

CITIZENS WITHOUT REPRESENTATION: HYPOCRISY IN THE UNITED STATES’ CARIBBEAN

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I. INTRODUCTION

The United States’ system of government has long been a guiding light to those seeking democracy within their own communities. American democracy, structured around representatives that are chosen and held accountable by the people,² has been a vital component in ensuring that the United States government would reflect the will of its citizens. Virtually every policy choice made by U.S. representatives has an opportunity to be closely scrutinized by the citizens it affects, from budget plans to military action. However, this key component in American democracy has been historically limited to citizens of states, drawing a divisive line between residents of states and those of the United States’ various territories.

Currently, the United States has five permanently inhabited territories: Puerto Rico, the United States Virgin Islands (“U.S. Virgin Islands”), American Samoa, the Northern Mariana Islands, and Guam.³ With the exception of American Samoa, the United States government has authorized the establishment of executive, legislative, and judicial bodies in these territories through various organic acts.⁴ These acts, which have been dynamic in their evolution, have greatly increased the autonomy of the U.S. territories by allowing their citizens to establish and maintain their own governments.⁵ However, the acts have also contributed to the continued subordinate position of these territories regarding federal affairs, as the citizens of these U.S. possessions have severely restricted rights in participating in federal elections and lawmaking.⁶

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² See generally *Proportional Representation*, HIST., ART, & ARCHIVES, U.S. HOUSE OF REPRESENTATIVES, <https://history.house.gov/Institution/Origins-Development/Proportional-Representation/> (last visited Feb. 2, 2022).

³ *How Are U.S. States, Territories, and Commonwealths Designated in the Geographic Names Information System?*, U.S. GEOLOGICAL SURV., https://www.usgs.gov/faqs/how-are-us-states-territories-and-commonwealths-designated-geographic-names-information-system?qt-news_science_products=0#qt-news_science_products (last visited Feb. 25, 2022).

⁴ *The Territories: They Are Us*, NAT’L CONF. OF STATE LEG. (Jan. 2018), https://www.ncsl.org/Portals/1/Documents/magazine/articles/2018/SL_0118-Stats.pdf.

⁵ *Id.*

⁶ Amber L. Cottle, *Silent Citizens: United States Territorial Residents and the Right to Vote in Presidential Elections*, 1995 U. CHI. LEGAL F. 315, 316-320 (1995).

The focus of this note is the United States' Caribbean citizens in Puerto Rico and the Virgin Islands. It analyzes the laws surrounding these citizens' rights to federal representation and the case law that has been used to enforce the territories subordination. In light of legislative history, precedents set by the Supreme Court, and novel arguments in favor of expansion of voter rights to territories, this note asserts that expanding federal representation to these territories is not only legally viable, but within the promises of the U.S. Constitution.

Section II will present background information on the history of representation of the U.S. Virgin Islands and Puerto Rico, as well as the historical arguments surrounding the constitutionality of expanding voting rights to the territories. Section III of this note will present a proposal (1) to reverse the outdated cases that have historically been used to limit the constitutional protections granted to those residing in the territories, (2) to uniformly enforce the Uniformed and Overseas Citizens Absentee Voting Act, and (3) for Congressional action to rectify the territories' histories of under representation. Section IV will conclude this note.

II. BACKGROUND

A. History of Territorial Representation

This section outlines the history of the U.S. Virgin Islands and Puerto Rico's relationship with the United States. This section focuses generally on the purpose for territories' acquisition by the United States, the development of representational rights in local elections, and the wartime and economic contributions of the territories in the last century. The first subsection provides a background of the U.S. Virgin Islands' long fought struggle for representational rights in the territories, and the second subsection outlines the unique relationship Puerto Rico has had with the United States since its purchase in 1898.⁷

1. *United States Virgin Islands*

Prior to World War I, the U.S. Virgin Islands were a possession of Denmark and known as the Danish West Indies.⁸ As the First World War

⁷ See generally Jennifer Sinco Kelleher, *Ex-Hawaii Residents in Territories Seek Presidential Voting*, AP NEWS (Oct. 9, 2020), <https://apnews.com/article/voting-rights-lawsuits-us-virgin-islands-northern-mariana-islands-hawaii-8cfa23632e7ba339285846a3d2fea8de> (illustrating an ongoing legal battle that highlights the difference in the representation for U.S. citizens that move to territories versus other parts of the world).

⁸ *Purchase of the United States Virgin Islands, 1917*, U.S. DEP'T OF STATE ARCHIVE (Jan. 20, 2009), <https://2001-2009.state.gov/r/pa/ho/time/wwi/107293.htm>.

raged on and the Germans made considerable advances in Europe, U.S. President Woodrow Wilson feared that the Germans would overrun the Danish forces and annex their possessions in the Caribbean.⁹ President Wilson worried that by the Germans establishing a military presence in the Caribbean, they would launch their U-boats against U.S. forces with devastating effects.¹⁰ To ensure that safety of the U.S. southern coast, the United States' government purchased the Danish West Indies in 1917 and renamed the cluster of isles the United States Virgin Islands,¹¹ with no referendum taken to ascertain the public opinion of the territory's residents.¹²

Following the Great War,¹³ the U.S. Virgin Islands continued to be used as a military base, allowing the United States to monitor its strategic interests in the Caribbean and South America.¹⁴ Despite the islanders' war efforts and risk of attack by the adversaries of the United States, citizenship was not granted to the residents of the U.S. Virgin Islands until 1927.¹⁵ However, recognizing the Virgin Islanders as citizens of the United States did not result in the establishment of a territorial government. The island was maintained under naval rule until 1931.¹⁶ Further, the judiciary was comprised of federally monitored "police courts"¹⁷ until the introduction of territorial courts in 1954.¹⁸ Despite Congress's granting greater local autonomy to Virgin Islanders in 1931 and extending judicial autonomy in 1954, the islands were not permitted to elect their own governor until 1970.¹⁹ Prior to that time, they solely depended on the United States government to choose their governmental leaders.²⁰

⁹ *Id.*

¹⁰ Christopher Woolf, *How a Violent History Created the US Virgin Islands as We Know Them*, THE WORLD (Sept. 13, 2017, 6:00 PM EDT), <https://www.pri.org/stories/2017-09-13/how-violent-history-created-us-virgin-islands-we-know-them>.

¹¹ *Purchase of the United States Virgin Islands, 1917*, *supra* note 8.

¹² Malik Sekou, *The Failure of the Political Status Process in the U.S. Virgin Islands* 6 (May 1994) (unpublished presentation) (on file at ufdcimages.uflib.ufl.edu/ca/00/40/01/86/00001/pdf.pdf).

¹³ World War I is known as the Great War. *See* History.com Editors, *World War I*, HIST. (Apr. 8, 2021), <https://www.history.com/topics/world-war-i/world-war-i-history>. The Great War ended in 1918. *Id.*

¹⁴ *Purchase of the United States Virgin Islands, 1917*, *supra* note 8.

¹⁵ 8 U.S.C. § 1406.

¹⁶ Sekou, *supra* note 12.

¹⁷ A "police court" is defined as "a court of record that has jurisdiction over various minor offenses (such as breach of the peace) and the power to bind over for trial in a superior court or for a grand jury persons accused of more serious offenses." *Police Court*, MERRIAM-WEBSTER (11th ed. 2020).

¹⁸ *See generally* 48 U.S.C. §§ 1611-17 (establishing a court system within the Virgin Islands); *History of the V.I. Judiciary, About Us*, JUDICIARY OF THE U.S. V.I., <https://www.vicourts.org> (last visited Feb. 26, 2022).

¹⁹ Sekou, *supra* note 12.

²⁰ §§ 1541-42; Sekou, *supra* note 12.

