was the only way to raise revenue for Puerto Rico.<sup>29</sup> This contention was also an "open challenge to the U.S. Supreme Court to decide whether the Constitution applied with equal force to" Puerto Rico.<sup>30</sup>

The *Insular Cases* settled this debate. In *De Lima v. Bidwell*,<sup>31</sup> the plaintiff sought to recover duties paid on sugar products imported from Puerto Rico.<sup>32</sup> The central issue was whether a territory acquired from a foreign power remains foreign for the purposes of U.S. tariff laws.<sup>33</sup> The Supreme Court held that the tariffs were invalid because Puerto Rico became a domestic territory upon ratification of the Treaty of Paris, "although not an organized territory in the technical sense of the word."<sup>34</sup> The Court noted that the political branches had previously treated ceded territory as domestic, not foreign, in all cases except for the Louisiana Territory:<sup>35</sup>

The theory that a country remains foreign with respect to the tariff laws until Congress has acted by embracing it within the customs union presupposes that a country may be domestic for one purpose and foreign for another . . . This theory also presupposes that territory may be held indefinitely by the United States; that it may be treated in every particular, except for tariff purposes, as domestic territory; . . . that everything may be done which a government can do within its own boundaries, and yet that the territory may still remain a foreign country. To hold

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26. Foraker Act §§ 2-5, 31 Stat. at 77-79; Terrasa, *supra* note 19, at 64-66.

27. Terrasa, *supra* note 19, at 64-66.

28. U.S. CONST. art I, § 8, cl. 1 ("The Congress shall have the Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States.").

29. Terrasa, *supra* note 19, at 66.

30. *Id.* at 67.

31. *De Lima v. Bidwell*, 182 U.S. 1 (1901).

32. *Id.*

33. *Id.* at 174.

34. *Id.* at 196-97, 200. Similarly, in *Huus v. New York & Porto Rico Steamship Co.*, 182 U.S. 392, 393-97 (1901), the last of the *Insular Cases*, the Court unanimously held that trade with Puerto Rico became domestic within the meaning of a cabotage statute upon ratification of the Treaty of Paris. Note that U.S. officials changed the spelling of Puerto Rico to "Porto" Rico, "an Americanized corruption of Spanish that remained the official spelling until 1932." DIETZ, *supra* note 25, at 85.

35. *De Lima*, 182 U.S. at 187-94.

that this can be done as a matter of law we deem to be pure judicial legislation. We find no warrant for it in the Constitution or in the powers conferred upon this court. We are unable to acquiesce in this assumption that a territory may be at the same time both foreign and domestic.<sup>36</sup>

This language has been described as “nothing short of amazing”<sup>37</sup> when compared to the holding in *Downes v. Bidwell*, one of the later *Insular Cases*.<sup>38</sup> These words also continue to ring with irony considering that Puerto Rico is a model for how a territory can be held indefinitely by the United States.<sup>39</sup>

The next case before the Court, *Goetze v. United States*,<sup>40</sup> has little significance beyond its historical context.<sup>41</sup> Here, the Court followed *De Lima*, and swiftly reversed a lower court’s ruling that Puerto Rico was foreign within the meaning of the tariff laws.<sup>42</sup> The Court then decided *Dooley v. United States*,<sup>43</sup> in which the plaintiff sought to recover duties paid on goods exported from New York to Puerto Rico during the period of U.S. military occupation of the island prior to the ratification of the Treaty of Paris. The Court held that Puerto Rico remained a de jure foreign country during that time and did not belong to the United States until the treaty was ratified.<sup>44</sup> The imposition of the duties was therefore held to be a valid exercise of the war power.<sup>45</sup>

Although its holding is difficult to reconcile with the result in *De Lima*, *Downes v. Bidwell*<sup>46</sup> became “the central case on the question of Puerto Rico’s status within the Union at that stage in history.”<sup>47</sup> In *Downes*, the plaintiff sought to recover duties paid for

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36. *Id.* at 198-99.

37. JUAN R. TORRUELLA, *THE SUPREME COURT AND PUERTO RICO: THE DOCTRINE OF SEPARATE AND UNEQUAL* 43 (1985).

38. *Infra* notes 46-79 and accompanying text.

39. TORRUELLA, *supra* note 37 at 43-44.

40. *Goetze v. United States*, 182 U.S. 221 (1901).

41. *See* TORRUELLA, *supra* note 37, at 45-46. The decision applied to two cases that had been joined, one involving Puerto Rico and the other involving Hawaii. *Id.* Hawaii would eventually achieve statehood, while Puerto Rico remained in legal limbo. *Id.*

42. 182 U.S. at 221-22.

43. *Dooley v. United States*, 182 U.S. 222 (1901).

44. *Id.* at 230.

45. *Id.*; *see also* *Armstrong v. United States*, 182 U.S. 243 (1901) (presenting the same issues as *Dooley*). The war power includes the constitutional authority of Congress to declare war and maintain armed forces and the president’s power to conduct war as commander-in-chief. *See* U.S. CONST. art. I, § 8, cl., 11-14; U.S. CONST. art. II, § 2, cl. 1.

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

47. TORRUELLA, *supra* note 37, at 48.



goods shipped from Puerto Rico to New York after the passage of the Foraker Act.<sup>48</sup> The Court upheld the constitutionality of the Foraker Act's tariffs on imports and exports.<sup>49</sup> A plurality of the Court advanced varying justifications for this apparent change of position.

Justice Brown's opinion began by noting that nothing in the Constitution's historical development justified a finding that it applied directly to the territories.<sup>50</sup> He argued that the Constitution was limited to "states, their people, and their representatives."<sup>51</sup> Next, Justice Brown analyzed the Court's earlier decisions and found no basis for the notion that the Constitution applies to a territory prior to an act of Congress.<sup>52</sup> He concluded that the Constitution's "Uniform Taxation Clause,"<sup>53</sup> which requires uniform taxation "throughout the United States," was not binding on Congress when legislating for the territories.<sup>54</sup>

Justice Brown further noted that there are "no limitations upon the power of Congress" in dealing with the territories because no such limitation is expressed in the "Territory Clause."<sup>55</sup> The Territory Clause provides that "The 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."<sup>56</sup> Justice Brown's conclusions with regard to congressional power were tempered somewhat by the following passage:

We suggest . . . that there may be a distinction between certain natural rights . . . and what may be termed artificial or remedial rights which are peculiar to our own system of jurisprudence. [Natural rights might include freedom of religion, speech, and the press; the right to personal liberty, property, due process, equal protection, and free access to courts; immunities from unreasonable searches and seizures, cruel and unusual punishments, and other immunities that are indispensable to a free government. Artificial rights include] the rights of citizenship, to suffrage and to the particular methods of procedure pointed out in the Constitution which are peculiar to Anglo-Saxon jurisprudence, and some of which have already been held by the

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48. *Downes*, 182 U.S. at 247-48.

49. *Id.* at 287.

50. *Id.* at 250-51.

51. *Id.* at 251.

52. *Id.* at 258-73.

53. U.S. CONST. art. I, § 8, cl. 1.

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

55. *Id.* at 285.

56. U.S. CONST. art IV, § 3, cl. 2.

states to be unnecessary to the proper protection of individuals. Whatever may be finally decided . . . as to the status of [Puerto Rico, it does not follow that its] people are in the matter of personal rights unprotected by the provisions of our Constitution.<sup>57</sup>

Justice White's concurrence outlined what would later be recognized as the rule of the *Insular Cases*. Justice White began by noting that he would extend the applicability of the Constitution to the territories, but might limit the operation of certain provisions in light of "the situation of the territory and its relations to the United States."<sup>58</sup> Justice White then offered a distinction between "incorporated" and "unincorporated" territories.<sup>59</sup> Under this incorporation theory, incorporated territories are destined to become states and form an integral part of the U.S., thus entitling them to equal treatment under the Constitution.<sup>60</sup> In contrast, unincorporated territories are a part of the U.S. in an international sense, but foreign in a domestic sense.<sup>61</sup> Thus, an unincorporated territory is "merely . . . a possession"<sup>62</sup> and has no significant legal status under the Constitution.<sup>63</sup>

Justice White argued that Congress is limited only by the provisions of the Constitution protecting the liberty and property of the people when legislating for an unincorporated territory.<sup>64</sup> Thus, only fundamental natural rights<sup>65</sup> apply to such territories.<sup>66</sup> Justice White further argued that Congress had the power to withhold the incorporation of a territory into the Union.<sup>67</sup> He found that Congress had declined to incorporate Puerto Rico into the Union because the Treaty of Paris<sup>68</sup> did not provide for its incorporation.<sup>69</sup>

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57. *Downes*, 182 U.S. at 282-83.

58. *Id.* at 293 (White, J., concurring).

59. *Id.* at 292, 299, 317 (White, J., concurring).

60. *Id.* (White, J., concurring).

