

COMMENTS

IGARTÚA DE LA ROSA v. UNITED STATES: THE RIGHT OF THE UNITED STATES CITIZENS OF PUERTO RICO TO VOTE FOR THE PRESIDENT AND THE NEED TO RE-EVALUATE AMERICA'S TERRITORIAL POLICY

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INTRODUCTION

Something remarkable happened to the author of this piece on October of 2000—he received an absentee ballot to vote for the President and Vice President of the United States. For many electors, there is nothing remarkable about this event. Every four years, thousands of Americans receive absentee ballot materials, including a presidential ballot, from their states. What makes this event peculiar is that the author of this piece is a resident of Puerto Rico¹ and the absentee materials were sent not by a state, but by the Puerto Rico government. As the United States went through one of its closest elections in years,² most Americans were unaware that, for at least a month, the federal courts had put Puerto Rico and eight additional electoral votes at play.³

It started when three men from the western coastal town of Aguadilla, Puerto Rico sued⁴ to remedy one side effect of the deplor-

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¹ From 1900 to 1932, “Puerto Rico was officially misspelled as ‘Porto Rico’—a result of the incorrect spelling of the island’s name in the English version of the Treaty of Paris.” JOSÉ A. CABRANES, *CITIZENSHIP AND THE AMERICAN EMPIRE* 1, n.1 (1979). “Puerto Ricans had objected ‘that there [did] not even exist the pretext of changing the name to Americanize [Puerto Rico], since porto is not an English but a Portuguese word.’” *Id.* (quoting 33 CONG. REC. app. 233 (1900) (statement of Rep. Jones)).

² The Electoral College results for the 2000 election were 271 votes for George W. Bush and 266 for Albert Gore. CNN.com, *Election 2000*, available at <http://www.cnn.com/ELECTION/2000> (last visited Aug. 6, 2001).

³ According to the 2000 Census, the resident population of Puerto Rico is 3,808,610. United States Census Bureau, at <http://www.census.gov/dmd/www/resapport/states/puerto-rico.pdf>. If Puerto Rico becomes a state, this would translate into at least six representatives, in addition to the two senators.

⁴ See *Igartúa de la Rosa v. United States (Igartúa I)*, 842 F. Supp. 607 (D.P.R. 1994) (denying declaratory and injunctive relief that would have allowed Puerto Ricans to vote in presidential elections and dismissing plaintiffs’ complaint for failure to state a claim upon which relief could be granted), *aff’d*, 32 F.3d 8 (1st Cir. 1994). See also *Igartúa de la Rosa v. United States (Igartúa*

able political condition of the inhabitants of Puerto Rico:⁵ their inability to vote, as United States citizens, for the President and Vice President. In fifty years, Puerto Rico went from being the stricken land to the showcase of democracy.⁶ In those same remarkable fifty years, however, the fundamental underpinnings of the island's relationship with the United States have remained unaltered—Puerto Rico remains the oldest colony in the world.⁷ These men sued to

II), 113 F. Supp. 2d 228 (D.P.R. 2000) (entering final judgment finding United States citizens in Puerto Rico have the right to vote for representatives of the electoral college in presidential elections and ordering the Puerto Rico government to create mechanisms by which those citizens could vote in the elections), *rev'd*, 229 F.3d 80 (1st Cir. 2000). Also note that the government in the original suit of *Igartúa II* brought a motion to dismiss the suit, which was denied. See 107 F. Supp. 2d 140 (D.P.R. 2000).

⁵ Persons born in Puerto Rico are United States citizens at birth. Immigration and Nationality Act of 1952 § 302, 8 U.S.C. § 1402 (1999) (“All persons born in Puerto Rico on or after January 13, 1941, and subject to the jurisdiction of the United States, are citizens of the United States at birth.”). Thus, they do not need a passport to visit the United States and, in fact, use a United States passport to travel internationally. Their condition and rights as citizens, however, are different from those who reside in the mainland. The residents of Puerto Rico do not pay federal taxes, but receive approximately \$13 billion in federal funds, including Medicare, Medicaid, and welfare benefits. Dan Perry, *Puerto Rico Wants Say in U.S. Vote*, ASSOCIATED PRESS ONLINE, Nov. 3, 2000, available at 2000 WL 29037278. They have served in the United States military forces since World War I and their valor in defense of liberty and freedom has been well documented. See Guillermo Moscoso, *Decolonizing P.R. Justifies Fallen War Heroes*, THE SAN JUAN STAR, May 25, 1998, available at <http://www.puertorico-herald.org/issues/1997-98/misc/moscoso-19980525.shtml> (“Memorial Day to us in Puerto Rico means honoring over 1,000 Puerto Ricans killed in action in the wars in which the United States has been involved Puerto Rico's participation in the above-mentioned wars was greater than the participation of 22 states of the Union . . .”). After one hundred years as part of the American Empire, however, these people still are not represented in the body that holds plenary authority over their island. Puerto Ricans do not have any say in the election of the President and Commander-in-Chief that sends their sons and daughters to fight in foreign lands and controls naval bases and other military installations throughout the island. The flags of Puerto Rico and the United States always fly together, a symbol of a “rigorous maintained balance of identity.” *Id.* For background discussion on the history of U.S. citizenship in Puerto Rico, see *infra* Part I.

⁶ Puerto Rico “had remained mired in social and economic stagnation for the four centuries following Christopher Columbus's landing in 1493” A.W. MALDONADO, TEODORO MOSCOSO AND PUERTO RICO'S OPERATION BOOTSTRAP, at xi-xii (1997). President Franklin D. Roosevelt referred to Puerto Rico as “hopeless,” *id.* at xii (quoting ERNEST GRUENING, MANY BATTLES—AN AUTOBIOGRAPHY 181 (1973)), and the last American governor called it “the stricken land.” REXFORD GUY TUGWELL, THE STRICKEN LAND: THE STORY OF PUERTO RICO (Greenwood Press 1968) (1946). In the 1950's, however, Puerto Rico had become the “Showcase of Democracy—a laboratory proving that poor societies can improve their lot under a democratic, free-enterprise system.” MALDONADO, *supra*, at 116. *Time* called it the “Democracy Laboratory in Latin America,” explaining that the island had “clawed its way in fifteen years to a nearly doubled standard of living” *Id.* at 116-17 (quoting *TIME*, June 23, 1958); see also *infra* note 62. See generally HARVEY S. PERLOFF, PUERTO RICO'S ECONOMIC FUTURE: A STUDY IN PLANNED DEVELOPMENT (3d ed. 1950) (documenting the historic and current trends in the Puerto Rican economy and discussing principles and programs of planned economic development).

⁷ See generally JOSÉ TRÍAS MONGE, PUERTO RICO: THE TRIALS OF THE OLDEST COLONY IN THE WORLD 107 (1997) (“Commonwealth, with all its faults, has served Puerto Rico well, but attempting to hide its shortcomings and pretending that all is well in the oldest colony in the world does a disservice to both the people of Puerto Rico and the government of the United States.”). José Trías Monge, a former Chief Justice of the Supreme Court of Puerto Rico, was

change this. And their challenge, although ridiculous to some,⁸ brings into the spotlight questions ranging from the existence of a right to vote for the President under the Constitution to the need to re-evaluate the usefulness and constitutional validity of America's territorial policy.

In the middle of what already had been a tumultuous election season in Puerto Rico,⁹ the United States District Court responded. On

one of the chief architects of the Commonwealth status and a member of the constitutional convention that drew up the Puerto Rico Constitution.

⁸ See Dan Perry, *supra* note 5 ("[S]o many people condemned the idea as a sham and mere 'beauty contest.'"); Zena Polin, *Puerto Ricans Win Right To Vote on Nov. 7 but Appeals Court Might Reverse Ruling*, WASH. TIMES, Oct. 12, 2000, at A12 (quoting Aníbal Acevedo Vilá, the vice president of the Popular Democratic Party, calling the whole process "a sham"); *id.* (quoting Jose M. González-Rodríguez, a Puerto Rican lawyer and litigation consultant, who argued that the law was clear and that the residents of Puerto Rico had no constitutional right to participate in presidential elections); see also John Marino, *For Puerto Rico, an Election of Ifs; Territory Sets Vote for President but Court Must Decide If Ballots Count*, WASH. POST, Oct. 10, 2000, at A3 (quoting John Killian, a constitutional expert with the Congressional Research Service, describing the district court's argument as "wrong").

⁹ Puerto Rican politics is deeply polarized among the three main status alternatives: statehood, supported by the New Progressive Party (NPP); Commonwealth, supported by the Popular Democratic Party (PDP); and independence, supported by the Puerto Rican Independence Party. The candidate for the New Progressive Party or the Popular Democratic Party has been elected governor in every election since 1948. José Trías Monge, *Plenary Power and the Principle of Liberty: An Alternative View of the Political Condition of Puerto Rico*, 68 REV. JUR. U. P.R. 1, 18-19 (1999). See generally REECE B. BOTHWELL, *ORÍGENES Y DESARROLLO DE LOS PARTIDOS POLÍTICOS EN PUERTO RICO* (1988). The NPP, under the leadership of Pedro Rosselló, won the 1992 and 1996 elections with a platform stressing market liberalization, privatization of government-owned enterprises, smaller government, privately administered health coverage, and school vouchers. EDGARDO MELÉNDEZ, *MOVIMIENTO ANEXIONISTA EN PUERTO RICO* 289 (1993). In the 1996 election, Rosselló became the first candidate for governor to garner over one million votes and the first to surpass the 50 percent barrier since 1964. See Comisión Estatal de Elecciones de Puerto Rico, *Consulta de Resultados*, at <http://www.ceepur.net/cgi-bin/municipios.pl> (reporting election results from 1992-2000).

The division also extends to political status preferences. In 1967, in a referendum boycotted by the Statehood Republican Party and several pro-independence groups, Commonwealth received 60.4 percent of the vote, statehood 39 percent, and independence 0.6 percent. *Id.* In the next referendum, in 1993, Commonwealth received 48.6 percent of the vote, statehood 46.3 percent, and independence 4.4 percent. *Id.* In 1998 another referendum took place, but one where the PDP was unwilling to favor Commonwealth status subject to the plenary powers of Congress and campaigned for "None of the above." In this referendum, "None of the above" received 50.3 percent of the vote, statehood 46.5 percent and independence 2.5 percent. *Id.*

Choosing among the options is not as simple as it seems. Independence provides sovereignty and the opportunity to protect and reaffirm Puerto Rico's cultural identity. Still, it poses significant questions regarding economic development, especially in an island heavily dependent on federal transfers and greatly interwoven with the American economy. Statehood, on the other hand, promises full and equal membership in the United States, along with the prospects of economic development and the extension of all rights and responsibilities as United States citizens. There are, however, pressing questions regarding the effects of federal taxation on the island's economy and the fear of cultural assimilation.

The tumultuous 2000 election began when then-incumbent governor, Pedro Rosselló, announced that he would not seek a third consecutive term and his Secretary of Transportation and Public Works, Carlos Pesquera, became the nominee of the NPP. See generally Ivan Roman, *Puerto Rico Puts Its Hopes on Rail Line*, ORLANDO SENTINEL, Sept. 3, 2000, at A1 ("Carlos

July 19, 2000, Senior District Court Judge Jaime Pieras delivered an opinion and order,¹⁰ later supplemented by a final opinion and order,¹¹ declaring that the United States citizens of Puerto Rico had a constitutionally protected right to vote for the President and Vice President of the United States.¹² The court also ordered the Government of Puerto Rico to organize the means by which to appoint Presidential electors.¹³ The Government of Puerto Rico went ahead as ordered and even printed out ballots with the names and pictures of George W. Bush and Al Gore.¹⁴ The prospect of the President of the Senate receiving the electoral votes from Puerto Rico disappeared soon enough, however, as the United States Court of Appeals for the First Circuit reversed *Igartúa II* almost a month before the elections.¹⁵ The after-effects did not disappear so easily.¹⁶

Pesquera, the former transportation head who oversaw all major infrastructure projects until he stepped down last year to run for governor for the pro-statehood New Progressive Party”). Subsequently, the government and the statehood party came under intense heat for a series of corruption cases against high-profile party members. *See generally* John Marino, *U.S. Corruption Prosecutions Rock Puerto Rico*, WASH. POST, Aug. 27, 2000, at A3 (“For two years, federal prosecutors here have secured a stream of public corruption indictments. Municipal mayors, heads of nonprofit social service agencies, government bureaucrats, contractors and political party officials have all faced charges in the ongoing probe.”). More importantly, the election year was dominated, and the people of Puerto Rico polarized, by the events surrounding the United States Navy’s activities in the small island of Vieques, off the eastern coast of Puerto Rico. *Id.* In April 1999, a Puerto Rican civilian, while performing his duties as a security guard for the Navy, was accidentally killed during one of the training sessions that the Navy conducted in Vieques since 1941. Manuel Ernesto Rivera, *Protesters Gather as Navy Prepares To Resume Vieques Bombing*, WASH. POST, June 25, 2000, at A5. That event re-ignited the highly nationalistic movement to get the Navy out of Vieques. *See generally* 25 *Vieques Activists Freed Without Bail*, WASH. POST, May 16, 2000, at A10 (“Twenty-five protesters charged with trespassing at the Navy’s Vieques bombing range over the weekend were released without bail today to cheers from supporters.”); Sylvia Moreno, *Navy Protest Intensifies: Officials Urge Clinton To Defuse Puerto Rican Showdown*, WASH. POST, May 4, 2000, at A3 (“[A] ragtag group of protesters little known outside this island town, the dissidents, and their cause, drew supporters from as far away as Chicago and New York to their turf—a dozen illegal seaside camps that are reachable only by boat.”); Rivera, *supra*, at A5 (“Islanders say five decades of live bombing have caused environmental damage, contaminated water supplies, stunted tourism, destroyed fishing grounds and led to a higher cancer rate.”).

¹⁰ *Igartúa de la Rosa v. United States (Igartúa II)*, 107 F. Supp. 2d 140 (D.P.R. 2000).

¹¹ *Igartúa de la Rosa v. United States (Igartúa II)*, 113 F. Supp. 2d 228 (D.P.R. 2000).

¹² *Id.* at 242.

¹³ *Id.*

¹⁴ Nilka Estrada Resto, *Sigue Vigente la Ley Local para la Comisión Estatal*, EL NUEVO DÍA (San Juan), Oct. 14, 2000, available at <http://endi.zonai.com/politica/html/p31a13m10.asp> (last visited Oct. 16, 2000) (explaining that the state electoral commission had received 2.7 million of the 3 million ballots that it had ordered).

¹⁵ *Igartúa de la Rosa v. United States (Igartúa II)*, 229 F.3d 80 (1st Cir. 2000).

¹⁶ This was not the first time that the question of granting Puerto Ricans residing in the island the right to vote arose. In 1970, during the administration of the first pro-statehood governor, Luis A. Ferré, an Ad Hoc Advisory Committee was formed to study the issue. Although the effort concentrated on starting the constitutional amendment process, many of the passions raised by *Igartúa II*, and even the argument that Puerto Ricans could vote for the President without amending the Constitution, also arose during that process. *See* David M. Helfeld, *The Constitutional and Legal Feasibility of the Presidential Vote for Puerto Rico*, in SIX SPECIAL STUDIES REQUESTED FOR THE AD HOC ADVISORY GROUP ON THE PRESIDENTIAL VOTE FOR PUERTO RICO 87,

At the political level, the insistence by the pro-statehood¹⁷ government to prepare ballots for the presidential election was perceived as yet another bold and consensus-breaking action by the Rosselló administration and further electrified the nationalist forces that had taken center stage in the election season.¹⁸ Prominent political leaders called for voters to reject the presidential ballot by writing "Peace for Vieques" on it.¹⁹ The decision also divided the statehood movement.²⁰ Former Governor and Resident Commissioner Carlos Romero Barceló hesitated with the idea, believing that the decision was going to be reversed quickly.²¹ In a more ideological twist, many sup-

92 (1971) (explaining that the possibility of granting the right to vote to Puerto Ricans without a constitutional amendment had been "posed in the press and in popular discussions."); *see also* 5 JOSÉ TRIÁS MONGE, HISTORIA CONSTITUCIONAL DE PUERTO RICO 83 (1994) ("One of the favorite arguments at that moment, frequently espoused by statehood supporters, was that the presidential vote could be granted without an amendment to the Constitution of the United States, either by legislative or judicial action."). *Igartúa II*, then, suddenly opened a Pandora's box that many believed had been shut.

¹⁷ The statehood movement began before the American occupation in 1898, but strengthened with the founding of the Puerto Rico Republican Party right after the occupation. The Republicans dominated the elections of 1900 and 1904 and again, as part of a coalition with two other parties, from 1924 until 1940. In the 1940s, the Republicans began losing much of their electoral support, as the Popular Democratic Party, led by the "father" of Commonwealth, Luis Muñoz Marín, dominated every electoral event until 1968. After the Republican Party refused to defend statehood in the 1967 referendum, Luis A. Ferré founded a new organization, United Statehooders. This organization later became the New Progressive Party, which won the elections of 1968 after a split in the Popular Democratic Party. The New Progressive Party lost in 1972, but won again, under the leadership of Carlos Romero Barceló, in the 1976 and 1980 elections. After losing in 1984 and 1988, the New Progressive Party won in 1992 and 1996 under the leadership of Pedro Rosselló. MELÉNDEZ, *supra* note 9, at 1-3.