By the late twentieth century, the government of the U.S. Virgin Islands was beginning to reflect the governments of the United States.²¹ Congress authorized the democratic election of a local governor,²² approved the drafting of a U.S. Virgin Islands' Constitution,²³ and granted a non-voting delegate to represent the territory in the House of Representatives who, as of today, *still* has no ability to vote on finalized bills.²⁴ The territory's judicial autonomy also expanded with the Congressional authorization to establish a local appellate court in 1984,²⁵ which allowed the U.S. Virgin Islands government to create a distinct lower and supreme court, mirroring that of the United States.²⁶ With greater autonomy, officials in the territory began educating residents of their rights as U.S. citizens, eventually introducing a referendum to urge the federal government to remove the subordinated status tied to territorial citizenship.²⁷ Though the referendum eventually failed,²⁸ the residents of the U.S. Virgin Islands have since yearned for suffrage and rights equal to those of their counterparts residing in the continental United States.²⁹

2. Puerto Rico

Puerto Rico became a colony of the United States in 1898 as part of the Treaty of Paris that ended the Spanish-American War.³⁰ Believing the United States' promises of democracy and economic expansion, Puerto Ricans were initially enthusiastic about turning their backs to Spain and embracing the expanding United States.³¹ However, shortly following its annexation, Puerto Rico witnessed large-scale socioeconomic reform and loss of economic power to several North American companies.³²

Shortly following the island's acquisition by the United States, Congress passed the Foraker Act of 1900 ("Foraker Act").³³ The Act

²¹ *Purchase of the United States Virgin Islands, 1917*, *supra* note 8.

²² Sekou, *supra* note 12.

²³ Act of Oct. 21, 1976, Pub. L. No. 94-584, 90 Stat. 2899.

²⁴ Sekou, *supra* note 12; CHRISTOPHER M. DAVIS, CONG. RSCH. SERV., R40555, DELEGATES TO THE U.S. CONGRESS: HISTORY AND CURRENT STATUS, 5-6 (2015).

²⁵ *Supreme Court of the Virgin Islands, About Us*, SUP. CT. OF THE U.S. V.I., http://visupremecourt.hosted.civiclive.com/about_us (last visited Feb. 26, 2022).

²⁶ *Id.*

²⁷ Sekou, *supra* note 12.

²⁸ *Id.*

²⁹ Kelleher, *supra* note 7.

³⁰ *Treaty of Paris of 1898*, LIBR. OF CONG., <https://www.loc.gov/rr/hispanic/1898/treaty.html> (last visited Feb. 26, 2022).

³¹ *Puerto Rico and the United States*, LIBR. OF CONG., www.loc.gov/collections/puerto-rico-books-and-pamphlets/articles-and-essays/nineteenth-century-puerto-rico/puerto-rico-and-united-states/ (last visited Feb. 26, 2022).

³² *Id.*

³³ *Foraker Act (Organic Act of 1900)*, LIBR. OF CONG., www.loc.gov/rr/hispanic/1898/foraker.html (last visited Feb. 26, 2022).

established a civilian government in Puerto Rico consisting of a governor, an executive council, and a judiciary, all of which were appointed by the President of the United States.³⁴ Most importantly, the Act codified Puerto Rico's subordinate status in the United States by denying citizenship to Puerto Ricans,³⁵ granting a single, nonvoting delegate to the House of Representatives that was intended to represent a population greater than one million,³⁶ and imposing tariffs that were significantly greater than those imposed across the United States.³⁷ Legal opposition to the harsh federal taxes imposed on Puerto Rico led to the infamous Insular Cases that created a subordinate caste of citizenship for "unincorporated" territories that is still in place today³⁸ and will be discussed in detail later in this note.

In 1917, the Jones-Shafroth Act ("Jones Act") modified the impact of the Foraker Act by extending statutory citizenship, which was limited by the Insular Cases, to Puerto Ricans and establishing a bicameral legislature that was elected by the people of Puerto Rico.³⁹ However, the inspiration for the Jones Act originated from a desire to reduce the possibility of a revolt on the island and to increase the number of Puerto Ricans recruited into the military during the first World War.⁴⁰ Since the enactment of the Jones Act, Puerto Rico has participated in every U.S. military effort, with about 236,000 Puerto Ricans registered for World War I's draft.⁴¹

Approximately forty-three years after the United States acquired Puerto Rico, Congress passed the U.S. Nationality Act of 1940 which recognized Puerto Ricans as citizens, albeit with limited rights, and extended the Fourteenth Amendment's protections to the island.⁴² Shortly after, President Harry Truman signed the Elected Governors Act in 1947, which allowed Puerto Ricans to elect their governor for the first time since flying the U.S. flag.⁴³ Truman's efforts were expanded in 1951 with the passage of the "600 Law," which allowed Puerto Ricans to govern with a certified constitution.⁴⁴

³⁴ *Puerto Rico and the United States*, *supra* note 31.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Jones Act*, LIBR. OF CONG., <https://www.loc.gov/rr/hispanic/1898/jonesact.html> (last visited Feb. 26, 2022).

⁴⁰ *Puerto Rico*, HIST., ART, & ARCHIVES, U. S. HOUSE OF REPRESENTATIVES, <https://history.house.gov/Exhibitions-and-Publications/HAIC/Historical-Essays/Separate-Interests/Puerto-Rico/> (last visited Feb. 26, 2022).

⁴¹ *Id.*

⁴² *Puerto Rico's History 1900-1949*, WELCOME TO P.R.!, <https://welcome.topuertorico.org/history5.shtml> (last visited Feb. 26, 2022).

⁴³ *Id.*

⁴⁴ 48 U.S.C. § 731; *Puerto Rico's History 1950-2019*, WELCOME TO P.R.!, <https://welcome.topuertorico.org/history6.shtml> (last visited Feb. 26, 2022).

Puerto Rico has since maintained its democratic elections but retains a politically ambiguous unincorporated territorial status,⁴⁵ which limits voting rights to U.S. citizens that choose to reside on the island, despite their origin.⁴⁶ The Puerto Rican government has long sought to change their unincorporated status with referendums for statehood, with the most recent referendum held in 2020.⁴⁷ However, arguments that Congress would never support Puerto Rico's formal integration were apparent in the island's political sphere.⁴⁸

The need for increased federal representation became more apparent following the devastating impact of Hurricane Maria in 2017.⁴⁹ Maria, the first category five hurricane to make landfall since 1928,⁵⁰ required the immediate assistance of the Federal Emergency Management Agency ("FEMA") and the federal government.⁵¹ The promised assistance largely fell short, however, as the territory awaited the necessary funds for multiple years following the disaster.⁵² The result was further distrust of the federal government,⁵³ which may have been avoided if the territory was allotted more influence in Congress to timely provide the disaster relief funds.

B. Arguments Surrounding the Expansion of Representative Rights

Beginning in 1927, Congress has enacted various organic acts that extended U.S. citizenship to Virgin Islanders⁵⁴ and Puerto Ricans⁵⁵ within a narrowly tailored scope. Since the establishment of citizenship, however, Congress has long grappled with identifying what citizenship rights should be afforded to the residents of these Caribbean territories, often granting rights that fall short of those cherished by the average U.S. citizen.⁵⁶ This

⁴⁵ *Puerto Rico*, *supra* note 40.

⁴⁶ *See generally* Igartúa-de la Rosa v. United States, 107 F. Supp. 2d 140, 150 (D.P.R. 2000) (finding that residents of Puerto Rico are not owed the right to vote in the U.S. Constitution).

⁴⁷ *Puerto Rico's Statehood Referendum (2020)*, BALLOTPEDIA, [https://ballotpedia.org/PuertoRicoStatehoodReferendum\(2020\)#cite-note-12](https://ballotpedia.org/PuertoRicoStatehoodReferendum(2020)#cite-note-12) (last visited Feb. 26, 2022).