61. *Id.* at 341-42 (White, J., concurring).

62. *Id.* at 342 (White, J., concurring).

63. *See Downes*, 182 U.S. at 342.

64. *Id.* at 294-95 (White, J., concurring).

65. Natural rights include freedom of religion, speech, and press; the right to personal liberty, property, due process, equal protection, and free access to courts; immunities from unreasonable searches and seizures, cruel and unusual punishments, and other immunities that are indispensable to a free government. *Supra* note 57 and accompanying text.

66. *Downes*, 182 U.S. at 294-95.

67. *Id.* at 336 (White, J., concurring).

68. *Supra* note 5.

69. *Downes*, 182 U.S. at 336 (White, J., concurring).

Thus, he concluded that the Uniform Taxation Clause did not apply to Puerto Rico.<sup>70</sup>

The dissenting opinions in *Downes* greatly criticized the majority. Chief Justice Fuller's dissent argued that the Uniform Taxation Clause required uniformity throughout the geographical United States because the United States is composed of both states and territories.<sup>71</sup> He noted that "the national government is a government of enumerated powers . . . [and] . . . [t]he powers delegated by the people to their agents are not enlarged by the expansion of the domain within which they are exercised."<sup>72</sup> In addressing Justice White's incorporation theory, the Chief Justice argued that such a theory

assumes that the Constitution created a government empowered to acquire countries throughout the world, to be governed by different rules than those obtaining in the original States and territories, and substitutes for the present system of republican government, a system of domination over distant provinces in the exercise of unrestricted power.<sup>73</sup>

The Chief Justice concluded that the duties imposed by the Foraker Act were unconstitutional because Congress was bound by the Constitution and thus the Uniform Taxation Clause, when legislating for the territories.<sup>74</sup>

Critics of the *Insular Cases* often cite Justice Harlan's dissent. Justice Harlan noted that "[T]he Constitution speaks . . . to all people, whether of States or territories, who are subject to the authority of the United States."<sup>75</sup> He emphasized that Congress has no existence or power outside of the Constitution.<sup>76</sup> Justice Harlan did not believe that Congress could acquire territory under powers enumerated in the Constitution, while simultaneously excluding the Constitution from operating in that territory.<sup>77</sup> He further noted that "The idea that this country may acquire territories anywhere upon the earth, by conquest or treaty, and hold them as

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70. *Id.* at 342 (White, J., concurring). Justice Gray also wrote a concurring opinion. Justice Gray's opinion is similar to Justice White's concurrence, but it could be interpreted as yielding greater power to Congress than the other majority opinions. His opinion was never followed by the Court and does not warrant further comment. See TORRUELLA, *supra* note 37, at 56-57.

71. *Downes*, 182 U.S. at 353 (Fuller, C.J., dissenting).

72. *Id.* at 359 (Fuller, C.J., dissenting).

73. *Id.* at 373 (Fuller, C.J., dissenting).

74. *Id.* at 373-75 (Fuller, C.J., dissenting).

75. *Id.* at 378 (Harlan, J., dissenting).

76. *Id.* at 380 (Harlan, J., dissenting).

77. *Id.* at 379-80 (Harlan, J., dissenting).

mere colonies or provinces,—the people inhabiting them to enjoy only such rights as Congress chooses to accord to them—is wholly inconsistent with the spirit and genius as well as with the words, of the Constitution.”<sup>78</sup> He concluded that the Foraker Act’s tariff bill was unconstitutional because Puerto Rico became part of the United States and subject to the Constitution upon ratification of the Treaty of Paris.<sup>79</sup>

The Supreme Court adopted Justice White’s incorporation theory in *Dorr v. United States*,<sup>80</sup> where it concluded that the right to a jury trial was not a fundamental right applicable to unincorporated territories, but merely a method of procedure.<sup>81</sup> Justice Harlan’s dissent once again criticized the Court for suspending the operation of the Constitution in the territories.<sup>82</sup>

In 1917 Congress realized that a disgruntled colony was a dangerous liability in an era of world war and grudgingly passed the Jones Act.<sup>83</sup> The Jones Act granted Puerto Ricans United States citizenship and a new civil government that included a Bill of Rights.<sup>84</sup> Many believed that the grant of citizenship was sufficient to incorporate Puerto Rico into the Union because this was apparently a clear move towards statehood.<sup>85</sup> *Balzac v. Porto Rico* [sic],<sup>86</sup> however, resolved that issue. In *Balzac*, a newspaper editor in Puerto Rico was found guilty of libel without a jury trial.<sup>87</sup> The Court unanimously held that the Jones Act had no effect on Puerto Rico’s status as an unincorporated territory and therefore Congress had not extended the Sixth Amendment right to a jury trial to Puerto Rico.<sup>88</sup> The Court found the granting of citizenship to Puerto Ricans to be “entirely consistent with non-incorporation.”<sup>89</sup>

Any thought that the *Insular Cases* were of only historical interest was erased in 1990<sup>90</sup> when they were cited extensively by the

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78. *Id.* at 380 (Harlan, J., dissenting).

79. *Id.* at 391 (Harlan, J., dissenting).

80. *Dorr v. United States*, 195 U.S. 138 (1904).

81. *Id.* at 144-45.

82. *Id.* at 155-58 (Harlan, J., dissenting).

83. Jones Act, ch. 145, 39 Stat. 951 (1917) (current version at 48 U.S.C. §§ 731 *et seq.* (2002)); SMITH, *supra* note 21, at 433.

84. Jones Act §§ 2, 5, 39 Stat. at 951-53.

85. Terrasa, *supra* note 19, at 83.

86. *Balzac v. Porto Rico*, 258 U.S. 298 (1922).

87. *Id.* at 300.

88. *Id.* at 305-11.

89. *Id.* at 308.

90. Jon M. Van Dyke, *The Evolving Relationships Between the United States and its Affiliated U.S.-Flag Islands*, 14 U. HAW. L. REV. 445, 455-56 (1992) (analyzing the current legal status of all of the U.S. territories).

Supreme Court in *United States v. Verdugo-Urquidez*.<sup>91</sup> There the Court held that the Fourth Amendment<sup>92</sup> does prohibit the search and seizure of property that is located in a foreign country and owned by a nonresident alien.<sup>93</sup> To hold otherwise, the Court reasoned, would be contrary to the *Insular Cases*, which held that not every constitutional provision applies to governmental activity in the territories.<sup>94</sup>

### C. The Significance of Commonwealth Status

By 1950, pressure from the Puerto Rican people<sup>95</sup> prompted Congress to enact Public Law 600,<sup>96</sup> a statute that offered Puerto Rico a chance to establish a local government.<sup>97</sup> Puerto Ricans soon enacted their own constitution and Congress recognized the island's transition to "commonwealth status."<sup>98</sup> At the time, it was assumed that Puerto Rico's status within the United States had fundamentally changed, and that the Puerto Rican government would be free from plenary congressional control.<sup>99</sup> Furthermore, it was believed that neither Congress nor the Puerto Rican legislature could alter the island's status unilaterally.<sup>100</sup> Apparently, Puerto Rico had achieved state-like status in that it was sovereign over matters not delegated to the federal government by the Constitution.<sup>101</sup> This was, in fact, the U.S. government's apparent position as expressed in a 1961 memorandum by President Kennedy:

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91. *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990).

92. U.S. CONST. amend. IV. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." The Fourth Amendment protects the people from unreasonable searches and seizures by the government. *Verdugo-Urquidez*, 494 U.S. at 265-66. The Court notes that historical data shows that it was meant to protect the people against arbitrary action against their own government and was never intended to protect aliens outside of United States territory. *Id.*

93. *Id.* at 261.

94. *Id.* at 268.

95. Van Dyke, *supra* note 90, at 473.

96. Pub. L. No. 600, ch. 446, 64 Stat. 319 (1950) (current version at 48 U.S.C. §§ 731b-731e (2002)).

97. Van Dyke, *supra* note 90, at 473.

98. *Id.*

99. *Id.* at 474.

100. *See id.* (quoting a U.S. representative to the United Nations who defined the new relationship between the U.S. and Puerto Rico as a "compact," (*i.e.*, an agreement that cannot be altered by either party without consent)).

101. *See id.* at 473.

The Commonwealth structure, and its relationship to the United States which is in the nature of a compact, provide for self-government in respect of internal affairs and administration, subject only to the applicable provisions of the Federal Constitution, the Puerto Rican Federal Regulations Act, and the acts of Congress authorizing and approving the constitution.<sup>102</sup>

Despite this historic change, the Supreme Court has failed to recognize the significance of Puerto Rico's transition to commonwealth status and has continued to refer to Congress's broad power under the Territory Clause,<sup>103</sup> as established by the *Insular Cases*. The Court has upheld reduced social security and welfare benefits for Puerto Ricans, reasoning that under the Territory Clause, Congress "may treat Puerto Rico differently from States so long as there is a rational basis for its actions."<sup>104</sup> As one commentator suggested, applying a "rational basis" test to the Territory Clause leaves the near absolute power of Congress over Puerto Rico unaffected.<sup>105</sup> This empowers Congress to continue to exercise plenary power over Puerto Rico, including the power to withhold federal programs and fundamental political rights<sup>106</sup> from the citizens who reside on the island.