Today, the statehood movement encompasses various social and economic classes, but with particularly strong support in the higher and lower economic classes. *Id.* at 8-9. The incredible growth of pro-statehood forces in the last thirty years also has polarized the island, producing a parallel nationalistic, anti-statehood movement. The anti-statehood movement finds particular support in labor unions, the University of Puerto Rico, cultural and performing arts organizations, environmental groups, the Catholic Church, and some sectors of the press. LUIS DÁVILA COLÓN, LA DICTADURA DE LA PRENSA 101-06 (1999).

¹⁸ *See* Marino, *supra* note 8 ("[C]ritics of the Rosselló administration say that the push for the presidential vote is a back door way of pushing its statehood agenda."); Polin, *supra* note 8 (quoting Anibal Acevedo Vila, who argued that the government was trying to "divert people's attention from real issues, such as rampant government corruption, fraud and illegal use of public funds"); *Puerto Rico Court Halls Voting Bid; Some Wanted a Say in Presidential Race*, WASH. POST, Nov. 3, 2000, at A10 (quoting Carlos Gorrín Peralta, a lawyer for the Puerto Rican Independence Party, who described the attempts to claim the right to participate in presidential elections as an abuse of power and an imposition upon the people of Puerto Rico); *see also* Perry, *supra* note 5 (quoting Puerto Rican Independence Party leader Rubén Berríos, who stated: "This was a mechanism for [statehooders] to try to push statehood through the back door.").

¹⁹ Polin, *supra* note 8.

²⁰ Ivan Roman, *Puerto Rico's Status Again Splits Island*, ORLANDO SENTINEL, July 31, 2000, at A8 ("Even some of the pro-statehood New Progressive Party's own leaders acknowledge the problem. Sen. Sergio Pena Clos warned his colleagues not to mislead the people."). *But see* Perry, *supra* note 5 (quoting Kenneth McClintock, a Puerto Rican lawmaker, statehood supporter, and strong defender of the attempt to give Puerto Ricans the right to vote in presidential elections).

²¹ *See* Roman, *supra* note 20 ("Resident Commissioner Carlos Romero Barceló said that, as a

porters of statehood—most of them privately—were questioning the wisdom of Puerto Ricans acquiring the right to vote in presidential elections from judicial fiat, and not from admission as a state of the union.

In the legal context, the decision raises—and this Comment deals with—many of the fascinating and perpetual issues surrounding the constitutional framework of the United States-Puerto Rico relationship. First, the claim of a right to vote for the President raises questions about the kind of citizenship that Puerto Ricans possess. Are the United States citizens of Puerto Rico “equal” with those of the mainland and entitled to enjoy a constitutional right to vote? Which constitutional rights apply to the United States citizens of Puerto Rico?

Second, the case raises questions regarding the nature of presidential elections in the United States and the right of the people to vote in them—questions that garnered additional relevance in the wake of the 2000 election contest and America’s collective re-reading of Article II.²² Who has the right to vote for the President and Vice President, the citizens or the states? What have been the effects of the Supreme Court statements describing the right to vote as a fundamental right protected by the Constitution? The confusion reigning in American jurisprudence regarding the answer to these questions played an important role in the *Igartúa II* court’s holding.

Finally, and most importantly, the decision raises questions about the treatment of the territories under constitutional law. One hundred years ago, during the Spanish American War, the United States went through a remarkable transformation. No longer the neutral continental power, the United States became an administrator of foreign lands.²³ Scrapping the original policy of treating territories as

lawyer, he thought the judge’s decision would be revoked.”).

²² See generally U.S. CONST. art. II, § 1, cl. 2 (“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 Congress . . .”).

²³ See Treaty of Peace Between the United States of America and the Kingdom of Spain, Dec. 10, 1898, U.S.-Spain, art. II, 30 Stat. 1754, 1755 [hereinafter Treaty of Paris] (“Spain cedes to the United States the island of Porto Rico and other islands now under Spanish sovereignty in the West Indies, and the island of Guam in the Marianas or Ladrões.”); see also CABRANES, *supra* note 1, at 1-4 (“The acquisition[s] . . . signaled the rise of the United States to the position of a world power [and] . . . revealed in microcosm many of the characteristics of America’s new role in world affairs: an abiding sense of mission and a certain nobility of purpose; a belief in the superiority of American institutions and values; an insensitivity or indifference to peoples and values imperfectly understood; and an ambivalence about the exercise of power combined with a deeply rooted innocence.”). In 1916, the United States acquired the Danish West Indies (currently the United States Virgin Islands). ARTURO MORALES CARRIÓN, *PUERTO RICO: A POLITICAL AND CULTURAL HISTORY* 198 (1983) (“The treaty [of purchase] was signed on August 4, 1916, and presented to Congress as a way of thwarting German ambitions in the Caribbean. Under Article VI, the inhabitants who did not declare within a year their intention to preserve their citizenship in Denmark were held to have renounced it and to have accepted American citizenship.”); accord JUAN M. GARCÍA PASSALACQUA, *INVADIENDO AL INVASOR* 77 (1999).

“states-in-training,”²⁴ the Supreme Court gave judicial backing to these imperialist designs and created the constitutionally dubious distinction between incorporated territories and unincorporated territories.²⁵ America no longer had to promise statehood to its territories; it could hold them permanently in the game of European imperialism the Founding Fathers had so despised in 1776.

This doctrine was wrong one hundred years ago, and it cries for a revision today. Surprisingly, due to a combination of neglect, convenience, and disinterest, this doctrine, and the territorial policy it entails, has not been seriously re-evaluated. The United States has over four million citizens living in permanent colonies; yet, it is no closer than it was one hundred years ago to understanding how they fit within its constitutional framework. *Igartúa II* took the challenge directly and posed the question of why territories cannot be included under “states” for the purposes of Article II of the Constitution. Any responsible answer to this question requires serious rethinking of the status of territories under constitutional law. This Comment seeks to throw the first stone.

This Comment will focus on whether the United States citizens of Puerto Rico have a right to vote for the President under the current legal and constitutional framework, and on how the answer to this question highlights the need to re-evaluate the status of territories within American constitutional law. The Comment will not discuss the wisdom of extending the right to vote in presidential elections by amending the Constitution.²⁶ Neither does it dwell specifically on the right of United States citizens of other territories to vote in such elections.²⁷ Finally, the Comment avoids entering into the never-ending debate surrounding the current Commonwealth status and the effects these changes had—if any—on the status of Puerto Rico within

²⁴ *Shively v. Bowlby*, 152 U.S. 1, 49 (1894) (“The territories acquired by Congress, whether by deed of cession from the original States, or by treaty with a foreign country, are held with the object, as soon as their population and condition justify it, of being admitted into the Union as States . . .”); LÓPEZ BARALT, *THE POLICY OF THE UNITED STATES TOWARDS ITS TERRITORIES WITH SPECIAL REFERENCE TO PUERTO RICO* 237 (1999) (“Up to that time [(1898)] territories had eventually become States of the Union.”); Jamin Raskin, *Is This America? The District of Columbia and the Right To Vote*, 34 HARV. C.R.-C.L. L. REV. 39, 52 (1999) (“In the American system, territories are designed to be the principal states-in-training.”).

²⁵ See *Downes v. Bidwell*, 182 U.S. 244, 291 (1901) (distinguishing between incorporated and unincorporated territories and explaining that in treating unincorporated territories “there may nevertheless be restrictions of so fundamental a nature that they cannot be transgressed, although not expressed in so many words in the Constitution”); see also LÓPEZ BARALT, *supra* note 24, at 299 (“If unincorporated, then only such provisions of the Constitution protecting the fundamental rights of citizenship were to apply.”). See generally *González v. Williams*, 192 U.S. 1 (1904); *DeLima v. Bidwell*, 182 U.S. 1 (1901); *Downes*, 182 U.S. at 244.

²⁶ See generally SIX SPECIAL STUDIES, *supra* note 16 (discussing the proposals in 1970 to grant Puerto Ricans the right to vote for the President); 5 TRÍAS MONGE, *supra* note 16, at 48-91.

²⁷ The general principles, however, also should be applicable to other unincorporated territories of the United States where residents are United States citizens, such as Guam, the Northern Mariana Islands, and the U.S. Virgin Islands.

the United States constitutional framework. Although this is a very worthy subject, time and space constraints force us to assume that Puerto Rico's Commonwealth status would not affect the ability of the residents of Puerto Rico to participate in presidential elections.

Part I provides a background to Puerto Rican history, specifically its political relationship with the United States. Part II discusses the holding of the district court granting the right to vote and the court of appeals' reversal. Part III focuses on the limitations of the United States citizenship possessed by Puerto Ricans and how these could affect the right to vote espoused by *Igartúa II*. Part IV analyzes *Igartúa II*'s main reasoning behind extending the right to vote for the President to Puerto Ricans: The right to vote is a fundamental right of citizenship and Puerto Ricans, as United States citizens, cannot be denied such right. Finally, Part V analyzes the other reasoning provided by *Igartúa II* in support of granting Puerto Ricans the right to vote for the President: The word "state" in Article II of the Constitution does not exclude territories.

The Comment concludes that the right to vote for the President of the United States is not a constitutional right. There has been a trend in Supreme Court jurisprudence to view voting for the President as a right, but this trend has not been consummated and is of doubtful constitutionality. Supreme Court ambiguity surrounding the interpretation of the word "state" in the Constitution, however, leaves the ground fertile for an argument calling for an expansive interpretation—one that would include territories and allow its residents to participate in presidential elections. More importantly, the Comment argues that the case at least calls for a re-examination of the status of territories within the American constitutional landscape. The United States has become the administrator of permanent territories. The Constitution dealt with territories in the context of "states-in-training," yet the Supreme Court—either by neglect or convenience—created and has maintained an imperialist doctrine allowing the United States to become an administrator of permanent territories. History may have made the United States an administrator of territories, but those territories are populated by United States citizens who deserve better than second-class citizenship, limited rights, and restricted access to political processes. The time has come for the United States to revamp its century-old constitutional understanding of its territories in favor of a framework that promises the territories and their citizens full political participation.

I. CITIZENSHIP AND POLITICS IN PUERTO RICO: A BRIEF OVERVIEW FROM THE SPANISH KINGDOM TO THE AMERICAN EMPIRE²⁸

The island of Puerto Rico, which had been invaded and occupied by the United States during the Spanish American War, was ceded from Spain to the United States under the terms of the Treaty of Paris of 1898.²⁹ Breaking away from precedent, the Treaty of Paris did not grant United States citizenship to the inhabitants of Puerto Rico.³⁰ In what has become an infamous provision, Article IX of the

²⁸ This historical background begins with the invasion and occupation of Puerto Rico by the United States during the Spanish American War of 1898, which is the relevant starting point for this work. The exclusion of a discussion of the Spanish era should not be interpreted as insignificant, however. The four centuries of Spanish rule, along with a strong Afro-Antillean influence, left a permanent mark on the cultural, religious, political, and social development of the people of Puerto Rico.

Before the American invasion, a concept of *patria* (nationhood) was already well established among the masses in Puerto Rico. Juan M. García Passalacqua, *La Falsedad del Canon: Análisis Crítico de la Historia Constitucional de Puerto Rico*, 65 REV. JUR. U.P.R. 589, 591 (1996); see also TRIAS MONGE, *supra* note 7, at 19 ("At the end of the nineteenth century Puerto Rico had thus a well-defined national identity, a strong sense of its own culture, part of the Spanish-speaking Latin American and Caribbean communities, with its own singularities and as much right as others to freedom and respect."). This embrace of nationhood had some political expressions, such as the failed armed revolt against Spain in 1867 (the Grito de Lares) and was decisive in the formation of Puerto Rican culture and identity. Among the elite, however, the support for the cause of independence was weaker than, for instance, in Cuba and other Latin American countries. See JOSÉ LUIS GONZÁLEZ, *EL PAÍS DE CUATRO PISOS Y OTROS ENSAYOS* (1985).

Yet, this lack of support for independence, both in the past and in the present, should not be confused with a lack of pride or weak sense of identity. The people of Puerto Rico have a strong sense of nationhood and national pride—one that survived the Americanization policies of the early twentieth century and unites all Puerto Ricans above party lines. See GARCÍA PASSALACQUA, *supra* note 23, at 230 ("Despite the direct and indirect pressures to Americanize felt during the entire twentieth century, a majority of Puerto Ricans do not consider themselves as 'essentially Americans.' The collective identity of Puerto Ricans has been influenced by its relationship with the United States, but Puerto Ricans have retained their identity . . .") (author's translation). This prevailing sense of "Puerto Ricanness" is reflected in the resurgence of nationalistic musical compositions. See, e.g., MARC ANTHONY, *Preciosa*, on DESDE UN PRINCIPIO—FROM THE BEGINNING (Sony Discos 1999); LUCECITA BENÍTEZ, *Verde Luz*, on EN VIVO DESDE EL CARNEGIE HALL (BMG/U.S. Latin 2000); EL JUNTE, *Boricua en la Luna*, on UN JUNTE PARA LA HISTORIA (Acisum Group 1999). Even the statehood movement has been influenced by this phenomenon. Since the late 1920's, the statehood movement abandoned calls for cultural assimilation to the United States, instead developing the concept of "jíbaro statehood"—the idea that Puerto Ricans can maintain their identity and culture as a state of the union. MELÉNDEZ, *supra* note 9, at 9. The statehood movement also stresses the use of both the Puerto Rican and United States flag at their rallies and official functions.

²⁹ Treaty of Paris, Dec. 10, 1898, U.S.-Spain, art. II, 30 Stat. 1754 ("Spain cedes to the United States the island of Porto Rico and other islands now under Spanish sovereignty in the West Indies, and the island of Guam in the Marianas or Ladrones.").

³⁰ See LÓPEZ BARALT, *supra* note 24, at 278 ("All the treaties and agreements, beginning with the cession of part of the Northwest Ordinance by Virginia to the acquisition of Alaska contained provisions guaranteeing to the inhabitants of the ceded land the privileges, rights and immunities of the citizens of the United States and promising incorporation to the territory."); see also, e.g., LUELLA GETTYS, *THE LAW OF CITIZENSHIP IN THE UNITED STATES* 145 (1934); 1 WESTEL WOODBURY WILLOUGHBY, *THE CONSTITUTIONAL LAW OF THE UNITED STATES* 444 (1910).

Treaty stated that “the civil rights and political status of the native inhabitants of the territories hereby ceded to the United States *shall be determined by Congress.*”³¹

A. *The Foraker Act Years (1900-1916)*

The inhabitants of the island remained under a military regime and in political limbo³² until 1900, when the Foraker Act³³ established a civil government for Puerto Rico. The Foraker Act provided for a governor to be appointed by the President of the United States, six government departments whose heads were also appointed by the President, and a Legislative Assembly composed of two chambers.³⁴ The higher chamber was composed of the six department heads and

³¹ Treaty of Paris, *supra* note 29 at art. IX (emphasis added).

³² The following statement best summarizes this state of uncertainty immediately after the occupation: “The occupation has been a perfect failure. We have suffered everything. No liberty, no rights, absolutely no protection . . . We are Mr. Nobody from Nowhere. We have no political status, no civil rights.” TRIÁS MONGE, *supra* note 7, at 40, citing *Hearings on H.R. 6883*, 56th Cong. 103 (1900) (statement of Dr. Julio Henna).

Still, many Puerto Ricans—both in the elite and the masses—were originally satisfied with the coming of American rule. See MORALES CARRIÓN, *supra* note 23, at 140-41 (“Most of the liberal elite rejoiced at the coming of the Americans. The reaction covered a wide spectrum: there were those who offered their services to [General] Miles in the belief that the landing meant the coming of freedom to the island. Others along the southern coast, who had favored the separation of Puerto Rico from Spain, joined the American troops as interpreters or scouts.”); FERNANDO PICÓ, *HISTORIA GENERAL DE PUERTO RICO* 229-30 (5th ed. 1990) (“Among some business people and landowners in the island there was an illusion that the annexation of Puerto Rico as a state of the Union was imminent and that it would bring increased prosperity to the sugar industry.”) (author’s translation); JUAN R. TORRUELLA, *THE SUPREME COURT AND PUERTO RICO: THE DOCTRINE OF SEPARATE AND UNEQUAL* 21 (1985) (“Despite pre-invasion flag-waving by some Puerto Rican *políticos*, the Americans were received with open arms in Puerto Rico.” (citations omitted)). *But see* MORALES CARRIÓN, *supra*, at 142 (“Some Puerto Ricans had high expectations, others faced the change with ambivalent feelings.”). After all, the United States was a progressive and democratic country—the beacon of liberty. Regardless of their political preference, most Puerto Ricans felt optimistic that under the tutelage of the United States the route toward self-determination would clear rapidly. Thus, there was deep disappointment when the United States failed to improve on Spain’s despotic ways. See TORRUELLA, *supra*, at 119 (“Although autocratic action had come to be expected from Spain, such behavior, when coming from the United States, bitterly disappointed Puerto Rican expectations of American democratic traditions.”). This disappointment found different expressions, as discussed by Juan Torruella:

The Puerto Rican independence movement, even today, and in both its peaceful and violent phases, is a direct result of the legitimate frustration of Puerto Rico and Puerto Ricans with the colonial policies commencing with the Foraker Act. . . . As long as Puerto Rico is given separate and unequal treatment by the rest of the Nation, with such discrimination being sanctioned by all branches of government, including the judiciary, Puerto Rico’s U.S. citizenry will continue to feel alienated from its Mainland compatriots, and a glimmer of justification can be claimed by even those committing reprehensible acts of violence.