⁴⁸ *Id.*

⁴⁹ Angela Fritz, *Puerto Rico Has a Long History with Tropical Storms*, WASH. POST (Sept. 19, 2017), <https://www.washingtonpost.com/news/capital-weather-gang/wp/2017/09/19/puerto-rico-has-a-long-history-with-tropical-storms-none-of-them-were-like-hurricane-maria/>.

⁵⁰ *Id.*

⁵¹ Greg Allen & Marisa Peñaloza, *Puerto Rico Preps for Next Storm*, NPR (July 3, 2019), <https://www.npr.org/2019/07/03/737001701/i-don-t-feel-safe-puerto-rico-preps-for-another-maria-without-enough-government>.

⁵² Arelis R. Hernández, *Puerto Ricans Still Waiting on Disaster Funds*, WASH. POST (Jan. 19, 2020), <https://www.washingtonpost.com/national/puerto-ricans-still-waiting-on-disaster-funds-as-hurricane-marias-aftermath-earthquakes-continue-to-affect-life-on-the-island/2020/01/19/3864fcea-387f-11ea-bb7b-265f4554af6dstory.html>.

⁵³ *Id.*

⁵⁴ 8 U.S.C. § 1406 (granting U.S. citizenship to the residents of the Virgin Islands).

⁵⁵ § 1402 (granting U.S. citizenship to the residents of Puerto Rico).

⁵⁶ Sekou, *supra* note 12.

section focuses on key areas of debate regarding whether citizens residing in territories could lawfully be granted expanded voting rights. The first subsection focuses on federal voting rights through the lens of *stare decisis* and how that doctrine is applied to voting rights in the territory. The second subsection argues that Virgin Islanders and Puerto Ricans are discrete and insular minorities, which should guide the United States Supreme Court's decisions on cases regarding their status. The third subsection analyzes the leading, textual argument against granting territorial citizens voting rights. The final subsection focuses on the Territorial Clause of the U.S. Constitution.

1. *The Political Franchise of Voting*

The legal system in the United States adheres to the doctrine of *stare decisis*, demanding that courts follow precedents set by past decisions of higher courts within their jurisdiction.⁵⁷ The use of *stare decisis* as a guiding principle has resulted in a consistent body of law that is fairly predictable whilst indirectly guiding the legislative branch to codify legal traditions that have become common law.⁵⁸ Pursuant to tradition, no court has jurisdiction relative to that of the United States Supreme Court, which has utilized its limited powers to define and unify U.S. law since the acknowledgment of its powers in *Marbury v. Madison*.⁵⁹

Since *Marbury*,⁶⁰ the role of the Supreme Court has been to interpret the U.S. Constitution in our rapidly changing society. While the interpretation of the Constitution has varied among the Justices representing the Court, one key philosophy surrounding an aspect of rights granted to U.S. citizens has remained the same: “the political franchise of voting” is a “fundamental political right.”⁶¹ One well versed in U.S. history, or having basic knowledge of the United States' Civil War and its aftermath, can acknowledge that this principle has not been lived up to. In 1868, Congress passed the Fourteenth Amendment demanding that the rights granted to white citizens *must* be granted to African Americans as well.⁶² A variety of cases were brought to the U.S. Supreme Court that sought to enforce the Fourteenth

⁵⁷ Julie Young, *Stare Decisis*, INVESTOPEDIA (Dec. 2, 2021), https://www.investopedia.com/terms/s/stare_decisis.asp#:~:text=Stare%20decisis%20is%20a%20legal%20doctrine%20that%20obligates,therefore%2C%20all%20states%20rely%20on%20Supreme%20Court%20precedents.

⁵⁸ TONI M. FINE, AMERICAN LEGAL SYSTEMS: A RESOURCE AND REFERENCE GUIDE (Anderson Publ'g, 1997).

⁵⁹ *Marbury v. Madison*, 5 U.S. 137, 150 (1803).

⁶⁰ *Id.*

⁶¹ *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

⁶² *Voting Rights for African Americans*, LIBR. OF CONG., <https://www.loc.gov/classroom-materials/elections/right-to-vote/voting-rights-for-african-americans/> (last visited Nov. 16, 2020).

Amendment and protect African American citizens in various aspects of American life.⁶³

2. *Discrete and Insular Minority*

A key case that allowed for greater protections for African Americans and expanded the protections of the Fourteenth Amendment was *United States v. Carolene Products Company*.⁶⁴ In this case surrounding the commerce powers conferred to Congress, Justice Harlan Fiske Stone wrote the famous “footnote four,” indicating that the Court would utilize heightened scrutiny when analyzing regulations that adversely affect “discrete and insular minorities.”⁶⁵ Today, a discrete and insular minority is defined as a group (1) sharing an immutable characteristic, (2) traditionally lacking access to political power, and (3) having a history of discrimination against the group.⁶⁶

Justice Stone’s footnote defined the agenda of the federal court, assisted in the elimination of segregation in public schools⁶⁷ and established a standard of one person getting one vote.⁶⁸ The Court, however, has fallen short of expanding the representational rights of citizens residing in the territories, even though they are comprised of a discrete and insular minority when viewed under the guiding principle of *stare decisis*.

The first prong, requiring that citizens garnering increased judicial protection share an immutable characteristic, is arguably the most difficult requirement to identify and characterize. The U.S. Supreme Court has defined immutability in a limited number of cases, notably *Frontiero v. Richardson*.⁶⁹ In *Frontiero*, the Court defined immutability as a characteristic determined at birth, such as race, ethnicity, or sex.⁷⁰ Since *Frontiero*, various federal appellate courts have characterized an immutable trait to include a segment of one’s identity that would involve great difficulty to change⁷¹ “such as requiring a major physical change or a traumatic change of identity.”⁷² In other words, “immutable” is commonly defined and accepted by the courts as having a broader context than simply an unchangeable

⁶³ *Id.*

⁶⁴ *United States v. Carolene Products Co.*, 304 U.S. 144 (1938).

⁶⁵ *Id.* at 152 n.4.

⁶⁶ *Id.*

⁶⁷ *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955).

⁶⁸ *Reynolds v. Sims*, 377 U.S. 533 (1964).

⁶⁹ *Frontiero v. Richardson*, 411 U.S. 677 (1973).

⁷⁰ *Id.* at 686.

⁷¹ Sharona Hoffman, *The Importance of Immutability in Employment Discrimination Law*, 52 WM. & MARY L. REV. 1483, 1512 (2011).

⁷² *Watkins v. U.S. Army*, 875 F.2d 699, 726 (9th Cir. 1989) (Norris, J., concurring).

characteristic, such as race, but includes characteristics that are core to one's identity and should not be changed to garner equal protection.⁷³

In the context of this note, citizens residing in the United States' Caribbean territories share an immutable characteristic surrounding their identity as Caribbean islanders. In the U.S. Virgin Islands, culture has been largely derived from African and European influences, resulting in a unique society that cherishes their *Quelbe* music,⁷⁴ diverse architecture,⁷⁵ and colorful customs that define a Virgin Islander.⁷⁶ In Puerto Rico, a complex history has led to development of unique cuisine,⁷⁷ lifestyles surrounding close family relations,⁷⁸ and a culture of music extending as far back as when the Taino natives dominated the island.⁷⁹ Culture may travel with an individual that cherishes it, but demanding that a U.S. citizen physically leave their homeland and relocate to another segment of the country to be granted the federal right to representation, which the Court has recognized as fundamental,⁸⁰ cannot be said to follow the country's past precedents regarding voting rights. Rather, the requirement of relocation to gain voting rights raises an issue regarding the right to travel, which is discussed later in this note.