On occasion, the First Circuit has taken a more progressive approach toward Puerto Rico,<sup>107</sup> seeming to be more comfortable with the position that congressional authority over the Commonwealth is no longer derived from the Territory Clause.<sup>108</sup> This line

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102. President's Memorandum to the Heads of the Executive Departments and Agencies Concerning the Commonwealth of Puerto Rico, 26 Fed. Reg. 6695 (July 25, 1961), reprinted in DOCUMENTS ON THE CONSTITUTIONAL HISTORY OF PUERTO RICO 206 (Office of the Commonwealth of Puerto Rico ed., 2d ed. 1964).

103. Van Dyke, *supra* note 90, at 452.

104. Harris v. Rosario, 446 U.S. 651, 651-52 (1980) (welfare benefits); see also Califano v. Torres, 435 U.S. 1, 5 (1978) (social security benefits).

105. Van Dyke, *supra* note 90, at 477 n.177.

106. See note 57 and accompanying text.

107. Van Dyke, *supra* note 90, at 478.

108. United States v. Quinones, 758 F.2d 40, 42-43 (1st Cir. 1985) (cautiously holding that a federal wiretapping statute superceded Article II, § 10 of the Puerto Rico Constitution, which explicitly prohibited wiretapping, because "Congress maintains similar powers over Puerto Rico as it possesses over the federal states").

[I]n 1952, Puerto Rico ceased being a territory of the United States subject to the plenary powers of Congress as provided in the Federal Constitution. The authority exercised by the federal government emanated thereafter from the compact itself. Under the compact between the people of Puerto Rico and the United States, Congress cannot amend the Puerto Rico Constitution unilaterally, and the government of Puerto Rico is no longer a federal government agency exercising delegated power.

*Id.* at 42 (citing Mora v. Mejias, 206 F.2d 377, 386-88 (1st Cir. 1953)).

of thinking argues that Congress has relinquished its plenary power over the island by recognizing commonwealth status, thus leaving Puerto Rico sovereign over matters not delegated to the federal government.<sup>109</sup> As previously noted, this is not the law according to the U.S. Supreme Court which has repeatedly held that Puerto Rico's transition to Commonwealth status has had no effect on its treatment under the Constitution.<sup>110</sup>

#### D. Military Service and Federal Taxation

Historically, all governments have two basic components: a means of coercion, such as an army or police force, and a means of collecting revenue.<sup>111</sup> Indeed, it would be difficult for the United States government to maintain the ideals of democracy and freedom without these components.<sup>112</sup> One of the U.S. government's primary tools of coercion is compulsory military conscription or "the draft."<sup>113</sup> Likewise, its principal mechanism for collecting revenue is the federal income tax.<sup>114</sup>

Although these issues are often raised within the context of national voting rights,<sup>115</sup> they are also relevant to the general discussion of Puerto Rico's relationship with the United States. This section explores Puerto Rico's contributions to the United States in terms of military service and its exclusion from the federal income tax system. It then highlights the reasons for removing these factors from a purely legal discussion on voting rights.

##### 1. Military Service

The island of Puerto Rico has been characterized as "irreplaceable" in terms of strategic defense and national security.<sup>116</sup> The continuous military service provided by Puerto Ricans over the past century is also significant. In 1906 President Theodore

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109. *Supra* notes 95-102 and accompanying text.

110. *Supra* notes 103-106 and accompanying text.

111. THEODORE J. LOWI & BENJAMIN GINSBERG, *AMERICAN GOVERNMENT: FREEDOM AND POWER* 9 (3d ed. 1994)

112. *Id.*

113. *Id.* at 10.

114. *Id.*

115. See Amber L. Cottle, Comment, *Silent Citizens: United States Territorial Residents and the Right to Vote in Presidential Elections*, 1995 U. CHI. LEGAL F. 315, 327-30 (1995) (discussing military service and the payment of taxes as reasons for the passage of the Twenty-third and Twenty-fourth Amendments).

116. Humberto García Muniz, *U.S. Military Installations in Puerto Rico: Controlling the Caribbean*, in *COLONIAL DILEMMA: CRITICAL PERSPECTIVES ON CONTEMPORARY PUERTO RICO* 53 (Edwin Meléndez & Edgardo Meléndez eds., 1993).

Roosevelt recommended that the Porto Rican Regiment be made a permanent body, noting that he was "struck by the excellent character" of its troops.<sup>117</sup> When World War I began, Congress passed a bill establishing compulsory military service that expressly excluded Puerto Ricans.<sup>118</sup> Puerto Rico, however, immediately protested and demanded that its people be sent to fight as well.<sup>119</sup> Out of the 1.3 million inhabitants of Puerto Rico at that time, 140,000 soldiers were mobilized without a single deserter.<sup>120</sup> Since then, Puerto Ricans have served in every conflict involving the United States.<sup>121</sup> In the Korean War, many Puerto Rican servicemen were sent into the sub-arctic region of North Korea and fought in some of the bloodiest sections of the conflict.<sup>122</sup> In addition, Puerto Ricans continue to be subject to the draft and a very high proportion of Puerto Rican servicemen have been volunteers. In fact, it was once reported that the island's percentage of volunteers exceeds that of most states.<sup>123</sup>

It might be argued that service in the military entitles citizens to political rights, including the right to participate in national elections.<sup>124</sup> In fact, this was one of the chief arguments in support of the passage of the Twenty-third Amendment, which allows residents of the District of Columbia to participate in presidential elections.<sup>125</sup> Although there is moral force behind this assertion, there are no legal grounds for suggesting that suffrage and other political rights are at all related to military service.<sup>126</sup> Nonetheless,

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117. THE PUERTO RICANS: A DOCUMENTARY HISTORY 113 (Kal Waggenheim & Olga Jiménez de Waggenheim eds., 1996) [hereinafter THE PUERTO RICANS].

118. *Id.* at 145.

119. *Id.*

120. *Id.*

121. AD HOC ADVISORY GROUP ON THE PRESIDENTIAL VOTE FOR PUERTO RICO, THE PRESIDENTIAL VOTE FOR PUERTO RICO 8 (1971) [hereinafter PRESIDENTIAL VOTE].

122. THE PUERTO RICANS, *supra* note 117, at 221.

123. PRESIDENTIAL VOTE, *supra*, note 121, at 8.

124. *See* Cottle, *supra* note 115, at 325-26.

125. *Id.* U.S. CONST. amend. XXIII.

126. The clearest support for this argument is the Twenty-third and Twenty-sixth Amendments to the Constitution. The former granted residents of the District of Columbia the right to vote in presidential elections, and the latter granted eighteen, nineteen, and twenty-year-old citizens the right to vote in general. U.S. CONST. amend XXIII; U.S. CONST. amend XXVI. These amendments were ratified in 1961 and 1971 respectively, but it is commonly known that these two groups of citizens have always served in the armed forces. Thus, if one's eligibility for military service triggered the right to vote, these amendments to the Constitution would have been unnecessary. Furthermore, residents of the District of Columbia do not have any representation in Congress.



Puerto Ricans should be commended for their willingness to defend a nation that has refused to grant them the rights afforded to citizens of states.<sup>127</sup>

## 2. Federal Taxation

Although the U.S. Treasury receives over two billion dollars annually from sources in Puerto Rico,<sup>128</sup> the internal revenue laws of the United States generally do not apply to Puerto Rico.<sup>129</sup> As a result, residents of Puerto Rico do not pay federal income taxes.<sup>130</sup> Nonetheless, residents are subject to local taxes, which are higher than those of all fifty states.<sup>131</sup>

It has been suggested that it is proper to withhold certain political rights from citizens who are exempt from the national tax system.<sup>132</sup> It seems clear that the political right of suffrage cannot be contingent on the payment of any tax.<sup>133</sup> The most obvious support for this assertion is found in the Twenty-fourth Amendment, which bans the payment of "any poll tax or other tax"<sup>134</sup> as a prerequisite for voting in national elections.<sup>135</sup> The phrase "other tax" includes income taxes,<sup>136</sup> and the Supreme Court subsequently banned the payment of taxes as a prerequisite for voting in state elections.<sup>137</sup> In *Harper v. Virginia State Board of Elections*,<sup>138</sup> the Court used the Equal Protection Clause to invalidate a law providing for a \$1.50 poll tax in state elections: "To introduce wealth or payment of a fee as a measure of a voter's qualifications is to introduce a capricious or irrelevant factor."<sup>139</sup> As an advisory group appointed by President Nixon later concluded, it is "unpersuasive

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127. See THE PUERTO RICANS, *supra* note 117, at 145.