See *id.* at 133

³³ Organic Act of April 12, 1900, ch. 191, 31 Stat. 77, amended by Organic Act of 1917, ch. 145, 39 Stat. 951.

³⁴ Organic Act of April 12, 1900 §§ 17-30.

five Puerto Rican-born citizens.³⁵ The lower chamber was composed of elected citizens who could read and write English or Spanish and owned property.³⁶ The United States Congress was the supreme authority, since it could annul any law approved by the Puerto Rican legislature.³⁷ The Supreme Court of Puerto Rico was the highest judicial authority, but the President also appointed its members.³⁸

More importantly, the Foraker Act set forth the economic principles underlying the relationship between the United States and Puerto Rico.³⁹ One of the most controversial provisions of the Foraker Act was the tariff charged on "all merchandise coming into Puerto Rico from the United States."⁴⁰ Since the adoption of this provision presumably violated the United States Constitution,⁴¹ the provision became the battleground for differing views on American territorial policy. One school of thought, defended by Carman F. Randolph, argued that the Constitution followed the flag—"new territories could be acquired by conquest or cession, but only to be governed subject to the full limitations of the Constitution and solely with the purpose of eventually admitting them to the Union in equality with other states."⁴² A second school of thought, espoused by Dean Langdell of Harvard Law School, argued the opposite, "maintaining that the constitutional restrictions applied only to the States and not to the territories, for which reason Congress had the most untrammelled power legislation over the new dependencies."⁴³ A

³⁵ *Id.* § 18.

³⁶ *Id.* § 27.

³⁷ *Id.* § 31.

³⁸ *Id.* § 33.

³⁹ See García Passalacqua, *supra* note 28, at 596 (arguing that the Foraker Act had little to do with self-government and much to do with establishing the economic bases of the relationship between the United States and Puerto Rico, which have not been altered in a century). Many provisions of the Foraker Act have never been repealed. Instead, they were retained in the Federal Relations Act of 1950. See Puerto Rico Federal Relations Act, ch. 446, § 4, 64 Stat. 319 (1950) ("That all laws or parts of laws applicable to Puerto Rico not in conflict with any of the provisions of this Act, including the laws relating to tariff, customs, and duties on importations into Puerto Rico prescribed by the Act of Congress . . . approved [April 12, 1900] and hereby continued in effect . . .").

⁴⁰ *Id.* § 3.

⁴¹ See CABRANES, *supra* note 1, at 47 ("If the Court had decided that Puerto Rico was a territory of the United States equal in status to the incorporated territories of the American West, the imposition of duties on goods carried between the island and the continental United States would have been prohibited."); see also U.S. CONST. art. 1, § 8, cl. 1 ("[A]ll Duties, Imposts and Excises shall be uniform throughout the United States.")

⁴² Trías Monge, *supra* note 7, at 44; accord López Baralt, *supra* note 24, at 239. See generally Carman Randolph, *Constitutional Aspects of Annexation*, 12 Harv. L. Rev. 291 (1898) (examining the extent of the power of the United States federal government to annex lands in their military possession).

⁴³ LÓPEZ BARALT, *supra* note 24, at 238; accord TRÍAS MONGE, *supra* note 7, at 44. See generally C.C. Langdell, *The Status of Our New Territories*, 12 HARV. L. REV. 365, 376 (1899) (explaining why and how territories are different from states comprising the United States). Two types of protectionism drove this doctrine: economic protectionism, which feared the influx of products from the newly acquired territories, and racial protectionism, which was concerned with

third theory, defended by Abbott Lawrence Lowell, “went half way between the other two in a sort of compromise.”⁴⁴ Lowell argued that the Constitution:

allowed for two kinds of territories: those that were part of the United States and those that were not part of but were instead possessions of the United States. The Constitution did not extend completely to the latter, but there were certain provisions embodying certain rights that limited the otherwise plenary powers of Congress.⁴⁵

Final resolution of this dilemma rested on the shoulders of the United States Supreme Court. In the *Insular Cases*,⁴⁶ the Court declared that the tariff provision was constitutional because Puerto Rico was “a territory appurtenant and belonging to the United States, but not a part of the United States within the revenue clauses of the Constitution.”⁴⁷ To the detriment of freedom and self-determination, the Court gave judicial credence to the imperialist views in Congress and academia.⁴⁸ The tariff provision became the window through which Puerto Ricans discovered the naivete of their hope for American democracy.⁴⁹

the extension of American citizenship to peoples of a different race. TRIÁS MONGE, *supra* note 7, at 41; RONALD FERNÁNDEZ, *LA ISLA DESENCANTADA: PUERTO RICO Y LOS ESTADOS UNIDOS EN EL SIGLO XX* 30 (1996).

⁴⁴ López Baralt, *supra* note 24, at 239. See generally Abbot L. Lowell, *The Status of Our New Possessions—A Third View*, 13 Harv. L. Rev. 155 (1899) (arguing that possessions may be acquired so that they become a part of the United States, subject to all the general constitutional restrictions except those relating to the organization of the judiciary, or possessions may be acquired so that they do not form a part of the United States and are, therefore, not subject to constitutional limitations).

⁴⁵ TRIÁS MONGE, *supra* note 7, at 44-45.

⁴⁶ See, e.g., *González v. Williams*, 192 U.S. 1 (1904); *DeLima v. Bidwell*, 182 U.S. 1 (1901); *Downes v. Bidwell*, 182 U.S. 244 (1901); see also *infra* Part III.B.

⁴⁷ *Downes*, 182 U.S. at 287.

⁴⁸ One commentator has described the territorial policy at the time as follows:

Its fundamental tenets would be that the people of Puerto Rico were not ready for self-government; a learning period, of unspecified duration, was necessary before self-government could be extended; the eventual status should be neither statehood nor independence, but a self-governing dependency, subject to the plenary power of Congress; the learning process required a policy of political and cultural assimilation, which necessarily involved the extension of United States laws, institutions, and language to the island; and living conditions should be improved to the extent possible. This colonial policy, still incipient at that moment, would prove to be a hard one once it jelled. Parts of it still plague the relationship between the United States and Puerto Rico.

TRIÁS MONGE, *supra* note 7, at 38-39; Carlos I. Gorrín Peralta, *Historical Analysis of the Insular Cases: Colonial Constitutionalism Revisited*, 56 REV. COLEGIO ABOGADOS P.R. 31, 50 (1995) (“The anti-imperialist positions were ignored. The Jeffersonian attempt at equilibrium was abandoned. Colonialist constitutionalism was enthroned as the law of the land, and basic tenets of democracy, liberty and self-determination were set aside to serve the national self interest through the acquisition of new unincorporated territories.”); see also TORRUELLA, *supra* note 32, at 267 (“Relying on the dubious theories of the various academic ‘hawks,’ influenced, as was Congress, by an irrelevant ‘Philippine problem,’ the Court, by an exiguous majority of one vote, proceeded to invent a constitutional theory totally lacking in American historical or legal support . . .”).

⁴⁹ Luis Muñoz Rivera, leader of the Federal Party, a strong supporter of autonomy for Puerto Rico and one of the most prominent political leaders in the history of Puerto Rico, best

B. *The Jones Act Years (1917-1951)*

In 1917, the United States Congress enacted the Jones Act.⁵⁰ This Act contained very modest improvements over the Foraker Act in terms of self-government, but “retained the substance of colonial tutelage.”⁵¹ The Act granted United States citizenship to all “citizens of Puerto Rico,” as defined in the Foraker Act.⁵² This was merely a collective naturalization, however, and no provisions were included to make future Puerto Ricans born in the island United States citizens at birth.

Two major policy motivations drove the grant of United States citizenship under the Jones Act. First, there was the desire to differentiate Puerto Rico from the Philippines and Hawaii. The former was already being groomed for independence, while the latter was being groomed for statehood; in the case of Puerto Rico, however, Congress intended neither of those alternatives.⁵³ Through the con-

expressed this sentiment in a letter he wrote explaining why the Federalists would not participate in the holiday celebrating the American invasion: “Because we thought that an era of liberty was dawning and instead are witnessing a spectacle of terrible assimilation Because none of the promises made were kept and because our present condition is that of serfs attached to conquered territory.” TRIÁS MONGE, *supra* note 7, at 52 (quoting LUIS MUÑOZ RIVERA, *CAMPAÑAS POLÍTICAS* 279 (1925)). The policy of Americanizing Puerto Rico as fast as possible further compounded the disappointment. *Id.* at 55 (“The teaching in English of the whole public school curriculum started as soon as teachers became available. The situation was deeply resented by most segments of the population. It was not until the end of the forties, when Puerto Ricans took firm control of the education department and most public offices, that these practices were repealed . . .”). In 1904, the Federal Party was abolished and a new party, the Union Party, was formed. A month before forming the new Union Party, Muñoz Rivera issued the following manifesto:

You are nothing but slaves. You are ruled by a President that is elected without your vote. A Council appointed at the whim of the President legislates for you. You do not even effectively intervene in the approval of the taxes that weigh upon you. Such a shame would not be tolerated by . . . even the Patagonian tribes; such slavery would be undeserved if you manfully attempt to reject it, but it shall degrade you if you sheepishly accept it.

TRIÁS MONGE, *supra* note 7, at 59 (quoting I BOLÍVAR PAGÁN, *HISTORIA DE LOS PARTIDOS POLÍTICOS PUERTORRIQUEÑOS, 1898-1956*, at 99-102 (1959)). Not surprisingly, the Union Party became the first party to officially mention independence as a legitimate form of self-government. *Id.*

⁵⁰ See Organic Act of 1917, *amended by* Puerto Rican Federal Relations Act, ch. 446, § 464 Stat. 319 (codified as amended at 48 U.S.C. §§ 731-894 (1995)).

⁵¹ MORALES CARRIÓN, *supra* note 23, at 200. The Jones Act instituted an elective Senate, but one that found itself subject to the veto not only of the Governor, but ultimately of the United States Congress. The Senate was given the power to approve the appointments of most of the department heads, although for many years no Puerto Rican occupied such positions. See Organic Act of 1917 §§ 25-39. A bill of rights was also provided, albeit a limited one. See *id.* § 2; see also MORALES CARRIÓN, *supra*, at 200; 2 JOSÉ TRIÁS MONGE, *HISTORIA CONSTITUCIONAL DE PUERTO RICO* 88-105 (1981).

⁵² Organic Act of 1917 § 5. The Foraker Act had provided that all the inhabitants of Puerto Rico were “citizens of Porto Rico, and as such entitled to the protection of the United States” Organic Act of April 12, 1900 § 7.

⁵³ See TORRUELLA, *supra* note 32, at 85 (“Two basic undercurrents were perceptible throughout the political period: first, that Puerto Rico and the Puerto Ricans were to be treated differ-

ferment of citizenship, the United States was proclaiming "the future of Puerto Rico to be something other than national independence,"⁵⁴ while denying that citizenship entailed an immediate eventual offer of statehood.

World War I was the other policy motivation. The need to establish a safe and stable base of operations in the Caribbean became acute⁵⁵—a concern reflected in the purchase of the Danish West Indies (currently known as the United States Virgin Islands) and the conferment of citizenship to its inhabitants.⁵⁶ In his message to Congress on December 5, 1916, President Woodrow Wilson explained that there was "uneasiness among the people of [Puerto Rico] and even a suspicious doubt with regard to our intentions concerning them which the adoption of the pending measure would happily remove . . ."⁵⁷ Thus, the fear of dissent and disloyalty were pivotal in pressuring the United States to give Puerto Ricans citizenship.⁵⁸ The

ently from the Philippine Islands and the Filipinos; and second, that Puerto Rico was destined to remain permanently a part of the United States."); TRÍAS MONGE, *supra* note 7, at 76 ("The Jones Act reaffirmed instead the decision to keep Puerto Rico as an increasingly Americanized colony, on the road to self-government, but always to be securely subject to the sovereignty of the United States.").

⁵⁴ CABRANES, *supra* note 1, at 6. This unequivocal decision to preserve American sovereignty over Puerto Rico was intimately linked with its military interests. GARCÍA PASSALACQUA, *supra* note 23, at 76; *see also* TRÍAS MONGE, *supra* note 7, at 65 ("I believe it is idle to consider or to discuss any future for the people of Porto Rico as separated from the United States.") (quoting 1913 SECRETARY OF WAR ANN. REP. 41); *id.* at 119 ("Puerto Rico was to be held instead in perpetuity, or as long as needed, firmly under the control of Congress, as a useful guardian of eastern access to the Panama Canal, a key part of the security system for the Caribbean area . . ."). America's military interest in the Caribbean antedates the Declaration of Independence, *see* TRÍAS MONGE, *supra* note 7 at 21, and increased under the influence of Alfred Thayer Mahan, who greatly influenced President Theodore Roosevelt. *See generally* A. T. MAHAN, THE INFLUENCE OF SEA POWER UPON HISTORY, 1660-1783 (1914) (arguing that naval power was the key to national greatness and that United States security required full dominion of both the Caribbean Sea and the Pacific Ocean around Hawaii). *See generally* GARCÍA PASSALACQUA, *supra* note 23, at 75 ("Our island was considered essential for the control of two of the most important maritime passages controlling the entrance into the Caribbean Sea and the Gulf of Mexico . . .") (author's translation). During the Cold War, Puerto Rico and the Caribbean were considered national security issues and public policy was established through that prism. *Id.* at 80-82.

⁵⁵ By 1914, the Navy feared German interventions in the Caribbean, prompting the United States to establish their primary Caribbean naval base in Puerto Rico. *Id.* at 77; *see also* MORALES CARRIÓN, *supra* note 23, at 197 ("After the outbreak of World War I, there was great fear that the Germans would secure a coaling station in Haiti and would take advantage of the European upheaval to absorb Denmark and obtain legal title to the Danish West Indies.").

⁵⁶ *See* MORALES CARRIÓN, *supra* note 23, at 198 ("The treaty [of purchase] was signed on August 4, 1916, and presented to Congress as a way of thwarting German ambitions in the Caribbean. Under Article VI, the inhabitants who did not declare within a year their intention to preserve their citizenship in Denmark were held to have renounced it and to have accepted American citizenship."); *accord* GARCÍA PASSALACQUA, *supra* note 23, at 77.

⁵⁷ MORALES CARRIÓN, *supra* note 23, at 198 (quoting 3 THE STATE OF THE UNION MESSAGES OF THE PRESIDENTS, 1790-1966, at 2578-79 (Fred L. Israel ed. 1966)).

⁵⁸ Some commentators have argued that the grant of citizenship to Puerto Ricans was designed to conscript them for service in World War I. *See, e.g.,* MANUEL MALDONADO-DENIS, PUERTO RICO: A SOCIO-HISTORIC INTERPRETATION (1972). United States citizenship is not a

United States was unequivocally signaling its intention to retain sovereignty over Puerto Rico.

The grant of citizenship did not reflect a congressional intent to augment personal rights or facilitate incorporation into the United States.⁵⁹ At this stage the Supreme Court again intervened, lending judicial backing to the theory that the grant of United States citizenship did not entail incorporation into the United States⁶⁰ and added no new rights to those already granted to Puerto Ricans under the Foraker and Jones Act.⁶¹ While the United States reaffirmed its sovereignty over Puerto Rico, Puerto Ricans remained in political limbo and the much-heralded United States citizenship appeared worthless.

C. *The Commonwealth Years*

Subsequently, both the citizenship condition of Puerto Ricans and the political status of the Island changed.⁶² The Immigration and Na-

requirement for conscription, however. CABRANES, *supra* note 1, at 16. Aliens were subject to the draft during the Civil War, the Spanish-American War, and World War I. *Id.* at 16 (quoting Civil War Conscription Act of 1863, ch. 75, § 1, 12 Stat. 731 (1863); Spanish American War Act of 1898, ch. 187, § 1, 30 Stat. 361 (1898); Act of May 18, 1917, ch. 15, § 2, 40 Stat. 76 (1917)). As nationals of the United States, *see* *Gonzalez v. Williams*, 192 U.S. 1, 13 (1904), "Puerto Ricans would have been subject to conscription into military service even if they had remained 'citizens of Puerto Rico.'" CABRANES, *supra* note 1, at 16.

At least one commentator has argued that the military concerns went beyond fear of disloyalty and extended to concerns about a possible German invasion of Puerto Rico. *See* Juan M. García Passalacqua, *¿Imposición o Préstamo?: La Cuidadanía Norteamericana de 1917*, 28 REV. JUR. U. INTERAMERICANA P.R. 225, 231-33 (1994) (arguing that only with the conferment of citizenship to the inhabitants of Puerto Rico did the United States strengthen and firmly establish its sovereignty in the Caribbean and forestall a German invasion into American "sovereign" territory).