As to the second prong of the Court's discrete and insular minority requirements, the residents of the Caribbean territories have historically lacked any semblance of political power from their time of acquisition to the present. The Virgin Islanders, for example, were not permitted to elect their own governor until 1970, forty-three years after Congress recognized their citizenship⁸¹ and fifty-three years after their purchase from the Danish.⁸² The only argument with merit is drawn from the presence of a delegate, or Resident Commissioner in the context of Puerto Rico, to the House of Representatives.⁸³ However, despite having a representative, the Caribbean territories have severely limited political power.⁸⁴ The representatives from

⁷³ Hoffman, *supra* note 71.

⁷⁴ Stanley Jacobs *on the Official Music of the Virgin Islands: Quelbe*, SMITHSONIAN FOLKWAYS RECORDINGS (2016), <https://folkways.si.edu/stanley-jacobs-on-the-official-music-of-the-virgin-islands-quelbe/african-american-music/music/video/smithsonian>.

⁷⁵ *Virgin Islands Architecture*, AM. INST. OF ARCHITECTS V.I., http://www.aiavi.org/VIR/History_Virgin-Islands-Architectural-History.cfm (last visited Nov. 17, 2020).

⁷⁶ Karen Fog Olwig, *Caribbean Place Identity: From Family Land to Region and Beyond*, 5 IDENTITIES 435 (1999).

⁷⁷ *Puerto Rican Cuisine*, WELCOME TO P.R.!, <https://welcome.topuertorico.org/culture/foodrink.shtml> (last visited Nov. 16, 2020).

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

⁸¹ Sekou, *supra* note 12.

⁸² *Purchase of the United States Virgin Islands, 1917*, *supra* note 8.

⁸³ CHRISTOPHER M. DAVIS, CONG. RSCH. SERV., R40170, PARLIAMENTARY RIGHTS OF THE DELEGATES AND RESIDENT COMMISSIONER FROM PUERTO RICO (2017).

⁸⁴ *Id.*

Puerto Rico and the Virgin Islands are not only limited to the House of Representatives, but they may not vote on the House floor or preside over the House, limiting their power to persuasion through debate.⁸⁵ Likewise, many view both Puerto Rico and the Virgin Islands as colonies of the United States due to their lack of political influence and representation.⁸⁶ Thus, it is evident that the U.S. citizens residing in Puerto Rico and the Virgin Islands have traditionally lacked access to political power, fulfilling the second prong of the discrete and insular minority requirements.

As to the last prong, the citizens residing in the Caribbean territories have faced a long history of discrimination. The greatest visual example lies within the abundance of political cartoons.⁸⁷ Presented as Figure 1 in the appendix of this note, the 1914 cartoon titled “What the United States has Fought For” depicts Puerto Rico and her residents as dirty and weak, bearing brown skin and clothed in torn garments, until the United States “saves” the territory, turning the representation of Puerto Rico into stout Caucasian men wearing suits and an appreciative grin.⁸⁸

While the image serves as a visual representation that many U.S. citizens did not view Puerto Ricans as equal, the Court itself has demonstrated an acceptance of discriminatory treatment by Congress.⁸⁹ When faced with the question of whether federal tax laws should be applied uniformly to territories as they have been applied to states in *Downes v. Bidwell*,⁹⁰ as dictated in Article I, Section 8, of the Constitution,⁹¹ the Court concluded that Congress may rightfully revoke protections that are historically regarded as equal from territories.⁹² The Court’s reasoning surrounded the fact that the territories are populated by an “alien race,” differing in “religion, customs, laws, methods of taxation, and modes of thought.”⁹³ *Downes* will later be recognized as an integral part of the “Insular Cases” that have long categorized the Caribbean territories as a subordinate political caste, a point which shall be expanded upon further in this note.

As a discrete and insular minority, the U.S. citizens residing in Puerto Rico and the U.S. Virgin Islands are entitled to heightened judicial scrutiny

⁸⁵ *Id.*

⁸⁶ *See, e.g.*, Paul Leary, *Op-Ed: The Colony of the United States Virgin Islands*, ST. JOHN SOURCE (Aug. 25, 2020), <https://stjohnsource.com/2020/08/25/the-colony-of-the-united-states-virgin-islands/> (arguing that the Virgin Islands are a colony in a “politically subordinate limbo”); *see also* Harold Peón, *It Is 2020, and Puerto Rico is Still a Colony*, HARV. POL. REV. (Nov. 22, 2020), <https://harvardpolitics.com/puerto-rico-colony/> (explaining that Puerto Rico is a colony of the United States with a history rooted in racial intolerance).

⁸⁷ *See infra* Figure 1.

⁸⁸ *See infra* Figure 1.

⁸⁹ *See Downes v. Bidwell*, 182 U.S. 244 (1901).

⁹⁰ *Id.*

⁹¹ U.S. CONST. art. I, § 8.

⁹² *Downes*, 182 U.S. 244.

⁹³ *Id.* at 287.

when their rights are being adversely affected.⁹⁴ As the U.S. Supreme Court has continuously noted and upheld, voting is a fundamental right that is inclusive of all other rights conferred with citizenship,⁹⁵ a right that has been denied to territorial residents since their acquisition by the United States. However, when faced with determining whether the blatant infringement on the islanders' fundamental right is Constitutional, the courts have expressed a belief that Congress is justified in limiting the rights of citizens residing in the Caribbean due to their territorial status,⁹⁶ effectively barring millions of citizens from the political franchise of voting. The following subsection discusses further disenfranchisement of territorial citizens, relevant to an act that allows the citizens of states to participate in absentee voting overseas.

3. *Textualism*

The strongest argument against the expansion of federal representation lies within the text of the Constitution. In Article I, the Constitution reads “[t]he House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.”⁹⁷ Originalists utilize this clause to formulate the textual argument that the drafters of the Constitution intended federal representation to be derived from statehood, expanding the scope of the text to bar residents outside of a designated state from voting for both a Congressperson and the President.⁹⁸ Early case law supports this argument. For example, in 1901 the Supreme Court decided that Puerto Rico, and other territories of similar status, were not considered part of the United States under the scope of the Constitution's revenue clauses, as the Constitution only limits Congress's commerce powers to “states” and citizens thereof.⁹⁹ In the Court's view, Congress has expansive power over the possessions of the United States greatly exceeding Congress's power over states, and Congress is not *required* to extend the protections granted in the Constitution to territories.¹⁰⁰

⁹⁴ See *Graham v. Richardson*, 403 U.S. 365, 372 (1971) (laying out an example of who qualifies to be such an “insular minority” and stating they are to receive “close judicial scrutiny” when denied state protections).

⁹⁵ *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

⁹⁶ *Downes*, 182 U.S. 244 (establishing a distinction between the rights allotted to “incorporated” and “unincorporated” territories).

⁹⁷ U.S. CONST. art. I, § 2, cl. 1.

⁹⁸ John C. Fortier, *The Constitution Is Clear: Only States Vote in Congress*, 116 YALE L.J.F. 403, 404 (2007).

⁹⁹ *Downes*, 182 U.S. at 389.

¹⁰⁰ *Id.*

The textualist arguments against increasing federal representation to the territories are weak when viewed today. Since the early twentieth century, Congress has enacted various organic acts to integrate the residents of both Puerto Rico and the U.S. Virgin Islands into general United States citizenship.¹⁰¹ Similarly, since the 1970's Congress has allowed the U.S. Virgin Islands, the smallest U.S. territory in the Caribbean,¹⁰² to establish its own constitution and authorized for the election of a non-voting delegate to Congress.¹⁰³ By acting on its power, Congress has not only recognized territorial residents as citizens of the United States, a status that is omitted from the Constitution, but also demonstrated that the Territorial Clause of Article IV, which will be discussed in greater detail in the following section, can be used to shift the rights of citizens within the nation's possessions.¹⁰⁴

The textualist argument that statehood is a prerequisite of representation is further weakened when considering the circumstances surrounding the Constitution's drafting. The colonists largely fought the American Revolution because the colonies were subjects to strong-handed English regulations with little say in decision-making.¹⁰⁵ "No taxation without representation" became a rally cry for the patriots,¹⁰⁶ as the founding fathers recognized a necessity for individuals being ruled to have a say in their ruling, as memorialized in the Gadsden Flag.¹⁰⁷ Thus, it is difficult to fathom that the men who fought a bloody war to establish a representative government intended citizens under said government to be indefinitely ruled without a voice.

