

PUERTO RICO, INC.: IMPLICIT INCORPORATION AND PUERTO RICO'S RIGHT TO VOTE FOR PRESIDENTIAL ELECTORS

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Por donde quiera que ande, porque lo llevo en la sangre, por la herencia de mis padres, y con orgullo repito: Yo te quiero Puerto Rico, yo te quiero Puerto Rico. (Translation: For wherever I walk, because I carry it in my blood, for the heritage of my parents, and with pride I repeat: I love you Puerto Rico, I love you Puerto Rico).

—Marc Anthony, *Preciosa*¹

INTRODUCTION

In 2017, the centennial anniversary of the grant of United States citizenship to Puerto Ricans, the people on the island experienced quite a year. Two powerful hurricanes, Irma and Maria, rocked Borinquén,² the latter leaving Puerto Rico torn apart and one million people without electricity and many without access to food or clean drinking water.³ Four months after Hurricane María hit, much of the island still lacked access to vital resources. This was due to botched Federal Emergency Management Agency (FEMA) contracts for both electricity and food, which left half of the island without power and 29,950,000 meals undelivered.⁴ Additionally, a

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¹ MARC ANTHONY, *PRECIOSA* (Universal Latino 2006) (adding this stanza to the original song written by Rafael Hernandez Marin in 1937).

² Puerto Ricans often call the island “Borinquén,” derived from its indigenous Taino name meaning “Land of the valiant Lord.”

³ Alex Johnson et al., *Hurricane Irma Skirts Puerto Rico, Leaves 1 Million Without Power*, NBC NEWS (Sept. 7, 2017, 11:02 PM), <https://www.nbcnews.com/storyline/hurricane-irma/hurricane-irma-skirts-puerto-rico-lashing-it-powerful-winds-flooding-n799086> [<https://perma.cc/VSV8-A9JJ>]; Brian Resnick & Eliza Barclay, *What Every American Needs to Know About Puerto Rico's Hurricane Disaster*, VOX (Oct. 16, 2017, 2:27 PM), <https://www.vox.com/science-and-health/2017/9/26/16365994/hurricane-maria-2017-puerto-rico-san-juan-humanitarian-disaster-electricity-fuel-flights-facts> [<https://perma.cc/Y9FT-UG9G>].

⁴ Patricia Mazzei & Agustin Armendariz, *FEMA Contract Called for 30 Million Meals for Puerto Ricans. 50,000 Were Delivered.*, N.Y. TIMES (Feb. 6, 2018), <https://nyti.ms/2EnaNKS>; Frances Robles, *Contractor for Puerto Rico Power Suspends Work, Citing Unpaid Bills*, N.Y. TIMES (Nov. 21, 2017), <https://nyti.ms/2jMCoCH>.

recent update to the death toll from Hurricane Maria placed the death toll at 2,975 people,⁵ a significant increase from the initial number of sixty-four.⁶

One cannot help but wonder how an island full of United States citizens could find themselves in this position.⁷ Many argue that statehood would solve the issue, bringing this second class citizenry onto an equal playing field with most of its countrymen.⁸ A major roadblock on the path to statehood, however, is that the island's population is split on the issue.⁹ In the meantime, however, this Note argues the most effective method of providing aid to Puerto Rico is a right enshrined in the American Revolution and the minds of the Founding Fathers: the right to vote.

By expanding presidential voting rights to Puerto Rico, the population would step into the light of political relevance and toward equal participation in the American democracy instead of being left in the shadows of a former tax haven and popular tourist destination. As of now, residents of Puerto Rico can vote in presidential primaries but not in the general election in November.¹⁰ With sixty-seven votes in the Democratic primary, Puerto Rico played a hefty role in Hillary Clinton's nomination fight and eventual victory,¹¹ so the question remains: how would the 2016 election have turned out if the residents of Puerto Rico had been able to play a part?

The answer: not a whole lot differently. Given the difference in make-up of Puerto Rico's party system and that of the mainland, the partisan affiliation likely would

⁵ GEO. WASH. UNIV. MILIKEN INST. OF PUB. HEALTH, PROJECT REPORT: ASCERTAINMENT OF THE ESTIMATED EXCESS MORTALITY FROM HURRICANE MARIA IN PUERTO RICO (2018), <https://reliefweb.int/sites/reliefweb.int/files/resources/AcertainmentoftheEstimatedExcessMortalityfromHurricaneMariainPuertoRico.pdf> [<https://perma.cc/FDU9-WU35>].

⁶ Brian Naylor, *Trump Denies Almost 3,000 Died In Puerto Rico, Falsely Claims Democrats Inflated Data*, NPR (Sept. 13, 2018, 10:39 AM), <https://www.npr.org/2018/09/13/647377915/trump-denies-death-toll-in-puerto-rico-falsely-claims-done-by-the-democrats> [<https://perma.cc/PU6Y-TFDN>]. President Trump denied this total number, tweeting that the increase was a false narrative created "by the Democrats in order to make [him] look as bad as possible." *Id.*

⁷ There was a stark difference between the aid given to Texas and Florida after they were hit by hurricanes in 2017 and the aid given to Puerto Rico after Hurricane Maria. Nicole Einbinder, *How the Response To Hurricane Maria Compared to Harvey and Irma*, PBS FRONTLINE (May 1, 2018), <https://www.pbs.org/wgbh/frontline/article/how-the-response-to-hurricane-maria-compared-to-harvey-and-irma/> [<https://perma.cc/BK5R-XA8L>].

⁸ Charles R. Venator-Santiago, *Puerto Rico Votes on Statehood—Fifth Time's the Charm?*, CONVERSATION (June 8, 2017, 11:55 PM), <https://theconversation.com/puerto-rico-votes-on-statehood-fifth-times-the-charm-75975> [<https://perma.cc/WW5W-J8AH>].

⁹ *Id.*

¹⁰ Sandra Lilley, *Puerto Rico Is Part Of the U.S.: Here's A Few Things to Know*, NBC NEWS (Oct. 3, 2017, 9:47 AM), <https://www.nbcnews.com/storyline/puerto-rico-crisis/puerto-rico-part-u-s-here-s-few-things-know-n807101> [<https://perma.cc/3VE8-TEFX>].

¹¹ The proportional split of the delegates went thirty-seven delegates and seven superdelegates to Clinton and twenty-three delegates to Bernie Sanders. *Puerto Rico Primary Results—Election 2016*, CNN (Aug. 10, 2016, 12:50 PM), <http://www.cnn.com/election/primaries/states/pr/Dem> [<https://perma.cc/8T7C-63QP>] [hereinafter *Puerto Rico Primary Results*].

not match up exactly.¹² Based on voting records of Puerto Ricans on the mainland (who, yes, can vote for president),¹³ however, Clinton would have likely won the island's seven electoral votes.¹⁴ Those votes, however, would not have made a significant impact on Trump's margin of victory.¹⁵

The real value in providing the residents of Puerto Rico with the right to vote in presidential elections is not that it would provide either party with huge Electoral College gains.¹⁶ Rather, the value would be in giving a full voice to an island whose residents have fought for the American military and have the highest voter turnout rates in the United States (in non-presidential elections).¹⁷ In order to create this right to vote, many assume that a constitutional amendment is necessary, but this Note will argue that there are already existing constitutional provisions and legal precedents that would suffice to expand the franchise to residents of Puerto Rico. This Note is specifically limited to Puerto Rico because its residents have been citizens for longer than any other territory without a solution to this disenfranchisement problem.¹⁸ Additionally, as the argument for implicit incorporation will reveal below, Puerto Rico has been treated as a state in many statutes and in administrative law, giving it a unique and nebulous status compared with the other territories.

¹² Eugene Scott, *Who Are Trump's Political Allies in Puerto Rico? Explaining the Island's Political Factions.*, WASH. POST: THE FIX (Oct. 3, 2017), https://www.washingtonpost.com/news/the-fix/wp/2017/10/03/who-are-trumps-political-allies-in-puerto-rico-explaining-the-islands-political-factions/?utm_term=.3dd3b0fa2816 [<https://perma.cc/FQ5Q-4SAN>] (describing how political parties other than the Democratic and Republican parties run island affairs).

¹³ Lilley, *supra* note 10.

¹⁴ See Ryan Struyk, *Here's What Would Happen to US Politics if Puerto Rico Became a State*, CNN POLITICS (Oct. 14, 2017, 10:51 AM), <https://www.cnn.com/2017/10/14/politics/puerto-rico-state-congress-white-house/index.html> [<https://perma.cc/6EU3-A25M>].

¹⁵ Due to the cap on the number of total representatives allowed within the House of Representatives, five states (Minnesota, California, Texas, Washington, and Florida) would likely have to relinquish one seat each to give Puerto Rico the five seats it would be entitled to. With the addition of two senators for Puerto Rico, the total number of electoral college votes would only increase by two. Each of the previously mentioned states would lose one electoral vote, which would presumably have gone Democrat. Thus, if Puerto Rico was able to vote in the 2016 election, the final count would have been 304–236. See Andy Kiersz, *Here's the Final 2016 Electoral College Map*, BUS. INSIDER (Nov. 28, 2016, 6:12 PM), <http://www.businessinsider.com/final-electoral-college-map-trump-clinton-2016-11> [<https://perma.cc/TF5Z-SA54>].

¹⁶ *Id.*

¹⁷ Monica Matos-Desa, *Second Class Citizens: The Case Against Unequal Military Healthcare Benefits for Puerto Rican Veterans*, 16 CARDOZO J.L. & GENDER 291, 291 (2010); Sasha Issenberg, *The Mystery of the Puerto Rican Voter*, SLATE (Jan. 27, 2012, 6:31 PM), http://www.slate.com/articles/news_and_politics/victory_lab/2012/01/puerto_rico_voter_turnout_why_is_it_so_high_.html [<https://perma.cc/D2BG-MFCZ>].

¹⁸ See Jones-Shafroth Act, Pub. L. No. 64-368, § 5, 39 Stat. 951, 953 (1917); Guam Organic Act of 1950, Pub. L. No. 81-630 (1950) (giving citizenship to Guam); Pub. L. No. 69-640 (1927) (giving citizenship to the U.S. Virgin Islands).

This Note will begin in Part I by giving a historical background of the island, beginning briefly with the Taíno Amerindians and the Spanish Colonial era, then moving into the history since American annexation in 1898 with particular focus on the *Insular Cases*. Building upon that history, Part II will focus on the case law of voting rights for Puerto Rico, where residents of Puerto Rico have repeatedly petitioned for and been denied the franchise. Part III will answer the question of justiciability by arguing that the right to vote is not a political question, and even if it were, the century-long lack of an answer by the political branches represents a breakdown of the political process, requiring judicial intervention. On the merits, I will then propose constitutional arguments for the right to vote for residents of Puerto Rico. First, I argue that, based on the language of various amendments and case law enshrining the right to vote as fundamental, Puerto Ricans are entitled to that right under the *Insular Cases* and that a way to remedy the violation of that right is found in the Equal Protection and Due Process Clauses. Second and more broadly, Puerto Ricans are entitled to the full swath of constitutional rights under the *Insular Cases* due to Congress implicitly making the island an incorporated territory. Finally, Part IV will detail the three legislative remedies as an alternative method of achieving Puerto Rico's franchisement: a constitutional amendment, a resolution to Puerto Rico's political status to finally explicitly solve the question of incorporation, and an amendment for the nuclear option of eliminating the Electoral College.

I. HISTORICAL BACKGROUND

A. *Taínos, Spaniards, and Colonialism*

Before Christopher Columbus “discovered” the Americas, Amerindian societies had been inhabiting the continents and the Caribbean islands for generations.¹⁹ The Taíno phase of Amerindian culture is the most well-known in Puerto Rico and was the final one before the arrival of Columbus “in Boriquén, the name given to the island by its [original] inhabitants.”²⁰ Over the next few centuries, Puerto Rico served as an economic staple in the Spanish empire but it had almost no political rights.²¹ Soon after the American and French revolutions, however, the Spanish had a revolution of their own in 1812, resulting in the Constitution of Cadíz, which was Puerto Rico's first taste of representative government and was adopted and revoked four times.²² The third and fourth iterations of the Constitution lacked the legislative

¹⁹ FERNANDO PICÓ, HISTORY OF PUERTO RICO: A PANORAMA OF ITS PEOPLE 11–12 (2006).