128. GREGORIO IGARTUA DE LA ROSA, U.S. DEMOCRACY FOR PUERTO RICO: A DENIAL OF VOTING RIGHTS IN PRESIDENTIAL ELECTIONS TO OVER 3.5 MILLION AMERICAN CITIZENS v (1996).

129. TAX AND TRADE GUIDE - PUERTO RICO 1 (Arthur Andersen & Co. ed., 3d ed. 1978) [hereinafter TAX AND TRADE GUIDE]. As discussed above, Congress has plenary power over Puerto Rico under the Territory Clause. *Supra* Part I.B. This includes the authority to exclude Puerto Rico from the internal revenue laws. *Id.*

130. TAX AND TRADE GUIDE, *supra* note 129, at 29.

131. Van Dyke, *supra* note 90, at 507.

132. See Cottle, *supra* note 115, at 327 (discussing the abolition of the payment of taxes as a qualification for voting).

133. *Id.* at 327-30.

134. U.S. CONST. amend. XXIV.

135. Cottle, *supra* note 115, at 328-30.

136. See *Id.*; PRESIDENTIAL VOTE, *supra* note 121, at 8-9.

137. *Harper v. Va. St. Bd. of Elections*, 383 U.S. 663 (1966).

138. *Id.*

139. *Id.* at 668.

to argue that U.S. citizens in Puerto Rico should or would be required to pay federal taxes in order to vote" in national elections.<sup>140</sup>

### E. The Fifty-first State

Over the past century, Puerto Rico has evolved from a "mere possession"<sup>141</sup> of the United States to a commonwealth with state-like status.<sup>142</sup> Its people enjoy U.S. citizenship and its government is in complete harmony with the federal constitution.<sup>143</sup> Nearly every federal agency operates in Puerto Rico and federal services such as the postal system extend to the island.<sup>144</sup> Although Puerto Ricans do not pay federal income taxes,<sup>145</sup> they have paid for their citizenship in blood by being subject to the draft and continually serving in the military.<sup>146</sup>

However, Puerto Rico will never be an equal part of the United States unless it decides to make the transition to statehood. The Supreme Court made sure of this when it decided the *Insular Cases*<sup>147</sup> nearly one hundred years ago. It is also apparent that today's judiciary will continue to uphold these decisions and reaffirm the plenary power of Congress over the island.<sup>148</sup> The courts simply will not diminish the significance of statehood by recognizing a de facto state-like status for Puerto Rico. Thus, an effort to overturn the *Insular Cases*, though noble in cause, would be a futile endeavor. Puerto Rico will continue to languish in the constitutional phantom zone that lies between territories and states until it opts for equality. Puerto Rico must take a bold step and free itself from a doctrine of "constitutional authoritarianism"<sup>149</sup> by demanding to become the fifty-first state.

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140. PRESIDENTIAL VOTE, *supra* note 121, at 9.

141. *Supra* note 62 and accompanying text.

142. TAX AND TRADE GUIDE, *supra* note 129, at 1.

143. *Id.*

144. *Id.*

145. *Supra* Part I.D.

146. *Supra* Part I.D.

147. *Supra* Part I.B.

148. *Supra* Part I.A-B.

149. *See* Terrasa, *supra* note 19.

## II. SEEKING A CONSTITUTIONAL RIGHT TO VOTE IN PRESIDENTIAL ELECTIONS

Separate from the constitutional issues raised by the *Insular Cases* is the question of whether United States citizenship entitles the people of Puerto Rico to vote in presidential elections.

### A. Relevant Caselaw

Since the 1970s, United States citizens living outside of the fifty states have sought the right to vote in presidential elections through the federal courts. In *Sanchez v. United States*,<sup>150</sup> a Puerto Rican citizen challenged the constitutionality of a statute allowing the island's people to consent to commonwealth status,<sup>151</sup> since it did not explicitly include the right to vote in presidential elections.<sup>152</sup> In dismissing the action, the district court held that all citizens do not have the right to vote in presidential elections because "the Constitution does not, by its terms, grant citizens the right to vote, but leaves the matter entirely to the States."<sup>153</sup> To support its assertion that suffrage is not an essential right of citizenship, the court cited several constitutional amendments dealing with voting rights.<sup>154</sup> It noted that the Constitution had to be amended to grant women,<sup>155</sup> former slaves,<sup>156</sup> residents of the District of Columbia,<sup>157</sup> and eighteen, nineteen, and twenty-year-olds<sup>158</sup> the right to vote.

The court acknowledged Puerto Rico's transition to commonwealth status<sup>159</sup> and hinted that the island was no longer subject to the plenary power of Congress under the Territory Clause.<sup>160</sup> Nevertheless, its opinion fell short of identifying any benefits gained by this development in terms of political rights.<sup>161</sup> The court earnestly agreed, however, with the conclusion reached by an advisory group partly formed by President Nixon,<sup>162</sup> which found that "it is inex-

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150. *Sanchez v. United States*, 376 F. Supp. 239 (D.P.R. 1974).

151. Pub. L. No. 600, ch. 446, 64 Stat. 319 (1950) (current version at 48 U.S.C. §§ 731b-731e (2002)).

152. *Sanchez*, 376 F. Supp. at 240.

153. *Sanchez*, 376 F. Supp. at 241.

154. *Id.*

155. U.S. CONST. amend. XIX.

156. U.S. CONST. amend. XV.

157. U.S. CONST. amend. XXIII.

158. U.S. CONST. amend. XXVI.

159. *Sanchez*, 376 F. Supp. at 240-41.

160. *Id.* at 241.

161. *Id.*

162. See PRESIDENTIAL VOTE, *supra* note 121, at 1.

cusable that there still exists a substantial number of U.S. citizens who cannot legally vote" in presidential elections.<sup>163</sup>

Following *Sanchez*, the Ninth Circuit decided *Attorney General of the Territory of Guam v. United States*,<sup>164</sup> in which four U.S. citizens residing in Guam argued that voting in presidential elections is a privilege of citizenship.<sup>165</sup> In affirming the lower court's dismissal, the Ninth Circuit held that "[T]he Constitution does not grant to American citizens the right to elect the President."<sup>166</sup> The court explained that under Article II, the right to vote in presidential elections is given to the states, and citizens vote indirectly for the president by voting for state electors.<sup>167</sup> The court noted that "apart from the thirteen original states, the only areas which have achieved national voting rights [without an amendment to the Constitution] have done so by becoming States."<sup>168</sup>

In *Igartua de la Rosa v. United States I*,<sup>169</sup> two groups of Puerto Rican citizens sought declaratory judgments granting them the right to vote in presidential elections, based on the fact that they were U.S. citizens.<sup>170</sup> The first group consisted of citizens that had always resided in Puerto Rico.<sup>171</sup> The second group was comprised of former state citizens that had lost their right to vote in presidential elections by moving to Puerto Rico.<sup>172</sup> The court held that the people of Puerto Rico could not participate in presidential elections until Puerto Rico either 1) became a state or 2) was granted the right through a constitutional amendment.<sup>173</sup> The two groups of plaintiffs argued that Puerto Rico was entitled to national voting rights because its political status closely resembled that of a state.<sup>174</sup> However, the court assumed that it was being asked to determine whether Puerto Rico had evolved into a de facto state<sup>175</sup> and declined to settle the issue, invoking the political question doc-

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163. *Sanchez*, 376 F. Supp. at 242.

164. *Territory of Guam v. United States*, 738 F.2d 1017 (9th Cir. 1984).

165. *Id.* at 1018.

166. *Id.* at 1019.

167. *Id.*

168. *Id.*

169. *Igartua de la Rosa v. United States I*, 842 F. Supp. 607, 608 *aff'd*, 32 F.3d 8 (1994).

170. *Id.* at 608.

171. *Id.*

172. *Id.*

173. *Id.* at 609.