Utilizing the knowledge that the drafters of the Constitution constructed the United States' guiding document with the intent to establish a representative democracy, the textualist argument continues to fall short when examining the requirements for statehood outlined in the Constitution.¹⁰⁸ The Admission Clause of the Constitution offers virtually no guidance on how Congress should admit states.¹⁰⁹ The short and relatively simple Clause permits Congress to admit new states into the Union and bars the erection of new states, or joining of two preexisting states within the jurisdiction of established states, without the consent of Congress and

¹⁰¹ See 8 U.S.C. § 1402 (extending U.S. citizenship to the residents of Puerto Rico); see also § 1406 (extending U.S. citizenship to the residents of the Virgin Islands).

¹⁰² See *US States and Territories Resized by Population*, BRILLIANT MAPS, <https://brilliantmaps.com/us-territories-resized/> (last visited Feb. 2, 2022).

¹⁰³ Sekou, *supra* note 12.

¹⁰⁴ U.S. CONST. art. IV, § 3, cl. 2.

¹⁰⁵ William S. Price, Jr., *Reasons Behind the Revolutionary War*, N.C.PEDIA, <https://www.ncpedia.org/history/usrevolution/reasons> (last visited Feb. 26, 2022).

¹⁰⁶ *Id.*

¹⁰⁷ *The Gadsden Flag*, CHAMBER OF COM., <https://www.chamberofcommerce.org/usflag/history/gadsden.html> (last visited Nov. 7, 2020).

¹⁰⁸ See U.S. CONST. art. IV, § 3, cl. 1.

¹⁰⁹ *Id.*

legislatures of the states.¹¹⁰ The clause falls short in providing any guidance beyond Congress's grant of power and select limitations in the power's use.¹¹¹ Thus, arguing that the Drafters intended statehood to be a prerequisite of representation, with little guidance on how Congress is to grant statehood and how long territories should remain in a subordinate caste, provides more doubt than certainty for the textualist answer.

4. Territorial Clause

The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular state.¹¹²

The Territorial Clause of the Constitution confers an abundance of power to Congress to dictate the nature of the citizenship granted to territories, but the limits of its powers are unclear.¹¹³ For over one hundred years, the court's understanding of the Territorial Clause has been guided by *Downes v. Bidwell*,¹¹⁴ a key component of the infamous Insular Cases which will be discussed in greater detail in the following section.¹¹⁵ The Court in *Downes* promised to protect "fundamental" rights of United States citizens within the territories, despite instances in which Congress may act to obstruct the outlined liberties.¹¹⁶ The *Downes* Court sought to protect religious liberties, freedom of speech, and rights to property, but did not include suffrage rights, essentially eliminating a right that is embedded in the very essence of U.S. democracy.¹¹⁷

Despite the Insular Cases, modern U.S. history demonstrates that Congress has the freedom to expand voting rights to its territories under the Territorial Clause. In mid-June of 1960, almost fifty years after *Downes v. Bidwell*,¹¹⁸ Congress passed the Twenty-Third Amendment, granting the citizens in the District of Columbia ("D.C.") the right to vote in presidential elections.¹¹⁹ Though the District of Columbia is attached to the mainland United States, it is not formally a part of any state in the Nation and is often

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² U.S. CONST. art. IV, § 3, cl. 2.

¹¹³ *See generally id.*

¹¹⁴ *Downes v. Bidwell*, 182 U.S. 244 (1901).

¹¹⁵ *See generally* Juan R. Torruella, *The Insular Cases: The Establishment of a Regime of Political Apartheid*, 29 U. PA. J. INT'L L. 283, 291-92 (2007) (discussing that the Insular Cases explored how territories were to be treated by the government and its impact is seen today).

¹¹⁶ *Downes*, 182 U.S. at 282-83.

¹¹⁷ *See id.* at 283.

¹¹⁸ *Id.*

¹¹⁹ U.S. CONST. amend. XXIII.

viewed as a territory,¹²⁰ allowing the adoption of the Twenty-Third Amendment to be viewed as a significant victory to U.S. citizens residing in territories around the globe. Since the Amendment's passage and subsequent ratification, the U.S. Supreme Court has not questioned its validity. In fact, members of Congress sought to expand the rights of D.C.'s residents to include voting for Congresspersons in 1978, a feat that ultimately failed.¹²¹

The success of adopting the Twenty-Third Amendment and subsequent attempts to expand the voting rights of the D.C.'s residents, demonstrate that Congress has the authority to expand voting rights to the United States' other territorial citizens. In fact, in the summer of 2020, Justice Thomas reaffirmed the "absolute and undisputed" powers granted to Congress by the Territorial Clause in his concurrence in *Financial Oversight and Management Board for Puerto Rico v. Aurelius Investment, LLC*.¹²² The following section proposes how the federal judiciary and Congress may utilize precedent and their enumerated powers to expand the right of suffrage to citizens within the United States Caribbean territories.

III. PROPOSAL FOR GOVERNMENT ACTION TO EXPAND TERRITORIAL REPRESENTATION

The most accessible avenues for the judiciary to extend voting rights are by either overturning the determinations made in the Insular Cases, discussed in the first subsection; or by requiring equal enforcement of the Uniformed and Overseas Citizens Absentee Voting Act, which is discussed in the second subsection.

A. Judicial Support

In 1995, the Supreme Court recognized the value of unified suffrage in *U.S. Term Limits, Inc. v. Thornton*,¹²³ concluding that "the Framers, in perhaps their most important contribution, conceived of a Federal Government directly responsible to the people, possessed of direct power over the people, and chosen directly, not by States, but by the people."¹²⁴ While *U.S. Term Limits* served to identify the bounds of state power in

¹²⁰ Jenna Portnoy & Fenit Nirappil, *D.C. Intentionally Classified as Territory*, WASH. POST (Mar. 26, 2020), https://www.washingtonpost.com/local/dc-politics/dc-was-intentionally-classified-as-a-territory-in-virus-aid-bill-lawmakers-say/2020/03/26/4b8c4ba8-6f74-11ea-b148-e4ce3fbd85b5_story.html.

¹²¹ *The Twenty-Third Amendment, 1961*, NAT'L MUSEUM OF AM. HIS., <https://americanhistory.si.edu/democracy-exhibition/vote-voice/getting-vote/sometimes-it-takes-amendment/twenty-0> (last visited Feb. 26, 2022).

¹²² *Fin. Oversight and Mgmt. Bd. for P.R. v. Aurelius Inv., L.L.C.*, 140 S. Ct. 1649, 1666 (2020).

¹²³ *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995).

¹²⁴ *Id.* at 821.

federal elections and better define the boundaries of the Seventeenth Amendment,¹²⁵ it exemplifies the consistent trend embedded in the Court's jurisprudence: political representatives are elected by the people to serve the people.¹²⁶ In fact, that very philosophy is attributed to the adoption of the Seventeenth Amendment in which Congress was motivated to ensure that the people held their representatives directly accountable.¹²⁷ Thus, the same philosophy can continue to be implemented by the Supreme Court as a means to ensure that the right to choose those that represent the population is extended to U.S. citizens residing in the nation's territories.