²⁰ *Id.*

²¹ *See generally id.*

²² *Id.* at 128–29, 132–35, 175–76. When the Spanish government returned to constitutional monarchy after its brief flirtation with republicanism, it was hesitant to raise Puerto Rico to provincial, rather than colonial, status, so the island's government mitigated the lower status with critical reforms. *Id.* at 217, 219–20. *See also French Defeated in Spain*, HISTORY (July 21, 2010), <https://www.history.com/this-day-in-history/french-defeated-in-spain> [<https://perma>

institutions of the previous two versions, however, thus imprinting Puerto Rico's colonial status under the Crown.²³

In 1868, events in the United States again affected Puerto Rico as the end of the Civil War triggered calls for the end of slavery on the island, culminating in El Grito de Lares (the Shout of Lares).²⁴ El Grito was an attempted revolt to create the Republic of Puerto Rico that quickly died out.²⁵ It is noteworthy, however, because it was "the first major concerted effort by Puerto Ricans to radically alter their common situation."²⁶ As calls for Puerto Rican autonomy were increasingly raised, they were stifled after the explosion of the U.S.S. Maine in Cuba led to the beginning of the Spanish-American War on April 21, 1898.²⁷

B. *The Insular Cases and Citizenship*

Following a relatively short war, Spain and the United States signed the Treaty of Paris on December 10, 1898 to end the conflict, which included the cession of Puerto Rico to the United States.²⁸ The treaty was ratified in April 1899 and spelled out Spain's rights with regard to the island, but left out the rights of Puerto Rico itself and of its inhabitants.²⁹ This problem was solved on April 12, 1900 with the passage of the Foraker Act, which officially ended the military government on the island and established a civil one with a resident commissioner to Congress.³⁰

In the years after the passage of the Foraker Act, the Supreme Court heard a group of cases often referred to as the *Insular Cases*,³¹ regarding the application of the

.cc/YEU3-RKHE] (describing the revolt against Napoleonic rule over the Iberian Peninsula and the victorious alliance between Spain, Portugal, and Britain). The disillusionment of being repeatedly granted political rights, only to have them taken away, led to an attempted revolt in 1838. PICÓ, *supra* note 19, at 176.

²³ PICÓ, *supra* note 19, at 175–76.

²⁴ *Id.* at 183.

²⁵ *Id.*

²⁶ *Id.* at 183–86.

²⁷ *Id.* at 233; *Spanish-American War*, HISTORY (May 10, 2010), <https://www.history.com/topics/early-20th-century-US/spanish-american-war> [<https://perma.cc/4K3Z-7ALJ>].

²⁸ PICÓ, *supra* note 19, at 238; GARRINE P. LANEY, CONG. RESEARCH SERV., RL 97-526, PUERTO RICO: A CHRONOLOGY OF POLITICAL STATUS HISTORY (1998) [hereinafter CRS REPORT].

²⁹ PICÓ, *supra* note 19, at 238–39.

³⁰ CRS REPORT, *supra* note 28, at 3.

³¹ See Juan R. Torruella, *Ruling America's Colonies: The Insular Cases*, 32 YALE L. & POL'Y REV. 57, 58 n.3 (2013) (citing to the *Insular Cases*). Torruella lists the following cases: *Armstrong v. United States*, 182 U.S. 243 (1901) (holding invalid the tariffs imposed on goods exported to Puerto Rico from the United States after the ratification of the treaty between the latter and Spain); *DeLima v. Bidwell*, 182 U.S. 1 (1901) (holding that once the United States had acquired Puerto Rico through cession from Spain, it was no longer considered a foreign country within the meaning of tariff laws); *Dooley v. United States*, 182 U.S. 222 (1901) (holding that the President's right to exact duties on imports from Puerto Rico into the United States ceased after the ratification of the treaty between the United States and Spain); *Downes v. Bidwell*,

Constitution to the territories and whether the full swath of constitutional rights followed the flag.³² Many of these cases were decided in 5–4 plurality opinions by much of the same Court that created *Plessy v. Ferguson*'s³³ “separate but equal” doctrine and decided the Chinese Exclusion cases,³⁴ so the precedential value is in doubt and had “a definite tinge of racial bias.”³⁵ In his dissent in *Igartua III*³⁶ discussed below, Judge Torruella placed *Plessy* and the *Insular Cases* on similar terms in terms of “licencing [sic] the downgrading of the rights of discrete minorities” within the United States.³⁷

By hitting the incorporation issue on its head, the final *Insular Case*, *Downes v. Bidwell*,³⁸ would become the most important because it would determine Puerto Rico's status in the United States until the present day.³⁹ The issue in the case was whether the Foraker Act violated the Uniformity Clause of the Constitution.⁴⁰ In Justice White's concurrence, he echoed the dissent in the first of the *Insular Cases*.⁴¹ He argued that because the treaty did not specifically discuss incorporation, it was up to Congress to allow Puerto Rico to “enter into and form a part of the American family,”⁴² but until that time, Puerto Rico “is both foreign and domestic at once.”⁴³ Therefore, Congress's lack of action on the issue meant that the residents of Puerto Rico would not be given the full swath of constitutional rights.

Chief Justice Fuller's dissent, joined by Justices Harlan, Brewer, and Peckam, presents the argument that “the [Foraker Act] . . . made Porto Rico . . . an organized territory of the United States” and that the idea of incorporation replaces the American republican government with one resembling the empire the United States left.⁴⁴ Writing separately, Justice Harlan added to the Chief Justice's concern by noting that the Constitution provides rights based on the very fact of being part of the United States,

182 U.S. 244 (1901) (holding that Puerto Rico did not become a part of the United States within the meaning of Article I, Section 8 of the Constitution); *Goetze v. United States*, 182 U.S. 221 (1901) (holding that, within the meaning of United States tariff laws, Hawaii and Puerto Rico were not foreign countries); *Huus v. N.Y. & P.R. S.S. Co.*, 182 U.S. 392 (1901) (holding that a vessel engaging in trade between New York and Puerto Rico was engaged in coastal trade, not foreign trade).

³² Torruella, *supra* note 31, at 66.

³³ *Plessy v. Ferguson*, 163 U.S. 537 (1896).

³⁴ *See, e.g.*, *Chae Chan Ping v. United States*, 130 U.S. 581 (1893); *Fong Yue Ting v. United States*, 149 U.S. 698 (1889).

³⁵ Torruella, *supra* note 31, at 68.

³⁶ *Igartua De La Rosa v. United States (Igartua III)*, 417 F.3d 145 (1st Cir. 2005).

³⁷ *Id.* at 162 (Torruella, J., dissenting).

³⁸ 182 U.S. 244 (1901).

³⁹ Torruella, *supra* note 31, at 69–70.

⁴⁰ *Downes*, 182 U.S. at 247; *see* U.S. CONST. art. I, § 8, cl. 1 (“[A]ll Duties, Imposts and Excises shall be uniform throughout the United States.”).

⁴¹ *See* Torruella, *supra* note 31, at 71.

⁴² *Downes*, 182 U.S. at 339 (White, J., concurring); *see De Lima v. Bidwell*, 182 U.S. 1, 214 (1901) (McKenna, J., dissenting).

⁴³ Torruella, *supra* note 31, at 71–72.

⁴⁴ *Downes*, 182 U.S. at 373 (Fuller, C.J., dissenting).

not based on where one lives within it, thus the idea of “mere colonies . . . is wholly inconsistent with the spirit and genius as well as the words of the Constitution.”⁴⁵ Because these dissents have never made the transition into a holding, the power to incorporate Puerto Rico remains in Congress’s hands.

In the years following the decisions of the *Insular Cases*, Congress passed the Jones-Shafroth Act in 1917, granting Puerto Ricans U.S. citizenship during World War I, providing a bill of rights for the island, and establishing a locally elected House and Senate.⁴⁶ Cases in Hawaii and Alaska created an assumption that with a grant of citizenship came incorporation into the Union with full rights of that citizenship.⁴⁷ Alaska would not become a state until 1959,⁴⁸ fifty-five years after its incorporation, demonstrating that incorporation into the Union did not require statehood.

The test of whether the holding in *Rasmussen v. United States*,⁴⁹ that a congressional grant of citizenship to a territory incorporated that territory into the Union, would apply to Puerto Rico’s 1917 grant of citizenship came in 1922 in the form of *Balzac v. Porto Rico*,⁵⁰ a libel case where the Puerto Rican defendant requested a jury trial.⁵¹ The case moved its way up through the courts as the defendant’s right to a jury trial was repeatedly denied, including by a final decision from the Supreme Court.⁵² The Court unanimously held that the only right added to the “fundamental rights” of an unincorporated territory by the 1917 grant of citizenship was the ability to freely move to the United States.⁵³ Otherwise, Chief Justice Taft wrote, “it is locality that is determinative of the application of the Constitution, . . . and not the [citizenship] status of the people who live in it.”⁵⁴ Thus, the fundamental rights of the residents of Puerto Rico are still undefined except on a case-by-case basis.⁵⁵

⁴⁵ *Id.* at 380 (Harlan, J., dissenting).

⁴⁶ CRS REPORT, *supra* note 28, at 3. This Act is not to be confused with the Jones Act of 1920, which, among other things, included a provision requiring that shipments between U.S. ports be made by U.S. ships with U.S. crew. Jones Act of 1920, 41 Stat. 988, 46 U.S.C. § 55102(b) (2006).

⁴⁷ See Torruella, *supra* note 31, at 74–75. See also *Rasmussen v. United States*, 197 U.S. 516, 522 (1905) (holding that the grant of citizenship to Alaskans expressly incorporated the territory into the United States in 1905).

⁴⁸ *Alaska Celebrates Statehood As Two Others Consider Options*, NAT’L CONST. CENTER (Jan. 3, 2013), <https://constitutioncenter.org/blog/alaska-celebrates-statehood-as-two-others-consider-options> [<https://perma.cc/DB9C-T2Z6>].

⁴⁹ 197 U.S. 516 (1905).

⁵⁰ 258 U.S. 298 (1922).

⁵¹ *Id.* at 300.

⁵² *Id.*

⁵³ *Id.* at 308.

⁵⁴ *Id.* at 309. This holding is in direct tension with *Rasmussen*, 197 U.S. at 516, decided only seventeen years prior. Taft distinguished the discrepancy by saying that Alaska was “enormous . . . very sparsely settled, and offering opportunity for immigration and settlement [because it was near the United States]” whereas Puerto Rico, only 100 miles from Florida’s coast, is difficult to incorporate because it is none of these. *Balzac*, 258 U.S. at 309.

⁵⁵ Torruella, *supra* note 31, at 78. As of right now, these rights have been limited to the

In the years since *Balzac*, the Supreme Court has suggested limitation of the *Insular Cases*' incorporation doctrine. Justice Black stated concern about the *Insular Cases* in *Reid v. Covert*,⁵⁶ echoing some of the concerns expressed by the dissenting opinions in 1901.⁵⁷ In 1957, he did so by proclaiming that "neither the cases nor their reasoning should be given any further expansion."⁵⁸ Twenty-two years later, in a case considering the application of the Fourth Amendment to Puerto Rico, Justice Brennan penned a concurring opinion explaining his belief that:

Whatever the validity of the old cases such as *Downes v. Bidwell*, *Dorr v. United States*, and *Balzac v. Porto Rico*, in the particular historical context in which they were decided, those cases are clearly not authority for questioning the application of the Fourth Amendment—or any other provision of the Bill of Rights—to the Commonwealth of Puerto Rico in the 1970's.⁵⁹

Finally, the Court recently promoted the idea in *Boumediene v. Bush*⁶⁰ that a territory's relationship to the United States is not set in stone.⁶¹ Writing for the majority, Justice Kennedy stated that "[i]t may well be that over time the ties between the United States and any of its unincorporated Territories strengthen in ways that are of constitutional significance."⁶² As will be argued below, this idea of a change in relationship should clearly be applied to Puerto Rico, given the treatment of the island by Congress over the past century.