174. *Id.*

175. It is certainly arguable that Puerto Rico is a de facto state for certain purposes. For example, in *Sanchez* the court explicitly stated that Puerto Rico is not a territory. *Sanchez v. United States*, 376 F. Supp. 239, 241 (D.P.R. 1974).

trine.<sup>176</sup> The court held that “a determination of whether or not Puerto Rico’s political status has evolved into ‘de facto’ statehood for the purposes of presidential elections would correspond to Congress . . . [and] . . . no standards exist by which a Court can or should decide what is or is not a ‘de facto’ state.”<sup>177</sup>

The former state citizens group also argued that the Uniformed and Overseas Citizens Absentee Voting Act (“UOCAVA”)<sup>178</sup> was unconstitutional because it violated the Due Process Clause and the equal protection component of the Fifth Amendment<sup>179</sup> by allowing citizens living abroad to vote in presidential elections, without extending the same opportunity to citizens who relocate to Puerto Rico.<sup>180</sup> The court dismissed this argument, holding that the UOCAVA did not, by its terms, prohibit former stateside citizens that resided in Puerto Rico from voting in presidential elections, and that it was for the states to determine whether their former residents could vote by absentee ballot.<sup>181</sup>

The court also concluded that the UOCAVA would pass constitutional muster.<sup>182</sup> It reasoned that the UOCAVA distinguished between those who reside overseas and those who live anywhere in the U.S. and thus did not single out those who moved to Puerto Rico.<sup>183</sup> In affirming the dismissal, the court of appeals added that “[W]hile the [UOCAVA] does not guarantee that a citizen moving to Puerto Rico will be eligible to vote in a presidential election, this limitation is not a consequence of the Act, but of the constitutional” restrictions implicit in Article II.<sup>184</sup>

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176. *Igartua de la Rosa I*, 842 F. Supp. at 609-10. The political question doctrine is a judicial principle premised on the separation of powers that requires courts to refuse to decide an issue that is within the discretionary power of the executive or legislative branches of the government. *See id.* (citing *Baker v. Carr*, 369 U.S. 186, 217 (1962) (holding that a political question exists where, among other things, the Constitution has committed resolution of the issue to another branch of the government)).

177. *Igartua de la Rosa I*, 842 F. Supp. at 609-10.

178. Uniformed and Overseas Citizens Absentee Voting Act, 42 U.S.C. § 1973ff (2000).

179. U.S. CONST. amend. V; *see e.g.*, *Bolling v. Sharpe*, 347 U.S. 497 (1954) (applying equal protection principles to the federal government, even though the Fifth Amendment does not contain an Equal Protection Clause).

180. *Igartua de la Rosa I*, 842 F. Supp. at 610-12.

181. *Id.* at 611.

182. *Id.* The court applied low-level scrutiny. It held that the UOCAVA was reasonably related to the proper legislative purpose of allowing citizens living abroad to vote in federal elections. *Id.*

183. *Id.* at 611.

184. *Igartua de la Rosa I*, 32 F.3d at 11.

*Igartua de la Rosa v. United State II*,<sup>185</sup> decided in 2000, presented identical facts to those in *Igartua de la Rosa I*.<sup>186</sup> Although the district court's decision failed to spark a national debate, its opinion deserves political and scholarly attention for several reasons. First, the court called attention to Puerto Rico's problematic political status,<sup>187</sup> noting that Puerto Rico's status within the U.S. must be viewed "within the context of the unfulfilled promises of freedom."<sup>188</sup> The court then briefly discussed 1) how the U.S. acquired Puerto Rico;<sup>189</sup> 2) the U.S. Supreme Court's views on Puerto Rico's status within the U.S.;<sup>190</sup> 3) the granting of citizenship to the people of Puerto Rico;<sup>191</sup> and 4) Puerto Rico's transition to commonwealth status.<sup>192</sup> Next, the court offered a broad interpretation of Article II, § 1, cl. of the U.S. Constitution. Article II provides that "Each State shall appoint, in such a Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress."<sup>193</sup> The court rejected the conclusions reached in *Sanchez, Guam*, and *Igartua de la Rosa I*, and held that Article II does not limit the right to choose the president to the states, but merely provides the logistics by which state residents participate in presidential elections.<sup>194</sup> It further held that if U.S. citizens living in Puerto Rico had the right to participate in presidential elections, such a right could not be derived from Article II.<sup>195</sup> Finally, the court concluded that the right to vote is a function of citizenship<sup>196</sup> and that U.S. citizens residing in Puerto Rico have the right to participate in presidential elec-

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185. *Igartua de la Rosa v. United States II*, 113 F. Supp. 2d 228 (D.P.R.), *rev'd*, 229 F.3d 80 (1st Cir. 2000). Note, the district court adopted and incorporated its prior opinion denying the government's motion to dismiss. *Id.* at 231. Therefore, *Igartua de la Rosa v. United States II*, 107 F. Supp. 2d 140 (D.P.R. 2000), must be read as part of the district court's final opinion.

186. The court followed part of the holding in *Igartua de la Rosa I* and dismissed the plaintiff's cause of action under UOCAVA. *Igartua de la Rosa II*, 107 F. Supp. 2d at 150.

187. 107 F. Supp. 2d at 141.

188. *Id.*

189. *Id.*

190. *Id.* at 142-44.

191. *Id.*

192. *Id.*

193. U.S. CONST. art. II, § 1, cl. 2.

194. *Igartua de la Rosa II*, 107 F. Supp. 2d at 145.

195. *Id.*

196. *Id.*

tions.<sup>197</sup> This holding was based on the fact that U.S. history is “largely characterized by the enfranchisement of segments within its citizenry”<sup>198</sup> and on the consistent acknowledgement by the Supreme Court that voting is a fundamental right.<sup>199</sup>

The First Circuit reversed the district court’s decision solely on the grounds of *stare decisis*.<sup>200</sup> The court held that the district court was required to follow the decision in *Igartua de la Rosa I* because the facts were virtually identical to those in that case.<sup>201</sup> The court added that although the Supreme Court had repeatedly held that the right to vote was fundamental, no case held that the right to vote in a presidential election was derived from any source other than Article II.<sup>202</sup>

In Judge Torruella’s concurring opinion, he found the court’s decision to be technically correct based on the explicit language in Article II.<sup>203</sup> He noted, however, that Puerto Rico is politically powerless and suggested that in the future, a court may be compelled to “fill the vacuum created by the failure or refusal of the political branches to protect the civil rights” of these loyal citizens.<sup>204</sup> Torruella argued that the continued disenfranchisement of the United States citizens residing in Puerto Rico could provide a solid basis for judicial intervention.<sup>205</sup> Although Judge Torruella’s opinion did not discuss when or how the judiciary should intervene, his book *The Supreme Court and Puerto Rico: The Doctrine of Separate and Unequal*<sup>206</sup> reveals his views on the matter. Judge Torruella believes that the *Insular Cases*<sup>207</sup> stand at par with *Plessy v. Ferguson*<sup>208</sup> by permitting unequal treatment for U.S. citizens living in Puerto Rico.<sup>209</sup> Furthermore, he argues that cases like *Brown v.*

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197. *Id.* at 150.

198. *Id.* at 145.

199. *Id.* at 146; *Igartua de la Rosa II*, 113 F. Supp. 2d at 231-35.

200. *Igartua de la Rosa II*, 229 F.3d at 84-85.

201. *Id.* at 83-85.

202. *Id.* at 84-85.

203. *Id.* at 85 (Torruella, J., concurring).

204. *Id.* at 89 (Torruella, J., concurring) (citing *Brown v. Board of Educ.*, 347 U.S. 483 (1954) and *United States v. Carolene Prods. Co.*, 304 U.S. 144 (1938)).

205. *Id.* (Torruella, J., concurring).

206. TORRUELLA, *supra* note 37, at 3.

207. *Supra* Part I.B.

208. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

209. TORRUELLA, *supra* note 37, at 3.

*Board of Education* provide a resounding precedent<sup>210</sup> for overturning the obsolete doctrines created by the *Insular Cases*.<sup>211</sup>

The First and Ninth Circuits have the better argument. Article II explicitly grants the responsibility of electing the president and vice-president to the states.<sup>212</sup> Puerto Rico is not a state. Therefore, Puerto Rico and its residents do not have the right to participate in presidential elections.<sup>213</sup> Still, the district court's argument in *Igartua II* is worth considering because it attempts to reinterpret the explicit language of Article II (*i.e.*, reducing the states' power to choose the president to a procedural formula) by declaring that suffrage is based on citizenship.<sup>214</sup>

### B. Is There a Fundamental Right to Vote?

The district court's decision in *Igartua de la Rosa II* seems correct in principle. The United States is a constitutional democracy.<sup>215</sup> Accordingly, all citizens should have the right to vote in presidential elections regardless of their residence. In discussing this issue, however, one must put aside the specifics of presidential elections and the distinction between citizens who reside in states and those who reside in the Commonwealth of Puerto Rico.<sup>216</sup> It is essential to focus solely on the district court's basic assertion in *Igartua de la Rosa II* — that the Constitution guarantees a general right to vote to all citizens.<sup>217</sup>

There are three major views on whether suffrage is a basic right belonging to all citizens.<sup>218</sup> Under a "traditional view," the right to vote is not a basic right<sup>219</sup> and the Constitution does not guarantee any person the right to vote.<sup>220</sup> Under a "relative right view,"<sup>221</sup> the question of whether the Constitution recognizes a substantive

210. *Igartua de la Rosa v. United States II*, 229 F.3d 80, 89 (1st Cir. 2000) (Torruella, J., concurring).

211. TORRUELLA, *supra* note 37, at 3.

212. *Supra* notes 150 to 184 and accompanying text.