⁵⁹ The citizenship provision of the Jones Act in 1917, partly because a similar bill had been introduced in each Congress following the enactment of the Foraker Act, produced little debate and neither the Senate nor House report devoted any particular attention to it. CABRANES, *supra* note 1, at 81. Yet, "[t]he legislative record concerning proposals for conferring American citizenship upon the Puerto Ricans in the years after the Foraker Act and the *Insular Cases* suggests that those concerned with the subject understood that American citizenship would yield little or nothing in the way of personal rights and liberties for the inhabitants of Puerto Rico." *Id.* at 51; *see also id.* at 71-72 (noting that the Senate Report on the 1913 citizenship bill "rejected the notion that citizenship would involve 'the right to participate in the government [or] affect in any particular the question of statehood'").

⁶⁰ *Balzac v. Porto Rico*, 258 U.S. 298, 306 (1922).

⁶¹ *Id.* at 308. *See also infra* notes 144-47 and accompanying text.

⁶² From the enactment of the Jones Act in 1917 to the establishment of the Commonwealth in 1952, the constitutional relationship between the United States and Puerto Rico remained unaltered. Important changes took place, however, in the economic, social, and political scene. In the years immediately following the Jones Act, "cracks appeared in the old colonial policy," including the independence of the Philippines, the failure of the Americanization policy, the constant Puerto Rican requests for more self-government, and the need to repress the nascent nationalist movement. TRIAS MONGE, *supra* note 7, at 86. These cracks expanded in the 1930's. "After forty years of United States rule, the economy of the island was in shambles, little better than at the end of the nineteenth century." *Id.* at 98. The island, in fact, had become "little more than a plantation." *Id.* at 86. The economic stagnation compounded with political explosiveness, and "the regime became more impatient and repressive with the believers in inde-

tionality Act of 1952 made every person born in Puerto Rico a citizen of the United States at birth.⁶³ Thus, Puerto Ricans no longer depended on the naturalization grant of the Jones Act.

In the political arena, the Commonwealth of Puerto Rico⁶⁴ was established in 1952.⁶⁵ Under this political arrangement, Puerto Ricans

pendence." *Id.* at 88. In this context, Pedro Albizu Campos, "long to be remembered in Puerto Rican history as the heir to the nineteenth-century revolutionary tradition represented by exiled Puerto Rican independence leaders, became president of the old Nationalist party" *Id.* at 92. See also JAMES L. DIETZ, *HISTORIA ECONÓMICA DE PUERTO RICO* 180 (1989) ("The Nationalist program followed the nationalist and populist tradition of Latin America It rejected foreign control over Puerto Rican resources, labor, and politics in favor of native power.") (author's translation). See generally DIETZ, *supra*, at 154 ("In general terms, the legitimacy of the United States control over Puerto Rico was being questioned by an ample spectrum of society as a result of the economic collapse.") (author's translation); TORRUELLA, *supra* note 32, at 121 (arguing that Balzac, along with the "abrasive suprapatriotism" of Governor Reilly "ignited the creation of the Nationalist Party" in 1922).

The economic situation also changed dramatically. Through Operation Bootstrap, an industrialization program developed by Teodoro Moscoso and Luis Muñoz Marín, Puerto Rico left behind its days as "little more than a plantation" and experienced "a remarkable economic transformation." MALDONADO, *supra* note 6, at xii. From a "centuries-old rural-agricultural country with all its traditional socioeconomic characteristics, within a generation and within a democratic framework, Puerto Rico became a modern urban-industrial society. In practically all economic and social indices—from pre capita income to life expectancy—Puerto Rico joined the ranks of the 'developed countries' of the world." *Id.* See also DIETZ, *supra*, at 198. See generally DIETZ, *supra*, at 262 (showing GNP increased from \$754.5 million in 1950 to \$4,687.5 million in 1970 and GNP per capita increased from \$342 million in 1950 to \$1,729 million in 1970). The industrialization program had two stages. From 1941 to 1949, the government undertook agrarian reform, infrastructure development, and limited industrialization through government-owned enterprises. DIETZ, *supra*, at 203. From 1945 to 1953 the agrarian reform and agriculture in general received less attention, the government-owned enterprises were privatized, and private capital-based industrialization (Operation Bootstrap) began. *Id.* at 203-04. "In both stages, however, the planning and promoting activities set forth by the government constituted the driving force for change." *Id.* at 204 (author's translation). Aside from the efforts by Puerto Rican leaders, the success of Operation Bootstrap was linked to the demand for manufacturing during World War II, the ensuing economic boom, and the grant of federal tax incentives.

⁶³ Immigration and Nationality Act of 1952, 8 U.S.C. § 1402 (1994) ("[A]ll persons born in Puerto Rico on or after January 13, 1941, and subject to the jurisdiction of the United States, are citizens of the United States at birth.").

⁶⁴ The body politic created under the Puerto Rico constitution was the *Estado Libre Asociado de Puerto Rico*, which literally translates into "Free Associated State of Puerto Rico." In English, however, it is officially called the "Commonwealth of Puerto Rico." Resolution No. 22 of the Constitutional Convention: "To determine in Spanish and in English the name of the body politic created by the Constitution of the people of Puerto Rico." Constituent Assemb. R. 22, Plenary Sess. (P.R. 1952), reprinted in 1 P.R. LAWS ANN., at 135-36 (1999) [hereinafter Resolution No. 22]. Resolution No. 22 explains that the expression "*estado libre asociado*" should "not be rendered 'associated free state' in English inasmuch as the word 'state' in ordinary speech in the United States means one of the States of the Union . . ." *Id.* But see MORALES CARRIÓN, *supra* note 23, at 277-78 (explaining that the translation was made to "allay fears that Puerto Rico was asking for statehood"); TRÍAS MONGE, *supra* note 7, at 114 (arguing that "'Estado Libre Asociado de Puerto Rico' . . . should have been translated 'Free Associated State of Puerto Rico,' but was instead dubbed, by convoluted and misleading interpretation of the Spanish terms, the Commonwealth of Puerto Rico").

⁶⁵ The process to establish the Commonwealth started with Public Law 600, which was adopted "in the nature of a compact so that the people of Puerto Rico may organize a government pursuant to a constitution of their own adoption." Act of July 3, 1950, ch. 446, § 1, 64

drafted their own constitution⁶⁶ and acquired, in the words of President Harry Truman, "full authority and responsibility for local self-government."⁶⁷ Contrary to the two previous organic acts—the Foraker Act and the Jones Act—the constitution was not the work of Congress, but the work of the people of Puerto Rico. Finally, "We, the people of Puerto Rico"⁶⁸ were taking control over their destiny.

The effects of this change on the *constitutional* relationship between the United States and Puerto Rico have never been fully defined and have been subject to endless discussion. Many commentators argue that the Commonwealth arrangement was based on a bilateral pact between the United States and Puerto Rico unalterable except by mutual consent; it constituted an irrevocable grant of sovereignty from the United States to Puerto Rico; and it represented a new status for Puerto Rico *vis-à-vis* the United States.⁶⁹ The state-

Stat. 319. The Act was submitted for approval to the people of Puerto Rico in a referendum and upon approval of the referendum, the Legislature of Puerto Rico was authorized to call a constitutional convention. *Id.* § 2. Once the constitution was effective, Public Law 600 re-named the Jones Act as the Puerto Rican Federal Relations Act and provided for the repeal of certain provisions. *Id.* §§ 4, 5. The people of Puerto Rico approved the Act by a vote of 387,016 to 119,169. The Popular Democratic Party had seventy delegates, out of ninety-two, in the constitutional convention. MORALES CARRIÓN, *supra* note 23, at 277; *see* TRÍAS MONGE, *supra* note 7, at 113-14.

The constitutional convention met from September 17, 1951 to February 6, 1952 and submitted the constitution to a referendum on March 3, 1952. TRÍAS MONGE, *supra* note 7, at 114-15. The constitution was approved by a vote of 373,594 to 82,877 and was subsequently delivered to President Harry Truman, who transmitted it to Congress on April 22, 1952. MORALES CARRIÓN, *supra* note 23, at 278. Congress approved the Constitution, subject to two amendments that were later approved by the constitutional convention. TRÍAS MONGE, *supra* note 7, at 117-18. The Commonwealth of Puerto Rico officially came into being on July 25, 1952—not coincidentally, the same date that marked the American invasion in 1898.

⁶⁶ Jose Trías Monge described the Puerto Rico constitution as follows:

The constitution followed the main lines of a typical state constitution, with some interesting innovations. The bill of rights, largely patterned after the Universal Declaration of Rights approved by the United Nations and the American Declaration of the Rights and Duties of Man, approved at Bogotá by the Organization of American States, was generally broader than the usual state constitution, a fact that created problems when the constitution was considered by Congress. The article dealing with the legislative power also had a striking provision. As the Popular Democratic party had proved to be so powerful at the polls and the minority parties had been able to elect only a token number of legislative representatives, the PDP delegates themselves requested a device to ensure that, no matter how many votes were polled by the majority party, the minority parties would together always be able to elect at least one-third of the members of each chamber. The article dealing with the judicial power was also innovative, and the constitution of Puerto Rico became the second constitution within the United States (after that of New Jersey) to provide for full unification of its court system.

TRÍAS MONGE, *supra* note 7, at 114; *see also* MORALES CARRIÓN, *supra* note 23, at 277 ("The result was a very progressive and widely praised document which asserted Puerto Rico's natural rights and its commitment to the democratic system and human rights, as well as its loyalty to the principles of the federal Constitution and the idea of a compact."). The fact that the constitution had to be approved by Congress, however, "had a dampening effect on the efforts to break new ground." TRÍAS MONGE, *supra* note 7, at 114.

⁶⁷ H.R. DOC. NO. 82-435, at 4 (1952).

⁶⁸ P.R. CONST. pmb1.

⁶⁹ *See generally* MORALES CARRIÓN, *supra* note 23, at 279-80 (describing the popular view in

ments of the United States before the United Nations in 1953⁷⁰ and a series of court decisions⁷¹ seem to support this position.

Others commentators have pointed out, however, that the creation of the Commonwealth did not alter Puerto Rico's condition as an unincorporated territory of the United States.⁷² The legislative record⁷³ and a different series of court decisions⁷⁴ support this position.

Puerto Rico that the "compact" ended the colonial relationship and began a "new federal relationship"); ANTONIO FERNÓS ISERN, *ESTADO LIBRE ASOCIADO DE PUERTO RICO* 81-195 (1974); JOSE TRÍAS MONGE, *HISTORIA CONSTITUCIONAL DE PUERTO RICO* 40-59 (1982).

⁷⁰ See SENATE COMM. ON FOREIGN AFFAIRS, 83D CONG., REPORT BY HON. FRANCES P. BOLTON AND HON. JAMES P. RICHARDS ON THE EIGHTH SESSION OF THE GENERAL ASSEMBLY OF THE UNITED NATIONS 241 (U.S. Gov't Printing Office 1954) ("It would be wrong, however, to hold that . . . the creation of the Commonwealth of Puerto Rico does not signify a fundamental change in the status of Puerto Rico.") quoted in TRÍAS MONGE, *supra* note 7, at 123.

⁷¹ See *Rodríguez v. Popular Democratic Party*, 457 U.S. 1, 8 (1982) ("Puerto Rico, like a state, is an autonomous political entity, 'sovereign over matters not ruled by the Constitution.'" (quoting *Caldero-Taledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 673 (1974)); *Cordova & Simonpietri Ins. Agency Inc. v. Chase Manhattan Bank*, 649 F.2d 36, 41 (1st Cir. 1981) ("Puerto Rico's status changed from that of a mere territory to the unique status of Commonwealth. And the federal government's relations with Puerto Rico changed from being bounded merely by the territorial clause . . ."); *Mora v. Torres*, 113 F. Supp. 309, 313-14 (D.P.R. 1953) (concluding that a new relationship was established between Puerto Rico and the United States when, as a result of the enactment of Public Law 600, Congress could no longer exercise plenary jurisdiction over the Island). But see TORRUELLA, *supra* note 32, at 162 ("A reading of that opinion [*Mora v. Torres*] shows that the findings regarding [Public Law 600] and Puerto Rico's status were totally unnecessary to a ruling of the case, and are at best *dicta*.").

⁷² See TORRUELLA, *supra* note 32, at 193 ("[T]he early cases in which the so-called 'irrevocable compact' theory was expounded have not been followed by any of the appellate courts."); *id.* at 194 ("Although no appellate court has ruled that Congress' plenary power to legislate *intra*-Puerto Rico has ceased, several have in fact intimated that such power has continued post-Commonwealth . . . Furthermore, *it is the existence of such plenary power in Congress that determines the real status of Puerto Rico*, and not the title given to the political entity or the granting of internal autonomy."); David Helfeld, *Congressional Intent and Attitude Toward Public Law 600 and the Constitution of the Commonwealth of Puerto Rico*, 21 REV. JUR. U.P.R. 255, 314 (1952) ("In Constitutional theory, Congress continues to possess plenary authority over Puerto Rico which, in status if not in title, remains a territory."); Helfeld, *supra* note 16, at 103 ("However Commonwealth status may be defined it remains 'unincorporated' in a constitutional sense."); see also José Trías Monge, *El Estado Libre Asociado Ante los Tribunales, 1952-1994*, 64 REV. JUR. U.P.R. 1, 41 (1995) ("The nature, extent, and even the existence of a true compact, amendable only by mutual consent, have not been determined precisely.") (author's translation).

⁷³ See *Hearings on H.R. 7674 and S. 3336, To Provide for the Organization of a Constitutional Government by the People of Puerto Rico Before the Committee on Public Lands*, 81st Cong. 33 (1950) (statement of Governor Luis Muñoz Marín) ("You know, of course, that if the people of Puerto Rico should go crazy, Congress can always get around and legislate again."); *id.* at 43 (statement of Edward Millar, Assistant Sec'y of State for Inter-Am. Affairs) (explaining that there would be no change in Puerto Rico's "political, social and economic relationship" to the United States); *Hearings Before the Senate Committee on Interior and Insular Affairs on S.J. Res. 151*, 82d Cong. 43-44 (1952) (statement of Irwin Silverman, Chief Counsel, Office of Territories, Dep't of the Interior) ("We now solemnly enter into a compact with the people of Puerto Rico. It would be in the nature of contractual obligations. It is our hope and it is the hope of Government, I think, not to interfere with that relationship but nevertheless the basic power inherent in the Congress of the United States, which no one can take away, is in the Congress as provided for in article IV, section 3 of the Constitution of the United States."); S. REP. NO. 1779, at 3 (1950) ("The measure would not change Puerto Rico's fundamental political, social, and economic relationship to the United States.").

⁷⁴ See *Harris v. Rosario*, 446 U.S. 651, 651-52 (1980) ("Congress, which is empowered under

This debate has been going on since 1952, and while most Puerto Ricans admit that some change is necessary, the efforts have been unsuccessful.⁷⁵ Puerto Ricans, then, remain with a fifty-nine year-old Commonwealth that even its supporters wish to change, and a second-class citizenship and political condition that have remained unaltered for the last eighty-three years.

II. *IGARTÚA DE LA ROSA V. UNITED STATES*: THE CASE THAT (BRIEFLY) GAVE PUERTO RICANS THE RIGHT TO VOTE FOR PRESIDENT AND VICE PRESIDENT OF THE UNITED STATES

In *Igartúa de la Rosa v. United States (Igartúa I)*,⁷⁶ a group of residents of Puerto Rico claimed that their inability to vote for the President and Vice President of the United States violated their constitutional rights.⁷⁷ The district court dismissed the suit for failure to state a claim upon which relief can be granted.⁷⁸ The court cited *Sánchez v. United States*,⁷⁹ involving a similar constitutional challenge, and held that the Constitution did not grant citizens the right to vote, leaving the matter “entirely to the States.”⁸⁰ The court also cited *Attorney General of the Territory of Guam v. United States*,⁸¹ where the court rejected a similar challenge by residents of Guam.⁸² In that case, the Court of Appeals for the Ninth Circuit likewise concluded that the Constitution did not grant American citizens the right to elect the President.⁸³ Based on this jurisprudence, the Court in *Igartúa I* concluded that “granting U.S. citizens residing in Puerto Rico the right to vote in presidential elections would require either that Puerto Rico become a

the Territory Clause of the Constitution . . . to ‘make all needful Rules and Regulations respecting the Territory . . . belonging to the United States,’ may treat Puerto Rico differently from States so long as there is a rational basis for its actions.”); *Dávila-Pérez v. Lockheed Martin Corp.*, 202 F.3d 464, 468 (1st Cir. 2000) (Puerto Rico is “still subject to the plenary powers of Congress under the territorial clause.”); *Detres v. Lions Bldg. Corp.*, 234 F.2d 596, 600 (7th Cir. 1956) (“The mere change of the name of Puerto Rico to the Commonwealth of Puerto Rico did not change Puerto Rico from a territory to a commonwealth unless its form of government was so changed as to actually make it a commonwealth.”).