First, Fourth, and Fifth Amendments. Carlos R. Soltero, *The Supreme Court Should Overrule the Territorial Incorporation Doctrine and End One Hundred Years of Judicially Condoned Colonialism*, 22 CHICANO-LATINO L. REV. 1, 19–20 (2001). This includes Equal Protection claims. See *Examining Bd. of Eng'rs, Architects, & Surveyors v. Flores de Otero*, 426 U.S. 572, 600 (1976) ("It is clear now, however, that the protections accorded by either the Due Process Clause of the Fifth Amendment or the Due Process and Equal Protection Clauses of the Fourteenth Amendment apply to residents of Puerto Rico."). It also includes habeas corpus. Additionally, the right to privacy is protected. See *Montalvo v. Colon*, 377 F. Supp. 1332, 1341–42 (D.P.R. 1974). Finally, travel is also incorporated. See *Califano v. Torres*, 435 U.S. 1, 1 n.1 (1978). This is a particularly short list, given the laundry list of personal rights that the people of the States and D.C. have come to take for granted.

⁵⁶ 354 U.S. 1 (1957).

⁵⁷ *Id.* at 14 ("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 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."). See also *Downes v. Bidwell*, 182 U.S. 372–73 (Fuller, C.J., dissenting); *id.* at 379 (Harlan, J., dissenting).

⁵⁸ *Reid*, 354 U.S. at 14.

⁵⁹ *Torres v. Puerto Rico*, 442 U.S. 465, 475–76 (1979) (Brennan, J., concurring) (citations omitted).

⁶⁰ 553 U.S. 723 (2008).

⁶¹ See *id.* at 758.

⁶² *Id.*

The *Insular Cases*' incorporation doctrine has also been called into doubt by a lower court on the island in *Consejo de Salud Playa de Ponce v. Rullan*.⁶³ In that case, medical centers on the island sued the Secretary of Health for Puerto Rico for Medicaid wraparound payments.⁶⁴ In response, the Secretary argued that the wrap-around statute treated Puerto Rico disparately from the States, which could no longer be allowed as "the *Insular Cases* doctrine is anachronistic, and, thus, no longer applicable."⁶⁵ The district court, after thoroughly examining the relationship between the United States and Puerto Rico, agreed with this sentiment and held that the congressional treatment of Puerto Rico since 1898 had evolved Puerto Rico's status from an unincorporated to an incorporated territory.⁶⁶ Recognizing that he could not ignore Supreme Court precedents of the *Insular Cases* as a whole, Judge Gelpí necessarily limited his ruling to the island of "Puerto Rico and the 4,000,000 United States citizens residing therein."⁶⁷

C. World War II, Nationalism, and Law 600

Following their service in World War II, the thousands of returning soldiers helped to modernize the island due to their access to "higher education, finance for purchasing a house, [and] federal employment" among other things.⁶⁸ Their military service and subsequent access to these vital services created a generation of leadership for the island, including participation in the island's two, newly founded major parties: the Popular Democratic Party (PDP) and the Puerto Rican Independence Party (PRIP).⁶⁹

Conversely, the post-war period also saw a mass emigration from the island to the mainland, particularly to Manhattan, the Bronx, Brooklyn, Chicago, and Philadelphia, due to economic opportunity and cheap airfare.⁷⁰ These groups of Puerto Ricans faced numerous problems, most notably prejudice and racism, leading the second and third generations to move out of the old neighborhoods to "beg[i]n a new stage in the history of the Puerto Rican communities."⁷¹

In the years following the return of Puerto Rico's war heroes, Law 600, passed in 1950, modified the Jones Act of 1917 to allow Puerto Rico to draft its own constitution.⁷² The island's constitution was adopted on March 3, 1952, then passed through

⁶³ 586 F. Supp. 2d 22 (D.P.R. 2008).

⁶⁴ *Id.* at 23.

⁶⁵ *Id.*

⁶⁶ *Id.* at 43.

⁶⁷ *Id.* *Consejo de Salud* has never been overruled, but a later case, *Igartua IV*, did decline to extend this ruling to the right to vote for a House of Representatives member. See *Igartua v. United States (Igartua IV)*, 86 F. Supp. 3d 50 (D.P.R. 2015).

⁶⁸ PICÓ, *supra* note 19, at 269.

⁶⁹ *Id.* at 267, 269–70.

⁷⁰ *Id.* at 272–73.

⁷¹ *Id.* at 273–75.

⁷² Puerto Rico Federal Relations Act of 1950, Pub. L. No. 81-600 (1950); PICÓ, *supra* note 19, at 279.

Congress, albeit with opposition, and signed by President Truman as H.J. Res. 430 on July 3, 1952.⁷³ The island then gained a new title for its status: *Estado Libre Asociado* (Free Associated State).⁷⁴ In the years following, Puerto Ricans were placed in their own military regiment (the 65th) for the Korean and Vietnam Wars, and the island's standard of living seemed to be improving.⁷⁵

D. Status, Bankruptcy, and Hurricanes

On December 14, 1960, the United Nations adopted Resolution 1514 (XV), mandating that “colonialism in all its forms and manifestations’ must be brought ‘to a speedy and unconditional end.’”⁷⁶ This resolution triggered the creation of the U.S.-Puerto Rico Commission on the Status of Puerto Rico in 1964 to study the relations between the two.⁷⁷ The Commission released its report in 1966, finding that “the three status alternatives [of statehood, commonwealth, and independence,] were equally valid and recommended that a plebiscite on status be held.”⁷⁸ The plebiscite was held the following year with 60.4% of the island voting to remain a commonwealth, 38.9% voting for statehood, and 0.06% voting for independence.⁷⁹ The results of this plebiscite led to the foundation of Puerto Rico’s third major party: the New Progressive Party (NPP) in 1967.⁸⁰

Six years later, following the energy crisis in 1973–74, Puerto Rican manufacturing took a hit, so Congress attempted to solve the issue through Clause 936, allowing U.S. companies to move to the territories tax-free.⁸¹ The banking industry boomed, but the number of jobs on the island did not.⁸² Once the federal budget went into a deficit, Clause 936 was limited in order to keep business in Puerto Rico while also increasing federal revenue.⁸³ This limitation came as globalization increased, especially due to the North American Free Trade Agreement (NAFTA), and the only companies that did not flock to other cheaper places were the pharmaceuticals.⁸⁴ In

⁷³ PICÓ, *supra* note 19, at 279; CRS REPORT, *supra* note 28, at 3.

⁷⁴ PICÓ, *supra* note 19, at 279.

⁷⁵ *Id.* at 280–82.

⁷⁶ CRS REPORT, *supra* note 28, at 3.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* In the time since this first plebiscite, more have been taken with varied results. See Venator-Santiago, *supra* note 8. The most recent, in 2017, came back with ninety-seven percent in favor of statehood, but the voter turnout was astonishingly low when compared with Puerto Rico’s average turnout, which is higher than any other state or territory. Issenberg, *supra* note 17; Amy Roberts, *Puerto Rico Statehood Referendum Draws Big Support—But Small Turnout*, CNN (June 12, 2017, 2:03 AM), <http://www.cnn.com/2017/06/09/us/puerto-rico-statehood-vote-2017/index.html> [<https://perma.cc/LH7T-A3BD>].

⁸⁰ PICÓ, *supra* note 19, at 288.

⁸¹ I.R.C. § 936 (1976); PICÓ, *supra* note 19, at 291.

⁸² PICÓ, *supra* note 19, at 291.

⁸³ *Id.* at 292.

⁸⁴ *Id.* at 305.

order to counterbalance this economic fallout, more money was spent in infrastructure in an effort to increase tourism.⁸⁵

A major issue in the 1990s was the use of the island of Vieques by the United States Navy after the accidental death of a naval employee.⁸⁶ As a result, the largest public demonstration in Puerto Rican history occurred on an expressway in Hato Rey as a protest of the continued occupation of Vieques.⁸⁷ While President George W. Bush made good on President Bill Clinton's promise to withdraw from Vieques, the additional closure of the naval base in Ceiba led to economic hardship in the area, and there is still an unfulfilled promise to clean up the Navy's debris.⁸⁸

In the past year or so, Puerto Rico has been frequently featured in American news media. First, the island had a debt crisis—the result of many of the economic policies of the federal government described above—that led to its bankruptcy and the passage of the unpopular Puerto Rico Oversight, Management, and Economic Stability (PROMESA).⁸⁹ Second, the island had its fifth plebiscite regarding its political status, where only 23% of the voting age population turned out to vote due to a protest staged by anti-statehood political parties, leading to a skewed 97% vote for statehood.⁹⁰ Third, Puerto Rico was hit by the worst hurricane since 1928, and the Trump Administration's response has been heavily critiqued by those on the mainland and on the island.⁹¹ As the island is rocked by economic ruin, feelings of political inefficacy, and natural disasters, now is the right time to protect our fellow Americans with the most fundamental of American rights: the right to vote for president.

II. PUERTO RICAN VOTING RIGHTS CASES

At the outset, it is important to note that the U.S. Supreme Court has repeatedly held that voting is a fundamental right for United States citizens.⁹² In a seminal voting rights case, *Reynolds v. Sims*,⁹³ where the Court was faced with the Alabaman

⁸⁵ *Id.* at 306.

⁸⁶ *Id.* at 309.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ Charles M. Tatelbaum, *Puerto Rico's Debt Crisis Threatens the Rest of the US*, OBSERVER (May 8, 2017, 6:30 AM), <http://observer.com/2017/05/puerto-ricos-debt-crisis-us-promesa/> [<https://perma.cc/PV9L-B6ZC>].

⁹⁰ Frances Robles, *23% of Puerto Ricans Vote in Referendum, 97% of Them for Statehood*, N.Y. TIMES (June 11, 2017), <https://nyti.ms/2scfiaN>.

⁹¹ Laignee Barron, *U.S. Emergency Response Efforts in Puerto Rico Aren't Good Enough, U.N. Experts Say*, TIME (Oct. 31, 2017), <http://time.com/5003470/united-nations-puerto-rico-hurricane-response/> [<https://perma.cc/272G-HSXB>].

⁹² *See, e.g.*, *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 627 (1969); *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 670 (1966); *Lucas v. Forty-Fourth Gen. Assembly of State of Colo.*, 377 U.S. 713, 736 (1964); *Reynolds v. Sims*, 377 U.S. 533, 561–62 (1964); *Baker v. Carr*, 369 U.S. 186, 208 (1962).

⁹³ *Reynolds v. Sims*, 377 U.S. 533 (1964).

legislatures apportionment scheme in 1964, the majority found that the right to vote is “preservative of other basic civil and political rights,”⁹⁴ so any denial of that right is subject to the strictest scrutiny.⁹⁵ Furthermore, in one of the cases discussed below, Judge Torruella states that “[t]he right to vote is a *fundamental* right, which our Constitution guarantees to *all citizens*.”⁹⁶ Having presented the unincorporated territory status of Puerto Rico as well as the fundamentality of voting rights, I would now like to turn to the current state of Puerto Rican voting rights case law.

One of the early cases concerning Puerto Rican voting rights arose in the District Court of Puerto Rico in 1974 in *Sanchez v. United States*.⁹⁷ The plaintiff in *Sanchez* brought an order for a three-judge court to decide whether the denial of her right to vote “as a citizen of the United States residing in Puerto Rico” for president and vice president is a constitutional violation.⁹⁸ The court denied her request as “plainly without merit” because the Constitution grants to the States the right to choose presidential electors, not to individual citizens.⁹⁹ The court did go on to lament that the disenfranchisement of Puerto Rico is inexcusable but stated that statehood or a constitutional amendment would be necessary for the residents of the island to have the right to vote.¹⁰⁰

Turning to the first of many in the *Igartua* line of cases,¹⁰¹ the First Circuit held that Article II of the Constitution gave Puerto Rico no constitutional right to vote in presidential elections.¹⁰² Rather, Article II gives the States the right to choose their electors, who then vote for president, thus only the citizens of the states have the right to “vote for electors and thereby indirectly for the president.”¹⁰³ Puerto Rico’s territorial status is therefore a bar from its “constitutional right to participate in that election.”¹⁰⁴ Because Puerto Rico, like the District of Columbia, is not a state, a constitutional amendment is required to give them presidential electors.¹⁰⁵

⁹⁴ *Id.* at 561.

⁹⁵ *Id.* at 561–62.

⁹⁶ *Igartua De La Rosa v. United States (Igartua III)*, 417 F.3d 145, 169 (1st Cir. 2005) (Torruella, J., dissenting) (emphasis added).

⁹⁷ 376 F. Supp. 239 (D.P.R. 1974). The likely reason that this case came up long after *Balzac* is that until *Baker* in the 1960s, the courts were not really set up to handle voting rights issues that might touch a political question. See *Baker*, 369 U.S. at 217. Following *Baker*, these types of voting claims slowly became more common, with a massive explosion of cases in the aftermath of the 2000 presidential election. See *Bush v. Gore*, 531 U.S. 98, 103 (2000); *Baker*, 369 U.S. at 217.