213. *Id.*

214. *Infra* Part II.B.

215. LOWI & GINSBERG, *supra* note 111, at 13.

216. *Supra* Part II.A.

217. *Supra* Part II.A.

218. See Symposium, *Is There a Constitutional Right to Vote and Be Represented?: The Case of the District of Columbia*, 48 AM. U. L. REV. 589, 605-33 (1999) (examining the merits of a lawsuit challenging the lack of congressional representation in the District of Columbia) [hereinafter Symposium].

219. *Id.* at 609.

220. *E.g.*, *Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 178 (1874) (holding that the recently ratified Fourteenth Amendment does not extend voting rights to women).

221. Symposium, *supra* note 218, at 613, 626.



right to vote is left unanswered.<sup>222</sup> Instead, this view merely acknowledges a limited, but nonetheless fundamental right to vote based on principles of equal protection.<sup>223</sup> Under the “citizenship-based view,” the right to vote is a fundamental right guaranteed to all citizens. The basis for each of these views is discussed below.

### 1. *The Traditional View*

Under the traditional view, United States citizens residing in Puerto Rico would have no basis for a right to vote in presidential elections. The traditional view is expressed in *Minor v. Happersett*,<sup>224</sup> an infamous case in which Virginia Minor, a woman’s suffragist, argued that she was guaranteed the right to vote under the Fourteenth Amendment. She had attempted to register as a voter in Missouri. The Missouri state constitution, however, confined the right of suffrage to men.<sup>225</sup> Mrs. Minor asserted that she was a citizen under the Fourteenth Amendment Citizenship Clause, and thus was entitled to all the privileges and immunities enjoyed by other citizens.<sup>226</sup> She essentially made two arguments for the right to vote: 1) the right to vote is a privilege of citizenship and 2) equal protection requires equal voting rights between men and women.<sup>227</sup>

The Court began its opinion by noting that the Fourteenth Amendment did not confer citizenship on women, because women have always been citizens of the United States.<sup>228</sup> It then briefly examined the text of the Constitution and found no indication that the right to vote was intended to be extended to all citizens of the United States.<sup>229</sup> The Court emphasized the fact that a constitutional amendment was required to prevent the right of suffrage from being denied on account of race.<sup>230</sup> Finally, the Court held that the adoption of the Fourteenth Amendment added nothing to privileges and immunities of citizenship and so did not guarantee women the right to vote.<sup>231</sup> The Court concluded by stating that it

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222. *See id.* at 613.

223. *Id.*

224. *Minor v. Happersett*, 88 U.S. (21 Wall.) 162 (1874).

225. *Id.* at 163-65.

226. *Id.*

227. *Minor*, 88 U.S. at 163-65.

228. *Id.* at 170.

229. *Id.* at 173-74.

230. *Id.* at 175; U.S. CONST. amend. XV.

231. *Minor*, 88 U.S. at 173, 177-78. The Court did not make an equal protection analysis because the issue was framed around the “privileges and immunities” of citizenship. *Id.* at 163-65.

was “unanimously of the opinion that the Constitution of the United States does not confer the right of suffrage upon anyone.”<sup>232</sup> Under this line of reasoning, citizens in Puerto Rico would have no right to participate in presidential elections without an amendment to the Constitution or the attainment of statehood by Puerto Rico.

## 2. *The Relative Right View*

Subsequent developments in constitutional law led the Supreme Court to treat the right to vote as a relative right under the Equal Protection Clause. For example, in *San Antonio Independent School District v. Rodriguez*,<sup>233</sup> the Court noted that:

Since the right to vote, per se, is not a constitutionally protected right, we assume that . . . references to that right are simply shorthand references to the protected right, implicit in our constitutional system, to participate in state elections on an equal basis with other qualified voters whenever the State has adopted an elective process for determining who will represent any segment of the State’s population.<sup>234</sup>

This view is narrower with respect to presidential elections. In *Bush v. Gore*,<sup>235</sup> the Court noted:

The individual citizen has no federal constitutional right to vote for electors for the President of the United States unless and until the state legislature chooses a statewide election as the means to implement its power to appoint members of the Electoral College. History has now favored the voter and in each of the several States the citizens themselves vote for Presidential electors. When the state legislatures vests the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental; and one source of its fundamental nature lies in the equal weight accorded to each vote and the equal dignity owed to each voter.<sup>236</sup>

Under this relative right view, constitutional protection for the right to vote must be triggered by a state’s choice to grant the right to its citizens.<sup>237</sup> This approach has been criticized as a “misguided commitment to [the traditional view] . . . that is not only rigid but . . . willfully blind . . . to the developments in constitutional

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232. *Minor*, 88 U.S. at 178.

233. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

234. *Id.* at 36 n.78.

235. *Bush v. Gore*, 531 U.S. 98, 104 (2000) (per curiam).

236. *Id.*

237. *See supra* notes 233-236 and accompanying text.

thought that have taken place since the framing.”<sup>238</sup> Arguably this view is fundamentally flawed because it does not reflect the modern reality of the right to vote, (*i.e.*, all fifty states have delegated much of their power to the people by adopting systems through which their citizens elect national representatives).<sup>239</sup> Furthermore, the few geographical subdivisions of the United States that have failed to implement a mechanism for participating in national elections are those without the power to do so.<sup>240</sup> Nonetheless, as discussed *infra*, the Supreme Court has been instrumental in expanding the “relative right” of suffrage. The Court’s development of this area of the law should not, however, be interpreted as creating a right to vote based on citizenship, as argued in *Igartua de la Rosa II*.<sup>241</sup>

*a. The Fundamental Nature of Voting*

Although the Supreme Court’s active role in the development of voting rights is a relatively recent development, the Court has recognized the importance of voting rights for some time. In *Yick Wo v. Hopkins*,<sup>242</sup> the Court invalidated a facially neutral California law regulating laundries because the law was applied exclusively against Chinese laundry owners.<sup>243</sup> The Court noted that “the very idea that one man may be compelled to hold . . . any material right essential to the enjoyment of life, at the mere will of another, seems intolerable in any country where freedom prevails, as being the essence of slavery itself. There are many illustrations that might be given of this truth, . . . the political franchise of voting is one.”<sup>244</sup> The Court reasoned that voting is regarded as a fundamental right because it is “preservative of all rights.”<sup>245</sup> A modern restatement of this principle can be found in *Wesberry v. Sanders*,<sup>246</sup> where the Court held that a state could not maintain discriminatory federal congressional districts.<sup>247</sup> After a thorough review of the relevant constitutional history, the Court noted that suffrage

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238. Symposium, *supra* note 218, at 614.

239. *Supra* note 236 and accompanying text.

240. *See supra* Part II.A.

241. *Supra* Part II.A.

242. *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) (holding that a facially neutral law may violate the Equal Protection Clause if it is administered in a racially discriminatory manner).

243. *Id.*

244. *Id.*

245. *Id.*

246. *Wesberry v. Sanders*, 376 U.S. 1, 17-18 (1964).

247. *Id.*

is vitally important in a free country because even the most basic rights become illusory when the right to vote is undermined.<sup>248</sup> The Court added: "Our Constitution leaves no room for classification of people in a way that unnecessarily abridges this right."<sup>249</sup>

The Court has also expressed the importance of presidential elections. In *Anderson v. Celebrezze*,<sup>250</sup> the Court struck down an Ohio statute that required early filing deadlines for presidential candidates—a practice that particularly harmed third-party candidates.<sup>251</sup> Stressing the unique importance of presidential elections, the Court noted that "the President and Vice President of the United States are the only elected officials who represent all the voters in the Nation."<sup>252</sup> It added that the public's interest in selecting candidates for national office is greater than any interest of an individual state.<sup>253</sup>

Even the current Supreme Court, with its affinity for the Tenth Amendment,<sup>254</sup> has held that the fundamental importance of voting is paramount to a state's power to regulate elections. In *United States Term Limits, Inc. v. Thornton*,<sup>255</sup> the Court invalidated term limits for federal senators and congressmen imposed by the Arkansas Constitution.<sup>256</sup> The Court placed great emphasis on the "fundamental principle of our representative democracy . . . that the people should choose whom they please to govern them."<sup>257</sup> The Court indicated that this broad principle incorporates two fundamental ideas: 1) the concept that the opportunity to be elected must be open to all citizens<sup>258</sup> and 2) "the critical postulate that sovereignty is vested in the people, and that sovereignty confers on

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248. *Id.*

249. *Id.*

250. *Anderson v. Celebrezze*, 460 U.S. 780 (1983).

251. *Id.* at 794.

252. *Id.* at 794-95.

253. *Id.* at 795.