⁷⁵ See *TRÍAS MONGE*, *supra* note 7, at 124 (“Puerto Rico leaders would spend the rest of the [twentieth] century unsuccessfully trying to convince the United States to allow full decolonization.”); see also *TORRUELLA*, *supra* note 32, at 194 (discussing the attempts since 1952 to “culminate” the Commonwealth’s development).

⁷⁶ 842 F. Supp. 607 (D.P.R. 1994), *aff’d*, 32 F.3d 8 (1st Cir. 1994).

⁷⁷ *Id.* at 608.

⁷⁸ *Id.*

⁷⁹ 376 F. Supp. 239 (D.P.R. 1974).

⁸⁰ See *Igartúa I*, 842 F. Supp. at 608 (quoting *Sánchez*, 376 F. Supp. at 241).

⁸¹ 738 F.2d 1017 (9th Cir. 1984).

⁸² See *Igartúa I*, 842 F. Supp. at 609 (quoting *Att’y Gen. of the Terr. of Guam*, 738 F.2d at 1019).

⁸³ *Att’y Gen. of the Terr. of Guam*, 738 F.2d at 1019 (“The right to vote in presidential elections under Article II inheres not in citizens but in states.”).

state, or that a constitutional amendment, similar to the Twenty-Third Amendment, be adopted.”⁸⁴

The Court of Appeals for the First Circuit affirmed the district court’s dismissal of the claims.⁸⁵ The court held that pursuant to Article II of the Constitution,⁸⁶ “only citizens residing in *states* can vote for electors and thereby indirectly for the President.”⁸⁷ Only a constitutional amendment or a grant of statehood could provide the residents of Puerto Rico the right to vote in the presidential election.⁸⁸

Six years later, the same group of residents of Puerto Rico brought suit claiming their right to vote in presidential elections because, as United States citizens, they were “vested with the inherent power to vote for those who represent them.”⁸⁹ The court distinguished this case from *Igartúa I*, explaining that while *Igartúa I* “centered on Plaintiff’s inability to vote for the President and Vice President, the instant case revolves around their inability to elect delegates to the electoral college.”⁹⁰ This time, the district court agreed with the plaintiffs, finding that United States citizens residing in Puerto Rico had the right to vote in presidential elections and ordered the Puerto Rico government to create the mechanisms to enable the voting.⁹¹

The *Igartúa II* court presented a set of rationales to sustain its holding. First, the court found that a United States citizen’s right to vote in presidential elections was not derived from Article II of the Constitution,⁹² but from “the principles entrenched in the Bill of Rights.”⁹³ Article II, the court explained, dealt with a question of federalism and did not bestow any right.⁹⁴ Second, the court explained

⁸⁴ 842 F. Supp. at 609. See generally U.S. CONST. amend. XXIII, § 1 (“The District constituting the seat of Government of the United States shall appoint in such manner as the Congress may direct: A number of electors of President and Vice President equal to the whole number of Senators and Representatives in Congress to which the District would be entitled if it were a State, but in no event more than the least populous State . . .”).

⁸⁵ *Igartúa de la Rosa v. United States (Igartúa I)*, 32 F.3d 8, 11 (1st Cir. 1994).

⁸⁶ U.S. CONST. art II, § 1, cl. 2 (“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 . . .”).

⁸⁷ *Igartúa I*, 32 F.3d at 9.

⁸⁸ *Id.* at 10.

⁸⁹ *Igartúa de la Rosa v. United States*, 107 F. Supp. 2d 140, 141 (D.P.R. 2000) (denying the government’s motion to dismiss the suit), *aff’d*, *Igartúa de la Rosa v. United States*, 113 F. Supp. 2d 228, 230 (D.P.R. 2000). As noted previously, these cases will be collectively referred to as *Igartúa II*.

⁹⁰ *Igartúa II*, 107 F. Supp. 2d at 145.

⁹¹ *Igartúa II*, 113 F. Supp. 2d at 229.

⁹² See U.S. CONST. art. II, § 1, cl. 2 (“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: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.”).

⁹³ *Igartúa II*, 113 F. Supp. 2d at 232.

⁹⁴ *Id.* (citing THE FEDERALIST NO. 39 (James Madison) (“The ‘difference between a federal

that the Supreme Court already recognized the right to vote as a national right guaranteed by the First Amendment and the Due Process and Equal Protection Clauses of the Constitution.⁹⁵ Thus, the *Igartúa II* court concluded that even if Article II is stricken from the Constitution, there would still be a right to vote for the President.⁹⁶ Finally, the court held that the use of the word “state” in the Constitution is not limited to the fifty states.⁹⁷ The Constitution “preexists the territorial relationship between Puerto Rico and the United States,”⁹⁸ and at the time of the ratification, “the only political subdivisions capable of conducting national elections were the States.”⁹⁹ The court also pointed out that the word “state” in the Constitution “has evolved in understanding and meaning.”¹⁰⁰

Without addressing any of the issues listed above, the United States Court of Appeals for the First Circuit reversed.¹⁰¹ The First Circuit noted that *Igartúa I*, where it had declared that the residents of Puerto Rico had no constitutional right to participate in Presidential elections presented an identical case and constituted binding authority.¹⁰² In *Igartúa I*, the court relied heavily on *Attorney General of the Territory of Guam v. United States*.¹⁰³ As discussed earlier, in that case, the Court of Appeals for the Ninth Circuit concluded that the United States citizens of Guam could not vote in presidential election because Guam was not a state and, therefore, could not have electors.¹⁰⁴

and national government, as it relates to the *operation of the government* . . . [is] that in the former the powers operate on the political bodies composing the Confederacy in their political capacities; in the latter, on the individual citizens composing the nation in their individual capacities. On trying the Constitution by this criterion, it falls under the national not the federal character.”) (alteration in original)).

⁹⁵ *Id.* (citing *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972)); see *Anderson v. Celebrezze*, 460 U.S. 780, 794-95 (1983) (stating that state-imposed restrictions on the election of the President and Vice President implicate “a uniquely important national interest [since they] are the only elected officials who represent all the voters in the Nation”); see *Bullock v. Carter*, 405 U.S. 134 (1972) (holding that the right to vote invokes the protection of the Equal Protection Clause).

⁹⁶ *Igartúa II*, 133 F. Supp. 2d at 232.

⁹⁷ *Id.* at 234-35 (“[T]he use of the term State in Article II does not mean that the United States citizens of the territories could not cast their ballots in Presidential elections. The Article is the product of its time.”).

⁹⁸ *Id.* at 234.

⁹⁹ *Id.* at 234 (citing *United States Term Limits, Inc. v. Thornton*, 514 U.S. 779, 803 (1995)) (arguing that “[t]he Framers envisioned a uniform national system, rejecting the notion that the Nation was a collection of States, and instead creating a direct link between the National Government and the people of the States”).

¹⁰⁰ *Id.* at 235 (“Congress was not precluded from extending diversity of citizenship jurisdiction from applying to Puerto Rico despite that Article III of the Constitution vests federal courts with the jurisdiction to hear suits ‘between Citizens of different States.’”).

¹⁰¹ *Igartúa de la Rosa v. United States (Igartúa II)*, 229 F.3d 80 (1st Cir. 2000).

¹⁰² *Id.* at 83. The only difference between *Igartúa I* and *Igartúa II* was that in the former the plaintiffs were seeking to vote for the President, while in the latter they were seeking to vote for the electors that choose the President. The court held this distinction as insignificant. *Igartúa II*, 229 F.3d at 84.

¹⁰³ 738 F.2d at 1017, 1019 (9th Cir. 1984).

¹⁰⁴ *Id.* at 1019.

Noting that Puerto Rico still was not a state, the court found no reason to steer away from its precedent.¹⁰⁵

After six years of legal arguments, the courts of the United States have repeatedly rejected the contention that the citizens of the territories have a right to vote in presidential elections. Under the banner of *stare decisis*, the courts have refused to give the issue more than a glance and, in the case of *Igartúa II*, completely ignored a set of new arguments presented by the district court. Two questions, specifically, have been left unanswered. First, whether the modern jurisprudence of the Supreme Court declaring the right to vote in presidential elections a "fundamental right protected by the Constitution" has altered the concept of the right to vote. Second, whether the word "state" in Article II can be interpreted to include the territories. Underlying the first question is the general confusion in American jurisprudence over the status of the right to vote within constitutional law. Underlying the second question is the need to re-evaluate the way the United States views the status of their territories in the contemporary constitutional framework.

III. THE UNITED STATES CITIZENSHIP OF PUERTO RICANS: AN OBSTACLE TO *IGARTÚA II*'S ALLEGED RIGHT TO VOTE IN PRESIDENTIAL ELECTIONS?

According to the district court in *Igartúa II*, the right to vote is "a function of citizenship."¹⁰⁶ This statement prompts a question never considered by the Court: Do Puerto Ricans possess the same United States citizenship as those born or naturalized in the United States under the Fourteenth Amendment? Or do they possess a second-class citizenship that makes them ineligible to enjoy the right to vote for the President espoused by the court in *Igartúa II*?

The answers to these questions start with the remarkable fact that "the concept of citizenship plays only the most minimal role in the American constitutional scheme."¹⁰⁷ The Constitution gives Congress the power to establish a "uniform Rule of Naturalization,"¹⁰⁸ which has been interpreted to give Congress *exclusive* power.¹⁰⁹ Before the

¹⁰⁵ See *Igartúa II*, 229 F.3d at 84-85.

¹⁰⁶ *Igartúa II*, 107 F. Supp. 2d at 145.

¹⁰⁷ T. ALEXANDER ALEINIKOFF, BETWEEN PRINCIPLES AND POLITICS: THE DIRECTION OF U.S. CITIZENSHIP POLICY 42 (1998) (quoting ALEXANDER BICKEL, THE MORALITY OF CONSENT 33 (1975)); see also CABRANES, *supra* note 1, at 5 n.12 ("Citizenship had not been defined in the original Constitution and, as the late Professor Alexander M. Bickel reminded us, that Constitution 'presented the edifying picture of a government that bestowed rights on people and persons, and held itself out as bound by certain standards of conduct in its relations with people and persons, not with some legal construct called citizen.'").

¹⁰⁸ U.S. CONST. art. I, § 8, cl. 4 ("To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States.").

¹⁰⁹ *Chirac v. Chirac*, 15 U.S. 259, 269 (2 Wheat.) (1817); see also 1 WILLOUGHBY, *supra* note 30, at 280-81 (1910) (describing it as "a full complete power on the part of Congress to provide for

adoption of the Fourteenth Amendment, United States citizenship, except in cases of naturalization, was viewed as “subordinate to and derived from state citizenship.”¹¹⁰ After the Fourteenth Amendment, however, national citizenship became “primary and paramount to state citizenship”¹¹¹ through the principle of *jus soli*.¹¹²

A. *Are Puerto Ricans Constitutional or Statutory
Citizens of the United States?*¹¹³

Whether Puerto Ricans are United States citizens under the Fourteenth Amendment should not make any difference in their claim to the right to vote, as suggested by *Igartúa II*. In a series of early citizenship cases, the Court declared that a naturalized citizen became a “member of society, possessing all the rights of a native citizen.”¹¹⁴ This conclusion was confirmed in *Afroyim v. Rusk*,¹¹⁵ where the Court cited dictum from *Osborn v. Bank of the United States*,¹¹⁶ declaring that a naturalized citizen had all the rights of a native citizen.¹¹⁷

Four years later the Supreme Court reversed course, however, declining to extend the principles of *Afroyim* to citizenship based upon the Fourteenth Amendment.¹¹⁸ In *Rogers v. Bellei*, the Court found that the plaintiff—who was born in Italy and whose mother was a native-born citizen of the United States—was not a Fourteenth Amendment citizen because he was not naturalized “in the United States.”¹¹⁹ Non-Fourteenth Amendment citizens, the Court further declared, were “necessarily left to proper congressional action”¹²⁰ and were sub-

the creation of federal citizens by the naturalization of persons of foreign birth”).

¹¹⁰ GETTYS, *supra* note 30, at 3 (citing C.K. BURDICK, *THE LAW OF AMERICAN CONSTITUTION* 318, 322 (1922)).

¹¹¹ *Id.* at 4.

¹¹² ALEINIKOFF, *supra* note 108, at 8. There are two basic principles of citizenship: *jus soli* (literally, right of the soil) and *jus sanguinis* (literally, right of blood). “Under *jus soli* a person is a citizen of the territory in which he or she is born; under the principle of *jus sanguinis*, citizenship is based on descent.” *Id.* at 7. The United States applies the *jus sanguinis* principles to children born to United States citizens outside its territories. *Id.* at 14.

¹¹³ Those born in the United States become citizens of the United States pursuant to the Fourteenth Amendment. U.S. CONST. amend. 14, § 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.”). The issues in this section are whether Puerto Ricans become citizens under this constitutional provision or if their citizenship is dependent on a statutory grant, specifically the Immigration and Nationality Act of 1952 § 302, 8 U.S.C. § 1402 (1994), and how this could affect their alleged right to vote in presidential elections under *Igartúa II*.

¹¹⁴ *United States v. Wong Kim Ark*, 169 U.S. 649, 703 (1898); *see also* *Osborn v. Bank of the United States*, 22 U.S. 738, 828 (9 Wheat.) (1824) (stating in dicta that a naturalized citizen is “distinguishable in nothing from a native citizen, except so far as the constitution makes the distinction . . . the law makes none”).

¹¹⁵ 387 U.S. 253, 261 (1967).

¹¹⁶ 22 U.S. at 827.

¹¹⁷ 387 U.S. at 261 (citing *Osborn*, 22 U.S. at 827-28).

¹¹⁸ *Rogers v. Bellei*, 401 U.S. 815, 835 (1971).

¹¹⁹ *Id.* at 827.

¹²⁰ *Id.* at 830.

ject to the power of Congress to “withhold citizenship from persons like plaintiff Bellei and . . . prescribe a period of residence in the United States as a condition *precedent* without constitutional question.”¹²¹

What do these cases mean for Puerto Ricans? In the eyes of some, because Puerto Ricans are neither born nor naturalized “in the United States,” Congress has wide powers to define the contours of their citizenship, including the power to withdraw it.¹²² One could argue that Puerto Ricans are in fact “born in the United States” for the purposes of the Fourteenth Amendment, just as the Immigration and Naturalization Act declares.¹²³ Yet, the applicability of Fourteenth Amendment citizenship to persons born in United States territories has never been fully determined¹²⁴ and there are strong reasons to believe that it was never so intended.¹²⁵

Non-Fourteenth Amendment citizens might be subject to withdrawal of citizenship and other restrictions imposed by Congress, but Congress has no power to grant or revoke the right to participate in presidential elections. As will be seen later, an individual’s right to vote in presidential elections is granted by the states—not by the federal government.¹²⁶ Since there is no federal right to vote for the President that Congress can take away, whether Puerto Ricans can vote for the President has little to do with whether they are citizens under the Fourteenth Amendment.

¹²¹ *Id.* at 831.

¹²² See Juan M. García Passalacqua, *supra* note 58, at 238-39 (arguing that the United States can revoke the United States citizenship of Puerto Ricans). *But see* José Julián Álvarez González, *The Empire Strikes Out: Congressional Ruminations on the Citizenship Status of Puerto Ricans*, 27 HARV. J. ON LEGIS. 309, 336 (1990) (“The fact that citizenship is a concept closely connected to individual rights, and one more relevant to the international, rather than to the domestic, realm, could lead the Supreme Court to hold that there is a constitutional difference between being born in Italy and being born in Puerto Rico.”).

¹²³ See 8 U.S.C. § 1402 (1994).

¹²⁴ ALEINIKOFF, *supra* note 108, at 14 n.21. *But see* GETTYS, *supra* note 30, at 14 (“Whenever territories have been incorporated into the United States . . . birth in those territories has been construed as birth ‘in the United States’ within the meaning of the Fourteenth Amendment.”).

¹²⁵ See LÓPEZ BARALT, *supra* note 24, at 235-36 (arguing that Puerto Ricans did not become United States citizens before the Jones Act of 1917 because the Fourteenth Amendment is only coextensive throughout the United States, and the United States did not include unincorporated territories like Puerto Rico); Álvarez González, *supra* note 122, at 326-31 (rejecting the notion that Congress’s determination that Puerto Rico is “in the United States” for the purposes of the Immigration and Nationality Act also applies to the Fourteenth Amendment); Juan M. García Passalacqua, *supra* note 58, at 236 (noting that the Committee Report of the Nationality Act of 1940 stated that Puerto Ricans were statutory, and not constitutional, citizens).

¹²⁶ See U.S. CONST. art. II, § 1, cl. 2 (quoted *supra* note 92); see also *McPherson v. Blacker*, 146 U.S. 1, 35 (1892) (“[T]he appointment and mode of appointment of electors belong exclusively to the States under the Constitution of the United States.”); discussion *infra* Part IV.

*B. Does the Status of Puerto Rico as an Unincorporated Territory
Affect the Rights as United States Citizens
of Those Residing in Puerto Rico?*

Puerto Rico's status within the United States constitutional framework, and not whether Puerto Ricans are Fourteenth Amendment citizens, plays a large role in limiting their rights. Determining Puerto Rico's status within the United States framework requires analyzing the *Insular Cases*.