⁹⁸ *Sanchez*, 376 F. Supp. at 240.

⁹⁹ *Id.* at 241.

¹⁰⁰ *Id.* at 242.

¹⁰¹ *Igartua De La Rosa v. United States (Igartua I)*, 842 F. Supp. 607 (D.P.R. 1994), *aff’d* 32 F.3d 8, 9–10 (1st Cir. 1994), *cert. denied*, 514 U.S. 1049 (1995).

¹⁰² *Id.*

¹⁰³ *Id.* at 9.

¹⁰⁴ *Id.* at 10.

¹⁰⁵ *Id.*

Speaking more specifically to the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), some plaintiffs sued under due process and equal protection claims, but the court found that UOCAVA did not violate their due process or equal protection rights because it did not guarantee citizens moving to Puerto Rico the right to vote in presidential elections.¹⁰⁶ The reason behind this ruling is that the Act only makes a distinction between citizens living overseas and those living within the United States.¹⁰⁷ Therefore, someone who moves from the mainland to Puerto Rico does not fall under the category of citizens who qualify for absentee ballots because both are within the jurisdiction of the United States.¹⁰⁸ The consequence of losing the right to vote in a presidential election is a result of Article II and Puerto Rico's status, not something wrong with UOCAVA.¹⁰⁹

In a second set of *Igartua* cases, which the First Circuit also heard, lifelong residents of Puerto Rico again brought an action alleging that their inability to vote in United States presidential elections violated their constitutional rights as citizens, and former mainlanders brought another claim under UOCAVA.¹¹⁰ The claim, unlike *Igartua I*,¹¹¹ was that the inability to vote for *presidential electors* was unconstitutional.¹¹² The District Court of Puerto Rico agreed and reasoned that the social contract was being breached due to lack of consideration because the citizens in Puerto Rico had given the government the right to govern without receiving the vital right to vote in return.¹¹³ Furthermore, Judge Pieras went on to find that no constitutional amendment was required to provide the vote to the residents of Puerto Rico because “[t]he right preexists the potential amendment by virtue that the Constitution itself provides that right.”¹¹⁴ Judge Pieras then lamented the abnormal status of Puerto Rico, leading to a confused relationship with the United States.¹¹⁵ Ultimately, the District Court briefly granted Puerto Rico's residents the right to vote in October 2000 before one of the country's most controversial elections.¹¹⁶

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 10–11.

¹⁰⁹ *Id.*

¹¹⁰ *Igartua De La Rosa v. United States*, 113 F. Supp. 2d 228, 230 (D.P.R. 2000). The Court ultimately rejected the UOCAVA claims. *Id.* at 150. The plaintiffs also alleged that their disenfranchisement violated the International Covenant on Civil and Political Rights. *Id.* at 141. The Court was not persuaded by this claim. *Id.* at 149.

¹¹¹ *Igartua I*, 32 F.3d 8 (1st Cir. 1994).

¹¹² *Igartua*, 113 F. Supp. 2d at 230.

¹¹³ *Igartua De La Rosa v. United States (Igartua II)*, 107 F. Supp. 2d 140, 147 (D.P.R. 2000). This opinion was later incorporated into *Igartua II* alongside the final judgment.

¹¹⁴ *Id.* at 148.

¹¹⁵ *Id.* at 149.

¹¹⁶ Eduardo Guzmán, *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*, 4 U. PA. J. CONST. L. 141, 141 (2001).

On appeal, the First Circuit, relying upon *Igartua I* decided only six years earlier, followed *stare decisis* and again ruled that the residents of Puerto Rico had no such right.¹¹⁷ The Court decided that the distinction relied on by the plaintiffs in this second go-around, namely claiming that they had a right to vote for electors as opposed to just for president, was no distinction at all because “the appointment of electors (through the popular vote) is the means by which the president and vice president are chosen.”¹¹⁸ The majority continued by stating that there were only two exceptions to *stare decisis*, and since neither applied in this case, it remanded the decision to be dismissed with prejudice.¹¹⁹

Judge Torruella wrote a concurrence based on his agreement that the majority opinion was legally correct, but after its first paragraph, the concurrence reads like a dissent that laments the current state of affairs between Puerto Rico and the United States.¹²⁰ Much of the concurrence retells the history described above,¹²¹ but then Torruella hones in on his real problem with the relationship between the United States and Puerto Rico:

The United States citizens residing in Puerto Rico to this day continue to have no real say in the choice of those who, from afar, really govern them, nor as to the enactment, application, and administration of the myriad of federal laws and regulations that control almost every aspect of their daily affairs.¹²²

He then cited to a predictive passage from the first *Insular Case* where the majority was worried that this territorial limbo “may continue for years, *for a century even. . .*”¹²³ To prevent this, the court held the opposite way because it did not believe that the Constitution nor the judicial powers conferred therein allowed for such an indefinite territorial status to exist.¹²⁴ Due to his strong belief that the relationship was wrongly one-sided and would seemingly not be solved through the political branches, Torruella recalled *Brown v. Board of Education*¹²⁵ as a time when the Supreme Court stepped in “to protect the civil rights of a distinct and politically powerless group of United States citizens.”¹²⁶ He then issued a warning to the political branches to step in soon or the courts would be forced into “corrective judicial action.”¹²⁷ Seventeen years later and no such action has taken place.¹²⁸

¹¹⁷ *Igartua De La Rosa v. United States*, 229 F.3d 80, 83–84 (1st Cir. 2000).

¹¹⁸ *Id.* at 84.

¹¹⁹ *Id.* at 84–85.

¹²⁰ *Id.* at 85 (Torruella, J., concurring).

¹²¹ *Id.* at 85–87; see *supra* Part I. See generally PICÓ, *supra* note 19.

¹²² *Igartua II*, 229 F.3d at 88.

¹²³ *Id.* (quoting *De Lima v. Bidwell*, 182 U.S. 1, 198 (1901)).

¹²⁴ *Id.* (quoting *De Lima*, 182 U.S. at 196–97).

¹²⁵ 347 U.S. 483 (1954).

¹²⁶ *Igartua II*, 229 F.3d at 88–89.

¹²⁷ *Id.* at 90.

¹²⁸ See *infra* note 161.

The following year, *Romeu v. Cohen*¹²⁹ filtered up to the Second Circuit; again, it involved the same issue—voting and Puerto Rico—just under a different name. A resident of Puerto Rico who had previously lived and voted in New York brought suit alleging that the Voting Rights Amendments, UOCAVA, and New York election law unconstitutionally denied his right to receive an absentee ballot for presidential elections.¹³⁰ The Court denied this claim, holding that Congress acted in accordance with the Equal Protection Clause by limiting UOCAVA to overseas citizens because of the potential for unequal rights of residents within Puerto Rico, with former mainlanders having voting rights and lifetime islanders without.¹³¹ The court also addressed Romeu’s other right to vote claims and his right-to-travel claim.¹³²

Following the holding, one of the judges suggested a creative, but likely unpopular, solution to the Puerto Rican voting rights issue.¹³³ The judge put forth a plan whereby Congress would create a method for the presidential votes of each territory to be spread out into the vote totals of each state when allocating its presidential electors.¹³⁴ Although this idea would help enfranchise the territories, it would do so at the expense of the sovereignty of the many states, which likely would go over very poorly and potentially be unconstitutional.¹³⁵

Returning to the *Igartua* series of cases, *Igartua III*¹³⁶ was brought by residents of Puerto Rico under the usual claim of a constitutional violation, and once again tacked on a claim that their disenfranchisement ran contrary to international obligations of the United States.¹³⁷ Following a district court dismissal, the residents appealed to the First Circuit, which held, once again, that on the constitutional violation claim, residents of the island had no constitutional right to participate in presidential elections.¹³⁸ It reasoned that *Igartua*’s claim was “unsupported by the Constitution [and] . . . contrary to its provisions”¹³⁹ because, as it reiterated in the other cases, Puerto Rico had not become a state, so its residents had no claim to presidential electors.¹⁴⁰

¹²⁹ 265 F.3d 118, 120–22 (2d Cir. 2001).

¹³⁰ *Id.* at 120.

¹³¹ *Id.* at 125.

¹³² *Id.* at 126–27.

¹³³ *Id.* at 129–30.

¹³⁴ *Id.*

¹³⁵ See *Shelby County v. Holder*, 133 S. Ct. 2612, 2616–18 (2013) (holding the pre-clearance formula in § 4 of the Voting Rights Act unconstitutional due to “dramatic departure from the principle that all States enjoy equal sovereignty”).

¹³⁶ *Igartua De La Rosa v. United States*, 417 F. 3d 145 (1st Cir. 2005).

¹³⁷ *Id.* at 146–47. Of the three treaties relied on, the majority stated that “neither a statute nor a treaty can override the Constitution.” *Id.* at 148. With regard to both the constitutional and international law arguments, the Court held that it was the place of neither federal judges nor international law to dictate changes to the Constitution’s provisions. *Id.* at 152.

¹³⁸ *Id.* at 146–47.

¹³⁹ *Id.* at 148.

¹⁴⁰ *Id.* at 147.

Following the concurrences are two lengthy dissents, one by Judge Torruella and the other by Judge Howard. Judge Torruella's concurrence is particularly significant because he changed from a concurring vote five years prior in *Igartua II* to a full-throated dissent in *Igartua III*.¹⁴¹ His dissent arose from his belief that the majority failed to meet its duty to protect the sanctity of the plaintiffs' voting rights, which they needed the court's help to declare because their lack of federal representation left no political recourse.¹⁴² Like his earlier concurrence, Torruella began with the history of the relationship between Puerto Rico and the United States and the relevant case law, focusing particularly on the *Insular Cases*, which he believed "would today be labeled blatant 'judicial activism.'"¹⁴³

After his discussion of the colonial relationship, Torruella set his sights on the right to vote.¹⁴⁴ First, he described the wealth of case law calling this right a fundamental right, then showed that fundamental rights apply to Puerto Rico.¹⁴⁵ Moving to the international law claim, Torruella showed that the United States must ensure voting rights, being bound by international law (including four treaties),¹⁴⁶ which the country has respected since its founding.¹⁴⁷ While the International Covenant on Civil and Political Rights is not self-executing, thus obligating Congress to make affirmative acts to meet its requirements rather than the treaty doing that itself, it is nonetheless binding on the United States, obligating it to make *some* act towards the treaty's stated goals.¹⁴⁸ To be considered customary international law, a norm must be clear, unambiguous, specific, universal, and obligatory.¹⁴⁹ The numerous treaties to which the United States is a party calling for the right to equal political participation as well as the number of democratic countries with this right both point to this norm to be customary international law.¹⁵⁰ As such, this right should clearly be "incorporated into the domestic law . . . as federal common law to be applied by the federal courts."¹⁵¹

Torruella then pushed against his colleague's belief that the declaratory claim here was impossible to redress because a declaration, in and of itself, would help the Puerto Rican case for the franchise.¹⁵² He shot down the concurrence as speculation

¹⁴¹ *Id.* at 158; see *Igartua De La Rosa v. United States (Igartua II)*, 229 F.3d 80, 85 (1st Cir. 2000).

¹⁴² *Igartua De La Rosa v. United States (Igartua III)*, 417 F.3d 145, 159, 168 (1st Cir. 2005) (Torruella, J., dissenting).

¹⁴³ *Id.* at 159–65, 163.

¹⁴⁴ *Id.* at 169.

¹⁴⁵ *Id.* at 169–70.

¹⁴⁶ These include the Universal Declaration of Human Rights, the American Declaration of the Rights and Duties of Man, the Inter-American Democratic Charter of the Organization of American States, and the International Covenant on Civil and Political Rights. *Id.* at 171.

¹⁴⁷ *Id.* at 170–71.

¹⁴⁸ *Id.* at 174–75.

¹⁴⁹ *Id.* at 175.

¹⁵⁰ *Id.* at 176.

¹⁵¹ *Id.* at 179.

¹⁵² *Id.* at 180–81.

itself, as opposed to the plaintiffs' claim at issue.¹⁵³ He also lamented the Court's reasoning that a ruling against the United States would embarrass it on the national stage, stating that this was not a reason to disenfranchise Puerto Rico and that the United States should *already* be embarrassed by its treatment of Puerto Rico.¹⁵⁴ He ended with his ideal holding: that the case be remanded for a declaratory judgment against the United States for breaking from its international law obligations.¹⁵⁵

The second dissent by Judge Howard is notable as well and begins by referencing the creative solution presented in *Romeu*.¹⁵⁶ He also stated that generations of Americans have put faith in their ability to vote for the nation's leaders, and any claim regarding that right should be approached "searchingly rather than skeptically" with the full breadth of the courts' declaratory ability.¹⁵⁷ Regarding the treaty claim, Howard viewed it as a separation-of-powers issue, "requir[ing] a court to examine independently the intentions of the treaty-makers to decide if a treaty, by its own force, creates individually enforceable rights."¹⁵⁸ The Constitution itself places treaties consented to by the Senate and ratified by the president as part of the domestic law enforceable by the courts.¹⁵⁹ Howard would have denied the motion to dismiss in order to create a factual record for the court to decide upon.¹⁶⁰

III. ARGUMENTS FOR PUERTO RICAN VOTING RIGHTS

A. Political Process Breakdown or Implicit Incorporation

The legislative options discussed in the next section would be simple solutions to the problem of Puerto Rican voting rights and incorporation. But Congress's inability to act on incorporation since annexation in 1898 and on the right to vote since citizenship in 1917 reveals that Congress will never solve the problem on its own, which leads to some important questions about judicial intervention.

If, as was held in *Igartua III*, "[t]he case for giving Puerto Ricans the right to vote in presidential elections is fundamentally a political one and must be made through political means," then could the lack of a solution for Puerto Rico's franchise in the past one hundred years since citizenship represent a political process breakdown like the one seen in *Baker v. Carr*?¹⁶¹ Similarly, if the power of incorporation more generally is left in the hands of Congress, would the lack of action in the past 130 years since

¹⁵³ *Id.* at 181.

¹⁵⁴ *Id.* at 183.

¹⁵⁵ *Id.* at 184.

¹⁵⁶ *Id.* at 184 (Howard, J., dissenting).

¹⁵⁷ *Id.* at 184–85.

¹⁵⁸ *Id.* at 185–86.

¹⁵⁹ *Id.* at 186.

¹⁶⁰ *Id.* at 192.

¹⁶¹ *Id.* at 151; Luis Fuentes-Rohwer, *Bringing Democracy to Puerto Rico: A Rejoinder*, 11 HARV. LATINO L. REV. 157, 166–67 (2008). See *Baker v. Carr*, 369 U.S. 186 (1961).

annexation on the issue of incorporation necessitate judicial intervention? Would that judicial intervention agree with Judge Gelpí's idea in *Consejo de Salud* that Congress has already incorporated the island into the Union without explicitly doing so?¹⁶²

Before answering these critical questions, it is important to look at the language of the Voting Rights Amendments of the Constitution in order to see the fundamentality and universality of the American right to vote. The text of each of these amendments (Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth) of the Constitution contains the following language, "the right of citizens of the United States to vote shall not be denied or abridged" and then goes on to prohibit discrimination based on race,¹⁶³ sex,¹⁶⁴ failure to pay a tax,¹⁶⁵ and age.¹⁶⁶ As written, the language is not a *grant* of the right to vote to certain subgroups as it is commonly assumed to be, but rather, the language is a *prohibition* on discrimination based on various factors. Combining this prohibitory language with the precedent regarding voting, the right to vote would seem to be a fundamental right to *all* United States citizens, regardless of place of residence.¹⁶⁷

1. Political Process Breakdown

If there is a political process breakdown, the courts have the ability under *Baker* to step in and rule upon the denial of the residents of Puerto Rico's right to vote.¹⁶⁸ To begin, it is important to consider whether one of the types of political questions on Justice Brennan's list in *Baker* could be at play in the Puerto Rican context.¹⁶⁹ The closest one would be "a textually demonstrable constitutional commitment of the issue to a coordinate political department"¹⁷⁰ because Congress has exercised power regarding voting consistently to protect the voting rights of United States citizens.¹⁷¹

But the justiciability of this claim does not fall under this political power. As Brennan wrote: "Judicial standards under the Equal Protection Clause are well developed and familiar, and it has been open to courts since the enactment of the Fourteenth Amendment to determine . . . that a discrimination reflects no policy, but simply arbitrary and capricious action."¹⁷² Thus, this claim would fall under the Court's

¹⁶² 586 F. Supp. 2d 22, 41 (D.P.R. 2008).

¹⁶³ U.S. CONST. amend. XV.

¹⁶⁴ *Id.* amend. XIX.

¹⁶⁵ *Id.* amend. XXIV.

¹⁶⁶ *Id.* amend. XXVI.

¹⁶⁷ *See id.* amends. XV, XIX, XXIV, XXVI. *See also supra* note 55.

¹⁶⁸ *See Baker v. Carr*, 369 U.S. 186 (1981).

¹⁶⁹ *Id.* at 217.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*; *see* U.S. CONST. amends. XIV, XV, XIX, XXIII, XXVI; Voting Rights Act, 52 U.S.C. § 10301 (1965).

¹⁷² *Baker*, 369 U.S. at 226. While *Baker* was dealing with an Equal Protection claim, it would be hard to argue that the standards under Substantive Due Process are any less "developed and familiar." *See id.*

adjudicative power to remedy the denial of fundamental rights, not under Congress's legislative power to protect them.¹⁷³ In *Baker*, the Tennessee legislature refused to do its constitutional duty of reapportionment based on the decennial census for sixty years, thereby severely diluting the votes of people in affected districts, so the Court stepped in and ruled the claim as justiciable.¹⁷⁴ Here, Congress has avoided for one hundred years the question of voting rights for Puerto Rico, thereby not simply diluting a fundamental right, but erasing it altogether. The Court should step in to resolve the issue.

The concern with this argument is potentially damning: the Court has held that citizens have no right to vote for president, but that citizens of the states have the right to vote for presidential electors.¹⁷⁵ This concern could be countered by arguing that the provision regarding electors in Article II is nothing more than an administrative regulation of how the states shall choose their presidential electors, as opposed to a limitation that only the states *can* choose presidential electors. That would be a tough needle to thread, so the better argument is found in Puerto Rico's nebulous, quasi-state status created by the federal government over the years.

2. Implicit Incorporation

A court may find that Congress's treatment of Puerto Rico has implicitly incorporated the island into the Union, thus entitling residents of Puerto Rico to the full swath of constitutional rights, including the right to vote for presidential electors.¹⁷⁶ One of the arguments for this implicit incorporation is the number of times that congressional statutes contain a provision with language that defines Puerto Rico as a state for purposes of the statute.¹⁷⁷ Were this type of provision to occur in one or two statutes, I would call them outliers. The fact that they appear in many statutes across the various titles of the United States Code presents another story.

One could argue that this language is simply for the ease of writing and applying legislation, but the singling out of Puerto Rico as opposed to including it in the "territories" is significant. For example, in the statute regarding diversity jurisdiction for federal courts, the statute states, "The word 'States,' as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico."¹⁷⁸

¹⁷³ *Igartua De La Rosa v. United States (Igartua III)*, 417 F.3d 145, 183 (1st Cir. 2005) ("There comes a point when the courts must intervene to correct a great wrong, particularly one of their own creation, because the political branches of government cannot or will not act.").

¹⁷⁴ *Baker*, 369 U.S. at 189–95.

¹⁷⁵ *Igartua De La Rosa v. United States (Igartua I)*, 32 F.3d 8, 9 (1st Cir. 1994).

¹⁷⁶ *See Consejo de Salud Playa de Ponce v. Rullen*, 586 F. Supp. 2d 22, 25 (D.P.R. 2008).

¹⁷⁷ *See infra* note 179.

¹⁷⁸ 28 U.S.C. § 1332(e) (1948). *See also, e.g.*, 4 U.S.C. § 112(b) (1949) (definition of "state" in relation to state cooperation against crime); 6 U.S.C. §§ 101(15) (2002), 1111(4) (2007), 1151(9) (2007) (defining "state" for domestic security, transportation security, and surface transportation security respectively); 10 U.S.C. § 1512(b) (1996) (defining "state" for nonpreemption purposes relating to missing persons); 15 U.S.C. §§ 267 (1966), 1214 (1956) (defining "state"

By naming Puerto Rico on its own, it places the other Territories and Puerto Rico in separate categories and may imply that Puerto Rico and the District of Columbia are on level ground with one another. Going further, a number of statutes do not even mention the territories in these types of provisions—only listing the several States, the District of Columbia, and the Commonwealth of Puerto Rico.¹⁷⁹

In addition to numerous statutes and chapters of the United States Code that define “state” to include Puerto Rico, certain statutes in and of themselves would seem to show implicit incorporation. First and foremost is the code provision giving statutory laws of the United States “the same force and effect in Puerto Rico as in the United States.”¹⁸⁰ As a further showing of the relationship between the United States and the island, Congress prohibited the application of tariffs and duties to products traded between the two.¹⁸¹ Additionally, the unincorporated status and lack of rights given to the island of Puerto Rico would seem to be “at odds with the legislative intent driving the Jones Act [of 1917], as it was believed that ‘the granting of citizenship to Puerto Ricans would entitle them to all the rights and privileges of such a status.’”¹⁸²

While making the laws and economic relationship between the mainland and the island more cohesive, Congress also melded the judicial systems of Puerto Rico and the United States.¹⁸³ Importantly, the judicial title of the United States Code contains provisions that allow the Supreme Court of the United States to grant certiorari to cases arising from the Supreme Court of Puerto Rico,¹⁸⁴ provide Puerto Rico with its own District Court,¹⁸⁵ and include appeals from that District Court within the First Circuit with other states.¹⁸⁶ Additionally, the title regarding Puerto Rico requires that all judicial proceedings be operated in the name of the United States, that all officials

for standard time and interstate commerce); 17 U.S.C. § 101 (1976) (defining “state” for scope of copyright); 28 U.S.C. § 1367(e) (1990) (defining “state” for supplemental jurisdiction); 31 U.S.C. § 6201(2) (1986) (defining “state” for the Consolidated Federal Funds Report); 38 U.S.C. § 6304(a) (2006) (separating out Puerto Rico from “territories and possessions” in relation to veterans assistance offices); 52 U.S.C. § 30101(R) (1972) (definition of “state” for federal elections campaigns).

¹⁷⁹ See, e.g., 6 U.S.C. § 765(c) (1956) (applying to the States, D.C., and Puerto Rico); 19 U.S.C. §§ 81a(c) (1934), 2095 (1972), 2577 (1993) (defining “state” for foreign trade zones, the “United States” for pre-Columbian art trading, and the North American Free Trade Agreement, respectively); 20 U.S.C. § 9548 (2002) (defining “state” for the National Center for Education Statistics).

¹⁸⁰ 48 U.S.C. § 734 (1917). See also 48 U.S.C. § 734a (1936) (applying industrial alcohol and internal revenue laws to Puerto Rico).

¹⁸¹ 48 U.S.C. § 864 (1900).

¹⁸² *Igartua De La Rosa v. United States (Igartua II)*, 107 F. Supp. 2d 140, 143 (D.P.R. 2000) (quoting JUAN R. TORRUELLA, *THE SUPREME COURT AND PUERTO RICO: THE DOCTRINE OF SEPARATE AND UNEQUAL* 89 (Universidad de Puerto Rico ed. 1985)).

¹⁸³ See *infra* notes 184–87.

¹⁸⁴ 28 U.S.C. § 1258 (1961).

¹⁸⁵ 28 U.S.C. § 119 (1948).

¹⁸⁶ 28 U.S.C. § 41 (1948).

be citizens of the United States, and that those officials “take an oath to support the Constitution of the United States and the laws of Puerto Rico.”¹⁸⁷

Beyond the statutory relationship, a court has actually called Puerto Rico incorporated.¹⁸⁸ In a case from earlier this year, the Seventh Circuit heard a case in which people in the Northern Mariana Islands and American Samoa were able to vote by absentee ballot, but people from Puerto Rico, the U.S. Virgin Islands, and Guam were not.¹⁸⁹ Interestingly, the court cited the following for holding this anomaly as constitutional:

One could rationally conclude that these two territories were in 1979 more similar to foreign nations than were the incorporated territories where the plaintiffs reside. So, at least at the time, it was rational for Illinois to treat the Northern Marianas and American Samoa as foreign countries for the purposes of overseas absentee voting.¹⁹⁰

Now, it is likely that the judge was referring to incorporation by the Illinois statute at issue, but it would be unusual for a judge in a case involving the territories to not choose his words more carefully. Therefore, what if the judge truly believed that Puerto Rico had been incorporated into the Union? The fact that a circuit judge may believe that Puerto Rico is an incorporated territory may be one of the strongest arguments for the island having been implicitly incorporated without express action by Congress.

While intertwining the laws, judicial branches, and economies of the two entities, Congress also brought Puerto Rico into the United States political system. Congress allowing Puerto Rico to become a commonwealth with its own Constitution points to this.¹⁹¹ Bringing Puerto Rico into the political system, however, did not bring about the same level of political autonomy given to the Fifty States. Rather, by allowing Puerto Rico to craft its own Constitution and calling the island a Commonwealth, Congress allowed Puerto Rico only “limited self-government.”¹⁹² The designation as a Commonwealth hardly does any lifting in actually bringing Puerto Rico “equivalent [to other Commonwealths] as a political entity.”¹⁹³ Thus, while Puerto Rico may superficially walk like a state in terms of having its own constitution and being a

¹⁸⁷ 48 U.S.C. § 874 (1917).

¹⁸⁸ See *infra* note 191.

¹⁸⁹ *Segovia v. United States*, 880 F.3d 384, 386–87 (7th Cir. 2018), *cert. denied*, 139 S. Ct. 320 (2018).

¹⁹⁰ *Id.* at 391.

¹⁹¹ Act of July 3, 1950 (Public Law 600), Pub. L. No. 81-600, 64 Stat. 319.

¹⁹² See *Igartua De La Rosa v. United States (Igartua II)*, 229 F.3d 80, 87–88 (1st Cir. 2000) (Toruella, J., concurring).

¹⁹³ *Id.* at 87 n.16.

“Commonwealth,” it does not yet talk like a state in terms of self-governance in our federal system.¹⁹⁴

Finally, the executive branch has also acted with regard to the idea of implicit incorporation by placing Puerto Rico on administratively level footing with the states. On November 30, 1992, President George H.W. Bush issued a presidential memorandum regarding how the heads of executive departments and agencies should treat the island.¹⁹⁵ In it, he praised Puerto Rico’s sacrifice in five wars, discussed the 1952 Constitution, and asserted that any change to Puerto Rico’s political status should be “enacted . . . in accordance with the freely expressed wishes of the people of Puerto Rico.”¹⁹⁶ He then went on to instruct the executive departments “to treat Puerto Rico administratively as if it were a state.”¹⁹⁷ His reasoning for this declaration was that “Puerto Rico’s degree of constitutional self-government, population, and size” set it apart from the other territories under congressional control.¹⁹⁸ Putting aside the fact that many referenda throughout the years have shown what those wishes are, only to be met with Congressional silence,¹⁹⁹ Bush’s memorandum is a large checkmark in favor of implied incorporation of the island of Puerto Rico.

Not only has the executive administratively treated Puerto Rico as a state, but the executive has also exercised the Commander-in-Chief powers to incorporate Puerto Rico.²⁰⁰ While the exercise of this power has also applied to the other territories, the grant of citizenship to residents of Puerto Rico in the middle of the First World War is critical to imply that Puerto Rican citizenship was a militaristic strategy to gain more soldiers to send to Europe. This implication is strengthened by the fact that *jus soli* citizenship, or automatic United States citizenship at birth, was not granted until 1940 under U.S. Nationality Act.²⁰¹ Since the time of the original grant in 1917, residents of Puerto Rico have served and died in every major war that the United States has fought in.²⁰²

Add to these executive actions the statutes listed above, and the case for implicit incorporation of Puerto Rico into the United States is very strong.

B. Puerto Rico’s Right to Vote

The success of either of the above arguments for justiciability and standing would allow the courts to consider a voting right denial claim brought forth by the residents

¹⁹⁴ *Id.*

¹⁹⁵ Memorandum for the Heads of Executive Departments and Agencies, 57 Fed. Reg. 57,093 (Nov. 30, 1992) (codified at 48 U.S.C. § 734) [hereinafter Memorandum].

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ Venator-Santiago, *supra* note 8.

²⁰⁰ See Memorandum, *supra* note 195; *infra* notes 270–76 and accompanying text.

²⁰¹ 8 U.S.C. § 1402 (1952).

²⁰² Memorandum, *supra* note 195.

of Puerto Rico. Were a court to take this case, it would first have to decide that the right to vote is fundamental for all United States citizens, regardless of residence, arguing against Taft's opinion in *Balzac*.²⁰³ A court would then have to decide whether to treat the denial of Puerto Rico's right to vote for president as a political process breakdown. If a court so held, it would then move to the question of whether to simply hold that Puerto Rico remains unincorporated but entitled to all fundamental rights, including the right to vote for president. Alternatively, it could delve deeper and follow the implicit incorporation argument to hold that the island is entitled to the full swath of constitutional rights, including the right to vote for president.

The next piece of the voting puzzle depends on whether a court will rely upon the political process breakdown regarding the Puerto Rican right to vote or implicit incorporation argument for standing.

If a court were to find that Puerto Rico is still unincorporated, it may still be able to confer the franchise upon the island's residents. The Court in the *Insular Cases* and *Balzac* held that Puerto Rico would remain unincorporated until Congress changed that status.²⁰⁴ But it also held that the United States citizens in an unincorporated United States territory were given the fundamental rights of the Constitution.²⁰⁵ Little more is fundamental to American democracy or America itself than the right to vote for the executive, so an argument would exist that this original grant of "fundamental rights" includes the right to vote for presidential electors.²⁰⁶ While this right is probably fundamental, the fact that Puerto Rico remains unincorporated (under this argument) likely prohibits a court from accepting this political process breakdown argument. That said, the Court has precedent to support "the proposition that certain constitutional rights are *inherent in* United States citizenship."²⁰⁷ Therefore, the notion that the right to vote for presidential electors is fundamental in citizenship is not as far of a logical leap as it may initially seem.

If a court were to find that Puerto Rico has been implicitly incorporated through the federal government's treatment of the island, the argument is much easier. The residents of an incorporated territory are entitled to the full swath of constitutional rights.²⁰⁸ Thus, if Puerto Rico were to be ruled as incorporated, the right to vote for presidential electors would necessarily be given to its residents as a constitutional right because Puerto Rico could be considered a state for purposes of the Electoral College.²⁰⁹

²⁰³ See *Balzac v. People of Porto Rico*, 258 U.S. 298, 309 (1922).

²⁰⁴ *Id.* at 311; *De Lima v. Bidwell*, 182 U.S. 1, 215 (1901) (McKenna, J., dissenting); *Downes v. Bidwell*, 182 U.S. 244, 256 (1901); *Consejo de Salud v. Rullan*, 586 F. Supp. 2d 23, 25 (2008).

²⁰⁵ *Consejo de Salud*, 586 F. Supp. 2d at 25; *Igartua De La Rosa v. United States*, 107 F. Supp. 2d 140, 143 (D.P.R. 2000).

²⁰⁶ See *supra* note 92.

²⁰⁷ *Igartua De La Rosa v. United States*, 229 F.3d 80, 87 n.14 (1st Cir. 2000) (Torruella, J., concurring) (emphasis added).

²⁰⁸ See *Balzac*, 258 U.S. 298; *Igartua*, 229 F.3d at 87.

²⁰⁹ This is supported by the reasons listed above in Section III.A.2 on implicit incorporation. See *supra* Section III.A.2.

The success of either of the above arguments would define the right to vote for presidential electors as fundamental for the residents of Puerto Rico. A claim could then be brought under either the Due Process or Equal Protection Clauses. The Due Process claim is the simpler of the two because the hypothetical plaintiffs would only have to prove that their fundamental right to vote is being burdened by the government for strict scrutiny to be triggered.²¹⁰

The Equal Protection claim would require a showing that Puerto Ricans are a suspect class or that a fundamental right is being burdened unequally between the citizens in Puerto Rico and other citizens.²¹¹ A suspect class is “one . . . ‘subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.’”²¹² Under this definition, Puerto Ricans are clearly a suspect class, having been subjugated for 500 years under the Spanish and American governments and, for the past century, having no method with which to effect change in the “majoritarian political process.”²¹³ With regards to the fundamental right Equal Protection claim, the residents could rely upon the unequal grant of the right to vote on the basis of residence.²¹⁴

Returning back to *Reynolds*, Chief Justice White wrote that “[d]iluting the weight of votes because of place of residence impairs basic constitutional rights under the Fourteenth Amendment just as much as invidious discrimination based upon factors such as race or economic status.”²¹⁵ While the Court was dealing with the discriminatory drawing of legislative lines, the idea that the denial of the right to vote based upon residence is unacceptable under Equal Protection should apply to Puerto Rico. The reason for this is that, at the very least, the residents of the island are entitled to the fundamental constitutional rights, and the unequal burdening of a fundamental right is violative of the Equal Protection clause.

Reynolds was not the only case where the Court believed that residence affecting voting power was problematic. In *Kramer v. Union Free School District No. 15*,²¹⁶ the plaintiff was suing a local school district for limiting the right to vote for the

²¹⁰ *Contra, e.g.,* *Igartua De La Rosa v. United States (Igartua I)*, 32 F.3d 8 (1st Cir. 1994).

²¹¹ *Plyler v. Doe*, 457 U.S. 202, 216–17 (1982) (“Thus we have treated as *presumptively invidious* those classifications . . . that impinge upon *the exercise of a ‘fundamental right.’*” (emphasis added)). Justice Blackmun’s concurrence in *Plyler* also contains language regarding voting: “In a sense, then, denial of an education is the analogue of denial of the right to vote: the former relegates the individual to second-class social status; *the latter places him at a permanent political disadvantage.*” *Id.* at 234 (Blackmun, J., concurring) (emphasis added).

²¹² *Segovia v. United States*, 880 F.3d 386, 390 (7th Cir. 2018) (quoting *St. John’s United Church of Christ v. City of Chicago*, 502 F.3d 616, 638 (7th Cir. 2007)).

²¹³ *See id.* (internal citations omitted). *See generally* PICÓ, *supra* note 19.

²¹⁴ *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 632–33 (1969); *Reynolds v. Sims*, 377 U.S. 533, 566 (1964).

²¹⁵ *Reynolds*, 377 U.S. at 566 (internal citations omitted).

²¹⁶ 395 U.S. 621 (1969).

school board based on either property ownership in the school district or having a child in the school.²¹⁷ In Kramer's view, his denial of the right to vote was unconstitutional because he still had a stake in the outcome of the school board elections.²¹⁸ The Court agreed with him, re-emphasizing what it had said in *Reynolds*:

Legislation which delegates decision making to bodies elected by only a portion of those eligible to vote for the legislature [or executive] can cause unfair representation. Such legislation can exclude a minority of voters from any voice in the decisions just as effectively as if the decisions were made by legislators [or executives] the minority had no voice in selecting.²¹⁹

Following the language from these cases, it would seem that the Court could be open to hear a vote denial claim from the residents of Puerto Rico because their lack of a right to vote is solely based upon their place of residence.

The major roadblocks for this have been the *Insular Cases*' holding that incorporation is the job of Congress and the general rule that Puerto Rican voting rights are the legislature's job as well.²²⁰ But with the assistance of the implicit incorporation argument, these roadblocks can be cleared for a successful Equal Protection claim based on Puerto Rican residents as a suspect class or the burdening of a fundamental right based on residential discrimination. Even though the Court has held previously that "Congress 'may treat Puerto Rico differently as long as there is a rational basis,'"²²¹ the denial of the right to vote for the residents of the island but not those on the mainland is quite different than unequal treatment economically.

Having found a potentially meritorious claim under the Due Process or Equal Protection Clauses,²²² either of these claims would give rise to a court reviewing the violation using heightened scrutiny analysis. Because a fundamental right is involved, strict scrutiny needs to be met.²²³ In order to do this, strict scrutiny analysis requires

²¹⁷ *Id.* at 622.

²¹⁸ *Id.* at 632–33.

²¹⁹ *Id.* at 628.

²²⁰ *Igartua De La Rosa v. United States (Igartua III)*, 417 F.3d 145, 151 (1st Cir. 2005); *Igartua De La Rosa v. United States (Igartua II)*, 229 F.3d 80, 83–84 (1st Cir. 2000); *Igartua De La Rosa v. United States (Igartua I)*, 32 F.3d 8, 10 (1st Cir. 1994) (holding that Puerto Ricans can only obtain this right through legislative processes). *See also* *Balzac v. Porto Rico*, 258 U.S. 298, 311 (1922); *Downes v. Bidwell*, 182 U.S. 244, 280 (1901); *De Lima v. Bidwell*, 182 U.S. 1, 215 (1901).

²²¹ *Harris v. Rosario*, 446 U.S. 651 (1980) (per curiam); Hector L. Ramos, *Igartua de la Rosa v. United States: Puerto Rico and the Right to Vote in Presidential Elections—Is the Time Ripe for Judicial Intervention?*, 18 T.M. COOLEY L. REV. 429, 437–38 (2001).

²²² *Igartua III*, 417 F.3d at 170 (Torruella, J., dissenting).

²²³ *See supra* note 92.

the government to prove its action promotes a compelling interest and that its action is narrowly tailored to meet this interest.²²⁴

With regards to the compelling interest prong, the Court has never properly defined this term but has decided how compelling an interest is on a case-by-case basis.²²⁵ That being said, strict scrutiny is incredibly difficult to satisfy, especially in the voting rights arena.²²⁶ The interest that the government would most likely assert is the protection of the sanctity of the votes cast by citizens in the many states by not allowing citizens in the territories to vote for presidential electors.²²⁷ While this interest may satisfy rational basis scrutiny or even intermediate scrutiny, the degree to which voting has been protected when looked at with strict scrutiny would likely lead to the failure of this interest.²²⁸

Regarding the narrow tailoring prong, the government would also likely fail. The asserted interest is underinclusive, as shown by the ability of the Northern Mariana Islands and American Samoa to vote²²⁹ and the ability of the territories to vote in presidential primaries.²³⁰

In *Segovia v. United States*, the plaintiffs, residents of many United States territories, asserted an Equal Protection claim against the United States with regards to absentee ballots for former mainlanders.²³¹ As noted in some of the case history above, courts have held that the reason for the denial of absentee ballots in the territories under UOCAVA is based on concerns about unequal treatment.²³² Namely, the courts were concerned that there would be unequal treatment between former mainland residents and lifelong island residents.²³³

²²⁴ See, e.g., *Kramer*, 395 U.S. at 633.

²²⁵ Robert T. Miller, *What is a Compelling Governmental Interest?*, 21 J. MKTS. & MORALITY 71 (2018) (“[T]he courts have had to decide only whether the particular ends asserted by the government in a given case are compelling. . . . Nevertheless, after decades of deciding such cases, it might seem that the Supreme Court would have announced some general principles concerning which ends of government are compelling and which not . . . Such general principles, however, have never appeared.”).

²²⁶ See *infra* note 228.

²²⁷ *Id.*

²²⁸ See, e.g., *Kramer*, 395 U.S. at 627–28; *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 670 (1966); *Lucas v Forty-Fourth General Assembly of State of Colo.*, 377 U.S. 713, 736 (1964); *Reynolds v. Sims*, 377 U.S. 533, 561–62 (1964); *Baker v. Carr*, 369 U.S. 186, 208 (1962).

²²⁹ *Segovia v. United States*, 880 F.3d 384, 386–87 (7th Cir. 2018); Lorraine Bailey, *Residents of U.S. Territories Ask Court to Expand Voting Rights*, COURTHOUSE NEWS (Sept. 15, 2017), <https://www.courthousenews.com/residents-u-s-territories-ask-court-expand-voting-rights/> [<https://perma.cc/ZX7P-D5J5>].

²³⁰ *Puerto Rico Primary Results*, *supra* note 11.

²³¹ 880 F.3d 384, 386 (7th Cir. 2018); Bailey, *supra* note 229.

²³² *Romeu v. Cohen*, 265 F.3d 118, 125 (2d Cir. 2001).

²³³ *Id.*

Now this concern has come to life, albeit not within the island of Puerto Rico but between the United States territories. An Illinois statute allows absentee ballots to former mainland residents of and military service members stationed on the Northern Mariana Islands and American Samoa, and UOCAVA makes a similar exception for the Northern Mariana Islands.²³⁴ The Seventh Circuit stated that UOCAVA is only a base requirement for the states, and that any state may create wider exceptions for the other territories.²³⁵ But if Congress wanted to promote its interest in only allowing state residents to vote, then why would it allow each of the states to provide presidential absentee ballots to whichever territory it so chooses? Why would Congress itself make such an exception? These inconsistencies within the rule of no territorial voting would seem to severely curtail the government's case by not roping in the voting rights of every resident of every territory, thus making the action underinclusive.²³⁶

A second reason that prohibiting territorial voting is underinclusive in meeting the interest of protecting the sanctity of the right to vote of the citizens of the many states is the fact that Puerto Rico holds presidential primaries for both the Republicans and Democrats.²³⁷ As was held in *Smith v. Allwright*,²³⁸ the "primary and general elections [are] a single instrumentality."²³⁹ Thus, giving Puerto Ricans only half of a bite at the proverbial apple allows them only half the involvement in the democratic process. But if the purpose of disenfranchising the island is to protect the votes of the citizens in the fifty states, then even that half bite is too much to stomach. In order for this to be properly tailored, Puerto Ricans should have full involvement in the single instrumentality or none.

²³⁴ *Segovia*, 880 F.3d at 387.

²³⁵ *Id.* at 388.

²³⁶ To finish up the discussion of *Segovia*, some argued that the proper remedy in that case, contrary to the claims of the plaintiffs, would be to simply rollback the voting rights for citizens in the Northern Mariana Islands. *Trump Administration Argues for Rollback of Voting Rights in U.S. Territories*, V.I. CONSORTIUM (Sept. 14, 2017), <http://viconsortium.com/virgin-islands-2/trump-administration-argues-for-rollback-of-voting-rights-in-u-s-territories/> [https://perma.cc/2JFS-5TE8]. Among those in this camp was the Trump Administration who "filed a last-minute letter" arguing that the correct remedy of an equal protection violation "should be to strip away statutorily provided absentee voting rights that are already provided to residents of certain territories." *Id.* When I completed the first draft of this Note, the Seventh Circuit decision had not come down yet, so I assumed that the court would be wary of agreeing with the disenfranchisement proposed by the Trump letter. The only footnote in the decision proved me wrong, however, by stating, "instead of extending voting rights to all the territories, the proper remedy would be to extend them to none of the territories. That means a holding that the UOCAVA violates equal protection would not remedy the plaintiffs' injuries." *Segovia*, 880 F.3d at 389 n.1. Luckily, the Court held that there was no standing for the plaintiffs before it could get to this holding, and this willingness to disenfranchise was left in dicta.

²³⁷ *Puerto Rico Primary Results*, *supra* note 11.

²³⁸ 321 U.S. 649 (1944).

²³⁹ *Id.* at 660 (discussing *United States v. Classic*, 313 U.S. 299 (1941)).

IV. LEGISLATIVE SOLUTIONS

In addition to the remedy through the courts outlined above, congressional solutions exist to provide Puerto Rico with the right to vote for presidential electors. Two that are most oft-cited in discussions of this issue are (1) a constitutional amendment akin to the Twenty-Third, which provided the District of Columbia federal electors, and (2) a final decision regarding the question of Puerto Rico's status, with Congress actually following a Puerto Rican plebiscite with legislation that matched the outcome.²⁴⁰ These two were specifically mentioned in *Igartua III* as the only options.²⁴¹ The final alternative would be the nuclear option of a constitutional amendment to eliminate the Electoral College.

A. The Twenty-Eighth Amendment

Ever since *Romeu v. Cohen* in 1974, the courts have been telling Puerto Rico's residents that they require a constitutional amendment to gain the right to vote for presidential electors.²⁴² Currently, a strong push is being made by the Equally American Legal Defense & Education Fund for such an amendment.²⁴³ Its draft amendment is more expansive than the purposes of this Note as it draws in all of the United States territories and concerns representation in Congress, but given that it includes a creation of Puerto Rican presidential electors, it is important to discuss it here.

In his article supporting this effort, Neil Weare discusses that calls for this type of amendment, at least regarding the District of Columbia, have existed since the founding, and calls for representation of the District to continue.²⁴⁴ Since 1973's presidential task force,²⁴⁵ there have been escalating calls for Congress to solve the problem of disenfranchisement of the territories.²⁴⁶ The concern has increased in recent years due to an increase in public exposure from Senator Elizabeth Warren and HBO's *Last Week Tonight with John Oliver*.²⁴⁷

²⁴⁰ *Igartua De La Rosa v. United States (Igartua III)*, 417 F.3d 145, 148 (1st Cir. 2005).

²⁴¹ *Id.* ("The path to changing the Constitution lies not through the courts but through the constitutional amending process, and the road to statehood—if that is what Puerto Rico's citizens want—runs through Congress." (internal citations omitted)).

²⁴² *Id.*

²⁴³ *Amendment*, EQUALLY AMERICAN, <http://www.equalrightsnow.org/amendment> [<https://perma.cc/SC5U-X7R9>].

²⁴⁴ Neil Weare, *Equally American: Amending the Constitution to Provide Voting Rights in U.S. Territories and the District of Columbia*, 46 STETSON L. REV. 259, 264–65 (2017).

²⁴⁵ See CRS REPORT, *supra* note 28, at 4.

²⁴⁶ Weare, *supra* note 244, at 263.

²⁴⁷ *Id.* at 263–64. John Oliver introduced the topic in one of his show's deep dive segments in the following manner: "American citizens living in the U.S. island territories do not get to vote for president; that's the kind of unsettling fact that you knew but chose not to think about, like the fact that the dog from *Full House* is definitely dead by now." *Last Week Tonight with John Oliver: U.S. Territories* (HBO television broadcast Mar. 8, 2015).

Building upon this history, Weare proposes his constitutional amendment to provide the territorial residents with representation and participation in the federal government.²⁴⁸ Relevant to this Note, he suggests the following for presidential voting rights: any territory with a population above 30,000 shall be entitled to presidential electors equal to the number of representatives it would have if it were a state, which shall be appointed and cast electoral votes for the president and vice president in accordance with the Twelfth Amendment.²⁴⁹ So under this amendment, the territories would be able to participate in the presidential elections, but with slightly less representation than states because the territories will lack the extra two-electoral cushion of senators.²⁵⁰ In the case of a tie, where each State's House representation votes as a block, the territories and the District will vote as one whole block as well.²⁵¹ The purpose of both of these provisions is likely to prevent states from objecting to the amendment as placing non-states on an equal Electoral College footing with the states.

Weare's approach, from which I only touched upon one of five provisions,²⁵² is very comprehensive, and he finishes the article seemingly writing directly at the legislators whose approval is required to get the constitutional amendment ball rolling.²⁵³ He writes that the territorial voters are huge populations of swing voters so both parties should support them voting.²⁵⁴ While it is hard to predict what this Congress will do, I would argue against that point because the extreme polarization in each chamber would seem to point more in favor of the party only supporting expanded voting rights for whatever territory will give it more votes.²⁵⁵ Thus, if none of the territories will provide a groundswell of particularly partisan votes, the current hyperpolarization in Congress would likely halt any move towards a constitutional amendment. His stronger argument is that the wide Puerto Rican diaspora could control the fate of presidential elections in key swing states, so the party that supports the Puerto Rican right to vote could do quite well for itself.²⁵⁶

Moving on from the partisan game, precedent exists within the constitutional amendment arena that supports a constitutional amendment for Puerto Rico's right to vote for presidential electors.²⁵⁷ It is these reasons that a stand-alone amendment for Puerto Rico would be stronger than one for the territories generally.

²⁴⁸ Weare, *supra* note 244, at 279.

²⁴⁹ *Id.* at 280.

²⁵⁰ U.S. CONST. art. II, § 1, cl. 2; Weare, *supra* note 244, at 280.

²⁵¹ Weare, *supra* note 244, at 281.

²⁵² *See id.* at App. A for the remainder of Weare's constitutional amendment.

²⁵³ *Id.* at 287–88.

²⁵⁴ *Id.*

²⁵⁵ *See* Nate Cohn, *Polarization Seems to Be Helping Republicans in Run-Up to Midterms*, N.Y. TIMES (Oct. 16, 2018), <https://nyti.ms/2Acyn00> (discussing polarization in Congress).

²⁵⁶ Weare, *supra* note 244, at 290. Weare discusses Puerto Rico's swing voting patterns specifically on the island and in Florida, where there is a large Puerto Rican population. *Id.* at 288–90.

²⁵⁷ U.S. CONST. amend. XXIII.

1. The Reasons for the Twenty-Third and Twenty-Sixth Amendments Support the Twenty-Eighth

The passage of the Twenty-Third Amendment marked the first time that a non-state, the District of Columbia, was allowed to vote for presidential electors.²⁵⁸ In the House Report from the Judiciary Committee about the amendment, Representative Celler reasoned that the District deserved this right because (1) its population exceeded that of thirteen states; (2) the residents paid federal and local taxes; and (3) the District's citizens "have fought and died in every U.S. war since the District was founded."²⁵⁹ He went on to write: "The resultant constitutional anomaly of imposing all the obligations of citizenship without the most fundamental of its privileges, will be removed by this proposed constitutional amendment."²⁶⁰

Borrowing this language's logic, the arguments for Puerto Rico are clear. First, with a population of 3,411,307 citizens, Puerto Rico's population exceeds that of twenty-one states.²⁶¹ Second, while Puerto Rico is not subject to federal income tax, it does pay "Social Security, Medicare, import, export and commodity taxes" for a grand total of \$3.6 billion in fiscal year 2016, which is almost as much as Vermont and Wyoming who *do* pay income tax.²⁶² It also has local taxes very similar to that of the states.²⁶³ Finally, Puerto Ricans "have served in every conflict [the United States] has fought since 1917, and the island has the second highest rate of military service of any state or territory."²⁶⁴ Thus, like the District of Columbia in 1960, Puerto Rico has fulfilled every obligation of citizenship, so it is high time to resolve this constitutional anomaly with regards to the island.²⁶⁵

Ten years after the District of Columbia got the right to vote for presidential electors, the passage of the Twenty-Sixth Amendment ended the prohibition against

²⁵⁸ *Id.*

²⁵⁹ H.R. REP. NO. 86-1770, at 1 (1960).

²⁶⁰ *Id.* at 1–2.

²⁶¹ Ryan Struyk, *More Americans Live in Puerto Rico Than 21 States (and other things to know)*, CNN (Sept. 26, 2017, 5:10 PM), <http://www.cnn.com/2017/09/26/politics/puerto-rico-state-hurricane-maria/index.html> [<https://perma.cc/GZ49-8X97>].

²⁶² Maggie Astor, *Puerto Rico: What Other Americans Should Know*, N.Y. TIMES (Sept. 25, 2017), <https://nyti.ms/2jWp12e>. See also Alexia Fernández Campbell, *Puerto Rico Pays Taxes. The US is Obligated to Help it Just as Much as Texas and Florida.*, VOX (Oct. 4, 2017, 9:50 AM), <https://www.vox.com/policy-and-politics/2017/10/4/16385658/puerto-rico-taxes-hurricane> [<https://perma.cc/SX5Z-ZVYS>].

²⁶³ Miguel Nicolas Moreda, *Types of Taxes in Puerto Rico*, PORTO CAP. (2014), <http://www.portocapital.com/types-of-taxes-in-puerto-rico/> [<https://perma.cc/MEB6-C42T>].

²⁶⁴ Luis G. Fortuño, Letter to the Editor, *Puerto Rico's Status*, N.Y. TIMES (May 29, 2008), <https://nyti.ms/2GG6NN3>.

²⁶⁵ See H.R. REP. NO. 86-1770, at 2.

eighteen-year-olds' right to vote across the entire country.²⁶⁶ While the Senate Report regarding this amendment only briefly mentions the ability of eighteen-year-olds to be drafted as its reasoning,²⁶⁷ the public conversation cited it much more. Passed in the heat of the Vietnam War, the amendment finally enshrined what young veterans had been calling for since World War II: the concept of “old enough to fight, old enough to vote.”²⁶⁸ The national conversation around this drew in the Supreme Court and President Nixon and was ratified within one hundred days of passing through Congress.²⁶⁹ A similar argument can be made for the territories and Puerto Rico especially.

Quickly after the grant of citizenship in the Jones Act of 1917, the United States entered into World War I, and 18,000 Puerto Ricans were drafted.²⁷⁰ The grant of citizenship being so close to the War points to the Jones Act of 1917 being anything but a coincidence. Furthermore, the service of Puerto Ricans since 1917 means that they have been conscripted by the Armed Forces more often than eighteen-year-olds had been in 1971, who had only been eligible for conscription since World War II.²⁷¹ Since World War I, 53,000 Puerto Rican men and 200 women served in World War II;²⁷² 60,000 fought in Korea with numerous awards bestowed upon the Puerto Rican 65th Regiment and individual soldiers;²⁷³ 48,000 disenfranchised Puerto Ricans fought for democracy in Vietnam while the eighteen-year-olds were getting their right to vote;²⁷⁴ 1,700 Puerto Ricans fought in the 1990 Gulf War;²⁷⁵ and while no specific numbers are available for the Iraq and Afghanistan Wars, Puerto Rico ranks fifteenth for National Guard and reserve deployment with ninety percent of its National Guard going on tours.²⁷⁶

Combining the rationales for the Twenty-Third and Twenty-Sixth Amendments, the Twenty-Eighth Amendment's rally cry should be “citizen enough to fight and pay taxes, citizen enough to vote.”

²⁶⁶ U.S. CONST. amend. XXVI.

²⁶⁷ S. REP. NO. 92-26, at 6 (1971).

²⁶⁸ Joseph P. Williams, ‘*Old Enough to Fight, Old Enough to Vote*’: *The 26th Amendment’s Mixed Legacy*, U.S. NEWS & WORLD REP. (July 1, 2016, 12:01 AM), <https://www.usnews.com/news/articles/2016-07-01/old-enough-to-fight-old-enough-to-vote-the-26th-amendments-mixed-legacy> [<https://perma.cc/QWX3-J3NC>].

²⁶⁹ *Id.*

²⁷⁰ Matos-Desa, *supra* note 17, at 299.

²⁷¹ Williams, *supra* note 268.

²⁷² Matos-Desa, *supra* note 17, at 300.

²⁷³ *Id.* These awards have included nine individual Congressional Medals of Honor and a Congressional Gold Medal to the 65th Regiment, also called the Borinqueneers. Weare, *supra* note 244, at 216–17.

²⁷⁴ Shannon Collins, *Puerto Ricans Represented Throughout U.S. Military History*, DEP’T. DEF. (Oct. 14, 2016), <https://www.defense.gov/News/Article/Article/974518/puerto-ricans-represented-throughout-us-military-history/> [<https://perma.cc/DP4P-7H76>].

²⁷⁵ *Id.*

²⁷⁶ Matos-Desa, *supra* note 17, at 301.

B. Puerto Rican Referendum

Another oft-cited solution to Puerto Rico's disenfranchisement problem is statehood.²⁷⁷ As noted above, Puerto Rico has had five referendums on this issue with varying results.²⁷⁸ But one thing is for sure, the calls for statehood were gaining traction in each plebiscite.²⁷⁹ The problem is that each of these island-wide votes have been little more than glorified public opinion polls due to congressional silence after each one.²⁸⁰ As the *Insular Cases* held, Congress must take charge of the incorporation process in order for Puerto Rico to become a state.²⁸¹ Were this to occur, Puerto Rican statehood would automatically give it the right to vote for presidential electors since the provision in Article II refers to "each state."²⁸²

C. Going Nuclear: Eliminating the Electoral College

The third congressional solution is by far the longest shot and the widest effect: the elimination of the Electoral College. As the cases regarding Puerto Rican voting rights have held, only citizens of states have the right to vote for presidential electors.²⁸³ But what if the need for electors were to be erased?

In the wake of the 2016 election, which stands as the second election in sixteen years where one candidate won the popular vote but lost to the candidate that won the Electoral College vote, calls for the elimination of the Electoral College have increased.²⁸⁴ These calls could ring beautifully in the ears of those looking to expand the franchise to Puerto Rico and even to all the territories. The elimination of the Electoral College would get rid of the idea that there is no constitutional right to vote for the President and Vice President because there would be no electors to serve as the middleman. Following this logic, the franchise could easily be expanded to every United States citizen, whether or not they live in a state, because all that would matter would be *citizenship*.²⁸⁵ Moving to a popular election could kill two

²⁷⁷ See, e.g., *Igartua De La Rosa v. United States (Igartua I)*, 32 F.3d 8, 10 (1st Cir. 1994).

²⁷⁸ Venator-Santiago, *supra* note 8.

²⁷⁹ *Id.* This was the case at least prior to the federal government's mismanaged response to Hurricane Maria. See *supra* notes 3–4 and accompanying text.

²⁸⁰ Venator-Santiago, *supra* note 8.

²⁸¹ See *Downes v. Bidwell*, 182 U.S. 224, 339 (1901) (White, J., concurring).

²⁸² U.S. CONST. art. II, § 1, cl. 2.

²⁸³ See *supra* Part III.

²⁸⁴ Joseph P. Williams, *Time for a Change?*, U.S. NEWS & WORLD REP. (Dec. 13, 2016, 12:42 PM), <https://www.usnews.com/news/the-report/articles/2016-12-13/advocates-call-for-an-end-to-the-electoral-college-after-trumps-win> [<https://perma.cc/LQ8G-6BCV>].

²⁸⁵ Ignoring for the purposes of this Note that voting based on citizenship would still disenfranchise American Samoans, who are, by statute, not considered citizens in contravention of the 14th Amendment. See Ann M. Simmons, *American Samoans Aren't Actually U.S. Citizens. Does that Violate the Constitution?*, L.A. TIMES (Apr. 6, 2018, 2:50 PM), <https://www.la>

birds with one stone: allowing the popularly elected candidate to win and allowing every citizen to vote regardless of where they live.

CONCLUSION

At the end of the day, the arguments for congressional solutions to the Puerto Rican voting problem have merit and have been anointed by the courts as the proper way forward. The only issue with congressional action is that, for over a century, Congress has refused to act on this issue. As it stands now, Puerto Ricans, who currently have very limited access to electricity, food, and potable water in the aftermath of Hurricane Maria,²⁸⁶ have no way to affect the federal government that rules over them. They can contact their non-voting member of Congress, which is their only source of “representation” in Washington, D.C., but without a vote or benefit to offer other members, the resident commissioner can do little to change minds in the chamber. They can try to effect change in the White House through their primary, but without the ability to vote in the general presidential election every fourth November, the residents of the island lack the power to truly affect the executive branch either.

Thus, the court-sanctioned political solution is no solution at all. Just like in *Baker*, *Reynolds*, and *Brown*, the case of Puerto Rican disenfranchisement in presidential elections requires judicial intervention. Because only citizens of the states have the right to vote for presidential electors, the strongest argument for Puerto Rico’s right to electors is in the implicit incorporation theory. Congress and the executive have incorporated Puerto Rico into the Union through their treatment of the island. As such, the residents’ fundamental right to vote is being unconstitutionally burdened in violation of equal protection and due process doctrines, thus the courts must step in to correct this violation. Because, as John Oliver stated, “When it comes to denying Americans the right to vote, we have to find a better reason than citing a 114-year-old legal decision, written by a racist, that was always supposed to be temporary.”²⁸⁷

Since the Spanish came in 1511, Puerto Rico has not been treated as anything more than a colonial possession by the governments that owned it. After 500 years of lacking autonomy, it is high time that Puerto Rico be allowed at least a modicum of self-determination through the right to vote for its own President of the United States.

times.com/nation/la-na-american-samoan-citizenship-explainer-20180406-story.html [https://perma.cc/C7MG-LRJB].

²⁸⁶ The island is still without much needed resources, even after one year of “recovery” at current writing. Rick Jervis, *Puerto Rico Recovery Status: Progress After Hurricane Maria Is Uneven Across Island*, USA TODAY (Oct. 1, 2018, 1:20 AM), <https://www.usatoday.com/story/news/2018/09/30/after-hurricane-maria-puerto-ricos-recovery-has-been-uneven-and-slow/1418094002/> [https://perma.cc/85YY-WHLJ].

²⁸⁷ *Last Week Tonight with John Oliver: U.S. Territories* (HBO television broadcast Mar. 8, 2015).