254. *See, e.g.,* *Printz v. United States*, 521 U.S. 898 (1997) (invalidating the Brady Act, which required local law enforcement officers to investigate prospective handgun purchasers); *New York v. United States*, 505 U.S. 144 (1992) (striking down a federal law requiring states that failed to plan for the disposal of radioactive waste by a particular date, to assume ownership of such waste and liability resulting from failure to do so); *National League of Cities v. Usery*, 426 U.S. 833 (1976) (holding that states are immune from federal control over operations in areas of traditional state government functions) *overruled by* *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

255. *United States Term Limits, Inc. v. Thornton*, 514 U.S. 779, 793-96 (1995).

256. *Id.*

257. *Id.* at 793 (quoting *Powell v. McCormack*, 395 U.S. 486 (1969)).

258. *Id.* at 793-94.

the people the right to choose freely their representatives to the National Government.”<sup>259</sup>

Although these cases support the idea that suffrage is one of the most basic political rights in the United States, they do not proclaim that the right is based on citizenship. *Yick Wo* is not a voting rights case. *Wesberry* merely holds that state citizens have the right to elect their federal representatives on an equal basis with their fellow state citizens. *Anderson* deals with the rights of presidential candidates, and *U.S. Term Limits* simply holds that states lack the power to impose qualifications for congressional offices in addition to those outlined in the Constitution.

### b. *One-Person-One-Vote*

The landmark voting rights case of the last century was *Reynolds v. Sims*,<sup>260</sup> which established the rule of one-person-one-vote.<sup>261</sup> In *Reynolds*, the Court invalidated the apportionment of the Alabama legislature and two of the state’s proposed reapportionment schemes.<sup>262</sup> Alabama had not reapportioned its state voting districts since 1900, resulting in gross imbalances in the relative weight of votes among the districts.<sup>263</sup> Tracing a long history of voting rights cases, the Court stated, “the Constitution . . . protects the right of all qualified citizens to vote, in state as well as federal elections.”<sup>264</sup> The Court also reaffirmed the *Yick Wo* principle, noting that the right of suffrage is a fundamental matter in a free society and that restrictions on the right had to be “meticulously scrutinized.”<sup>265</sup> With this, the Court remarked that it is unjustifiable to allow the votes of citizens to be weighed differently based on residence.<sup>266</sup> The Court further noted that “representative govern-

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259. *Id.* at 794.

260. *Reynolds v. Sims*, 377 U.S. 533 (1964).

261. *Id.* The one-person-one-vote doctrine provides that each person’s vote must be given the same relative weight of all other votes. Note the following illustration: State *X* has a population of 400,000 and is divided into three voting districts. Each district elects one state senator. Voting district *A* has 100,000 citizens. Voting district *B* also has 100,000 citizens. Voting district *C* has 200,000 citizens. According to population, district *C* should have as much voting power as districts *A* and *B* combined. This is not the case, however, because district *C* only elects one senator while districts *A* and *B* together elect two. Thus, votes in district *C* are worth half as much as they would be in districts *A* and *B*, consequently violating the rule of one-person-one-vote.

262. The existing scheme, as well as the two reapportionment schemes, were not based on population. *Id.* at 537-53.

263. *Id.*

264. *Id.* at 554.

265. *Id.* at 561-62.

266. *Id.* at 563.

ment is in essence self-government through the medium of elected representatives of the people"<sup>267</sup> and that "To the extent that a citizen's right to vote is debased, he is that much less a citizen."<sup>268</sup>

Despite its landmark status, *Reynolds* did not rewrite the Constitution by declaring a right to vote based on citizenship. Rather, *Reynolds* strongly reaffirmed the relative right to vote by acknowledging that the right belongs to all *qualified* citizens. The holding states that the Equal Protection Clause forbids states from adopting or maintaining discriminatory voting schemes.<sup>269</sup> Thus, even under *Reynolds*, U.S. citizens who reside in Puerto Rico cannot participate in presidential elections because they are not qualified citizens under Article II.

*c. The Evolving Right to Vote in Federal Enclaves*

The Supreme Court has in fact held that the Equal Protection Clause could extend the right to vote in state elections to areas under federal control. In *Evans v. Cornman*,<sup>270</sup> the Court affirmed a decision granting the residents of a federal enclave<sup>271</sup> located within Maryland the right to vote in Maryland elections.<sup>272</sup> The Court's decision conflicted with numerous state court decisions<sup>273</sup> that denied residents of federal enclaves the right to vote because the states had no jurisdiction over them.<sup>274</sup> In acknowledging the rights of these citizens, the *Evans* Court relied on the principle that "the right to vote, [as] a citizen's link to his laws and government, is protective of all fundamental rights and privileges."<sup>275</sup> While federal enclaves are not states and Congress has exclusive power over them, the Court justified its holding by recognizing that the rela-

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267. *Id.* at 564.

268. *Id.* at 567.

269. *Id.* at 584.

270. *Evans v. Cornman*, 398 U.S. 419, 426 (1970).

271. Federal enclaves are areas of land over which the United States exercises exclusive legislative authority. Common examples of federal enclaves include: the District of Columbia, military bases, and national parks. Andrew C. Mergen, *Surface Tension: The Problem of Federal/Private Split Estate Lands*, 33 LAND & WATER L. REV. 419, 437 (1998) (discussing the Enclave Clause of the Constitution).

272. *Id.*

273. See, e.g., *Herken v. Glynn*, 101 P.2d 946 (Kan. 1940); *Arledge v. Mabry*, 197 P.2d 884 (N.M. 1948); *McMahon v. Polk*, 73 N.W. 77 (S.D. 1897); *State ex rel. Lyle v. Willett*, 97 S.W. 299 (Tenn. 1906). But see *Arapajolu v. McMenamin*, 249 P.2d 318 (Cal. Ct. App. 1952); *Rothfels v. Southworth*, 356 P.2d 612 (Utah 1960); *Adams v. Londeree*, 83 S.E.2d 127 (W. Va. 1954).

274. *Evans*, 398 U.S. at 423.

275. *Id.* at 422.

tionships between federal enclaves and their host States have evolved considerably.<sup>276</sup>

Although the Court acknowledges the importance of the right to vote, it falls far short of recognizing a citizenship-based right. The Court even made clear that it applied a relative right analysis when it stated: "[O]nce the franchise [of voting] is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause."<sup>277</sup> Furthermore, the status of the federal enclave in *Evans* is distinguishable from Puerto Rico's status with respect to presidential elections. The federal enclave in *Evans* was located within a state and its residents were subject to a wide array of state laws,<sup>278</sup> whereas Puerto Rico is many miles away from the nearest state and has its own local government.<sup>279</sup>

#### d. *The Fundamental Right to Travel*

The right to travel is an essential attribute of citizenship.<sup>280</sup> Although one may not immediately associate the right to travel with national voting rights, both are relevant when discussing Puerto Rico since state residents lose the right to vote in presidential elections by moving to the island.<sup>281</sup> In *Shapiro v. Thompson*,<sup>282</sup> the Court invalidated laws enacted by Connecticut, Pennsylvania, and the District of Columbia, which imposed one-year residency requirements for recipients of welfare assistance.<sup>283</sup> The Court found that these laws imposed an undue burden on the fundamental right to travel:

This Court long ago recognized that the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement.<sup>284</sup>

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276. *Id.* at 423.

277. *Id.* at 422.

278. *Id.* at 424. Residents of the enclave were subject to certain state criminal laws; state income, gasoline, sales, and use taxes; state unemployment and workmen's compensation laws; state automobile laws; and the process and jurisdiction of state courts. *Id.* In addition, they could use the state court and school systems. *Id.*

279. *Supra* Part I.C.

280. *Shapiro v. Thompson*, 394 U.S. 618, 629-30 (1969) (discussing the fundamental right to travel), *overruled on other grounds by* *Edelman v. Jordan*, 415 U.S. 651 (1974).

281. *Supra* Part II.A.

282. *Shapiro*, 394 U.S. at 621-27.

283. CONN. GEN. STAT. § 17-2d (Supp. 1965); D.C. CODE ANN. § 3-203 (1967); PA. STAT. ANN. tit. 62, § 432 (6) (West 1968).

284. *Shapiro*, 394 U.S. at 629.