Opinions as to the handling of the territories diverged early. Jeffersonians "viewed the territorial system as a scheme of colonization that would temporarily operate in a given area only until it had reached a minimum population and after its inhabitants had experienced a brief tutelage in self-government."¹²⁷ Hamiltonians, on the other hand, "stressed Congress' unlimited hegemony over the colonies, which were considered more as national real estate than as developing communities of citizens reared in the ways of democracy."¹²⁸ In the end the Jeffersonians won, as the first Congress enacted the Northwest Ordinance.¹²⁹ Territories were afforded "a training school before the admission to statehood" and "a declaration that the ultimate goal of territorial status was statehood."¹³⁰ At least until the Spanish American War, territories were considered part of the Union as "states-in-training."¹³¹

The *Insular Cases* broke with this policy. In *De Lima v. Bidwell*,¹³² the Court declared that Puerto Rico was not a foreign country for the purposes of the tariff laws, but was a territory of the United States.¹³³ In *Downes v. Bidwell*,¹³⁴ however, the Court held that Puerto Rico was not part of the United States for the purposes of Article I, Section 8, Clause 1 of the Constitution.¹³⁵ In what has been described as a theory of "extraconstitutional power by Congress,"¹³⁶ Justice Brown declared that the power of Congress to acquire new territory "was not

¹²⁷ 2 GRUPO DE INVESTIGADORES PUERTORRIQUEÑOS, BREAKTHROUGH FROM COLONIALISM: AN INTERDISCIPLINARY STUDY OF STATEHOOD 1111 (1984).

¹²⁸ *Id.* at 1112.

¹²⁹ *See id.* ("Undoubtedly, the Jeffersonian view, with its recognition of the right to self-government and statehood, prevailed with the adoption of the Northwest Ordinances and throughout the Nineteenth Century."); LÓPEZ BARALT, *supra* note 24, at 240 ("[T]he very first Congress under the new Constitution adopted *in toto* the Northwest Ordinance . . ."). The Northwest Ordinance provided, in general terms, a partition scheme, three stages of the development of territorial government, "each one more advanced than the previous and the last one taking the territory into the Union," and a bill of rights. *Id.* at 24.

¹³⁰ BARALT, *supra* note 24, at 27-28.

¹³¹ *See supra* note 24 and accompanying text.

¹³² 182 U.S. 1 (1901).

¹³³ *Id.* at 200.

¹³⁴ 182 U.S. 244 (1901).

¹³⁵ *Id.* at 287.

¹³⁶ TORRUELLA, *supra* note 32, at 53.

hampered by the constitutional provisions."¹³⁷ Thus, "there is nothing in the Constitution to indicate that the power of Congress in dealing with [the territories] was intended to be restricted by any of the other provisions."¹³⁸

Justice White's concurring opinion merits a more careful look, since his distinction between incorporated and unincorporated territories later became the law of the land.¹³⁹ According to Justice White, Puerto Rico had not been incorporated into the United States upon its acquisition under the Treaty of Paris of 1898.¹⁴⁰ He rejected Justice Brown's rationale,¹⁴¹ however, explaining that "there may nevertheless be restrictions of so fundamental a nature that they cannot be transgressed, although not expressed in so many words in the Constitution."¹⁴² Although the Constitution did not "follow the flag" to unincorporated territories, those rights considered fundamental in nature limited the power of Congress over the territories. Determining what "these 'fundamental' rights [are] has been the subject matter of interminable *ad hoc* litigation and decision to this very day."¹⁴³

The grant of United States citizenship to the inhabitants of Puerto Rico in 1917 did not alter this predicament. Although the grant of citizenship had been associated with incorporation,¹⁴⁴ in *Balzac v. Puerto Rico* the Court concluded that the Jones Act had not incorporated the island into the United States.¹⁴⁵ Moreover, the United States citizenship granted to residents of Puerto Rico was one

¹³⁷ 182 U.S. at 285.

¹³⁸ *Id.* at 286.

¹³⁹ See *Balzac v. Puerto Rico*, 258 U.S. 298, 305 ("[T]he Dorr Case shows that the opinion of Mr. Justice White . . . in *Downes v. Bidwell* has become the settled law of the court."); see also TORRUELLA, *supra* note 32, at 53 ("Justice Brown's . . . 'extension theory' . . . was never followed by the Court."); LÓPEZ BARALT, *supra* note 24, at 263 ("[T]he concurring opinion of Justice White . . . has been reasserted and affirmed by subsequent unanimous courts, and the theory of incorporation of territories which it developed, is now accepted as good constitutional law.").

¹⁴⁰ *Downes*, 182 U.S. at 341 (White, J., concurring).

¹⁴¹ See *id.* at 291 ("As Congress in governing the territories is subject to the Constitution, it results that all the limitations of the Constitution which are applicable to Congress in exercising this authority necessarily limit its power on this subject.").

¹⁴² *Id.* at 291; see also LÓPEZ BARALT, *supra* note 24, at 299 ("If unincorporated, then only such provisions of the Constitution protecting the fundamental rights of citizenship were to apply.").

¹⁴³ TORRUELLA, *supra* note 32, at 55; accord LÓPEZ BARALT, *supra* note 24, at 299. See also David Helfeld, *How Much of the United States Constitution and Statutes Are Applicable to the Commonwealth of Puerto Rico?*, 110 F.R.D. 452, 454 (1986) ("The doctrine of unincorporated territory created considerable confusion over which clauses of the Constitution were applicable to Puerto Rico.").

¹⁴⁴ In *Rasmussen v. United States*, the Supreme Court concluded that the grant of citizenship in the treaty acquiring Alaska was a declaration sufficient to incorporate Alaska into the United States. *Rasmussen v. United States*, 197 U.S. 516, 522 (1905). See generally CABRANES, *supra* note 1, at 99 ("[F]or the first time in history, citizenship was granted to a people without the promise of eventual statehood and without the full panoply of rights guaranteed by the United States Constitution."); LÓPEZ BARALT, *supra* note 24, at 296 ("[T]he reason for momentarily abandoning citizenship as a test of incorporation is no legal reason, but one based on political expediency.").

¹⁴⁵ 258 U.S. 298, 306 (1922).

“clouded by legalistic ‘ifs,’ ‘ands,’ ‘buts,’ and footnotes.”¹⁴⁶ The only additional right earned by Puerto Ricans when they became citizens was the right to “move into the continental United States and becom[e] residents of any State there to enjoy every right of any other citizen of the United States, civil, social, and political.”¹⁴⁷ As long as they remain in Puerto Rico, however, they are entitled to those rights and privileges granted by Congress and those constitutional provisions under the fundamental rights paradigm of Justice White’s concurrence in *Downes*.

What are these fundamental rights that Justice White mentioned? Except for the trial by jury, “all the individual rights guaranteed by the federal Constitution had been incorporated in the Bill of Rights of the Jones Act of 1917 and in large measure had been fully respected and implemented.”¹⁴⁸ The right to a trial by jury is not fundamental; it is a procedural or remedial right.¹⁴⁹ The protections of the Due Process Clause are included, but the Court has refused to specify whether it was the due process required by the Fifth or Fourteenth Amendments.¹⁵⁰ It is clear, however, that only those constitutional rights of a fundamental nature are considered applicable to Puerto Ricans. Thus, whether *Igartúa II*’s alleged right to vote in presidential elections is available to Puerto Ricans depends on whether the Supreme Court considers it a fundamental right under the Constitution.

IV. ANALYZING *IGARTÚA II*: IS THE RIGHT TO VOTE FOR THE PRESIDENT REALLY A FUNDAMENTAL RIGHT OF CITIZENSHIP?

Article II of the Constitution provides that “[e]ach 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”¹⁵¹ Thus, the Constitution grants the states the power to determine how electors will be chosen.¹⁵² In the first few elections, legislatures in every state chose the electors themselves—without consulting the

¹⁴⁶ TORRUELLA, *supra* note 32, at 93.

¹⁴⁷ *Balzac*, 258 U.S. at 308; *see also* CABRANES, *supra* note 1, at 51 (“In the absence of a change in political status, it appeared that even American citizenship would not give Puerto Ricans any additional rights, a conclusion confirmed by the Court in *Balzac v. Porto Rico* in 1922.”).

¹⁴⁸ Helfeld, *supra* note 144, at 455.

¹⁴⁹ *Balzac*, 258 U.S. at 309 (“The citizen of the United States living in Porto Rico can not [sic] there enjoy a right of trial by jury under the Federal Constitution, any more than the Porto Rican.”); *see also* LÓPEZ BARALT, *supra* note 24, at 299.

¹⁵⁰ *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 676-80 (1974); *see also* Helfeld, *supra* note 143, at 456.

¹⁵¹ U.S. CONST. art. II, § 1, cl. 2 (quoted *supra* note 92).

¹⁵² *McPherson v. Blacker*, 146 U.S. 1, 35 (1892) (“[T]he appointment and mode of appointment of electors belong exclusively to the States under the Constitution of the United States.”).

general population.¹⁵³ Even when the states began holding popular elections to select the electors, the concepts of citizenship and voting were not always linked.¹⁵⁴ If at all, citizenship was viewed as a requirement for voting, and not as the vehicle granting the right to vote.¹⁵⁵

For most of the early years of the American republic, citizenship did not necessarily confer the right of suffrage.¹⁵⁶ In *Minor v. Happersett*,¹⁵⁷ the Court dissipated any doubts by declaring that “the Constitution had not added the right of suffrage to the privileges and immunities of citizenship as they existed at the time it was adopted.”¹⁵⁸ This holding was later reaffirmed in *McPherson v. Blacker*.¹⁵⁹ According to the Court, “the right of suffrage was not necessarily one of the privileges or immunities of citizenship before the adoption of the Fourteenth Amendment, and that that amendment does not add to these privileges and immunities.”¹⁶⁰ Moreover, the Court inadvertently foreshadowed how to understand the “fundamental right to vote” trend that was to take place almost one hundred years later. The right to vote comes from the states, “but the right of exemption from the prohibited discrimination comes from the United States. The first has not been granted or secured by the Constitution of the United States, but the last has been.”¹⁶¹ The Constitution protects against attempts to discriminate with the right to vote, but the actual conferral of the right comes from each state, and not from the Constitution.

During the 1960’s, however, a line of case-law developed declaring the right to vote a fundamental right. In *Wesberry v. Sanders*,¹⁶² the Court recognized the one-man-one-vote principle in the context of congressional elections.¹⁶³ Furthermore, it declared that “[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we

¹⁵³ ROBERT M. HARDAWAY, *THE ELECTORAL COLLEGE AND THE CONSTITUTION* 45 (1994).

¹⁵⁴ Paul Kleppner, *Defining Citizenship: Immigration and the Struggle for Voting Rights in Antebellum America*, in *VOTING AND THE SPIRIT OF AMERICAN DEMOCRACY* 43, 45 (Donald W. Rogers ed., 1992).

¹⁵⁵ *Id.*; see also KIRK HAROLD PORTER, *A HISTORY OF SUFFRAGE IN THE UNITED STATES* 3 (AMS Press 1971) (1918) (“[A] man’s property *entitled* him to vote—not his character, his nationality, beliefs, or residence, but his property.” (emphasis added)).

¹⁵⁶ See generally PORTER, *supra* note 155, at 11 (“[T]he Revolution had a very slight immediate effect on the development of suffrage.”).

¹⁵⁷ 88 U.S. (21 Wall.) 162 (1874).

¹⁵⁸ *Id.* at 171; see also PORTER, *supra* note 155, at 195 (describing the right of suffrage had never been considered one of the privileges and immunities guaranteed by the Constitution and the Fourteenth Amendment was not meant to change this situation).

¹⁵⁹ 146 U.S. at 38.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² 376 U.S. 1 (1964).

¹⁶³ *Id.* at 7.

must live.”¹⁶⁴ Other rights, “even the most basic, are illusory if the right to vote is undermined.”¹⁶⁵ The Court followed a similar line in *Reynolds v. Sims*,¹⁶⁶ where it declared that “all qualified voters have a constitutionally protected right to vote, and to have their votes counted,”¹⁶⁷ and that “the right of suffrage is a fundamental matter in a free and democratic society.”¹⁶⁸

Four years later, in *Williams v. Rhodes*,¹⁶⁹ the Court confirmed the validity of the language quoted above from *Wesberry*.¹⁷⁰ In 1972, in a case cited by *Igartúa II* in support of its argument for the right to vote for the President as a fundamental right,¹⁷¹ the Court quoted the language from *Reynolds v. Sims* referring to the right to vote as “a fundamental political right . . . preservative of all rights.”¹⁷² Not only were the courts riding the “fundamental right to vote” wave, but they were explicitly linking this fundamental right with the possession of citizenship.¹⁷³

Does this jurisprudence signal a shift in the status of the right to vote within constitutional law? The *Igartúa II* court seemed to think so, arguing that “[t]he right to vote is a function of citizenship and a fundamental right preservative of all other rights.”¹⁷⁴ It is a right “guaranteed by the principles of freedom of association as articulated in the First Amendment to the Constitution and protected by the Due Process and Equal Protection Clauses.”¹⁷⁵ Moreover, and relying on *Anderson v. Celebrezze*,¹⁷⁶ there is a “uniquely important national interest” in the election of “the only elected officials who represent all the voters in the Nation.”¹⁷⁷

This theory is riddled with problems. First, it directly contradicts the holdings in *McPherson v. Blacker*¹⁷⁸ and *Minor v. Happersett*,¹⁷⁹ both of which are still good law. These cases explicitly rejected the proposition that the right to vote for the President comes from the Consti-

¹⁶⁴ *Id.* at 17.

¹⁶⁵ *Id.*

¹⁶⁶ 377 U.S. 533 (1964).

¹⁶⁷ *Id.* at 554 (citations omitted).

¹⁶⁸ *Id.* at 561-62.

¹⁶⁹ 393 U.S. 23 (1968).

¹⁷⁰ *Id.* at 31.

¹⁷¹ See *Igartúa II*, 113 F. Supp. 2d at 232.

¹⁷² *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972) (quoting *Reynolds*, 377 U.S. at 562).

¹⁷³ See *Evans v. Cornman*, 398 U.S. 419, 422 (1970) (“[T]he right to vote, as the citizen’s link to his laws and government, is protective of all fundamental rights and privileges.” (citations omitted)); see also *Means v. Wilson*, 522 F.2d 833, 838 (8th Cir. 1975) (“The right to vote is fundamental to representative government. As a right of national citizenship, it is a source of constitutional power . . .”).

¹⁷⁴ *Igartúa II*, 107 F. Supp. 2d at 145 (citations omitted).

¹⁷⁵ *Igartúa II*, 113 F. Supp. 2d at 232 (citations omitted).

¹⁷⁶ 460 U.S. 780 (1983).

¹⁷⁷ *Igartúa II*, 113 F. Supp. 2d at 232 (quoting *Celebrezze*, 460 U.S. at 794-95).

¹⁷⁸ 146 U.S. 1 (1892).

¹⁷⁹ 88 U.S. 162 (1874).

tution or the privileges and immunities of citizenship.¹⁸⁰ Contemporary case-law echoing these words further weakens the claim that there is an inherent constitutionally protected right to vote for the President.¹⁸¹

Second, even if we accept the most liberal interpretation of the cases cited above, most of these cases did not take place in the context of presidential elections. *Wesberry v. Sanders* involved congressional elections,¹⁸² while *Reynolds v. Sims* dealt with the constitutionality of a plan for the apportionment of seats in the Alabama legislature.¹⁸³ *Evans v. Cornman* was a case brought by plaintiffs who were denied the right to vote in local Maryland elections,¹⁸⁴ and *Means v. Wilson* dealt with the right to vote in an Oglala Sioux Tribal Council election.¹⁸⁵ *Bullock v. Carter*,¹⁸⁶ a case relied on by the court in *Igartúa II*, involved candidates in a primary for local government positions.¹⁸⁷ In fact, the only case directly involving the right to participate in presidential elections was *Williams v. Rhodes*, which considered Ohio election laws impeding new political parties from being placed on state ballots from choosing electors pledged to a particular candidate for President and Vice-President.¹⁸⁸ These cases might have referred to the right to vote, but not the right to vote in *presidential* elections.

Finally, it seems that *Igartúa II* gravely misinterpreted this line of cases. *Wesberry* might have elevated the status of the one-man-one-vote principle, but it applied that principle only to those "qualified to vote"¹⁸⁹—not to every citizen of the United States—and only in the context of congressional representation.¹⁹⁰ *Evans* stressed the need of the citizens of a federal enclave to maintain their links with their government, but a federal enclave constitutionally holds a different position from a territory like Puerto Rico.¹⁹¹ Moreover, most of the cases involved equal protection claims. In these cases, the Court focused

¹⁸⁰ *Happersett*, 88 U.S. at 177; *McPherson*, 146 U.S. at 38.

¹⁸¹ See *Rodríguez v. Popular Democratic Party*, 457 U.S. 1, 9 (1982) ("[T]he Constitution 'does not confer the right of suffrage upon any one' and 'the right to vote, *per se*, is not a constitutionally protected right.'" (citations omitted)); see also Helfeld, *supra* note 16, at 106 ("There is no 'inherent constitutional right of citizens to vote for their President.'").

¹⁸² 376 U.S. 1, 2 (1964).

¹⁸³ 377 U.S. at 536-37.

¹⁸⁴ 298 U.S. 419 (1970).

¹⁸⁵ 522 F.2d 833 (8th Cir. 1975).

¹⁸⁶ 405 U.S. 134 (1972).

¹⁸⁷ *Id.* at 135-36.

¹⁸⁸ 393 U.S. 23, 24 (1968).

¹⁸⁹ *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964).

¹⁹⁰ Raskin, *supra* note 24, at 50 ("The logic of this ruling was that representation in Congress is a right that belongs to the people . . .").

¹⁹¹ In fact, the Court in *Evans* stressed the similarities between a federal enclave and a state—and not those with a territory. See *Evans*, 398 U.S. at 421; see also Raskin, *supra* note 24, at 54-63 (explaining that the differences between the residents of a federal enclave and a state are more theoretical than real).

on the protection of the right to vote from undue interference, and not with the actual concession of that right.¹⁹²

Declaring the right to vote a fundamental right for equal protection purposes, but void of any independent constitutional protection, certainly creates confusion. As one commentator pointed out, the confusion increases when one realizes that “the Court has been addressing the more specific and subsidiary questions [regarding voting] without any kind of developed background, principle, theory or philosophy that could guide it.”¹⁹³ In addressing the right to vote, the Court has concentrated on issues like ballot access, and not on whether a position must be filled by election or who has the right to vote.¹⁹⁴ In fact, in *Williams v. Rhodes*, which dealt specifically with the right to vote in presidential elections, the Court’s main concern rested on the burdens placed upon that right if votes could have been cast for one of only two parties.¹⁹⁵ Potential violations of other specific provisions of the Constitution in attempts to limit the right to vote for the President—and not the origin of the right—have occupied the Court’s attention.¹⁹⁶ Just as it declared in *McPherson*, the Court has assumed all along that the right to vote in presidential elections comes from the states—the Constitution does not give anyone the right to vote in presidential elections.¹⁹⁷ The Constitution, through the Equal Protection Clause, protects the exercise of that

¹⁹² See, e.g., *Dunn v. Blumstein*, 405 U.S. 330, 331 (1970) (holding that requiring a would-be voter reside in the state for one year and the country for three months violated the Equal Protection Clause of the Fourteenth Amendment since it did not further any compelling state interest); *Williams v. Rhodes*, 393 U.S. 23, 24 (1968) (holding that the Equal Protection Clause was violated where state law made it virtually impossible for a new political party, even one with substantial membership, or an old political party with small membership, to be placed on state ballots to choose electors for the national President and Vice President); *Reynolds v. Sims*, 377 U.S. 533, 554 (1964) (holding that apportionment that is not population based and lacks any other rationality violates the Equal Protection Clause); *Means v. Wilson*, 522 F.2d 833, 839 (8th Cir. 1975) (reaffirming that Indian tribes that adopt Anglo-Saxon democratic processes for selection of tribal representatives must comply with the one-person one-vote principle since equal protection concepts apply to the tribes by virtue of the Indian Civil Rights Act).

¹⁹³ James Gardner, *The Nature of the American Constitution: Is There a Constitutional Right To Vote and Be Represented?*, 48 AM. U. L. REV. 589, 612 (1998).

¹⁹⁴ *Id.*

¹⁹⁵ 393 U.S. at 31.

¹⁹⁶ See *Anderson v. Celebrezze*, 460 U.S. 780, 795 (1983) (stressing the uniqueness and national scope of the presidential election in the context of a state’s efforts to enforce ballot access requirements); *Williams*, 393 U.S. at 29 (“[T]he Constitution is filled with provisions that grant Congress or the States specific power to legislate in certain areas; these granted powers are always subject to the limitation that they may not be exercised in a way that violates other specific provisions of the Constitution.”); *McPherson v. Blacker*, 146 U.S. 1, 39 (1892) (“The right to vote intended to be protected refers to the right to vote as established by the laws and constitution of the State.”); cf. Gardner, *supra* note 193 at 613 (“The Court has treated the right to vote only as a relative right under the Equal Protection Clause. So what they say is, if and to the extent that a state chooses to grant to its own people the right to vote for its own state legislature, then to that extent and no further do the people of that state also have a right to vote for members of Congress.”).

¹⁹⁷ 146 U.S. at 38.

right from unreasonable encroachments and limitations; actual granting of the right lies in the hands of the states.

Where, then, does the right to vote stand? There is no constitutional right to vote for the President. Both *McPherson*¹⁹⁸ and *Minor v. Happersett*¹⁹⁹ make this clear. There is a trend to view voting more as a right than a privilege under the Constitution,²⁰⁰ but this trend has yet "to reach its full consummation."²⁰¹ Even then, it is doubtful how "fully consummated" this trend can become without contravening the Constitution. The United States Court for the District of Columbia effectively summarized this dilemma by pointing out that "notwithstanding the force of the one person, one vote principle in our constitutional jurisprudence, that doctrine cannot serve as a vehicle for challenging the structure the Constitution itself imposes upon the Congress."²⁰² In the end, the Constitution itself cannot be unconstitutional. It might be time to recognize that the Constitution "is simply not a consistently democratic instrument of government, nor is the one-man, one-vote principle a universal constitutional absolute."²⁰³ Until something is done through the amendment process to alter this constitutional fact, it would be unconstitutional for the Court to complete this swing towards recognition of the inherent right to vote for the President. For now, the right is given by the Constitution to the states, and the states decide if they wanted to give it to the people. Since Puerto Rico is not a state, it has no right to vote for the President to pass along to its residents. If Puerto Ricans are to vote for the President, they will have to rely on something other than the "fundamental right to vote" theory.

V. THE EVOLUTION OF THE WORD "STATE" IN THE CONSTITUTION: DOES THE WORD "STATE" INCLUDE TERRITORIES?

Under current constitutional understanding, Puerto Ricans cannot vote for the President until Puerto Rico becomes a state. It might be time, however, to challenge current understanding regarding the constitutional status of the territories. *Igartúa II*'s last argument in favor of the Puerto Ricans' right to vote for the President makes this point, suggesting that there is no reason to think that the word "state" in Article II excludes territories. "The use of the word 'state' in the Constitution," the court argued, "has evolved in understanding and meaning."²⁰⁴ This "evolution of the word 'state'" theory is probably

¹⁹⁸ *Id.*

¹⁹⁹ 88 U.S. 162, 177 (1874).

²⁰⁰ Helfeld, *supra* note 16, at 107.

²⁰¹ *Id.*

²⁰² *Adams v. Clinton*, 90 F. Supp. 2d 35, 67 (D.D.C. 2000).

²⁰³ Helfeld, *supra* note 16, at 102.

²⁰⁴ *Igartúa II*, 113 F. Supp. 2d at 235 (pointing out that "Congress was not precluded from extending diversity of citizenship jurisdiction from applying to Puerto Rico").

the most significant, and interesting contribution of *Igartúa II*. Not only does it favor extending the right to vote for the President to Puerto Ricans, but it forces a re-evaluation of the territorial policy embedded in the *Insular Cases*.

A. Interpreting "State" in the Constitution

The district court's evolution argument is supported at least in the context of Eleventh Amendment sovereign immunity. In *Rodríguez-García v. Dávila*,²⁰⁵ the First Circuit held that Puerto Rico is considered a "state" for the purposes of the Eleventh Amendment.²⁰⁶ The Supreme Court, however, has refused to consider this issue.²⁰⁷

The Supreme Court has dealt with the interpretation of "state" for the purposes of diversity jurisdiction under Article III. In *Hepburn v. Ellzey*²⁰⁸ the Court considered whether a resident of the District of Columbia could maintain a suit in a Virginia federal court.²⁰⁹ In what became the authoritative interpretation of the word "state" in the Constitution, the Court held that Article I and II "show[ed] that the word state is used in the [C]onstitution as designating a member of the union."²¹⁰ The Court recognized the injustice embedded in denying access to federal court to the residents of the District of Columbia, but believed that it was a subject "for legislative, not for judicial consideration."²¹¹ Under *Hepburn*, then, it was clearly established that the word "state" encompassed only the members of the Union and, therefore, could not include territories like Puerto Rico. It was not clear, however, what the Court meant by "legislative consideration." Did it mean that the amendment mechanism was available to remedy this wrong? Or did it mean that Congress had the power to extend the meaning of "state" in jurisdictional statutes without conflicting

²⁰⁵ 904 F.2d 90 (1st Cir. 1990).

²⁰⁶ See 904 F.2d at 98 ("It is equally well established that the Commonwealth of Puerto Rico is entitled to the same protections as those accorded to states under the Eleventh Amendment."); see also *Fred v. Aponte-Roque*, 916 F.2d 37, 38 (1st Cir. 1990) ("The Supreme Court has consistently held that an unconsenting state is immune from suits brought by her own citizens as well as citizens in other states This principle applies equally to the Commonwealth of Puerto Rico."); *Ezratty v. Puerto Rico*, 648 F.2d 770, 776 n.7 (1st Cir. 1981) ("The principles of the Eleventh Amendment, which protect a state from suit without its consent, are fully applicable to the Commonwealth of Puerto Rico." (citations omitted)).

²⁰⁷ See *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 142 n.1 (1993) (expressing no view on the law of the First Circuit treating Puerto Rico as a state for the purpose of the Eleventh Amendment); *Ngiraingas v. Sánchez*, 495 U.S. 182, 192 n.12 (1990) ("This conclusion makes it unnecessary to consider Guam's claim of immunity under the Eleventh Amendment.").

²⁰⁸ 6 U.S. (2 Cranch) 445 (1805).

²⁰⁹ *Id.* at 451.

²¹⁰ *Id.*

²¹¹ *Id.* ("It is true, that as citizens of the United States, and of that particular district which is subject to the jurisdiction of [C]ongress, it is extraordinary, that the courts of the United States, which are open to aliens, and to the citizens of every state in the union, should be closed upon them. But this is a subject for legislative, not for judicial consideration.").

with the Constitution? The Court did not consider this question again until 1949, and even then it produced no majority opinion on the matter.²¹²

In *Tidewater Transfer Co.*, the Court considered whether an act of Congress extending diversity jurisdiction to the citizens of the District of Columbia²¹³ was consistent with Article III of the Constitution. According to the plurality opinion, written by Justice Jackson and joined by Justices Black and Burton, the word "state" in Article III of the Constitution did not include the District of Columbia.²¹⁴ "State" certainly has many meanings, but "such inconsistency in a single instrument is to be implied only where the context clearly requires it."²¹⁵ The context of Article III did not require an expansive interpretation, however, because there was "no evidence that the Founders, pressed by more general and immediate anxieties, thought of the special problems of the District of Columbia in connection with the judiciary."²¹⁶ Echoing the language of *Hepburn*, the Court explained that when using "state" the Founders referred "to those concrete organized societies which were thereby contributing to the federation by delegating some part of their sovereign powers and to those that should later be organized and admitted to the partnership."²¹⁷ Accordingly, "state" did not include the District of Columbia or, for that matter, territories like Puerto Rico.

Curiously, the plurality opinion did not declare the Act unconstitutional. Congress, the Court explained, acted within its Article I powers²¹⁸ when it included the District of Columbia under the diversity jurisdiction statute.²¹⁹ The "exclusive responsibility of Congress for the welfare of the District" allowed Congress to provide its residents with "courts adequate to adjudge not only controversies among themselves but also their claims against, as well as suits brought by, citizens of the various states."²²⁰

Justice Rutledge, in his concurring opinion joined by Justice Murphy, disagreed. Criticizing the theory allowing Congress to extend diversity jurisdiction despite the constitutional limitations of Article III, the concurrence argued that "it [was] hard to see how [Article III, § 2] becomes no limitation when Congress decides to cast it off under some other Article, even one relating to its authority over the District

²¹² See *Nat'l Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582 (1949).

²¹³ Act of Apr. 20, 1940, ch. 117, 54 Stat. 143.

²¹⁴ *Tidewater*, 337 U.S. at 587.

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Id.* at 588.

²¹⁸ U.S. CONST. art. I, § 8, cl. 17 ("To exercise exclusive Legislation in all Cases whatsoever, over such District . . . as may . . . become the Seat of the Government of the United States.")

²¹⁹ 337 U.S. at 589.

²²⁰ *Id.* at 590.

of Columbia."²²¹ Arguing for the reversal of *Hepburn v. Ellzey*, Justice Rutledge rejected a strict construction of the word "state" in Article III.²²² The concurrence summarized its counter-reasoning as follows: "[W]hen long experience has disclosed the fallacy of a ruling, time has shown its injustice, and nothing remains but a technicality the only effect of which is to perpetuate inequity, hardship and wrong, those are the circumstances which this Court repeatedly has said call for reexamination of prior decisions."²²³

Where does *Hepburn's* statement regarding the interpretation of "state" in Article III stand? The case was not overruled, but a majority of the Justices rejected the Court's theory that Congress could use its Article I power over the District to work around the limitations of Article III. A majority also rejected the argument that the District of Columbia was included within "state."²²⁴ Subsequent decisions by lower courts have followed the plurality's rationale. In *Siegmund v. General Commodities Corp.*,²²⁵ the court extended the *Tidewater Transfer Co.* reasoning to the then-territory of Hawaii.²²⁶ Although the power of Congress to legislate over the territories is not as expressly stated as the power over the District of Columbia, the court noted that this power "has been held to be plenary."²²⁷ Thus, "the act in question would be constitutional because it is a legitimate exercise of the power of Congress to legislate for the territories."²²⁸ This reasoning was later applied specifically to Puerto Rico by other lower courts.²²⁹

At first glance, these cases would suggest that Puerto Rico cannot be considered a state under Article III; but the analysis should not end there. First, the Supreme Court has never declared whether the plurality's rationale in *Tidewater Transfer Co.* should apply to U.S. territories; that is, it is not clear that Congress' power to legislate for the District of Columbia is comparable to its power to "make all needful

²²¹ *Id.* at 605 (Rutledge, J., concurring).

²²² *See id.* at 617 ("It is doubtful whether anyone could be found who now would write into the Constitution such an unjust and discriminatory exclusion of District citizens from the federal courts.").

²²³ *Id.* at 618.

²²⁴ Lewis A. Kornhauser & Lawrence G. Sager, *The One and the Many: Adjudication in Collegial Courts*, 81 CAL. L. REV. 1, 25 (1993) ("[S]ubstantial majorities of the Justices rejected both the proposition that the District of Columbia was a 'State' within the meaning of Article III, and the proposition that Congress had the power to extend the jurisdiction of Article III courts.").

²²⁵ 175 F.2d 952 (9th Cir. 1949).

²²⁶ *Id.* at 953.

²²⁷ *Id.* at 954.

²²⁸ *Id.*

²²⁹ *See Americana of P.R., Inc. v. Kaplus*, 368 F.2d 431, 436 (3d Cir. 1966) (holding that Article IV provides the requisite constitutional authority for 28 U.S.C. § 1332(d)); *Detres v. Lions Bldg. Corp.*, 234 F.2d 596, 603 (7th Cir. 1956) (applying the *Siegmund* rationale to Puerto Rico); *Lummus Co. v. Commonwealth Oil Ref. Co.*, 195 F. Supp. 47, 51 (S.D.N.Y. 1961) ("Congress, in enacting section 1332(d) to include the Commonwealth of Puerto Rico, acted within its constitutional power under Article IV, section 3, clause 2 . . .").

Rules and Regulations”²³⁰ respecting the territories. The courts might have recognized Congress’ power to include the District of Columbia and Puerto Rico as states under the jurisdictional statutes, but the courts have admitted that the source of that power is unclear.²³¹

Second, assuming Congress has the power under the territorial clause to consider Puerto Rico as a “state” for diversity purposes, one could argue that Congress should also have the power to extend the right to vote for the President and Vice President to Puerto Ricans. Article III deals with the rights of citizens of states to enjoy the extension of the judicial power of the United States, but—according to the Court—Congress is authorized to extend that same right to those residing in the territories. If Congress can extend access to the courts to citizens residing in the territories, why could Congress not extend the right to vote too? Why does Congress have the “power and duty to provide [the] inhabitants [of the District of Columbia] . . . with courts adequate to adjudge” their claims,²³² but it doesn’t have the same power and duty to extend access to the Electoral College?

The problem with this argument might lie in a basic difference between Article II and Article III. Article II does not grant any rights to citizens—it delegates to the states “the appointment and mode of appointment of electors.”²³³ Congress does not have the power to extend the right to vote to residents of the territories because the Constitution does not confer this right in the first place. There is nothing for Congress to “extend” because Article II does not grant anything to the citizens; it only extends this right to the states. Moreover, one could argue that Article III deals with an issue of judicial administration, while voting for the President entails full political participation and a role in the development of national policy.²³⁴

Nevertheless, there is a strong case for heeding the words of the concurrence in *Tidewater Transfer Co.* and overruling *Hepburn*. Time has certainly shown the injustice of holding that the word “state” for the purposes of Article II does not include the territories. Why is it that restricting access to the federal courts is more unjust than denying national political participation? General access to courts is not denied, since residents of the District of Columbia and the territories still could get into federal court through subject matter jurisdiction and would have access to their own courts. In the case of the right to vote, however, the exclusion from political participation is absolute. United States citizens residing in Puerto Rico have faithfully served in the armed forces in defense of the U.S. and its ideals of freedom and

²³⁰ U.S. CONST. art. IV, § 3, cl. 2.

²³¹ *Kapfus*, 368 F.2d at 433 (explaining that in *Tidewater Transfer Co.* a majority of the Court could not agree on the nature of Congress’ source of power).

²³² *Nat’l Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 590 (1949).

²³³ *McPherson v. Blacker*, 146 U.S. 1, 35 (1892).

²³⁴ See generally *Tidewater Transfer Co.*, 337 U.S. at 585 (“This constitutional issue affects only the mechanics of administering justice in our federation.”).

liberty since World War I. If Puerto Ricans are capable of defending the nation, they also deserve political participation in the governmental bodies that send them to war. Surely, this situation “perpetuate[s] inequity, hardship and wrong”²³⁵ and calls for a reexamination of our understanding of the word “state” in the Constitution.

Moreover, the rationales given by the Court in *Hepburn*, and repeated by *Tidewater Transfer Co.*, merit a more careful review. The Court is probably right in maintaining that the word “state” originally was intended to designate only the members of the Union.²³⁶ There is no evidence that the Founders thought of the “special problems” of the District of Columbia or, for that matter, the territories, with regard to Article II or any other provision of the Constitution.²³⁷

The significance behind the lack of evidence regarding the Founders’ concern with territories should not be exaggerated, however. First, and as *Igartúa II* points out, Article II is a product of its time.²³⁸ At the time of the Constitutional Convention “the only political subdivisions capable of conducting national elections were the States.”²³⁹ Moreover, it is possible that the Founders excluded the territories from their concerns not as a deliberate act, but as a reflection of the territorial policy at the time. When the Founders thought about territories, they envisioned them as states-in-waiting.²⁴⁰ Under America’s original territorial policy, territories were admitted as states as soon as they fulfilled a series of requirements.²⁴¹ Thus, the Founders’ vision of the territories was inherently connected with the ability to admit states. They did not envision the United States holding a territory on a permanent basis without the implied promise of statehood—in fact, they would have been outraged at the idea of administering a colony for over one hundred years.²⁴² There was, then, little reason to be concerned with the possibility of territorial participation in presidential elections or in the national judicial scheme. The territorial status was temporary, and they would soon enjoy these rights under the Constitution as “states.”

²³⁵ *Id.* at 618 (Rutledge, J., concurring).

²³⁶ See *Hepburn v. Ellzey*, 6 U.S. (2 Cranch) 445, 451 (1805) (“[A]s the act of congress [sic] obviously uses the word ‘state’ in reference to that term as used in the constitution [sic] it becomes necessary to inquire whether [the District of] Columbia is a state in the sense of that instrument . . . [T]he members of the American confederacy only are the states contemplated in the constitution [sic].”).

²³⁷ See *Tidewater Transfer Co.*, 337 U.S. at 587 (“There is no evidence that the Founders, pressed by more general and immediate anxieties, thought of the special problems of the District of Columbia in connection with the judiciary.”).

²³⁸ *Igartúa II*, 113 F. Supp. 2d at 235.

²³⁹ *Id.* at 234.

²⁴⁰ See *supra* note 24 and accompanying text.

²⁴¹ See *supra* notes 129-30 and accompanying text.

²⁴² But see 2 GRUPO DE INVESTIGADORES PUERTORRIQUEÑOS, *supra* note 127, at 1112 (“[T]he advocates of Hamiltonian expansionism stressed Congress’ unlimited hegemony over the colonies, which were considered more as *national real estate* than as developing communities of citizens reared in the ways of democracy.”).

Today, however, territories are no longer seen as states-in-waiting. Guam and Puerto Rico have been territories since the Spanish American War, while the United States Virgin Islands have been held since 1916. It is incredibly unfair to analyze and study the United States constitutional framework while ignoring the presence of these permanent territories.

There are strong arguments for not considering territories full "states" under the Constitution. After all, there must be some difference between the status of state and that of territory. As *Anderson v. Celebrezze* pointed out, however, presidential elections are the only contest of truly national significance for a citizen of the United States.²⁴³ The plea for the right to vote is more about letting citizens strengthen their link with the national government than about giving a territory additional participation. Adding territorial representatives to the Senate certainly would create imbalances in the original constitutional design.²⁴⁴ Giving territories full representation in the House of Representatives might create a similar problem.²⁴⁵ But allowing the citizens of the territories to vote for the President—just like allowing them to claim diversity jurisdiction in federal court—would do little to alter the constitutional balance, while doing wonders for the political and legal status of those citizens.

The *Insular Cases* stand as one glaring legal objection to the theory that "state" could include territories. If Puerto Rico is an unincorporated territory, how can it be considered a state in any provision of the Constitution? In the *Insular Cases*, the Court clearly explained the position of territories within the constitutional framework and in distinguishing incorporated territories from unincorporated territories, converted the modern American territorial policy into law. Yet, if there is a legal doctrine that perpetuates more inequity, hardship and wrong for the citizens of the territories than the *Hepburn* ruling, it is the *Insular Cases*. Even those that reject the inclusion of territories under "state" should support the revision of the *Insular Cases* doctrine as a step towards bringing equality and justice to the United States citizens residing in Puerto Rico.

First, and as Torruella declared, "it is indeed ironic that from this potpourri of judicial indecisiveness should be spawned rules of law which would so fundamentally and adversely affect the lives of gen-

²⁴³ 460 U.S. 780, 794-95 (1983).

²⁴⁴ See *Adams v. Clinton*, 90 F. Supp. 2d 35, 49-50 (D.D.C. 2000) ("The Senate was expressly viewed as representing the states themselves and the guarantee of two senators for each was an important element of the Great Compromise between the smaller and larger states that ensured ratification of the Constitution." (citations omitted)).

²⁴⁵ *Id.* at 50 ("The House provisions, after all, were 'the other side of the compromise': to satisfy the larger states, the House was to be popularly elected, and 'in allocating Congressmen the number assigned to each State should be determined solely by the number of the State's inhabitants.'" (citations omitted)).

erations of American citizens.²⁴⁶ The concept of unincorporated territory was borne out of a case, *Downes v. Bidwell*,²⁴⁷ that produced no majority opinion and has created incredible confusion and endless litigation.²⁴⁸ In fact, and as discussed earlier, we still do not know with certainty which are the fundamental rights that Justice White so proudly proclaimed limited congressional power over Puerto Rico.²⁴⁹ The citizens of territories do not need a civics lesson to learn their rights—they need law degrees.

Second, the legal reasoning behind the opinions was suspect even one hundred years ago. Influenced by academic hawks and the spirit of imperialist pursuit, the United States ignored established tradition in the handling of territories in favor of a “constitutional theory totally lacking in American historical or legal support: The so-called unincorporated territory.”²⁵⁰ For centuries, the territorial policy of the United States, embedded in Jefferson’s scheme for the Northwest Ordinance and in *Shively v. Bowlby*,²⁵¹ called for the incorporation of territories and the object of admitting them as states.²⁵² The text of the Northwest Ordinance itself suggested that the territories were part of the United States forever.²⁵³ Instead, the Court invented a legal doctrine more in line with the imperialists interests of the time declaring that Congress had supra-constitutional powers. The *legal* basis for this theory was never clear, however, and is even less clear today.²⁵⁴

With the granting of United States citizenship to the inhabitants of Puerto Rico the Court had the opportunity to correct this situation. Instead, it compounded faulty legal reasoning with more faulty legal reasoning. Ignoring another long-standing legal principle—that the conferral of United States citizenship to a territory signaled its incorporation²⁵⁵—the Court held that the grant of citizenship to

²⁴⁶ TORRUELLA, *supra* note 32, at 48.

²⁴⁷ 182 U.S. 244, 291 (1901) (White, J., concurring).

²⁴⁸ See *supra* note 142 and accompanying text.

²⁴⁹ See discussion *supra* pp. 33-34.

²⁵⁰ TORRUELLA, *supra* note 32, at 267.

²⁵¹ 152 U.S. 1 (1894).

²⁵² See *supra* note 24 and accompanying text.

²⁵³ Northwest Ordinance of 1787, art. 4 (“The said territory, and the States which may be formed therein, shall forever remain a part of this Confederacy of the United States of America, subject to the Articles of Confederation, and to such alterations therein as shall be constitutionally made.”).

²⁵⁴ Justice White did provide a valid *policy* reason for distinguishing incorporated from unincorporated territories, noting the problems involved if every territory that the United States military occupied—even if temporarily—would have to be incorporated into the Union. *Downes*, 182 U.S. at 308-09 (White, J., concurring). But see TRIAS MONGE, *supra* note 9, at 5 (“Congress has no existence and can exercise no authority outside of the Constitution. Still less is it true that Congress can deal with new territories just as other nations have done or may do with their new territories. This nation is under the control of a written constitution, the supreme law of the land and the only source of our government, or any branch or officer of it, may exert at any time or at any place.” (quoting Justice Harlan)).

²⁵⁵ See *supra* note 143.

Puerto Ricans did not entail incorporation.²⁵⁶ The similarities between the languages of the treaty in the case of Alaska and the Jones Act in the case of Puerto Rico were evident.²⁵⁷ And the only differences that Justice Taft could come up with to distinguish Alaska from Puerto Rico were cosmetic.²⁵⁸ Alaska, he explained, was an enormous territory, sparsely populated, and contiguous to the mainland.²⁵⁹ The “establishment of standards such as distance from the United States, ease of travel, and propensity to settlement, for the purpose of determining whether or not incorporation had taken place,”²⁶⁰ however, was completely novel and vague. It is also ridiculous. The rights of citizens should not be dependent on the geographic characteristics of their place of origin or residence. Nobody asked Puerto Ricans what language they spoke, how easy it was to travel from the island to the United States or the population density in Puerto Rico when they were called to serve in the United States armed forces. Why should these questions be asked to recognize their full rights as citizens?

Finally, all of the historical and political underpinnings of the *Insular Cases* have been removed.²⁶¹ Underlying the argument that the Constitution did not follow the flag was the concern that the treatment of Puerto Rico would set a precedent for the “Philippine problem.”²⁶² There no longer is a Philippine problem. The Court and the Congress also were concerned with the lack of Anglo-Saxon institutions and traditions in Puerto Rico, but that problem has been resolved—right or wrong—after one hundred years of American rule. Puerto Ricans were not citizens when the *Insular Cases* were decided, so it was doubtful whether they deserved full rights under the Constitution. Puerto Ricans, however, have been loyal citizens since 1917 and are now fully deserving of all rights and protections under the

²⁵⁶ *Balzac v. Porto Rico*, 258 U.S. 298, 306 (1922).

²⁵⁷ *Compare* Treaty Concerning the Cession of the Russian Possessions in North America, March 30, 1867, U.S.-Russ. art. III, 15 Stat. 539, 542 (“The inhabitants of the ceded territory . . . shall be admitted to the enjoyment of all the rights, advantages and immunities of citizens of the United States . . .”), and Organic Act of 1917, § 5, 39 Stat. 951, 953 (“That all citizens of Puerto Rico . . . are hereby declared, and shall be deemed and held to be, citizens of the United States . . .”).

²⁵⁸ See *Balzac*, 258 U.S. at 309 (explaining that Alaska’s size, sparse settlement and proximity to the U.S. distinguished the issue of its incorporation from Puerto Rico’s incorporation).

²⁵⁹ *Balzac*, 258 U.S. at 309.

²⁶⁰ TORRUELLA, *supra* note 32, at 99.

²⁶¹ *Id.* at 268.

²⁶² See 33 CONG. REC. 1994 (1900) (statement of Rep. Newlands) (“[T]he establishment of a precedent which [would] be invoked to control our action regarding the Philippines later on; such action embracing not simply one island near our coast, easily governed, its people friendly and peaceful, but embracing an archipelago of seventeen hundred islands 7,000 miles distant, of diverse races, speaking different languages, having different customs, and ranging all the way from absolute barbarism to semicivilization.”); CABRANES, *supra* note 1, at 24 (“Concern about the possible effects of making the Philippines an integral part of the United States was not all new in 1900. This concern had been the basis of much of the vocal opposition to [President] McKinley’s policy toward Spain and to the original decision to require the cession of the Philippines to the United States . . .”).

Constitution. The *Insular Cases* might have served the interests of the United States in the twentieth century, but it is unclear which interests they serve in the twenty-first. The time has come to eliminate and delegitimize a second-class citizenship that finds its moral equivalent in the racist “separate but equal” doctrine.²⁶³

Commentators are not the only ones clamoring for the reversal of the *Insular Cases*. Although the doctrine is alive in the Supreme Court, the Court itself has produced some of the strongest statements against maintaining the doctrine. In *Reid v. Covert*,²⁶⁴ Justice Black’s plurality opinion questioned the authority of the *Insular Cases*.²⁶⁵ “The concept that the Bill of Rights and other constitutional protections against arbitrary government are inoperative when they become inconvenient or when expediency dictates otherwise,” Justice Black explained, “is a very dangerous doctrine and if allowed to flourish would destroy the benefit of a written Constitution and undermine the basis of our Government.”²⁶⁶ In *Harris v. Rosario*, Justice Marshall declared that the “present validity of those decisions is questionable.”²⁶⁷ Justice Brennan, in a concurring opinion joined by Justices Stewart, Marshall, and Blackmun, reiterated Justice Black’s statement in *Reid*: “[N]either the cases nor their reasoning should be given any further expansion.”²⁶⁸

Congress certainly has the power to change the political condition of Puerto Ricans—it can grant statehood or independence whenever it wishes—and deserves part of the blame. The Supreme Court, however, bears responsibility for supporting, following, and maintaining a legal doctrine that contradicts the principles of freedom and self-determination that America holds dearly. It is inconceivable that for the last one hundred years the Supreme Court has allowed for a scheme that gives the Congress “power untrammelled by constitutional limitations, except those emanating from undefined ‘fundamental’ provisions.”²⁶⁹ A scheme that created “a class of several million of its citizens in a subservient condition *ad infinitum*, with less right than even aliens who reside in the United States.”²⁷⁰

In the *Insular Cases*, the United States forgot its origins, and even the idealistic notions of manifest destiny, in favor of old-fashioned European imperialism. It was no longer content with having territories on a waiting list for statehood, and instead wanted to participate in the colonial experience it had so despised in 1776. In the last one hundred years, the United States has amended many of its wrongs

²⁶³ 2 GRUPO DE INVESTIGADORES PUERTORRIQUEÑOS, *supra* note 127, at 1125.

²⁶⁴ 354 U.S. 1 (1957).

²⁶⁵ *Id.* at 14.

²⁶⁶ *Id.*

²⁶⁷ 446 U.S. 651, 653 (Marshall, J., dissenting).

²⁶⁸ *Torres v. Puerto Rico*, 442 U.S. 465, 476 (1979) (Brennan, J., concurring).

²⁶⁹ Gorrín Peralta, *supra* note 48, at 44.

²⁷⁰ TORRUELLA, *supra* note 32, at 268.

previously supported under constitutional law—like racial segregation—in an attempt to move closer to the ideals of justice, equality, and liberty. The process skipped, however, the approximately four million citizens who cannot vote for the President who sends them to war. These citizens are not represented in the legislative body that has plenary powers over them, and they need law degrees and access to legal databases to decipher which rights they can claim. The United States can and should continue preaching the virtues of freedom and representative government—but it should look in its backyard more often. The question is “whether the United States would remain an imperial power or whether it would live up to its principles and rhetoric of equality for all of its peoples including those persons living in the non-incorporated dependencies.”²⁷¹ Recognizing that there are more than “states” under the Constitution would be the courageous thing to do. Scrapping a one hundred year-old doctrine that creates second class citizens is the mere minimum.

CONCLUSION

If the right to vote were a fundamental right of citizenship, the residents of Puerto Rico would enjoy it despite their second class citizenship. This citizenship does not grant them every protection under the Constitution, but it does grant them rights of a fundamental nature. *Igartúa II*'s brave attempt to remedy a pathetically unjust situation fails, however, because the right to vote for the President of the United States is not a fundamental right. The Supreme Court certainly has moved towards considering the right to vote as fundamental, but the trend is far from complete. Even if considered complete, there are doubts whether this right to vote would include the right to vote for the President, which is entrusted to the states in the Constitution.

Igartúa II might have provided the answer in its other argument. There is no authoritative jurisprudence, but good arguments on both sides of the issue, for including the territories under “states” in Article II. The idea is not implausible or menacing to the constitutional balance of the United States. More importantly, it is the right thing to do both in light of legal doctrines unreasonably ignored by the Court one hundred years ago and the modern historical development of the American nation. The increase in political participation by groups that have been long ignored has characterized, among other things, the last century in America. Women, blacks, minorities, and youths have experienced remarkable empowerment over the past few decades as part of the constitutional development of the United States. Inclusion—not exclusion—has become the norm. Expanding

²⁷¹ 2 GRUPO DE INVESTIGADORES PUERTORRIQUEÑOS, *supra* note 127, at 1125.

political participation and strengthening citizens' direct ties with their government has become our guide. Let the process come to the territories.