1. *Insular Cases*

Following the Spanish-American War,¹²⁸ the United States was faced with an unprecedented question: are the people living within the newly acquired territories U.S. citizens or something vastly different?¹²⁹ The Supreme Court answered this question, determining the bounds of the Constitution on the territory's residents and outlining which protections were suitably fit to be shared through a series of cases heard in the late 1800s and early 1900s.¹³⁰ These outdated cases are the basis of territorial citizenship today, despite the apparent prejudice and outdated philosophies that taint the opinions, solidifying a caste of citizens that are subordinate to those living in defined states.¹³¹ Of the many Insular Cases, this note continues to focus on *Downes v. Bidwell*,¹³² as it sufficiently demonstrates the Supreme Court's stance on whether the Constitution should extend to acquired territories.

Downes was brought to determine if the Constitution's Revenue Clauses apply to the acquired U.S. territories.¹³³ Answering that the Revenue Clauses do not apply to the territories as a textual reading of the Constitution affirms that said clauses only apply to states,¹³⁴ the opinion written by Justice Henry Billings Brown outlines the racial lens that the United States viewed these territories through.¹³⁵ In his opinion, Justice Brown creates two classifications for territories owned by the United States: (1) those

¹²⁵ See generally *id.* (defining the bounds of the relationship between the state and federal government in relation to the Seventh Amendment).

¹²⁶ 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, 267 (2017).

¹²⁷ *Id.*; see U.S. Const. amend. XVII.

¹²⁸ *Spanish-American War*, HIST. (Nov. 11, 2021), <https://www.history.com/topics/early-20th-century-us/spanish-american-war>.

¹²⁹ Torruella, *supra* note 115.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Downes v. Bidwell*, 182 U.S. 244 (1901).

¹³³ *Id.* at 287.

¹³⁴ *Id.*

¹³⁵ *Id.*

incorporated into the United States and (2) those not incorporated into the United States, with the Constitution, fully extending to the former and “fundamental” liberty protections to extending to the latter.¹³⁶ The Court limited the scope of fundamental liberties to exclude a range of traditionally fundamental rights, suffrage being the most relevant here.¹³⁷ The logic behind the distinction extends beyond legal reasoning and seemingly lies with both the United States’ expansionist agenda at the time and a society that was racially intolerant, expressing Congress’s desire to expand the U.S. borders but not wastefully attempt to instill Anglo-Saxon principles onto “alien races.”¹³⁸

Downes’ precedent that the Constitution does not extend to unincorporated territories continues to be utilized to ensure that the citizens of Puerto Rico and the U.S. Virgin Islands remain subordinate to those of the states.¹³⁹ For example, in *Balzac v. Porto Rico* the Supreme Court reiterated Justice Brown’s opinion,¹⁴⁰ stating that the Sixth Amendment’s protections do not apply to Puerto Ricans, as Puerto Rico is not incorporated, and residents of Puerto Rico, whether immigrants from a state or natives, could rightfully be denied a jury trial.¹⁴¹ However, the impact of *Balzac*¹⁴² has faced opposition from Congress with the passing of the U.S. Nationality Act of 1941, extending the protections of the Fourteenth Amendment to the territories.¹⁴³ Thus, the inquiry into the granted fundamental rights of citizens residing in territories has since shifted from an inquiry of equal protection to one of determining what territories are incorporated, without any clarity as to the definition of an incorporated territory beyond formal statehood.

The precedents established by *Downes*¹⁴⁴ and the remaining Insular Cases are ripe for judicial review, as the outdated racial biases of the early twentieth century United States are enshrined in the judicial opinions and the United States’ understanding of law and integration has since evolved. The obvious shortcomings of the Insular Cases are as outdated as *Plessy v. Ferguson*,¹⁴⁵ which was determined by the same Court that heard *Downes*,¹⁴⁶ but these shortcomings are ignored by the federal judiciary as evidenced by these cases not being overturned and still being considered “good law.” Upon review of the Insular Cases, the Supreme Court should overturn the arbitrary

¹³⁶ *Id.* at 341-43.

¹³⁷ Efrén Rivera Ramos, *Insular Cases*, in 2 OXFORD ENCYCLOPEDIA OF LATINOS AND LATINAS IN THE UNITED STATES 386-88 (2005).

¹³⁸ Torruella, *supra* note 115.

¹³⁹ *See, e.g.*, *Balzac v. Porto Rico*, 258 U.S. 298 (1922).

¹⁴⁰ *See Downes*, 182 U.S. 244.

¹⁴¹ *Balzac*, 258 U.S. at 305.

¹⁴² *Id.*

¹⁴³ *Puerto Rico’s History 1900-1949*, *supra* note 42.

¹⁴⁴ *Downes*, 182 U.S. 244.

¹⁴⁵ *Plessy v. Ferguson*, 163 U.S. 537 (1896).

¹⁴⁶ Torruella, *supra* note 115.

review of incorporated versus unincorporated, as the United States has since adopted a vastly greater racial tolerance and has outgrown the expansionist agenda that was once at the forefront of the U.S. government. Similarly, the Court should perceive citizens within the Caribbean territories of the United States in light of this note's earlier assertion that citizens residing in Puerto Rico and the U.S. Virgin Islands are in fact discrete and insular minorities and are entitled to greater protection, not lesser as the Insular Cases suggest.¹⁴⁷ Likewise, reversing the Insular Cases would be the most direct method of extending all of the Constitution's protections to U.S. citizens residing in the nation's territories, ensuring that citizenship is uniform across the United States.

2. *Uniformed and Overseas Citizens Absentee Voting Act*

The Uniformed and Overseas Citizens Absentee Voting Act ("UOCAVA") has been utilized to safeguard soldiers' right to vote when outside of the jurisdiction of their home state, albeit omitting any mention of soldiers from the territories and their right to vote.¹⁴⁸ The Act allows for "overseas voters" to utilize absentee voting procedures to cast their vote in federal elections.¹⁴⁹ The Act defines "overseas voters" as "a person who resides outside the United States and is qualified to vote in the last place in which the person was domiciled before leaving the United States."¹⁵⁰ Since the enactment of UOCAVA, states have modified their laws to allow their citizens who have emigrated to vote in federal elections via absentee ballots by defining procedures for the absentee voting process and outlining which areas their citizens may move to in order to participate in the federal election.¹⁵¹ For example, Illinois currently bars former residents of their state from voting via absentee ballot if the person has moved to Puerto Rico, Guam, or the U.S. Virgin Islands, but have allowed for absentee voting if a former resident currently resides in the Northern Mariana Islands ("NMI").¹⁵² In *Segovia v. Board of Election Commissioners of City of Chicago*, the district court for Illinois's North District's Eastern Division tried to ascertain

¹⁴⁷ See generally Rose Cuison Villazor, *Problematizing the Protection of Culture and the Insular Cases*, 131 HARV. L. REV. F. 127, 132 (2018) (discussing the Insular Cases' impact on territorial citizens and indigenous people).

¹⁴⁸ 52 U.S.C. §§ 20301-11.

¹⁴⁹ *Romeu v. Cohen*, 265 F.3d 118, 121 (2d Cir. 2001).

¹⁵⁰ *Id.*

¹⁵¹ See generally *The Uniformed and Overseas Citizens Absentee Voting Act*, U.S. DEP'T OF JUST. (Feb. 18, 2020), <https://www.justice.gov/crt/uniformed-and-overseas-citizens-absentee-voting-act> (providing a rundown of the UOCAVA's provisions and the intent of the Act).