These principles were recently reaffirmed in *Saenz v. Roe*,<sup>285</sup> a case in which a California statute limiting the maximum welfare benefits available to new residents was held unconstitutional. The Court explained that in *Shapiro*, it held “that a classification that had the effect of imposing a penalty on the right to travel”<sup>286</sup> violated the principles of equal protection.<sup>287</sup> The Court then outlined three components of the right to travel: 1) the right to freely enter and leave states, 2) the right to be treated as a welcome visitor when you travel outside your home state and 3) the right to permanently move to another state and be treated like other citizens of that state.<sup>288</sup> The Court found the basis for the third component in the Fourteenth Amendment Citizenship Clause<sup>289</sup> and noted that the Clause expressly equates citizenship with residence and does not tolerate subclasses of similarly situated citizens.<sup>290</sup>

The Court has also made similar findings within the context of voting rights. In *Dunn v. Blumstein*,<sup>291</sup> the Court invalidated a statute imposing a one-year residency requirement for voting eligibility. In addition to burdening the right to vote, the Court held that such a requirement “directly impinges on the exercise of a second fundamental personal right, the right to travel.”<sup>292</sup>

While, these cases do not acknowledge a right to vote based on citizenship, they do support the relative right view of voting and they recognize that a state citizen will lose the right to vote in presidential elections simply by moving to Puerto Rico. As the Court held in *Saenz*, when a citizen moves to a new state or territory, he or she must be treated like the citizens who reside there.<sup>293</sup>

### 3. *The Citizenship-Based View*

Modern conceptions of the right to vote are deeply imbedded in our jurisprudence<sup>294</sup> and politics.<sup>295</sup> This has led to the general be-

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285. *Saenz v. Roe*, 526 U.S. 489, 492 (1999).

286. *Id.* at 490, 499.

287. *Id.*

288. *Id.* at 500.

289. U.S. CONST. amend. XIV, § 1 (“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.”).

290. *Saenz*, 526 U.S. at 506-07.

291. *Dunn v. Blumstein*, 405 U.S. 330, 338 (1972).

292. *Id.*

293. *Saenz*, 526 U.S. at 500.

294. Symposium, *supra* note 218, at 606; *supra* Part III.B.

295. *See e.g.*, U.S. CONST. amend. XV (prohibiting denial of the right to vote based on race); U.S. CONST. amend. XVII (providing for the direct election of senators);



lief that the right to vote is a substantive fundamental political right belonging to all citizens.<sup>296</sup> Under this view, the origin of the right to vote is unclear. Some argue that the Constitution creates a substantive right to vote.<sup>297</sup> Others assert that the right is recognized by the Constitution, but not created by it.<sup>298</sup> Rather, the people through their inherent right to vote form the basis for the government and the Constitution.<sup>299</sup> Under a third line of reasoning, the right was created by the history of the development of constitutional principles such as equal protection and due process.<sup>300</sup> This third line of thinking seems to be the one followed by the district court in *Igartua de la Rosa II*.<sup>301</sup> The court cites *Yick Wo*, *Reynolds*, *U.S. Term Limits*, *Wesberry*, *Anderson*, *Evans*, and a number of other cases, asserting that the cumulative force of these decisions forms the basis for a right to vote based on citizenship.<sup>302</sup>

Although this view has had some academic support,<sup>303</sup> it is not the law.<sup>304</sup> The Supreme Court cases that arguably support a citizenship-based view of voting have been discussed earlier.<sup>305</sup> These

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U.S. CONST. amend. XIX (prohibiting denial of the right to vote based on sex); U.S. CONST. amend. XXIII (providing the formula by which the District of Columbia participates in presidential elections); U.S. CONST. amend. XXIV (prohibiting the imposition of any tax as a prerequisite to voting in federal elections); U.S. CONST. amend. XXVI (enfranchising eighteen, nineteen, and twenty-year-old citizens).

296. Symposium, *supra* note 218, at 622.

297. *Id.* at 613 (“[D]enying that the U.S. Constitution grants a substantive right to vote to people has got to be wrong.”).

298. *Id.* at 610.

299. *See id.*

300. *Id.* at 624-25.

301. *See Igartua de la Rosa v. United States II*, 107 F. Supp. 2d 140, 145-47 (D.P.R. 2000) (noting that the history of the United States is largely characterized by the enfranchisement of its citizenry and that the Supreme Court has been consistent in acknowledging the fundamental importance of the right to vote).

302. *Id.*; *Igartua de la Rosa II*, 113 F. Supp. 2d at 232-35.

303. *See* Jamin B. Raskin, *Is This America? The District of Columbia And The Right To Vote*, 34 HARV. C.R.-C.L. L. REV. 39 (arguing for congressional representation in the District of Columbia).

304. *Bush v. Gore*, 531 U.S. 98, 104 (2000) (per curiam) (noting that individuals have no constitutional right to participate in presidential elections); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 36 n.78 (1973) (noting that the right to vote is not *per se* constitutionally protected).

305. *United States Term Limits, Inc. v. Thornton*, 514 U.S. 779, 793-96 (1995); *Anderson v. Celebrezze*, 460 U.S. 780 (1983) (invalidated term limits for federal senators and congressmen imposed by Arkansas); *Dunn v. Blumstein*, 405 U.S. 330, 338 (1972) (invalidating a statute that required one year of state residency as a prerequisite for state voting eligibility); *Evans v. Cornman*, 398 U.S. 419, 426 (1970) (holding that residents of a federal enclave located within Maryland had a right to participate in Maryland state elections); *Reynolds v. Sims*, 377 U.S. 533, 554 (1964) (holding that states may not establish or maintain disproportionate state voting districts); *Wesberry*

cases illustrate a relative right to vote based on the Equal Protection Clause.<sup>306</sup> Furthermore, the Court continues to acknowledge that the Constitution does not guarantee anyone the right to vote.<sup>307</sup> The citizenship-based view is a misinterpretation of the relative right view. As the Court artfully explains in *Reynolds*, the Constitution merely “protects the right of all *qualified* citizens to vote.”<sup>308</sup> Unfortunately, citizens who reside in Puerto Rico are not qualified to vote in national elections under Article II.

### C. Revisiting the Argument for Statehood

Puerto Rico is a commonwealth. The significance of that particular designation is ambiguous. What is clear is that Article II of the Constitution grants states the right to elect the president and vice-president.<sup>309</sup> It is also clear that the right to vote is not based on citizenship,<sup>310</sup> and that Puerto Rico will not be able to participate in presidential elections unless it becomes a state or is granted the right through a constitutional amendment.<sup>311</sup> Thus, seeking the right to vote in presidential elections through the federal court system is even more futile than fighting to overturn the *Insular Cases*.

The language of the Twenty-third Amendment,<sup>312</sup> which grants the District of Columbia the right to participate in presidential elections, shows that an amendment may not be the appropriate solution for Puerto Rico. The Twenty-third Amendment merely grants the District “[a] number of electors . . . equal to the whole number of Senators and Representatives in Congress to which [it] would be entitled if it were a State, *but in no event more than the least populous state.*”<sup>313</sup> Thus, the District cannot have more electors than the least populous state, even if its population would normally warrant additional electors. The latest census figures

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v. Sanders, 376 U.S. 1, 17-18 (1964) (holding that states may not establish or maintain disproportionate federal voting districts); *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) (noting in dicta that the political franchise of voting is an essential right).

306. *San Antonio Indep. Sch. Dist.*, 411 U.S. at 36 n.78 (1973) (noting that references to fundamental right of suffrage “are simply shorthand references to the protected right, implicit in our constitutional system, to participate in state elections on an equal basis with other qualified voters whenever the State has adopted an elective process”).

307. *Id.*; *Bush*, 531 U.S. at 104.

308. *Reynolds*, 377 U.S. at 554.

309. *Supra* Part II.A.

310. *Supra* Part II.B.3.

311. *Supra* Part II.A.

312. U.S. CONST. amend. XXIII.

313. U.S. CONST. amend. XXIII (emphasis added).

indicate that the District of Columbia has a mere 572,000 residents,<sup>314</sup> compared to Puerto Rico's 3.8 million.<sup>315</sup> As Puerto Rico would be entitled to approximately eight electoral votes,<sup>316</sup> a similar limitation would grossly dilute the votes of its people. Furthermore, it should also be noted that such an amendment would not cure Puerto Rico's lack of congressional representation. Only statehood will give Puerto Rico full national voting rights.

### CONCLUSION

This Comment has highlighted two of Puerto Rico's major constitutional dilemmas. According to the *Insular Cases*, Puerto Rico is subject to the plenary power of Congress under the Territory Clause and its people are not entitled to any political rights. Puerto Rico also has no right to participate in presidential elections under Article II of the Constitution. Judge Torruella advocates overturning the *Insular Cases*, but this is no small task because the Supreme Court continues to rely on them and uphold their validity. Cases like *Sanchez*, *Igartua de la Rosa I*, and *Igartua de la Rosa II* futilely attempt to secure the right to vote in presidential elections by asking federal courts to ignore the explicit language in Article II. Furthermore, neither approach would solve both of these constitutional dilemmas. The only complete solution is for Puerto Rico to become the fifty-first state.

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314. U.S. CENSUS BUREAU, *supra* note 9, at 21.

315. U.S. CENSUS BUREAU, *supra* note 9, at 812.

316. Ivan Roman, *No Vote For President In Puerto Rico*, ORLANDO SENTINEL TRIBUNE, Nov. 3, 2000, at A11 (discussing a ruling by the Puerto Rico Supreme Court declaring the use of funds for Puerto Rico's possible participation in the 2000 presidential elections unconstitutional).