¹⁵² See generally Deborah F. Buckman, Annotation, *Validity, Construction, and Application of Uniformed and Overseas Citizens Absentee Voting Act*, 1 A.L.R. Fed. 2d § 251 (2005) (explaining that Illinois allows for absentee voting for their residents located in most places internationally, but not the Virgin Islands or Puerto Rico).

the reason behind Illinois' decision.¹⁵³ The district court alluded to the United States' "trustee" relationship with the NMI, as established by a trusteeship agreement with the United Nations, as opposed to the "unincorporated" territorial relationship with Puerto Rico and the U.S. Virgin Islands, established by direct treaties indicating total acquisition, as the root of differing treatment.¹⁵⁴ Upon review, the Seventh Circuit's Court of Appeals determined that Illinois' differing treatment of NMI in comparison to other territories is constitutional, as the NMI are treated as "overseas" by the UOCAVA and the United States' Caribbean territories are not.¹⁵⁵ The distinction between absentee voting rights suggests that both the state and federal government maintain wide latitude in determining where their citizens may emigrate to in order to maintain fundamental rights. However, the Supreme Court has not addressed whether the broad discretion granted to the states to discriminate against the identified territories is constitutional.

Lower federal courts have analyzed UOCAVA to determine the Constitutionality of its measures when weighed against its use by states.¹⁵⁶ *Igartúa-de la Rosa v. United States*, accurately demonstrates the general consensus among courts: states may permit their citizens to cast an absentee ballot after they move to a U.S. territory, but are not constitutionally required to do so.¹⁵⁷ In fact, the district court found that UOCAVA "does not distinguish between those who reside overseas and those who take up residence in Puerto Rico, but rather distinguishes between those who reside overseas and those who move anywhere within the United States."¹⁵⁸ Thus, the court believes that this distinction does not affect a suspect class or infringe upon a fundamental right, granting great deference to both the states and Congress.¹⁵⁹

A key argument raised against the validity of UOCAVA surrounds the infringement on a citizen's fundamental right to travel. The Supreme Court's opinion in *Saenz v. Roe* outlines that the Constitution strictly protects three elements regarding domestic travel, with the "right of a citizen of one State to enter and to leave another State" being most relevant here.¹⁶⁰ A lower appellate court provided a pertinent opinion in *Romeu v. Cohen*, in which the challenger demonstrated that New York allowed him, as a former New York resident, to cast his absentee ballot if he was living outside of the United States, but denied him the right to vote for moving to the U.S. territory of

¹⁵³ *Segovia v. Bd. of Election Comm'n*, 201 F. Supp. 3d 924 (N.D. Ill. 2016).

¹⁵⁴ *Id.* at 949-50.

¹⁵⁵ *Segovia v. United States*, 880 F.3d 384, 391 (7th Cir. 2018).

¹⁵⁶ *See Igartúa-de la Rosa v. United States*, 107 F. Supp. 2d 140 (D.P.R. 2000).

¹⁵⁷ *Id.* at 150.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Saenz v. Roe*, 526 U.S. 489, 500 (1999).

Puerto Rico.¹⁶¹ The challenger argued that this arbitrary distinction directly infringed on his fundamental right to travel by revoking voting rights *only* if he traveled to territories that New York determined were not sufficient to grant absentee ballots,¹⁶² identifying the need for the court to perform a substantive due process analysis. However, instead of identifying a fundamental right that was being infringed, the Second Circuit Court of Appeals noted that bona fide residents of Puerto Rico lacked access to federal elections, determining that it was the challenger's status as a Puerto Rican resident, not the fact that he traveled to Puerto Rico, which obstructed his right to vote.¹⁶³ Thus, the court narrowly navigated its interpretation to avoid conducting a thorough substantive due process analysis by highlighting a distinction between the travel-focused discrimination and discrimination rooted in residency.¹⁶⁴ Furthermore, the court found that the Privileges and Immunities Clause of Article IV of the Constitution does not protect citizens attempting to carry their privileges from one state to another.¹⁶⁵

The Second Circuit Court of Appeals' focus on making a distinction between travel-based discrimination and residency-based discrimination in *Romeu v. Cohen*¹⁶⁶ does not fit properly with precedent. Under the lens of the right to travel, it is apparent that citizens are deterred from residing in the nation's unincorporated territories, as their right to vote is directly impacted. Thus, the UOCAVA and its implementation by states infringe upon both a citizen's right to travel, through indirect deterrence, and the right to vote in federal elections if said citizen attempts to utilize the right to travel to territories waving the U.S. flag. If the Supreme Court were to hear *Romeu*,¹⁶⁷ or a similarly-situated case, the Court would likely determine that heightened scrutiny is necessary in its analysis, as the fundamental rights to vote and travel are affected by the Act, which directly implicates the rights of discrete and insular minorities. Similarly, the Court would likely find that the states' application of UOCAVA does not meet the level of heightened scrutiny. There is no indication, however, that the Supreme Court has granted certiorari to determine the constitutionality of UOCAVA's application.

This note's determination that the Supreme Court would find differently than the Second Circuit Court of Appeals is derived from the Court's opinion in *Reynolds v. Sims*.¹⁶⁸ In *Sims*, the Court analyzed whether substantial discrepancies in the number of representatives to population in

¹⁶¹ *Romeu v. Cohen*, 265 F.3d 118, 121-22 (2d Cir. 2001).

¹⁶² *Id.* at 123-24.

¹⁶³ *Id.* at 129-30.

¹⁶⁴ *See generally id.* (determining that the proper analysis of UOCAVA's application to Puerto Rico focuses on residency and not travel).

¹⁶⁵ Buckman, *supra* note 152.

¹⁶⁶ *Romeu*, 265 F.3d 118.

¹⁶⁷ *Id.* at 129-30.

¹⁶⁸ *Reynolds v. Sims*, 377 U.S. 533 (1964).

Alabama's electoral districts were constitutional.¹⁶⁹ The challengers argued that the discrepancies denied citizens "equal suffrage in free and equal elections," as the apportionment gave smaller populations a greater voice in state politics than more densely populated districts.¹⁷⁰ The Court ruled in favor of the challengers, arguing "the right of suffrage is a fundamental matter in a free and democratic society."¹⁷¹ Thus, the Court's echoing of the bedrock democratic principle of "one person one vote"¹⁷² demonstrates that when a qualified voter's right to suffrage is infringed, it is the Court's duty to grant judicial protection.¹⁷³ Much like the concerns in *Sims*, the states' implementation of UOCAVA not only strays from the "one person one vote" principle, but also enforces the principle that a U.S. citizen residing in select territories can have no say in the U.S. government.

If the Supreme Court were to determine that UOCAVA unjustly infringed on citizens' rights to vote, the subsequent enforcement of the Act would likely only grant protections to citizens originally from one of the states. While this can be considered a start in the direction of suffrage for U.S. citizens residing in the nation's Caribbean territories, the result is insufficient to maintain the democratic promise that helped found the United States. To build on this judicial victory would be incredibly time consuming and uncertain, as further litigation would be required to expand the protections of UOCAVA. Interestingly, the *Romeu* court, in dicta, stated that Congress's power to extend voting rights to territorial citizens is evident in Article IV of the Constitution.¹⁷⁴ Thus, action by Congress would not only secure the sought voting rights, but also guarantee the subsequent protection of Caribbean voters by the judiciary.

B. Legislative Action

For over a century, the U.S. citizens that reside in the country's Caribbean territories have fought in wars under the U.S. flag, enforced federal laws, and paid taxes to the nation, all without the fundamental rights to representation that the nation's forefathers promised. This note proposes to put an end requiring nearly three million citizens¹⁷⁵ to contribute to a democracy without federal representation by first pressuring Congress to pass a new Constitutional Amendment, expanding the right to vote for the

¹⁶⁹ *Id.* at 538-39.

¹⁷⁰ *Id.* at 540.

¹⁷¹ *Id.* at 561-62.

¹⁷² *Id.* at 558.

¹⁷³ *Id.* at 566.

¹⁷⁴ *Romeu v. Cohen*, 265 F.3d 118, 130 (2d Cir. 2001).

¹⁷⁵ *United States Territories 2022*, WORLD POPULATION REV., <https://worldpopulationreview.com/country-rankings/united-states-territories> (last visited Feb. 26, 2022).

U.S. President to the nation's Caribbean Territories, and secondly granting the territories representatives to Congress.

If passed, the proposed amendment, would be listed as the Twenty-Eighth Amendment and largely mimic the Twenty-Third Amendment which grants the residents of Washington D.C. the right to vote for Presidency and expanded the Electoral College.¹⁷⁶ In fact, the same language utilized in the Twenty-Third Amendment can be adopted in the proposed Twenty-Eight by simply changing the subject of the Amendment to address Puerto Rico and the U.S. Virgin Islands.

The great disparity between the population of the U.S. Virgin Islands and Puerto Rico can be overcome by simply conjoining the two territories under the same electors. The close proximity of the territories demonstrates that many of the political issues they face, such as immigration¹⁷⁷ and military efforts in the Caribbean,¹⁷⁸ are similar in nature. Likewise, the potential issues accompanying the population disparity between Puerto Rico and the U.S. Virgin Islands can largely be quelled by allowing the citizens of said territories to be represented by the same electors.

Similar to the U.S. Virgin Islands, Puerto Rico has a single nonvoting representative in the House of Representatives.¹⁷⁹ Unlike that of the U.S. Virgin Islands, Puerto Rico's representative maintains the title "Resident Commissioner"¹⁸⁰ and represents more than three million people,¹⁸¹ a population greater than both Rhode Island¹⁸² and Hawaii¹⁸³ combined. Thus, it would be wise to eliminate 48 U.S.C. § 891, which grants Puerto Rico its Resident Commissioner,¹⁸⁴ and expand the proposed amendment to include a section reading that both apportion representatives from Puerto Rico consistent with its population and integrates representatives from Puerto Rico

¹⁷⁶ U.S. CONST. amend. XXIII.

¹⁷⁷ See Marlon Bishop, *Unauthorized Immigration to Puerto Rico*, LATINO USA (Jan. 2, 2015), <https://www.latinousa.org/2015/01/02/border-unauthorized-immigration-puerto-rico/> (explaining the large influx of illegal immigrants fleeing their Caribbean homes and immigrating to Puerto Rico).

¹⁷⁸ E.g., Stephen Zunes, *U.S. Invasion of Grenada*, GLOB. POL'Y F. (Oct. 2003), <https://archive.globalpolicy.org/empire/history/2003/10grenada.htm> (outlining the U.S. Military's action in the Caribbean country of Grenada during the Cold War).

¹⁷⁹ *What is the Resident Commissioner?*, U.S. Congresswoman Jennifer González-Colón, U.S. HOUSE OF REPRESENTATIVES, <https://gonzalez-colon.house.gov/about/what-resident-commissioner> (last visited Feb. 26, 2022).

¹⁸⁰ *Id.*

¹⁸¹ *Puerto Rico*, *QuickFacts*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/PR> (last visited Feb. 26, 2022).

¹⁸² *Rhode Island*, *QuickFacts*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/RI> (last visited Feb. 26, 2022).

¹⁸³ *Hawaii*, *QuickFacts*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/HI> (last visited Feb. 26, 2022).

¹⁸⁴ 48 U.S.C. § 891 (outlining election qualifications for the Resident Commissioner of Puerto Rico).

as voting members of the House. The final proposed amendment, which largely mimics the Twenty-Third Amendment, would read as follows:

The territories of Puerto Rico and the Virgin Islands of the United States shall appoint in such manner as Congress may direct: A number of electors of President and Vice President equal to the whole number of Senators and Representatives in Congress to which the Territories would be entitled if it were a State, but in no event more than the least populous State; they shall be in addition to those appointed by the States, but they shall be considered, for the purposes of the election of President and Vice President, to be electors appointed by a State; and they shall meet in the Territories and perform such duties as provided by the twelfth article of amendment. For the purposes of representation in the House of Representatives, the territory of Puerto Rico each shall be represented in the United States Congress by Delegates to the House of Representatives, apportioned as if Puerto Rico were a State, elected as hereinafter provided.

The U.S. Virgin Islands is home to more than one hundred thousand people,¹⁸⁵ larger than a sixth of the population of the state of Wyoming,¹⁸⁶ but significantly smaller than Puerto Rico's population.¹⁸⁷ Thus to truly integrate the territory into the federal sphere that greatly impacts its people, this note proposes to expand existing laws and extend voting capabilities to the U.S. Virgin Islands' delegate to the House of Representatives, rather than expand on the proposed amendment.

In 1972, Congress granted the U.S. Virgin Islands and Guam a delegate to the House by passing 48 U.S. Code §1711, reading:

The territory of Guam and the territory of the Virgin Islands each shall be represented in the United States Congress by a nonvoting Delegate to the House of Representatives, elected as hereinafter provided.¹⁸⁸

Thus, the law can be simply modified by removing the words "nonvoting," allowing the delegate to vote on important matters and have a meaningful voice in the house. Furthermore, granting the U.S. Virgin Islands' delegate to the House voting abilities would allow for the territory

¹⁸⁵ *Central America and Caribbean: Virgin Islands, The World Factbook, Library, CENT. INTEL. AGENCY* (Oct. 15, 2018), <https://perma.cc/897X-G6UH>.

¹⁸⁶ *Wyoming, QuickFacts*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/WY> (last visited Feb. 26, 2022).

¹⁸⁷ *Puerto Rico*, *supra* note 181.

¹⁸⁸ 48 U.S.C. §1711.

to influence federal funds that were proven vital following the hurricanes that struck the islands in 2017.¹⁸⁹

IV. CONCLUSION

The United States acquired its Caribbean possessions during an era of war and popular expansionism.¹⁹⁰ However, by obtaining possessions overseas, the federal government was faced with the unprecedented task of determining how those living in the territories should be treated under the Constitution. The judiciary embarked on answering this question in its opinions in the infamous Insular Cases, drawing a harsh divide between territories that were incorporated into the nation and those that were not, without providing an identifiable guideline to determine the standards that satisfy incorporation. The Insular Cases, which solidified the nation's Caribbean citizens as subordinate to those living in states, have since been used to obstruct representational rights to both Puerto Ricans and U.S. Virgin Islanders for over a century. Since the Insular Cases, the United States has grown a greater appreciation for diversity and has made substantial advances in promoting equality through the nation, suggesting that extending federal suffrage to the Caribbean territories is not only a fathomable objective but also an obtainable goal. The most definite way to relieve the U.S. Caribbean islanders from their subordinate caste would be for the Supreme Court to reverse its ruling in *Downes v. Bidwell*¹⁹¹ and extend full Constitutional protections to all territories, eliminating the arbitrary incorporation scale. Another method would be to require a unified enforcement of Uniformed and Overseas Citizens Absentee Voting Act¹⁹² to include people residing in territories, which would allow for the future Equal Protection cases to gradually develop suffrage rights for territorial citizens. However, to avoid the uncertainties of litigation, Congress should ratify a new Amendment that mimics the Twenty-Third and extends voting rights to Puerto Rico and the U.S. Virgin Islands. The Amendment must be expanded on, however, by modifying 48 U.S. Code §1711 to allow for the Virgin Islands' delegate to the House of Representatives to have voting capabilities equal to the other members of the House.

¹⁸⁹ FEMA has Approved over \$2 Billion in Public Assistance Funds for the U.S. Virgin Islands, RELIEFWEB (Jan. 17, 2020), <https://reliefweb.int/report/united-states-virgin-islands/fema-has-approved-over-2-billion-public-assistance-funds-us>.

¹⁹⁰ *Purchase of the United States Virgin Islands, 1917*, supra note 8; *Treaty of Paris of 1898*, supra note 30.

¹⁹¹ *Downes v. Bidwell*, 182 U.S. 244 (1901).

¹⁹² 52 U.S.C. §§ 20301-20311.

V. APPENDIX

Figure 1:

