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No Right to Vote: Suffrage in the District of Columbia and U.S. Territories

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NO RIGHT TO VOTE: SUFFRAGE IN THE DISTRICT OF COLUMBIA AND U.S. TERRITORIES

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ABSTRACT

Part I: The United States is not violating the domestic rights of the citizens in the District of Columbia, Puerto Rico, and its other territories by denying them the right to elect voting representation in government or (in the case of the territories) the right to vote for the U.S. President, because U.S. Citizens in the Territories do not currently have the right to vote for president, nor do they or District residents currently have the right to elect voting representation in Congress.

Part II: This denial does not violate the International Covenant on Political and Civil Rights and/or the American Convention on Human Rights, because—combined with the attached U.S. reservations—the ICCPR obligates the federal government to grant Covenant rights by taking only those necessary steps which accord with U.S. constitutional processes, and the Constitution restricts the federal government's unilateral power to grant District and territory residents the right to vote. The ACHR is not being violated because the United States has not ratified it, and thus does not constitute an international obligation on the U.S.

Part III: Without ratification, there are no available remedies for these citizens in ICCPR or the Inter-American System. The Supreme Court refuses to apply these conventions, so the only domestic remedies available are congressional legislation or executive order, statehood for the District and each territory, or constitutional amendment granting these people the right to vote.
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Introduction

The issue of voting rights in the United States has always been hotly contested, regardless of the class of people seeking the right to vote. Essential to our conception of democracy, the right to vote embodies the people’s control of the government, which takes prime of place as the opening line of the United States Constitution: “We the People of the United States…do ordain and establish this Constitution…” Further entrenching this control, the Tenth Amendment reserves to the people all powers not delegated to the federal government. The framers designed popularly-elected representation as the people’s primary means of exercising this control. As Thomas Paine put it in 1795, “[t]he right of voting for representation is the primary right by which other rights are protected. To take away this right is to reduce a man to slavery, for slavery consists of being subject to the will of another, and he that has not a vote in the election of representation is in this case.” The promise of electoral votes has enticed 37 states to join the Union created by thirteen colonies over 200 years ago, but the power of the individual as against the government has endured, from the Bill of Rights, to the abolition of slavery, to the extension of equal protection for fundamental rights—often under the umbrella of the right to vote. The U.S. ideals of democracy and individual rights have changed the world by influencing the shape

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3 U.S. Const. amend. X. See also Price, Unfulfilled Ideal, supra note 2, at 77.
4 U.S. Const. art. I, § 2, cl. 1 (“The House of Representatives shall be composed of Members chosen…by the People of the several States.”); U.S. Const. Amend. XVIII, § 1 (“The Senate of the United States shall be…elected by the people [of each State].”) See also United States v. Classic, 313 U.S. 299, 314-15 (1941) (holding that the right to vote emanates from the Constitution); Price, Unfulfilled Ideal, supra note 2, at 78.
5 Thomas Paine, Dissertation on First Principles of Government (1795). See also Price, Unfulfilled Ideal, supra note 2, at 77.
6 See Price, Unfulfilled Ideal, supra note 2, at 77-78. See also U.S. Const. amends. I-X, XIII, XIV; Loan Association v. Topeka, 87 U.S. 655 (1875) (holding that the social compact implies reservations of individual rights beyond the control of the States);
of international and regional human rights agreements.7

Throughout this venerable history, like every other major power over the centuries, the United States colonized several neighboring territories, resulting in many states and fewer “states-in-waiting,” which have been held as territories for as long as one hundred years. The United States controls five territories that do not enjoy full citizenship privileges. Four of these island groups are unincorporated U.S. territories: Puerto Rico, American Samoa, Guam, and the United States Virgin Islands.8 As will be discussed in greater detail below, the United States Congress exercises plenary power over these territories, whose residents receive U.S. citizenship upon birth (or “national” status in Samoa) but do not have the right to vote for representation in the federal government.9 The other region, the Northern Mariana Islands, is a formally sovereign state recognized by the international community, but chose by referendum to be a territory under United States administrative control (including defense, foreign relations, funding and budgetary concerns, and U.S. program administration).10 Naturally, being a sovereign state in name, residents of the Northern Mariana Islands do not participate in electing the federal government either.

One other place exists in the United States where residents are denied voting representation in Congress: the District of Columbia. Though constitutionally distinct from the situation of the territories, the District’s special significance as the seat of the Federal government comes with restrictions strikingly similar to territorial status: its 600,000 residents are disenfranchised as a

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See also Price, Unfulfilled Ideal, supra note 2.
9 Price, Unfulfilled Ideal, supra note 2.
10 Id.
consequence of their location. Activists and advocates from both the unincorporated territories and the District have passionately and creatively argued for the extension of voting rights to the U.S. residents in these areas, succeeding at times (the Twenty-Third Amendment) and failing far more often. This article will synthesize these arguments, in both domestic and international law contexts.

There are four questions at issue here. Part I asks, “Is the United States violating the domestic rights of the citizens in the District of Columbia, Puerto Rico, and its other territories by denying them the right to elect voting representation in government or (in the case of the territories) the right to vote for the U.S. President?” To begin, Section I.A gives the short answer: no, their rights are not being violated, because these residents do not have the right to vote. Section I.B explains the relevant provisions of the U.S. Constitution and the theoretical underpinnings of the question; Section I.C examines the historical and jurisprudential background of the District, including an analysis of the 2000 case Adams v. Clinton, and Section I.D does the same with the other territories and the Insular Cases. Section I.D answers the question of the domestic right to vote in the District of Columbia and the unincorporated territories.

Part II extends the question to the sphere of the U.S.’s international obligations, asking, “Does this denial violate the International Covenant on Political and Civil Rights (ICCPR)?

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and/or the American Convention on Human Rights (ACHR)?" 13 Section II.A (again) briefly answers no, because these treaties do not grant rights to U.S. citizens. Section II.B introduces sources of international law, including the Charters of the United Nations and the Organization of American States, the International Bill of Rights, the American Declaration of the Rights and Duties of Man, and the Inter-American Democratic Charter. Section II.C expands that introduction by exploring customary international law, including federal jurisprudence on the applicability of international law from the nineteenth-century summary case *Paquete Habana* through the post-*Erie Sabbatino* (1964) and *Filártiga* (1980), as well as the Restatement (Third) of Foreign Relations Law (1987). Section II.D then considers the application of treaties as law in the United States and explores the self-executing / non-self-executing dichotomy. Section II.E completes the overview with an explanation of international human rights obligations generally and within the United States, including an analysis of the U.S. attachment of Reservations, Understandings, and Declarations (RUDs) to human rights treaties. Sections II.F and II.G lay out the basic substantive and enforcement provisions in the ICCPR and the ACHR, respectively, and analyzes U.S. voting rights in these areas under those provisions, concluding that neither is being violated, because neither treaty is currently enforceable in the United States.

Part III, the section on remedies, asks the general question, “should the Supreme Court’s interpretation of a U.S. constitutional provision be found to be in conflict with an international convention to which the United States is a party, what remedy exists?” Section III.A concludes that since the United States is not a party to the ICCPR First Optional Protocol or the ACHR, remedies through those bodies are not available. Section III.B revisits the constitutional constraints preventing the Supreme Court and the judiciary from granting the right to vote to

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District and territory residents under international human rights bodies. Section III.C explains the various arguments that have been advanced to find the (judicially enforceable) right to vote, and Section III.D considers other methods in the U.S. system for achieving the right to vote in the District and the territories, including congressional legislation or executive order, statehood for the individual territories and the District, or constitutional amendment granting citizens in these regions the right to vote.\footnote{For the activist reader, this article is bundled with several practical aids: an annotated table of relevant cases, two annotated bibliographies related (respectively) to International Law’s Applicability in the U.S. and Territorial Voting Rights in the U.S., and PDF documents containing the full text of all articles in the bibliographies. For access to these resources, please contact the author’s client, David Moon at Fairvote, available at dmoon@fairvote.org.}

**Part I: Is the United States violating the domestic rights of the citizens in the District of Columbia, Puerto Rico, and its other territories by denying them the right to elect voting representation in government or (in the case of the territories) the right to vote for the U.S. President?**

**A. Answer:** No, because United States citizens in the territories do not have the right to vote for president, nor do they or District residents have the right to elect voting representation in Congress.

As will be crystallized in the following sections, federal courts have been—and remain—clear on the point that the Constitution does not grant individuals in the United States the right to vote; that right is granted only indirectly to residents of the several states. Thus, (1) a constitutional amendment granting these citizens the right to elect the president (like the Twenty-Third Amendment for the District) and voting representation in Congress, or (2) statehood for each area desiring to vote, are the only existing options for residents in the District and the territories. It is unclear, however, if the Constitution bars Congress from legislating a new definition of “State” in the Constitution to include territories and federal enclaves. Such legislation, and other possible remedies (since judicial relief is barred), for these citizens will be revisited in the conclusion to Section II.E considering the U.S.’s obligations under the ICCPR,
infra page 102, and explored in-depth in the remedies section, Part III.C, beginning infra page 118.

B. Applicable Law: Constitutional Background

1. The Constitution’s General Application to the District of Columbia and the Territories

As laid out in further detail below, the U.S. Constitution has specific provisions concerning both the District of Columbia and U.S. territories. But before dealing with their specific situations, threshold issues regarding the general application of the Constitution to the District and the territories must be explored: Does the Constitution apply to the District and the territories? If so, how is it applied? And how is the Constitution’s use of the word “State” involved?

An important opening point is raised by Justice White’s concurring opinion in Downes v. Bidwell, also quoted by the Court in O’Donoghue v. United States: “when a provision of the Constitution is invoked [regarding territories], the question which arises is, not whether the Constitution is operative, for that is self-evident, but whether the provision is applicable.”

Regarding the District, scholars argue that general constitutional norms do restrict congressional action regarding District residents, in the same way that they restrict state action towards state citizens. The Supreme Court explicitly held: “There is nothing in the history of the constitution, or of the original amendments, to justify the assertion that the people of this District may be lawfully deprived of the benefit of any of the constitutional guarantees of life, liberty, and property…” The Court later added,

The District was made up of portions of two of the original states of the Union, and was not taken out of the Union by cession. Prior thereto, its inhabitants were

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entitled to all the rights, guaranties, and immunities of the Constitution … We think it is not reasonable to assume that the cession stripped them of those rights.\footnote{O’Donoghue v. United States, 289 U.S. 516, 540 (1933) (Sutherland, J.).}

The Court has even extended equal protection to D.C. residents by way of reverse incorporation of the Equal Protection Clause of the Fourteenth Amendment through the Due Process Clause of the Fifth Amendment.\footnote{Bolling v. Sharpe, 347 U.S. 497 (1954). See also Washington v. Davis, 426 U.S. 229 (1976); Shapiro v. Thompson, 394 U.S. 618 (1969); Raskin, Is This America?, supra note 11, at 46-47.} As Justice Brown put it in \textit{Downes v. Bidwell}, “to put at rest all doubts regarding the applicability of the Constitution to the District of Columbia, Congress by the act of February 21, 1871…specifically extended the Constitution and laws of the United States to this District.”\footnote{Downes v. Bidwell, 182 U.S. 244, 263 (1901) (Brown, J.) (plurality opinion) (citing 16 Stat. at L. 419, 426, chap. 62, § 34).}

The constitutional situation for the territories is much more ambiguous, and often more restricted. Although residents of the territories currently enjoy U.S. citizenship (except in American Samoa, where they have the status of “nationals”), the Supreme Court traditionally holds that Congress has wide discretion to discriminate against territorial residents, even when it came to fundamental individual rights; under the Territory Clause of the Constitution, “Congress…may treat Puerto Rico differently from States so long as there is a rational basis for its actions.”\footnote{Harris v. Rosario, 446 U.S. 651, 651-52 (1980) (rejecting an equal protection challenge to discrimination in welfare benefits). See also Califano v. Torres, 435 U.S. 1 (1978) (rejecting a right-to-travel challenge to discrimination in welfare benefits) (“Congress has the power to treat Puerto Rico differently, and…every federal program does not have to be extended to it.”); Sarah H. Cleveland, \textit{Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs}, 81 TEXAS L. REV. 1, 240 (2002) (hereinafter Cleveland, Sovereignty); E. Roman, Citizenship, supra note 8, at 588-89.} As Justice Marshall put it, “Heightened scrutiny under the equal protection component of the Fifth Amendment…is simply unavailable to protect Puerto Rico or the citizens who reside there from discriminatory legislation, as long as Congress acts pursuant to the...
Territory Clause.” Especially as regards government benefits, Congress has broad discretion to discriminate against territorial residents, even if it does so on the basis of race; “for the residents of these island territories, their disenfranchised status has not only caused inequality of political and civil rights, but has also manifested itself through unequal economic treatment.”

The historical treatment of the territories will be discussed below (Section I.B.2, beginning infra page 36), but over the last fifty years, the Constitution’s protections of individual rights have been applied piecemeal to the territories. Congress has chosen to apply certain of the Constitution’s protection to the territories by statute, including the Privileges and Immunities Clause, the First Amendment, and the Fourth Amendment; though the Supreme Court has upheld the laws extending these provisions, the opinions have not decided whether these rights were granted by the statute or by the Constitution. The Supreme Court has also applied certain rights and protections without specifying the constitutional source, including the Guarantee clause, due process protections, and equal protection of the laws. For example, in Calero-Toledo v. Pearson Yacht Leasing Co., the Court held that “there cannot exist under the American flag any

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21 Harris, 446 U.S. at 654 (Marshall, J., dissenting). See also Cleveland, Sovereignty, supra note 20, at 240; E. Roman, Citizenship, supra note 8, at 288-89.
22 E. Roman, Citizenship, supra note 8, at 588 (For example, “[f]or the residents of Puerto Rico, federal payments under Aid to Families with Dependent Children (AFDC), Medicaid, and food stamps are made at lower levels and are subject to an overall cap. Similarly, the Supplemental Security Income program (SSI) does not apply to Puerto Rico. Benefits under a similar program are capped and are made at lower levels than SSI payments made to eligible persons residing in the States. Benefits for needy children are likewise provided at appreciably lower levels.”) (citing Puerto Rico Status Referendum Act, S. REP. NO. 101-481, at 10-11 (1990) (“Under present law, federal social welfare programs…operate differently in Puerto Rico than they do in the states. Under statehood, both the amount of the welfare benefits and percentage of population receiving them would increase.”)); Califano v. Torres, 435 U.S. at 2 (holding that government benefits of a state citizen do not transfer when that citizen moves to Puerto Rico); Social Security Amendments of 1972, Pub. L. No. 92-603, § 303(b), 86 Stat. 1329, 1494 (repealing Titles I, X, and XIV of the Social Security Act with the exception that these titles would still apply to Puerto Rico, Guam, and the Virgin Islands); see also 42 U.S.C. § 1308(a)(1) (Supp. 1997) (specifying the amount of social security payments to Puerto Rico, Guam, the Virgin Islands, and American Samoa). See also Cleveland, Sovereignty, supra note 20, at 243.
23 See Rodriguez v. Popular Democratic Party, 457 U.S. 1, 8 (1982) (holding that “the voting rights of Puerto Rico citizens are constitutionally protected to the same extent as those of all other citizens of the United States”); Calero-Toledo, 416 U.S. at 669 n.5 (quoting Mora v. Mejias, 206 F.2d 377, 382 (1st Cir. 1953)); Examining Bd. of Eng’rs v. Flores de Otero, 426 U.S. 572 (1976). See also Cleveland, Sovereignty, supra note 20, at 241 (noting that the Supreme Court has also suggested that the rights to travel and habeas corpus may apply as well).
governmental authority untrammeled by the requirements of due process of law as guaranteed by the Constitution of the United States.”

Lower courts have also applied to the territories the Eighth Amendment prohibition on cruel and unusual punishment, the Eleventh Amendment, and the Fifth Amendment double jeopardy provisions (although courts are divided as to whether the right to a criminal jury trial applies to the territories).

Despite finding that the Constitution does apply, courts typically hold that in the certain context of the case at bar, the heightened scrutiny or the protection itself is not available. Courts often utilize a standard (adapted from language in the Insular Cases) that asks whether the right is universal, a right upon which all free governments are based, or whether it would be “impractical or anomalous” to extend the right or privilege to the territory. Since some of the territories have been granted self-government and commonwealth status by mutual consent between the territory and Congress, courts have often treated those entities as if they were the

24 See also Cleveland, Sovereignty, supra note 20, at 241.
25 Feliciano v. Barcelo, 497 F. Supp. 14, 33 (D.P.R. 1979) (Eighth Amendment); Fernandez v. Chardon, 681 F.2d 42, 59 n.13 (1st Cir. 1982) (“The Commonwealth enjoys the full benefits of the eleventh amendment.”). United States v. Sanchez, 992 F.2d 1143, 1152 (11th Cir. 1993) (Fifth Amendment double jeopardy); compare Torres v. Delgado, 391 F. Supp. 379, 383 (D.P.R. 1974) (holding that the right to jury trial is fundamental and applicable to Puerto Rico), with King v. Andrus, 452 F. Supp. 11, 17 (D.D.C. 1977) (holding that the right to criminal jury trial applies to American Samoa), and Commonwealth of the Northern Mariana Islands v. Atalig, 723 F.2d 682, 689-90 (9th Cir. 1984) (holding that the right to jury trial is not applicable to territories). See also Cleveland, Sovereignty, supra note 20, at 242.
26 See Downes v. Bidwell, 182 U.S. 244, 290-91 (White, J., concurring) (“While, therefore, there is no express or implied limitation on Congress in exercising its power to create local governments for any and all of the territories, by which that body is restrained from the widest latitude of discretion, it does not follow that there may not be inherent, although unexpressed, principles which are the basis of all free government which cannot be with impunity transcended.”). See also Torres v. Sablan, 528 U.S. 110 (2000) (holding that the “one-person, one-vote” requirements of the Equal Protection Clause did not apply to the U.S. citizens of the unincorporated Northern Mariana Islands, because while equal protection generally applied to the territory, the specific equal protection right at issue was not one of “those fundamental limitations in favor of personal rights” which are “the basis of all free government.”) (quoting Dorr v. United States, 195 U.S. 138, 146-47 (1904)); Banks v. American Samoa Government, 4 Am. Samoa 2d 113, 125 (1987) (holding that equal protection principles that were not fundamental to all free and civilized would not be applicable in American Samoa, “at least when they would tend to be destructive of the traditional culture.”); Cleveland, Sovereignty, supra note 20, at 244.
27 Reid v. Covert, 354 U.S. 1, 75 (1957) (Harlan, J., concurring) (creating the criterion “impractical and anomalous”); United States v. Verdugo-Urquidez, 494 U.S. 259, 268 (1990) (Kennedy, J., concurring) (applying the impractical and anomalous criterion); Wabol v. Villacrusis, 958 F.2d 1450, 1461 (9th Cir. 1992) (holding that while the Equal Protection Clause applied to the territories, it would be “impractical and anomalous” to apply equal protection to invalidate a race-based restriction on land sales that was intended to protect traditional island culture, and therefore equal protection analysis did not apply). See also Cleveland, Sovereignty, supra note 20, at 244.
functional equivalents of states.

2. The Role of the Term “State” and its Effect on the District and the Territories

But what is the role of the word “State” in constitutional provisions? Does the Constitution apply to federal districts, enclaves, and territories where it uses phrases such as “state,” “the several states,” or the “United States”? For example, the Constitution guarantees a republican form of government to the states, and grants only states the right to choose Senators, elect House representatives in Congress, and send delegates to the Electoral College.\textsuperscript{28} The Privileges and Immunities Clause protects only the “Citizens of each State.”\textsuperscript{29} Both of these provisions may be said to deny their protections to individuals who reside in the District of Columbia, Puerto Rico, and other territories which have not been admitted by Congress as states of the Union.\textsuperscript{30} As explained below in the discussion of the Insular Cases (Section I.B.2, \textit{infra} page 36), some provisions of the Constitution refer only to the “United States,” which could be construed as including only the states of the Union, or the federal government and its additional territories and districts.\textsuperscript{31} Making interpretation more difficult, some clauses explicitly denote a wider jurisdictional scope and include area “within the United States” as well other places “subject to their jurisdiction” or “not within any state,” like the Jury Trial Clause, the Thirteenth Amendment, and the Article I power to “define and punish Piracies and Felonies committed on the high Seas.”\textsuperscript{32} But was the use of the word “state” simply the contemporary conception of a

\textsuperscript{28} U.S. Const. art. IV, § 4 (guaranteeing “every State in this Union a Republican Form of Government”); art. I, § 2, cl. 1 (House representation); art. I, § 3, cl. 1 (Senate selection); amend. XVIII (Senate election); art. II, § 1, cl. 2 (Electoral College); amend. XXIII (electoral college rights for the District of Columbia).

\textsuperscript{29} U.S. Const. art. IV, § 2.

\textsuperscript{30} Cleveland, Sovereignty, \textit{supra} note 20, at 18.

\textsuperscript{31} See, e.g., Taxation Clause, U.S. Const. art. IV, § 8, cl. 1 (“all Duties, Imposts and Excises shall be uniform throughout the United States.”).

\textsuperscript{32} U.S. Const. art. III, § 2, cl. 3 (“The Trial of all Crimes... shall be by Jury;... when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.”); amend. XIII, § 1 (“Neither slavery nor involuntary servitude... shall exist within the United States, or any place subject to their jurisdiction.”); art. I, § 8, cl. 10 (High Seas Clause).
political unit, or did it intend to exclude territories and enclaves?

In *United States v. Sanchez*, the Eleventh Circuit court succinctly distinguished the statehood process from territorial acquisition:

After the creation of the Union from the original thirteen states, new states have been admitted to the Union from what had theretofore been territories of the United States. Although the process may never have been formally acknowledged, Congress must have, at some instant, relinquished its authority over territorial lands so that the people of those lands could approach the United States as an independent entity seeking admission to the Union. The process of statehood was, then, one by which a sovereign entity made a compact with the Union to submit to the (then limited) authority of the federal government in exchange for the benefits offered in Article IV, section 4 of the Constitution: that ‘the United States shall guarantee to every state in the Union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened) against domestic violence.’ The language of the Tenth Amendment, reserving ‘powers not delegated to the United States’ to new and existing states and to the people, acknowledges the reservoir of state sovereignty which permitted formation of a federal union.  

The territories, however, possessed no such inherent sovereignty; their sovereignty had been transferred to the U.S. from the previously controlling powers (or, in the case of the District, ceded from the states to the federal government).

On the whole, the Supreme Court refuses to include either the District or the territories in the constitutional definition of “state.” Exploring access to federal diversity jurisdiction under Article 3, the Supreme Court held in *Hepburn v. Ellzey* that Article I and II “showed that the word state is used in the Constitution as designating a member of the union,” which meant that the District of Columbia (and furthermore, the territories) could not be included in provisions meant for “states.” Discussing the District, the Court added,

It is true, that as citizens of the United States, and of that particular district which

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33 Sanchez, 992 F.2d at 1149 fn. 4 (11th Cir. 1993).
is subject to the jurisdiction of Congress, it is extraordinary, that the courts of the United States, which are open to aliens, and to the citizens of every state in the union, should be closed upon them. But this is a subject for legislative, not for judicial consideration.\footnote{Hepburn, 6 U.S. at 451. But see Loughran v. Loughran, 292 U.S. 216, 228 (1934) (holding that the Full Faith and Credit Clause binds D.C. courts “equally with the courts of the States”); Callan v. Wilson, 127 U.S. 540, 550 (1888) (holding that the right to trial by jury extends to District residents).}

The same can be said of the U.S. citizens (who are otherwise qualified voters) in the territories.

One hundred and fifty years later, the Court followed Hepburn in Tidewater Transfer Co.: considering whether an act of Congress extending diversity jurisdiction to the District was constitutional, a majority rejected the notion that the District of Columbia was included in the term “state,” arguing that “‘state’ certainly has many meanings, but such inconsistency in a single instrument is to be implied only where the context clearly requires it;” when using State, the founders meant “those concrete organized societies which were thereby contributing to the federation by delegating some part of their sovereign powers and to those that should later be organized and admitted to the partnership.”\footnote{Nat’l Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 587-88 (1949). See also Guzman, Igartua, supra note 34, at 174.} The plurality held, however, that the Act was constitutional under Congress’ Article I plenary power to administer the District. Federal appellate courts then extended this reasoning to existing territories, including Hawaii and Puerto Rico,\footnote{Siegmund v. General Commodities Corp., 175 F.2d 952, 953-54 (9th Cir. 1949) (Discussing Hawaii, holding that Congress has plenary power over the territories); Americana of P.R., Inc. v. Kaplus, 368 F.2d 431, 436 (3d Cir. 1966), Detres v. Lion Bldg. Corp., 234 F.2d 596, 603 (7th Cir. 1956) (extending Siegmund rationale to Puerto Rico). See also Guzman, Igartua, supra note 34, at 175.} though the Supreme Court has never explicitly applied this “plenary power” rationale to the territories.

Under this Congressional plenary power, the District is treated like a state for over 500 distinct legislative purposes, and District residents enjoy benefits and carry out duties like all other state citizens: they pay federal taxes and vote for president and vice-president; ceded from part of the original thirteen states, they are governed by the laws of the United States; they are
counted in the national census; they are drafted into the military; and under *Tidewater Transfer Co.*, they are treated like residents of the states for federal diversity jurisdiction purposes.\(^{38}\) Even the principle of “one person, one vote” applies locally within the District.\(^{39}\) Yet they do not enjoy the right of state citizens to elect members of Congress.

The situation is similar for Puerto Rico; since becoming a commonwealth, Puerto Rico has often been treated as if it were a state. The Supreme Court has concluded that “the purpose of Congress in the 1950 and 1952 legislation was to accord to Puerto Rico the degree of autonomy and independence normally associated with States of the Union,” and other courts have treated Puerto Rico as if it were a state for purposes of the Fifth, Eleventh, and Fourteenth Amendments.\(^{40}\) Though Puerto Rico and other territorial residents do not pay federal income taxes,\(^ {41}\) they are subject to the draft; Puerto Ricans have served in the United States military in every conflict since World War I.\(^ {42}\) But, as in the District, residents of the territories cannot elect members of Congress or participate in the Electoral College because the Constitution gives that privilege to the “States.”\(^ {43}\) Nor are they citizens for the purposes of the Fourteenth Amendment,

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\(^{38}\) Raskin, *Is This America?*, supra note 11, at 55-56.

\(^{39}\) Raskin, *Is This America?*, supra note 11, at 56 (one person-one vote for reapportionment of the District’s Council).

\(^{40}\) *Examining Bd. of Eng’rs v. Flores de Otero*, 426 U.S. at 594, 597 (citing *Calero-Toledo*, 416 U.S. at 671; federal civil rights jurisdiction). *See Lopez Andino*, 831 F.2d at 1168 (“Puerto Rico is to be treated as a state for purposes of the double jeopardy clause.”). *See, e.g., Fernandez v. Chardon*, 681 F.2d 42, 59 n.13 (1st Cir. 1982) (noting that the Eleventh Amendment applies to Puerto Rico); *Mora v. Mejias*, 206 F.2d 377, 382 (1st Cir. 1953) (finding that Puerto Ricans are entitled to due process protection under the Commonwealth Agreement); *Calero-Toledo*, 416 U.S. at 670-76 (Three-Judge Court Act). *See also* Cleveland, Sovereignty, *supra* note 20, at 249-250.

\(^{41}\) See I.R.C. § 933 (2006) (stating that Puerto Rican citizens, with the exception of federal employees, are exempt from federal income taxes on income earned in Puerto Rico). *See also* José D. Román, *Trying to Fit an Oval Shaped Island into a Square Constitution: Arguments for Puerto Rican Statehood*, 29 FORDHAM URB. L.J. 1681, 1695-96 (2002) (hereinafter J. Roman, Oval Shaped Island) (“Although the U.S. Treasury receives over two billion dollars annually from sources in Puerto Rico, the internal revenue laws of the United States generally do not apply to Puerto Rico. As a result, residents of Puerto Rico do not pay federal income taxes. Nonetheless, residents are subject to local taxes, which are higher than those of all fifty states.”)

\(^{42}\) J. Roman, Oval Shaped Island, *supra* note 41, at 1694.

\(^{43}\) *See Igartua de la Rosa v. United States*, 842 F.Supp. 607 (1994), aff’d, 32 F.3d 8 (1st Cir. 1994) (*per curiam*) (“Igartua I”) (noting that only a constitutional amendment or grant of statehood could provide Puerto Rican residents such voting rights).
which protects people “born in the United States.”

Finally, courts are divided as to whether territorial sovereignty vests upon congressional grant, as it does when a state is admitted into the Union, or whether Congress may unilaterally revoke the legal status of the territories.

Proponents of territorial suffrage argue that when the Constitution was drafted, “the only political subdivisions capable of conducting national elections were the States.” Territories were not U.S. colonies, but rather “states-in-waiting,” to be admitted as states by Congress once they had properly organized and met the following requirements: a minimum population threshold, a successful history of democratic self-government, and majority of voters in the region desiring statehood. As Chief Justice Taney explained in Dred Scott,

The power to expand the territory of the United States by the admission of new States is plainly given; and in the construction of this power by all the departments of the Government, it has been held to authorize the acquisition of territory, not fit for admission at the time, but to be admitted as soon as its population and situation would entitle it to admission. It is acquired to become a State, and not to be held as a colony and governed by Congress with absolute authority...

The Framers “did not envision the United States holding a territory on a permanent basis without the implied promise of statehood – in fact, they would have been outraged at the idea of administering a colony for over one hundred years.” Because territory status was meant to

44 Valmonte v. INS, 136 F.3d 914, 918 (2d Cir. 1998) (holding that persons born in the Philippines while it was a U.S. territory were not born within the “United States” within the meaning of the Fourteenth Amendment).

45 Compare United States ex rel. Richards v. Guerrero, 4 F.3d 749 (9th Cir. 1993) (finding that the Northern Marianas covenant is legally binding on Congress), United States v. Andino, 831 F.2d 1164, 1168 (1st Cir. 1987) (“Puerto Rico, like a state, is an autonomous political entity.”) (internal citation omitted); and United States v. Quinones, 758 F.2d 40, 42 (1st Cir. 1985) (noting that authority in Puerto Rico flows from a compact which Congress cannot unilaterally amend), with United States v. Sanchez, 992 F.2d 1143, 1152-53 (11th Cir. 1993) (finding that Puerto Rico remains subject to ultimate U.S. sovereignty), and Puerto Rico v. Shell Co., 302 U.S. 253, 264 (1937) (“Both the territorial and federal laws and the courts, whether exercising federal or local jurisdiction, are creations emanating from the same sovereignty.”). See also Cleveland, Sovereignty, supra note 20, at 249-250.

46 Igartua de la Rosa v. United States, 113 F.Supp. 2d 228, 235 (2000), rev’d, 229 F.3d 80 (1st Cir. 2000) (per curiam) (“Igartua II”). See also Guzman, Igartua, supra note 34, at 177.

47 Guzman, Igartua, supra note 34, at 177; Raskin, Is This America?, supra note 11, at 52-53.


49 Guzman, Igartua, supra note 34, at 177.
quickly lead to statehood, the Framers had little need to consider their participation in national elections. However, the U.S. today administers several territories, which no longer appear to be “states-in-waiting,” and proponents argue that they should be considered as states for access to the electoral franchise.\footnote{Guzman, Igartua, supra note 34, at 178.} But as yet, this extension has not happened.

District advocates, however, admit that the District has a separate constitutional status: “the District is not a territorial student of democracy waiting for eventual graduation to statehood but rather the campus of democracy itself, the residential home of the government which models democratic life for the nation’s citizenry.”\footnote{Raskin, Is This America?, supra note 11, at 54-55.} This leaves two possibilities for the status of the residents: either “District resident are like residents of the territories before statehood and simply have no way to vindicate their right to representation short of moving,” or they are, “for all practical and constitutional purposes, more like the residents of the fifty states and simply need Congress to find the appropriate mechanism for their representation.”\footnote{Raskin, Is This America?, supra note 11, at 55.} As with the territories, the District has yet to be recognized as a state for electoral purposes.

The troubled nature of the conception of “state” will be explored further below in the discussion of 	extit{Adams v. Clinton} (Section I.B.1, infra page Error! Bookmark not defined.), the 	extit{Insular Cases} and Igartua I and II (Section I.B.2, infra page 36), and in Part IV.B.4 exploring possible methods of advocating for the right to vote for the District and the territories.

3. The Constitution and the Right to Vote

With regard to the electoral franchise, there are four basic components to the “right to vote”:\footnote{Adapted from Jamin B. Raskin, \textit{Is There a Constitutional Right to be Represented?: The Case of the District of Columbia}, 48 Am. U. L. Rev. 589, 611 (Professor Rosen) (1998) (hereinafter Raskin, Symposium).}
(1) The scope of democratic self-government (must an office be filled by election?)

(2) The extent of suffrage (if an office is filled by election, who can cast a ballot?)

(3) Ballot access (in an election, for whom may ballots be cast?)

(4) The extent of “one person, one vote,” or vote dilution (in an election, how must votes be weighed and counted?)

This Part considers the following two questions within the “extent of suffrage” category: First, does the Constitution grant individuals the right to cast ballots in federal elections? And second, are District and territory residents entitled to vote for Congress (and for President and Vice President, in the territories’ case)?

On the matter of federal representation, the Constitution provides the following: “The House of Representatives shall be composed of Members chosen…by the People of the several States”; 54 and “The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof…” 55 The Constitution adds the Guarantee Clause: “The United States shall guarantee to every State in this Union a Republican Form of Government…” 56 Regarding presidential elections, the Constitution creates the Electoral College: “Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in Congress…”

In the late nineteenth century, the national reasoning on the right to vote “was uncontroversial: Text, history, structure and precedent all said that the right to vote is not

54 U.S. Const. art. I, § 2, cl. 1.
55 U.S. Const. amend. XVIII, § 1.
56 U.S. Const. art. IV, § 4.
fundamental.” That conception evolved rapidly amid the equal protection hullabaloo in the twentieth century. In 1941, the Court’s opinion in *U.S. v. Classic* summarized the status of the right to vote and began to phrase it in fundamental terms:

The right of the people to choose...is a right established and guaranteed by the Constitution and hence is one secured by it to those citizens and inhabitants of the state entitled to exercise the right. ... While, in a loose sense, the right to vote for representatives in Congress is sometimes spoken of as a right derived from the states, this statement is true only in the sense that the states are authorized by the Constitution, to legislate on the subject as provided by § 2 of Art. I, to the extent that Congress has not restricted state action by the exercise of its powers to regulate elections...

Obviously included within the right to choose, secured by the Constitution, is the right of qualified voters within a state to cast their ballots and have them counted at Congressional elections. This Court has consistently held that this is a right secured by the Constitution. And since the constitutional command is without restriction or limitation, the right, unlike those guaranteed by the Fourteenth and Fifteenth Amendments, is secured against the action of individuals as well as of states.

In 1964, the Court held in *Wesberry v. Sanders* that citizens must have equal access to vote for Congress regardless of their geographic residence. Justice Black wrote:

No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined. Our Constitution leaves no room for classification of people in a way that

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57 Raskin, Symposium, supra note 53, at 609 (Professor Rosen) (discussing Victoria’s Woodhull’s petition to John Bingham and the House Judiciary Committee, in which she argued that the right to vote was fundamental to U.S. citizenship under the Fourteenth and Fifteenth Amendments, and the Committee answered by invoking the framers’ intent, the Constitution’s text, and the history of the right to vote, and pointing out the Supreme Court’s affirmation of the principle in *Minor v. Happersett*, 88 U.S. 162 (1874) (holding that women were not entitled to a right to vote)).


59 (Court’s cites) *Ex parte Yarbrough*, 110 U.S. 651; *United States v. Mosley*, 238 U.S. 383.


61 (Court’s cites) See *Ex parte Siebold*, 100 U.S. 371; *Ex parte Yarbrough*, supra, 663, 664; *Swafford v. Templeton*, 185 U.S. 487; *Wiley v. Sinkler*, 179 U.S. 58, 64.

62 (Court’s cites) *Ex parte Yarbrough*, supra; *Wiley v. Sinkler*, supra; *Swafford v. Templeton*, supra; *United States v. Mosley*, supra; see *Ex parte Siebold*, supra; *In re Coy*, 127 U.S. 731; *Logan v. United States*, 144 U.S. 263.

63 (Court’s cites) *Ex parte Yarbrough*, supra; *Logan v. United States*, supra.

64 *Wesberry v. Sanders*, 376 U.S. 1 (1964). See also Raskin, Is This America?, supra note 11, at 50.
unnecessarily abridges that right.\textsuperscript{65}

That same year, Chief Justice Warren crystallized the right to vote in state legislative elections as fundamental in \textit{Reynolds v. Sims}: “The conception of political equality from the Declaration of Independence, to Lincoln’s Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments, can mean only one thing – one person, one vote.”\textsuperscript{66} He added the \textit{Wesberry} principle: “the weight of a citizen’s vote cannot be made to depend on where he lives …The Equal Protection Clause demands no less than substantially equal state legislative representation for all citizens, of all places as well as all races.”\textsuperscript{67}

But at present, the Supreme Court’s jurisprudence on the right to vote is somewhat “bizarre.”\textsuperscript{68} Prioritizing the use of the political entity “State” in these clauses, the Supreme Court has consistently held that “[t]he Constitution ‘does not confer the right of suffrage upon anyone’ and ‘the right to vote, per se, is not a constitutionally protected right.’”\textsuperscript{69} The Court has yet to overturn \textit{Minor v. Happersett} and \textit{McPherson v. Blacker}, cases expressly rejecting the notion that the Constitution or the “privileges and immunities of citizenship” provide for the individual right to vote for the President.\textsuperscript{70} The Court also continues to hold that issues under the Guarantee Clause constitute non-justiciable political questions, so that any existing right to elect a local political body is not judicially enforceable.\textsuperscript{71} Most strangely, despite the laundry list of cases holding that the right to vote is fundamental and thus that the extension of the franchise is

\textsuperscript{65} \textit{Wesberry}, 376 U.S. at 17-18 (1964) (Black, J.). \textit{See also} Raskin, Is This America?, \textit{supra} note 11, at 39; Raskin, Symposium, \textit{supra} note 53, at 610 (Professor Rosen).


\textsuperscript{68} Raskin, Symposium, \textit{supra} note 53, at 610 (Professor Rosen).

\textsuperscript{69} \textit{Rodriguez v. Popular Democratic Party}, 457 U.S. 1, 9 (1982) (citations omitted). \textit{See also} Raskin, Symposium, \textit{supra} note 53, at 612 (Professor Rosen) (“the Supreme Court has consistently refused to hold that the U.S. Constitution grants anyone[, any individual,) a substantive right to vote, which is to say that there is nobody in the country who can simply present himself and say without more, ‘I am entitled to vote for Congress.’”).

\textsuperscript{70} Guzman, Igartua, \textit{supra} note 34, at 169-70.

\textsuperscript{71} Raskin, Symposium, \textit{supra} note 53, at 612 (Professor Rosen).
qualified for strict scrutiny, the Court still treats the right to vote as simply a relative right under the Equal Protection Clause: “if and to the extent that a state chooses to grant to its own people the right to vote for its own state legislature, then to that extent and no further do the people of that state have the right to vote for members of Congress.”

In summary, the Supreme Court has moved towards considering the individual right to vote as fundamental, but “the trend is far from complete. Even if considered complete, there are doubts as to whether this right to vote would include the right to vote for the President, which is entrusted to the states in the Constitution.” Basically, the right is given to the states by the Constitution, and the states decide if they want to give it to the people. In its jurisprudence, the Court focuses more on undue interference with the right to vote, standing firm that the Constitution does not grant individuals the right to vote in congressional and presidential elections; rather, the Constitution, “through the Equal Protection Clause, protects the exercise of that right from unreasonable encroachments and limitations; actual granting of that right lies in the hands of the states.” Therefore, there seems to be no constitutional right to vote for the president (although there is a right to be extended the right to vote free from discrimination). This understanding was crystallized in 2000 in Bush v. Gore when the Supreme Court cited Article II, § 1 as the basis for holding that “[t]he individual citizen has no federal constitutional right to vote for electors for the President of the United States unless and until the state legislature chooses a statewide election as the means to implement its power to appoint

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72 Raskin, Symposium, supra note 53, at 613 (Professor Rosen).
73 Guzman, Igartua, supra note 34, at 182.
74 Guzman, Igartua, supra note 34, at 172.
75 Guzman, Igartua, supra note 34, at 171-72. See also Att’y Gen. of the Terr. of Guam, 738 F.2d 1017, 1019 (9th Cir. 1984) (“The right to vote in presidential elections under Article II inheres not in citizens but states.”)
76 Guzman, Igartua, supra note 34, at 170-71 fn. 192.
members of the electoral college.”

C. District of Columbia

1. Historical and Jurisprudential Background: The Creation of the District of Columbia

The framers of the U.S. Constitution desired a federal district separate from the influence of the States to locate the business of the federal government, and included the Seat of Government Clause in the Constitution, which states that Congress shall have the power:

“To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States.”

To ensure that absence of political influence, they purposely withheld the right to voting representation in the federal government from its residents. Owing to the “indispensable necessity of complete authority at the seat of government,” James Madison gave the following six reasons why “every imaginable objection [to the District] seem[ed] to be obviated,” because the District’s disenfranchisement would be voluntary:

- It was to be given to the federal government with the consent of the States ceding it;
- Those States were to provide in the compact for the rights and the consent of the citizens inhabiting it;
- Since they were to be living in the seat of the federal government, “the inhabitants [were to] find sufficient inducements of interest to become willing parties to the cession;”
- The District’s residents will have recently elected the members of Congress who would exercise “exclusive authority” over them;
- A municipal legislature would be convened for local purposes, whom the District residents would elect;
- Having been state citizens, the District residents would have participated in the adoption of the Constitution, thus giving the States’ legislatures and the residents the authority to agree to the cession.

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79 The Federalist No. 43, at 282 (James Madison) (Paul Leicester Ford ed., 1898). See also Neuman, Anomalous Zones, supra note 48, at 1216.
But when the District of Columbia was created by the Residence Act of 1790, Madison’s assertions were not all met: District residents did not enjoy the right to elect a municipal legislature, though they enjoyed full federal suffrage rights in their prior states, Maryland and Virginia, until Congress took over its exclusive jurisdiction in 1800.\footnote{Act Establishing the Temporary and Permanent Seat of the Government of the United States, ch. 28, 1 Stat. 130 (1790). \textit{See also} Price, Unfulfilled Ideal, \textit{supra} note 2, at 82.} Despite the District’s disenfranchisement, the “sufficient inducements” drew many new residents, pointing towards a sorting argument of sorts: “[m]oving to the District revealed a preference for greater economic opportunities and fewer political rights.”\footnote{Neuman, Anomalous Zones, \textit{supra} note 48, at 1220.} In 1820, when District residents argued that they were subject to taxation without representation, Chief Justice Marshall agreed with Madison that District residents had voluntarily “relinquished the right of representation and adopted the whole of Congress for its legitimate government.”\footnote{\textit{Loughborough v. Blake}, 18 U.S. 317, 324 (1820). \textit{See also} Neuman, Anomalous Zones, \textit{supra} note 48, at 1220.}

The District of Columbia has undergone several political transformations, only two of which have made (limited) progress in securing voting rights for its residents. The District’s administrative history includes:\footnote{Adapted from Price, Unfulfilled Ideal, \textit{supra} note 2, at 83-84.}

- A presidentially-appointed three-member commission (1790-1802, 1874-1967);\footnote{Act Establishing the Temporary and Permanent Seat of the Government of the United States (\textit{supra} note 80); Temporary Organic Act of 1874, ch. 337, 18 Stat. 116 (1874) (no delegate to the House of Representatives; District of Columbia government established as a municipal corporation); Organic Act of 1878, ch. 180, 20 Stat. 102 (1878).}
- A popularly-elected two-chamber council with a presidentially appointed mayor (1802-1820);\footnote{Act of 1802 Incorporating the City of Washington, ch. 53, 2 Stat. 195 (1802).}
- A popularly-elected board of common council and board of aldermen, and a mayor (who flipped from being elected to appointed and back again) (1820-1871);\footnote{Act of 1820 Reorganizing the Government of the City of Washington, ch. 104, 3 Stat. 583 (1820).}
- A presidentially-appointed governor and council along with a popularly elected house of delegates, and (for the first time) a popularly-elected non-voting delegate to the House of Representatives (1871-1874);\footnote{Act of 1871 Creating Legislative Assembly, ch. 62, 16 Stat. 419 (1871) (name of District of Columbia and motto “Justitia Omnibus” (Justice for All) adopted).}
- A presidentially-appointed mayor/commissioner and nine-member council (1967-1973),\textsuperscript{88}
- A non-voting delegate to the House of Representatives, independent of the form of government (1970-present),\textsuperscript{89}
- Home Rule, a congressional invention, providing for a popularly-elected mayor and city council (1974-present),\textsuperscript{90}
- A Congressionally established transitory Control Board, consisting of five members appointed by the President exercising sovereign authority over the popularly elected mayor and council (1995-2001).\textsuperscript{91}

For the first two centuries, the District government functioned as if it were an unincorporated territory of the United States.\textsuperscript{92} In \emph{Downes v. Bidwell},\textsuperscript{93} Justice White’s controlling concurrence gave the District as an example of a territory in which Congress could constitutionally grant “such degree of representation as may be conducive to the public well-being, [or] to deprive such territory of representative government.”\textsuperscript{94} The suffrage movement was largely unsuccessful during those first two centuries, though the Civil War had seen many black slaves fleeing into the District, and Congress eliminated existing racial restrictions on voting in the District in 1867.\textsuperscript{95} But in the latter half of the twentieth century, the administration has shifted to a “quasi-state model”\textsuperscript{96}: The Twenty-Third Amendment granting D.C. residents the right to vote for President and Vice President was passed in 1954;\textsuperscript{97} the District’s non-voting delegate to the House of Representatives was provided in 1971;\textsuperscript{98} Home Rule in 1974 allowed D.C. residents to elect local government to deal with local issues (subject to Congressional

\textsuperscript{89} 2 U.S.C. § 25a.
\textsuperscript{92} Price, Unfulfilled Ideal, \emph{supra} note 2, at 85-86; \emph{see also} Neuman, Anomalous Zones, \emph{supra} note 48, at 1214-15.
\textsuperscript{93} \emph{Downes v. Bidwell}, 182 U.S. 244 (1901).
\textsuperscript{94} \textit{Id.} at 289-90 (White, J., concurring).
\textsuperscript{95} Neuman, Anomalous Zones, \emph{supra} note 48, at 1217. \emph{See also} Constance McLaughlin Green, \emph{Washington: Village and Capital}, 1800-1878, at 272-77, 297-301 (1962).
\textsuperscript{96} Price, Unfulfilled Ideal, \emph{supra} note 2, at 85-86.
\textsuperscript{97} U.S. Const. amend. XXIII (ratified in 1961).
oversight), the failed amendment providing for D.C.’s treatment as a state for the purposes of congressional and presidential election and Article V protection was proposed in 1978; and D.C. residents drafted and ratified a proposed constitution for the state of “New Columbia” in 1985. Yet despite this progress, District residents are still citizens without voting representation in Congress.

Proponents of District suffrage argue that the Seat of Government Clause has outgrown its original purpose: “The federal government is no longer so weak that it need fear the appearance or the reality of dependence on a component state. Legally, technically, and politically its powers have grown so much that it can confidently maintain and protect its own infrastructure.” The consent/sorting hypothesis is also discounted, for several reasons. First and foremost, generations have passed since living District residents actually consented to live without the right to vote. Also, many African-American voters did not have the right to vote in the states from which they moved, and so did not give up the right to vote in exchange for the right to live in the District. Finally, though residents could move somewhere else to enjoy the right to vote, there are several barriers to prevent their moving, including “proximity to employment, poverty, housing discrimination, and attachment to community”; and regardless, forcing people to choose between their desired residence and their right to vote negates the purpose of the Voting Rights Act.

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100 1 D.C. Code Ann. 501 (1981); See also Price, Unfulfilled Ideal, supra note 2, at 86; Neuman, Anomalous Zones, supra note 48, at 1218.
101 12 Annals of Cong. 499 (1803); Joint Resolution to amend the Constitution to provide for representation of the District of Columbia in the Congress, H.R.J. Res. 554, 95 Cong. 2d Sess. (1978); N. Colum. Const. (1987). See also Price, Unfulfilled Ideal, supra note 2, at 86. See also Raskin, Is This America?, supra note 11, at 42.
103 Neuman, Anomalous Zones, supra note 48, at 1222.
104 Neuman, Anomalous Zones, supra note 48, at 1222-23.
In the words of Justice Sutherland, the District, having been ceded from States, had been subject to the Constitution, and was a part of the United States. The Constitution had attached to it irrevocably. There are steps which can never be taken backward … The mere cession of the District of Columbia to the Federal government relinquished the authority of the states, but it did not take it out of the United States or from under the aegis of the Constitution.\(^{105}\)

District defenders argue that, though the District treated as a state in some 537 ways by Congress when it comes to duties like paying taxes and serving in the military,\(^{106}\) this statement has ended up being largely theoretical in the sphere of rights.\(^{107}\) At any rate, “[t]he continued disenfranchisement of the District appears to result from some combination of political failure, partisan politics, racial distrust, and a highly contingent form of impossibility.”\(^{108}\)

a) \textit{Adams v. Clinton (2000)}

The twin cases of \textit{Alexander v. Daley} and \textit{Adams v. Clinton} are the most recent judicial attempts to obtain voting representation for District residents.\(^{109}\) In 1998, two sets of residents of


\(^{107}\) Price, Unfulfilled Ideal, \textit{supra} note 2, at 94-101. \textit{But see} Raskin, \textit{Is This America?}, \textit{supra} note 11, at 44-45 (arguing that the Court’s implementation of reverse incorporation in \textit{Bolling v. Sharpe}, 347 U.S. at 499, “applied to the District its long-established principle ‘that the constitution of the United States, in its present form, forbids, so far as civil and political rights are concerned, discrimination by the general government, or by the states, against any citizen because of his race[,]’ and [t]he Court has continued to assume that [the] Fifth Amendment Due Process Clause assimilates equal protection principles for the protection of Washingtonians.”).

\(^{108}\) Neuman, \textit{Anomalous Zones}, \textit{supra} note 48, at 1223. \textit{See also} Arlen J. Lange, \textit{Full Representation for D.C.?} Wall St. J., Aug. 30, 1978, at A14 (quoting Sen. Edward Kennedy saying that the District is “too liberal, too urban, too black, or too Democratic” to become a state).

D.C. and the District itself filed suit in the U.S. District Court for the District of Columbia against, *inter alia*, President Clinton, certain House officials, the Secretary of Commerce, and the D.C. Control Board, alleging that the denial of their right to elect representatives to Congress was unconstitutional and moving for a three-judge district court to consider their claims. The district judge consolidated the cases and granted the motion, and the issues were decided by a three-judge panel in *Adams v. Clinton* in 2000.

(1) **Plaintiffs’ Claims**

The plaintiffs collectively alleged:

(a) Their constitutional rights to equal protection of the laws, to a republican form of government, and to due process have been violated, and their privileges and immunities of citizenship have been abridged, because:

- The District is not apportioned congressional representatives;
- District residents are not allowed to elect House and Senate representation;
- Congress exercises “exclusive jurisdiction” over the District;
- Congress denies them a state government insulated from Congressional interference; and

(b) Article I and Amendment XVII of the Constitution have been violated, because they provide that members of the House shall be elected by “the People of the several States” and that senators shall come from “each State, elected by the people thereof.”

As remedies, the plaintiffs proposed a plan to allow them to vote as if they resided in a state or as
if they were citizens of Maryland, or a judicial order requiring the defendants to grant them the right to vote in congressional elections.

(2) Threshold Issues

Three threshold issues were first decided. Due to jurisdictional requirements, the three-judge panel considered only the claim regarding the failure to apportion members of the House or Representatives to the District, remanding the District’s demands for local (“state”) government and Senate representation. Although the defendants argued that the claim constituted a non-justiciable political question, a doctrine under which complaints dealing with arenas that the Constitution has explicitly given to a political department cannot be considered by the judicial system, the court held that deciding whether District residents are among the “people” qualified to elect House representatives was justiciable under Supreme Court precedent: “The Supreme Court has repeatedly held that ‘constitutional challenges to apportionment are justiciable.’” The court also decided that the plaintiffs had standing under the Supreme Court test requiring (1) injury in fact, (2) causation, and (3) redressability (the likelihood of an effective remedy). Assuming the validity of their claims, (1) denying them the right to vote constituted “injury in fact”; (2) that injury was assumed to be caused by the defendants in their failure to apportion representatives to D.C. on equal footing with the States; and (3) if the court were to order them to apportion representatives to the District, the President and the House officials had not threatened to disobey, and plans could be crafted to allow for...
Plaintiff’s Claims under Article I

The Court then considered merits of the claim under Article I that District residents should be allowed to elect House representatives because members of the House are to be elected by “the People of the several States.” Since (as elaborated further in the territorial doctrine explored below), U.S. citizens are not per se entitled to vote in federal elections, plaintiffs argued that District residents could be considered citizens of a “state” in one of two ways: (1) the District could be considered a “state” for electoral purposes, or (2) District residents could be considered “residual” citizens of the state of Maryland, which originally ceded the land for the District.

(a) Whether the District could be treated as a state for electoral purposes

On the first theory, the court concluded that “constitutional text, history, and judicial precedent bar us from accepting plaintiffs’ contention that the District of Columbia may be considered a state for purposes of congressional representation under Article I.” The court considered several aspects of the meaning of “state,” and decided:

- Under the text of the Constitution:
  - Art. I, § 2, cl. 1 makes the right to vote for House representation contingent on qualifications to elect representatives to a “State Legislature,” meaning that the District, without a comparable institution at the time (except for Congress, which cannot be considered a “state legislature”), was not intended for inclusion;
  - Art. I, § 2, cl. 3 provides that House representatives “shall be apportioned among the several States which may be included within this Union,” and the District, neither an

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116 Adams v. Clinton, 30 F. Supp. 2d at 44, 45. The decision regarding standing required an exhaustive analysis of Franklin v. Massachusetts, supra note 113, to discern the Court’s understanding of standing in a situation under this jurisdictional statute; see Adams, 30 F. Supp. 2d at 41-45.

117 See, e.g., Igartua I, 32 F.3d at 9 (holding that U.S. citizens in Puerto Rico are not entitled to vote in presidential elections); Att’y Gen. of Guam v. United States, 738 F.2d 1017 (1984) (holding that U.S. citizens in Guam are not entitled to vote in presidential and vice-presidential elections). See also Section I.A.2, beginning infra page 36.

118 Adams v. Clinton, 30 F. Supp. 2d at 55-56.

119 Id. at 47-48.
original state nor admitted to the Union by Congress under Art. IV, § 3, cl. 1, is not a “true” state and therefore not to be included for apportionment (especially since clause 3 of that section explains the thirteen entities it regards as states);\footnote{Id. at 48-49.}

- The Seat of Government Clause in Art. I, § 8, cl. 17 describes the “District” as a body distinct from the “particular States” ceding it;\footnote{Id. at 47.}

- Art. I, § 2, cl. 4 requires an “Executive Authority” to issue writs of election if a vacancy occurs in the representation for a state, and the only possible institution for the District would be Congress itself, and it makes no sense for Congress to issue writs of election for Congress;\footnote{Id. at 49.}

- The original provisions for choosing Senators and filling Senate vacancies required the state’s “Legislature” and “Executive” to appoint representatives; since Congress is the district’s legislative and executive authority, the District was clearly not included, as, again, it makes no sense for Congress to appoint people to Congress;\footnote{Id.}

### In historical context:

- Plans were considered briefly before and while the Constitution was drafted to provide for representation in Congress for the District, and ultimately rejected after much debate (including District residents, politicians, convention members, and the framers themselves);\footnote{Id. at 50-55 (including footnotes) (collecting many statements on this point).}

- Constitutional amendment (or even retrocession to Virginia and Maryland) was always noted as an effective avenue to remedy the lack of voting rights if necessary\footnote{Id. at 52-53.} (both of which occurred: Virginia residents returned to Virginia in 1846, and Amendment XXIII gave District residents the right to vote in presidential elections in 1974);

### Following judicial precedent:

- “[E]very other court to have considered the question – whether in dictum or in holding – has concluded that residents of the District do not have the right to vote for members of Congress.”\footnote{Id. at 54.}

- \textit{Hepburn}: Interpreting the Judiciary Act of 1789, Chief Justice Marshall analyzed the use of “state” in Article I and concluded that “[t]hese clauses show that the word state is used in the Constitution as designating a member of the union. [Because the word] has been used plainly in this limited sense in the articles respecting the legislative and
executive departments, it must be understood as retaining that sense” with regard to the judiciary.¹²⁷

- **Tidewater Transfer Co.** Considering Congress’ expansion of federal diversity jurisdiction to citizens of the District, a plurality of the Court agreed that the District was not being considered a state for judicial purposes, but rather that Congress was properly exercising its exclusive authority over the District under Article I. ¹²⁸

- **Loughborough:** Exploring whether Congressional taxes on District residents was unconstitutional “taxation without representation,” the Court unanimously held that Congress had the power to tax District residents. Chief Justice Marshall wrote that the District had voluntarily “relinquished the right of representation, and has adopted the whole body of Congress for its legitimate government…Although in theory it might be more congenial to the spirit of our institutions to admit a representative form the district, certainly the Constitution does not consider their want of a representative in Congress as exempting it from equal taxation.”¹²⁹

- **Heald:** Also discussing whether a congressional tax on the District was unconstitutional “taxation without representation,” Justice Brandeis concluded that “‘there is no constitutional provision which so limits the power of Congress that taxes can be imposed only upon those who have political representation.’”

### Conclusion – the District cannot be treated as a state:

- As explained above, the court concluded that “constitutional text, history, and judicial precedent bar us from accepting plaintiffs’ contention that the District of Columbia may be considered a state for purposes of congressional representation under Article I.”¹³⁰

### (b) Whether District residents have “residual” state citizenship in Maryland

The court next turned to the plaintiffs’ argument that they should be considered to have “residual” citizenship in Maryland. Plaintiffs relied on the fact that between the Act of 1790 creating the District and the Organic Act of 1801 when Congress assumed its jurisdiction over the District, those residents who had previously lived in Maryland continued to vote in Maryland. The court held that, as had been provided in the cession agreements, the residents had not been residual citizens, but rather had remained Maryland state citizens until Congress

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¹²⁷ *Id.* See also *Hepburn*, *supra* note 34, 6 U.S. at 452.

¹²⁸ *Id.* at 54-55. See also *Tidewater*, *supra* note 36, 337 U.S. at 600 (Jackson, J., plurality opinion).

¹²⁹ *Id.* at 55. See also *Loughborough v. Blake*, 18 U.S. at 324-25 (Marshall, C.J.).

assumed authority in 1901, and therefore, no residual citizenship existed. The court also addressed a tangential issue: whether the cession of the District had removed the “inalienable right to vote” from people who previously enjoyed it as state citizens. The court concluded that since “personal rights generally do not run with the land,” and it had been generations since District residents had been Maryland state citizens, the argument could not extend to the present plaintiffs.

The court advanced its holding on the Maryland issue notwithstanding the Supreme Court’s decision in *Evans v. Cornman*, which held that residents of a federal enclave must be permitted to vote in the state from which the enclave was created. Since Congress’s authority to govern enclaves is granted by the same clause of the Constitution that grants it authority over the District, its powers over enclaves is identical to its District jurisdiction; however, since Congress had passed statutes allowing Maryland to exercise authority over the enclave in question in *Evans*, it was easily distinguished from the District’s situation in *Adams*. Under all the arguments above, therefore, the court held that the Article I provisions of the Constitution did not apply to residents in the District of Columbia.

(4) **Plaintiffs’ claims under other constitutional provisions**

The court next addressed the plaintiff’s argument that the denial of their right to vote deprived them of the equal protection of the laws, protection applied against the federal government through the Fifth Amendment’s Due Process Clause. Plaintiffs argued that their

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131 *Id.* at 59-60. Furthermore, the court noted that this issue had already been decided in *Albaugh v. Tawes*, 233 F. Supp. 576 (D. Md. 1964), aff’d, 379 U.S. 27 (1964) (*per curiam*), which relied on *Reily v. Lamar*, 6 U.S. 344, 356-57 (1805) (holding that former residents of Maryland lost their state citizenship upon “the separation of the District of Columbia from the State of Maryland.”).
132 *Id.* at 61 (internal citation and quotation marks omitted).
133 *Id.* at 62-63. See also *Evans v. Cornman*, 398 U.S. 419 (1970).
134 *Id.* at 63-64.
135 *Id.* at 65.
136 *Id.* at 65-66. See also *Bolling v. Sharpe*, 347 U.S. at 501.
lack of representation constituted unequal treatment, and since the right to vote is fundamental, such unequal treatment must satisfy strict scrutiny: there must be a compelling government interest for which the unequal treatment is a narrowly tailored solution.¹³⁷ The court, however, held that strict scrutiny did not apply in this case:

[T]he classification complained of here is not the product of presidential, congressional, or state action. [Rather], the voting qualification of which plaintiffs complain is one drawn by the Constitution itself. The Equal Protection Clause does not protect the right of all citizens to vote, but rather the right ‘of all qualified citizens to vote.’ ‘The right to vote in federal elections is conferred by Art. I, § 2, of the Constitution,’ and the right to equal protection cannot overcome the line explicitly drawn by that Article.¹³⁸

The plaintiffs had argued that in extending the vote to federal enclaves but not extending the franchise to the District, Congress had acted in such a way that violated equal protection; the court noted in a footnote that this argument actually challenged Congress’ exclusive authority as unconstitutional, which, being granted by the Constitution, was impossible. The court concluded, “notwithstanding the force of the one person, one vote principle in our constitutional jurisprudence, that doctrine cannot serve as a vehicle for challenging the structure the Constitution itself imposes upon the Congress.”¹³⁹

With conclusions similar to those listed above, the court disposed of the plaintiffs’ claims regarding the District residents’ right to vote as a privilege of citizenship, a liberty not to be deprived without due process of law, or part of the guarantee of a republican form of government: because the Article I provisions do not (and were not intended to) apply to District residents, they are thus not “qualified” voters under the Constitution, which is the only class of

¹³⁷ Id. at 65-66. For the strict scrutiny test, see Washington v. Glucksberg, 521 U.S. 702 (1997).
¹³⁸ Id. at 66 (quoting Reynolds v. Sims, 377 U.S. at 554 (emphasis added by the court), and Harper v. Virginia Bd. of Elections, 383 U.S. 663, 665 (1966)).
¹³⁹ Id. at 67. See also Guzman, Igartua, supra note 34, at 172.
people protected by these clauses. Therefore, these provisions of the Constitution offered no protection to the plaintiffs.

(5) Justice Oberdorfer’s Dissent

Justice Oberdorfer’s dissent reanalyzed the issues in a positive light for the plaintiffs, conducting a comprehensive consideration of the meaning of the term “state” and the application of the Constitution to the District. He concluded,

The plain language of the Constitution does not necessarily deny the people of the District the right to voting representation in Congress. Neither the Seat of Government nor any other provision of Article I addresses, much less directly precludes, congressional representation for the people of the District. If the Framers intended to deny voting representation in Congress to inhabitants of the Seat of Government, the Seat of Government clause was an appropriate place to say so. It does not.

However, the majority’s simple answer is that it is not the judiciary’s place to decide: “‘For residents of the District, the right to vote in congressional elections is … totally denied. This regrettable situation is a product of historical and legal forces over which this court has no control.’ … If they are to obtain [the right to vote], they must plead their cause in other venues.’” Thus, the residents of the District have seen that domestic judicial relief will not be forthcoming, and they must seek other remedies.

2. The Territories: Puerto Rico, American Samoa, Guam, U.S. Virgin Islands, and the Northern Mariana Islands

a) Territorial acquisition and historical jurisprudence

The District’s disenfranchisement is frequently compared to the situation of the territories

140 Id. at 69-70 (denial of the right to vote does not abridge a privilege of citizenship), 70-71 (no due process protection), 71 (District residents not guaranteed a republican form of government).

141 Id. at 72 (Oberdorfer, J., dissentering). See also Guzman, Igartua, supra note 34, at 178.

142 Id. at 72 n. 75 (quoting United States v. Thompson, 453 F.2d 1333, 1341 (D.C. Cir. 1971). The court also cites Representation for the District of Columbia: Hearings Before the Subcomm. on Civil and Constitutional Rights of the Comm. on the Judiciary, 95th Cong. 131 (1978) (statement of Patricia M. Wald, Assistant Attorney General) (explaining that “constitutional amendment is necessary” to provide District with voting representation because “we do not believe that the word ‘state’ as used in Article I can fairly be construed to include the District”).
of the United States. The U.S. Constitution expressly provides for the Congressional administration of territories in the Territory 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.”\(^{143}\)

As mentioned above, the United States currently administers five unincorporated territories: Puerto Rico, the U.S. Virgin Islands, the Northern Mariana Islands, Guam, and American Samoa. Local activists argue that the unincorporated territories would be better classified as colonies, because Congress has plenary power to govern them, including veto power over their local laws and citizenship rights, and their residents’ U.S. citizenship is somewhat “second-class” compared to U.S. citizens of the fifty states; they do not qualify for many government benefits and privileges, including the right to vote in congressional and presidential elections.\(^{144}\)

The Spanish-American War was concluded in 1898 by the Treaty of Paris, in which Spain gave “to the United States the island of Porto Rico and other islands now under Spanish sovereignty,” which included Guam and the Philippines.\(^{145}\) Following the U.S. Constitution’s Territorial Clause, the treaty granted Congress the power over “the civil rights and political status” of these territories and its people, with no guarantee of statehood.\(^{146}\) The Treaty of Berlin in 1899 divided Samoa between the U.S. and Germany, resulting in U.S. sovereignty over

\(^{143}\) U.S. Const. art. IV, § 3, cl. 2.  
\(^{144}\) E. Roman, Citizenship, supra note 8, at 586. However, the residents of the territories are allowed to participate in territorial primaries and caucuses, with several delegates at stake for the candidates. See “The 2000 Campaign: Bush Wins Primaries in 4 U.S. Territories,” N.Y.Times, Feb. 28, 2000 (“Residents of United States territories cannot vote in the general election, but are allowed to participate in presidential primaries and caucuses”; noting four delegates to the Republican Convention each at stake for American Samoa, Guam, and the U.S. Virgin Islands, and fourteen at stake for Puerto Rico).  
\(^{145}\) Treaty of Paris, United States-Spain, art. 2, Dec. 10, 1898, T.S. No. 343. See also Guzman, Igartua, supra note 34, at 149; E. Roman, Citizenship, supra note 8, at 587; J. Roman, Oval Shaped Island, supra note 41, at 1684.  
\(^{146}\) Id. at art. IX. See also Guzman, Igartua, supra note 34, at 149; E. Roman, Citizenship, supra note 8, at 587.
American Samoa.\textsuperscript{147} The United States Virgin Islands were later purchased from the Danish government in 1917.\textsuperscript{148} After World War II, the U.S. administered the Northern Mariana Islands as part of the United Nations Trust Territory of the Pacific Islands; the people on the islands sought U.S. territorial status in 1972 instead of opting for independence, and the Commonwealth was established in 1975.\textsuperscript{149}

Puerto Rican residents received citizenship in the Organic Act of 1917, while residents of the United States Virgin Islands were granted U.S. citizenship in 1927, Guam residents received citizenship in 1950, and the inhabitants of the Northern Mariana Islands became citizens in 1976.\textsuperscript{150} American Samoans have had their own constitution since 1967, but have not received citizenship.\textsuperscript{151} But as territorial scholars argue, “United States citizenship status of the inhabitants of this country’s island conquests was and remains different from that held by their mainland counterparts. Such membership, simply stated, flies in the face of basic foundational constructs of United States citizenship law.”\textsuperscript{152}

This passionate statement stems from the Supreme Court’s decisions in the \textit{Insular Cases} in 1901, a line of decisions in which the Court decided that not all constitutional provisions apply in the territories. Given their special status, the territories have a long and varied jurisprudential history. At the end of the nineteenth century, the Constitution’s application to the territories could have been summarized as follows (note the myriad contradictions):\textsuperscript{153}

\begin{itemize}
  \item Congress had authority to govern territories under the Territory Clause (\textit{Canter},
\end{itemize}

\begin{flushright}
\footnotesize
\textsuperscript{148} E. Roman, Citizenship, supra note 8, at 587.
\textsuperscript{151} American Samoa, World Factbook: CIA, supra note 147.
\textsuperscript{152} E. Roman, Citizenship, supra note 8, at 589.
\textsuperscript{153} Adapted from Cleveland, Sovereignty, supra note 20, at at 207.
\end{flushright}
Congress had inherent authority to govern territories pursuant to the sovereign power to acquire (Canter, 1828; Dred Scott, 1857; Jones, 1890);\footnote{Am. Ins. Co. v. Canter, 26 U.S. 511, 542 (1828) (Marshall, C.J.) (holding that power over the territories, Florida in this case, stemmed from both the Territory Clause and the law of nations, which implied that a country had inherent powers over a territory within its jurisdiction, since the territory was not a sovereign).}

The Constitution and U.S. laws applied automatically to newly acquired territory (Loughborough, 1820; Cross v. Harrison, 1853; Dred Scott, 1857);\footnote{Scott v. Sandford, 60 U.S. at 450-51 (Taney, C.J.) (holding in part that because the federal government has limited sovereignty and may only act within the constraints of the Constitution, the protections of the Bill of Rights extend to citizens in U.S. territories and place them “on the same footing with citizens of the States.”); Jones v. United States, 137 U.S. 202, 212-13 (1890) (holding that under “the law of nations, recognized by all civilized states, dominion of new territory may be acquired by discovery and occupation, [and] the nation…may exercise such jurisdiction and for such period as it sees fit over territory so acquired.”)}

Not all portions of the Constitution and U.S. laws applied to the territories (Canter, 1828; Murphy v. Ramsey, 1885);\footnote{Loughborough v. Blake, 18 U.S. 317, 318-19 (1820) (holding that the Constitution applies equally to all parts of the “American Empire,” which is “all places over which the government extends,” and that the term “United States” “is the name given to our great republic, which is composed of States and territories. The district of Columbia, or the territory west of the Missouri, is not less within the United States, than Maryland or Pennsylvania…”); Cross v. Harrison, 57 U.S. 164 (1853) (holding that the Constitution and the laws of the United States applied immediately upon acquisition of new territory).}

The Constitution and U.S. laws did not apply to new territories until extended there by Congress (Fleming v. Page, 1850, dicta);\footnote{Murphy v. Ramsey, 114 U.S. 15 (1885) (holding that “the people of the United States, as sovereign owners of the national territories, have supreme power over them and their inhabitants…” and that though they enjoy the same personal and civil rights as other citizens, their political rights are subject to Congressional discretion).}

Constitutional protections might not apply to non-members of the constitutional compact in the territories (Dred Scott, 1857, dicta);\footnote{Fleming v. Page, 50 U.S. 603 (1850) (Taney, C.J.) (holding that affirmative action on the part of Congress was required to extend the application of U.S. law to the territories).}

The letter of constitutional limitations did not restrict Congress in the territories (Latter-Day Saints, 1890, dicta);\footnote{The Late Corporation of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1 (1880) (holding that the “power of Congress over the Territories of the United States is general and plenary…Doubtless Congress, in legislating for the Territories would be subject to those fundamental limitations in favor of personal rights which are formulated in the Constitution and its amendments, but these limitations would exist rather by inference and the general spirit of the Constitution than by any express and direct application of its provisions.”).}

Congress could act extraterritorially pursuant to the treaty power without constitutional limitation (In re Ross, 1891).\footnote{In re Ross, 140 U.S. 453 (1891) (Field, J.) (holding that the treaty power gave the United States complete authority to create consular courts and administer territories abroad, but that the individual protections guaranteed by U.S. Constitution did not extend to those territories unless Congress so extended them).}
b) The Insular Cases

Between 1901 and 1905, several cases dealing with the application of U.S. tariff law and constitutional protections for criminal defendants in the United States’ insular possessions came before the Supreme Court. Two of them, *De Lima v. Bidwell* and *Downes v. Bidwell*, both considering the constitutionality of imposing tariffs upon the territories as if they were foreign countries, resulted in particularly significant decisions for the territorial residents (with forceful dissenting opinions).161

(1) *De Lima v. Bidwell* (1901)

In *De Lima*, a Puerto Rico merchant sought to recover duties paid to import sugar to the United States in 1899, after the cession of Puerto Rico from Spain to the United States in the 1898, but prior to the passage of the Foraker Act in 1900.162 The major issue for the court was whether Puerto Rico constituted a “foreign country” subject to import duties prior to the Foraker Act. Reiterating that a foreign country is “one exclusively within the sovereignty of a foreign nation, and without the sovereignty of the United States,”163 the Court explored the nature of territorial status, inferring that because the “Constitution confers absolutely upon the government of the Union the powers of making war and of making treaties; consequently that government possesses the power of acquiring territory, either by conquest or by treaty.”164 Therefore, the Court reasoned, “[t]he territory thus acquired is acquired as absolutely as if the annexation were made, as in the case of Texas and Hawaii, by an act of Congress.” The Court added that, under the Territory Clause, “when once acquired by treaty, [the territory] belongs to

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161 *De Lima v. Bidwell*, 182 U.S. 1 (1901) (Brown, J.); *Downes v. Bidwell*, 182 U.S. 244 (1901). See also Cleveland, Sovereignty, supra note 20, at 214-38; Guzman, Igartua, supra note34, at 151; E. Roman, Citizenship, supra note 8, at 585-86; J. Roman, Oval Shaped Island, supra note 41, at 1684-91.
162 *De Lima*, 182 U.S. at 1-2.
163 *Id.* at 180 (citing Marshall, J. and Story, J. as circuit judges).
164 *Id.* at 195 (quoting *Am. Ins. Co. v. Canter*, 26 U.S. 511, 542 (1828) (Marshall, C.J.)).
the United States, and is subject to the disposition of Congress.” In fact, the court declared it “settled” law that

the right to acquire territory involves the right to govern and dispose of it…Congress ‘has full and complete legislative authority over the people of the territories and all the departments of the territorial governments. It may do for the territories what the people, under the Constitution of the United States, may do for the states.’

To better understand those powers in the tariff context, the Court examined Cross v. Harrison, which held that: (1) the war power allowed the governor of a territory to collect duties from importations from foreign countries until the ratification of the treaty of peace as regards that territory; (2) after the treaty was ratified, duties could be legally exacted under the tariff laws of the United States, which took effect immediately; and (3) the civil government established in the territory continued until Congress provided for a territorial government. This reasoning had been followed with regard to the territories of Louisiana, Florida, Texas, California, and Alaska. Finally, the Court added that § 2 of the Foraker Act “makes a distinction between foreign countries and Porto Rico, by enacting that the same duties shall be paid upon ‘all articles imported into Porto Rico from ports other than those of the United States, which are required by law to be collected upon articles imported into the United States from foreign countries.’”

From these observations, the Court held that “to the present there is not a shred of authority…for holding that a district ceded to and in the possession of the United States remains for any purpose a foreign country.” The Court explained:

The theory that a country remains foreign with respect to the tariff laws until Congress has acted by embracing it within the customs union presupposes that a country may be domestic for one purpose and foreign for another…no act is

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165 Id. at 196 (citing Scott; quoting National Bank v. Yankton County, 101 U. S. 129, 130 (1879)).
166 Id. at 186.
167 Id. at 187.
168 Id. at 194.
169 Id. at 194.
necessary to make it domestic territory if once it has been ceded to the United States.

The Court also believed it important to explain the intentionally short-lived nature of territorial status:

This theory also presupposes that territory may be held indefinitely by the United States; …that everything may be done which a government can do within its own boundaries, and yet that the territory may still remain a foreign country…until Congress enacts otherwise… To hold that this can be done as matter of law we deem to be pure judicial legislation. We find no warrant for it in the Constitution or in the powers conferred upon this court.170

These powerful words have been hailed as ironic, since—one hundred years later—Puerto Rico is the paradigm of a territory held indefinitely by the United States.171 And the constitutional promise of De Lima’s holding was quickly swept aside in Downes v. Bidwell.

(2)  

**Downes v. Bidwell (1901)**

In *Downes*, a Puerto Rican merchant sought to recover duties paid for the importation of oranges after the passage of the Foraker Act in 1900, arguing that Puerto Rico became a part of the United States upon the ratification of the treaty with Spain, and thus separate tariffs violated the Uniformity Clause of the Constitution: “all duties, imposts and excises shall be uniform throughout the United States.”172 This question had been resolved favorably for the District of Columbia in *Loughborough v. Blake* and for California in *Cross v. Harrison*.173 In answering the question for Puerto Rico, the Court also considered the broader question of whether the revenue clauses of the Constitution applied to newly acquired territories.174 There was no majority decision; the Court issued a plurality opinion, authored by Justice Brown, and Justice White

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170 *Id.*
174 *Id.* at 249.
wrote what is now considered the controlling ratio of the case in his concurring opinion.

(a) Justice Brown’s plurality opinion

Justice Brown examined the history of the Constitution’s text and subsequent interpretation by the Supreme Court as regards territories, including the Dred Scott Case and its pronouncements on territorial status. Justice Brown concluded that

it can nowhere be inferred that the territories were considered a part of the United States. The Constitution was created by the people of the United States, as a union of states, to be governed solely by representatives of the states; and even the provision relied upon here, that all duties, imposts, and excises shall be uniform ‘throughout the United States,’ is explained by subsequent provisions of the Constitution, that ‘no tax or duty shall be laid on articles exported from any state,’ and ‘no preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another; nor shall vessels bound to or from one state be obliged to enter, clear, or pay duties in another.’ In short, the Constitution deals with states, their people, and their representatives.\(^{175}\)

To illustrate his point, Justice Brown cited the Thirteenth and Fourteenth Amendments, arguing:

“The 13th Amendment to the Constitution, prohibiting slavery and involuntary servitude ‘within the United States, or in any place subject to their jurisdiction,’ is also significant as showing that there may be places within the jurisdiction of the United States that are no part of the Union.”\(^{176}\)

Comparatively, the Fourteenth Amendment grants citizenship to “all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the state wherein they reside,” which Justice Brown distinguished as “a limitation to persons born or naturalized in the United States, which is not extended to persons born in any place ‘subject to their jurisdiction.’”\(^{177}\) Justice Brown further argued that despite incorporation clauses in treaties regarding Louisiana, Florida, Hawaii, and even Puerto Rico,

Congress, not only in organizing the territory of Louisiana … but all other territories carved out of this vast inheritance, has assumed that the Constitution

\(^{175}\) *Id.* at 251.

\(^{176}\) *Id.*

\(^{177}\) *Id.*
did not extend to them of its own force, and has in each case made special provision, either that their legislatures shall pass no law inconsistent with the Constitution of the United States, or that the Constitution or laws of the United States shall be the supreme law of such territories. 178

On the Supreme Court’s territorial jurisprudence, Justice Brown admitted that because certain cases required legislation to implement the Constitution and others held that the Constitution became effective immediately upon cession, the line of cases was “not altogether harmonious”; however, he cautioned that these general statements ought not to be considered controlling outside the specific context of the facts of the case being decided. 179 He then discussed:

- **Hepburn v. Ellzey** (holding that the District was not a state, which denoted only members of the Union);
- **Loughborough v. Blake** (holding that because the District had been a part of the U.S., the cession did not remove it “from under the aegis of the Constitution”);
- **Callan v. Wilson** (applying right to a jury trial to the District);
- **De Geoffroy v. Riggs** (holding that in dealing with foreign nations, the term “United States” includes the District and the territories, “because the Federal government is the only authorized organ of the territories, as well as of the states, in their foreign relations”);
- **American Ins. Co. v. 356 Bales of Cotton** (holding that when a territory becomes part of the nation under a treaty, it does so subject to the Congressional plenary power under the Territory Clause, and that jurisdiction is independent from the rest of the Constitution);
- **The Late Corporation of the Church of Jesus Christ of Latter-Day Saints v. United States** (holding that Congressional authority to acquire and govern territories is “general and plenary,” granted by the Territory Clause and incidental to the treaty and war powers, and the Constitution does not legally restrain that power); and
- Several cases holding that territorial law did not have to incorporate constitutional protections, but that once Congress had done so, they may not be withdrawn. 180

Justice Brown summarized these holdings as they pertained to the case at bar, declaring that “the following propositions may be considered as established:”

178 Id. at 257.
179 Id. at 258-59 (citing *Cohen v. Virginia*, 19 U.S. 264, 398 (1821)).
1. That the District of Columbia and the territories are not states within the judicial clause of the Constitution giving jurisdiction in cases between citizens of different states;

2. That territories are not states within the meaning of Rev. Stat. § 709, permitting writs of error from this court in cases where the validity of a state statute is drawn in question;

3. That the District of Columbia and the territories are states as that word is used in treaties with foreign powers, with respect to the ownership, disposition, and inheritance of property;

4. That the territories are not within the clause of the Constitution providing for the creation of a supreme court and such inferior courts as Congress may see fit to establish;

5. That the Constitution does not apply to foreign countries or to trials therein conducted, and that Congress may lawfully provide for such trials before consular tribunals, without the intervention of a grand or petit jury;

6. That where the Constitution has been once formally extended by Congress to territories, neither Congress nor the territorial legislature can enact laws inconsistent therewith.\(^{181}\)

Justice Brown then turned to a comprehensive analysis of the *Dred Scott Case*. He cited Justice Taney, who argued:

> ‘There is certainly no power given by the Constitution to the Federal government to establish or maintain colonies bordering on the United States or at a distance, to be ruled and governed at its own pleasure; . . . and if a new state is admitted, it needs no further legislation by Congress, because the Constitution itself defines the relative rights and powers and duties of the state, and the citizens of the state, and the Federal government. But no power is given to acquire a territory to be held and governed permanently in that character.’\(^{182}\)

Justice Brown summarized Justice Taney’s reasoning regarding citizens who move from a state to a territory: they “cannot be ruled as mere colonists, and … while Congress had the power of legislating over territories until states were formed from them, it could not deprive a citizen of his property merely because he brought it into a particular territory of the United States.” Justice Brown admitted that such strong language would be decisive in the plaintiffs’ favor, had it not

\(^{181}\) *Id.* at 270-271.

\(^{182}\) *Id.* at 273 (citing *Scott v. Sandford*, 60 U.S. 393 (1857)).
been for the fact that the country did not acquiesce in the opinion, and that the Civil War followed, which “produced such changes in judicial, as well as public, sentiment as to seriously impair the authority of this case.”

Justice Brown then considered the applicability of the Guarantee Clause to the territories:

Notwithstanding its duty to ‘guarantee to every state in this Union a republican form of government’ (art. 4, § 4), … Congress did not hesitate, in the original organization of the territories…to establish a form of government bearing a much greater analogy to a British Crown colony than a republican state of America… It was not until [the territory] had attained a certain population that power was given them to organize a legislature by vote of the people. In all these cases…Congress thought it necessary either to extend to Constitution and laws of the United States over them, or to declare that the inhabitants should be entitled to enjoy [certain rights].

He concluded that “the practical interpretation put by Congress upon the Constitution has been long continued and uniform to the effect that the Constitution is applicable to territories acquired by purchase or conquest, only when and so far as Congress shall so direct.”

Justice Brown stated that the Court agreed that “the power to acquire territory by treaty implies, not only the power to govern such territory, but to prescribe upon what terms the United States will receive its inhabitants, and what their status shall be…” In fact, he argued, the inclusion of a clause guaranteeing future incorporation in acquisition treaties indicated “an implied denial of the right of the inhabitants to American citizenship until Congress by further action shall signify its assent thereto.” As to the fear that Congress would abuse this plenary power, Justice Brown thought it unlikely, and quoted Chief Justice Marshall in *Gibbons v. Ogden*:

‘This power,’ said he, ‘like all others vested in Congress, is complete in itself,

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183 *Id.* at 278-79 (citing the organization of the territories of “Louisiana, Florida, the Northwest Territory, and its subdivisions of Ohio, Indiana, Michigan, Illinois, and Wisconsin and still more recently in the case of Alaska”).
184 *Id.* at 279.
185 *Id.* at 279.
186 *Id.* at 280.
may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution...The wisdom and discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are in this, as in many other instances...the sole restraints on which they have relied to secure them from its abuse. They are the restraints on which the people must often rely solely in all representative governments.'\textsuperscript{187}

Before announcing the judgment, Justice Brown added the following caveat, disclaiming any intent to hold that Congress would be free to trample on their personal rights:

Whatever may be finally decided by the American people as to the status of these islands and their inhabitants—whether they shall be introduced into the sisterhood of states or be permitted to form independent governments—It does not follow that in the meantime, a waiting that decision, the people are in the matter of personal rights unprotected by the provisions of our Constitution and subject to the merely arbitrary control of Congress. Even if regarded as aliens, they are entitled under the principles of the Constitution to be protected in life, liberty, and property.'\textsuperscript{188}

Justice Brown then declared “that the island of Porto Rico is a territory appurtenant and belonging to the United States, but not a part of the United States within the revenue clauses of the Constitution; that the Foraker act is constitutional, so far as it imposes duties upon imports from such island, and that the plaintiff cannot recover back the duties exacted in this case.”\textsuperscript{189}

(b) Justice White’s controlling concurrence

Justice White began by laying out the following eight principles on which he based his rationale, citing the authority for those propositions in his footnotes, which are attached here:

1. “[W]hile confined to its constitutional orbit, the government of the United States is supreme within its lawful sphere.”\textsuperscript{190}

2. “Every function of the government being thus derived from the Constitution, it follows that that instrument is everywhere and at all times potential in so far as its

\textsuperscript{187} Id. at 281 (quoting Gibbons v. Ogden).
\textsuperscript{188} Id. at 283.
\textsuperscript{189} Id. at 287.
\textsuperscript{190} Id. at 298 (citing Marbury v. Madison, 1 Cranch, 176; Martin v. Hunter, 1 Wheat. 326; New Orleans v. United States, 10 Pet. 662, 736; De Geoffroy v. Riggs, 133 U. S. at 266; United States v. Gettysburg Electric R. Co., 160 U. S. 668, 679, and others).
provisions are applicable.”

3. “Hence it is that wherever a power is given by the Constitution, and there is a limitation imposed on the authority, such restriction operates upon and confines every action on the subject within its constitutional limits.”

4. No branch of the government may choose whether or not to apply the Constitution in circumstances where the Constitution itself prescribes that it should or should not apply.

5. “The Constitution has undoubtedly conferred on Congress the right to create such municipal organizations as it may deem best for all the territories of the United States, whether they have been incorporated or not, to give to the inhabitants as respects the local governments such degree of representation as may be conducive to the public well-being, to deprive such territory of representative government if it is considered just to do so, and to change such local governments at discretion…While, therefore, there is no express or implied limitation on Congress in exercising its power to create local governments for any and all of the territories, by which that body is restrained from the widest latitude of discretion, it does not follow that there may not be inherent, although unexpressed, principles which are the basis of all free government which cannot be with impunity transcended…even in cases where there is no direct command of the Constitution which applies, there may nevertheless be restrictions of so fundamental a nature that they cannot be transgressed, although not expressed in so many words in the Constitution.”

Justice White gave the District of Columbia as the perfect example of this tenet in action.

He also noted that although Congressional discretionary power to govern has been found at times in the power to acquire territory or in the power to dispose of and regulate it under the Territory Clause, both are rooted in the Constitution, giving no credence to the claim that a government of a territory is an extraconstitutional sphere.

6. “As Congress in governing the territories is subject to the Constitution, it results that all the limitations of the Constitution which are applicable to Congress in exercising this authority necessarily limit its power on this subject. It follows, also, that every

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193 Id.
194 Id. at 289-91 (emphasis added) (citing United States v. Kagama, 118 U. S. 375, 378; Shively v. Bowlby, 152 U. S. 1, 48; Church of Jesus Christ of L. D. S. v. United States, 136 U. S. 1, 42).
provision of the Constitution which is applicable to the territories is also controlling therein,” as is the case with all exercise of legislative power. 196

7. “In the case of the territories, as in every other instance, when a provision of the Constitution is invoked, the question which arises is, not whether the Constitution is operative, for that is self-evident, but whether the provision relied on is applicable.” 197

8. Since Congressional authority to tax the territories for local purposes is not granted by the general power to tax but by the broad power to administer the territories, those taxes are not subject to the limitations on the general power tax, including the Uniformity Clause. However, once a territory has been incorporated, it becomes a part of the United States and is then subject to the general power to tax and the uniformity restriction. 198

Justice White concluded from these propositions “that Congress in legislating for Porto Rico was only empowered to act within the Constitution and subject to its applicable limitations, and that every provision of the Constitution which applied to a country situated as was that island was potential in Porto Rico.” 199 He then distinguished between two types of restrictions on Congressional power: “those which regulate a granted power and those which withdraw all authority on a particular subject.” 200 Justice White asserted that the restrictions in the second class had always been assumed to apply to any condition or status of territory or citizen, citing Justice Field:

‘It is a general rule of public law, recognized and acted upon by the United States, that whenever political jurisdiction and legislative power over any territory are transferred from one nation of sovereign to another the municipal laws of the country—that is, laws which are intended for the protection of private rights—continue in force until abrogated or changed by the new government or sovereign.’ 201

Summing up these principles, Justice White declared Congress could not “destroy the

196 Id. at 291 (citing Scott v. Sandford, 60 U.S. 393 (McLean and Curtis, JJ., dissenting)).
197 Id. at 292.
199 Id. at 293.
200 Id. at 295.
201 Id. at 298 (citing Chicago, R. I. & P. R. Co. v. McGlinn, 114 U. S. 542 (1885) (Field, J.).)
liberties of the people of Porto Rico by exercising in their regard powers against freedom and justice which the Constitution has absolutely denied,” and while Congress had broad discretion to locally govern the territory, deny it representation, and levy local taxes, Congress could not demand import taxes from Puerto Rico if the island was a part of the United States.202 Thus, the only issue before the Court was whether Puerto Rico been incorporated into and become an integral part of the United States by the passage of the Foraker Act.

To answer this question, Justice White deemed it necessary to consider the law of nations along with the Constitution’s text, history, and judicial interpretation:

- **On the law of nations:**

  - “[E]very government which is sovereign within its sphere of action possesses as an inherent attribute the power to acquire territory by discovery, by agreement or treaty, and by conquest;”203

  - “To concede to the government of the United States the right to acquire, and to strip it of all power to protect the birthright of its own citizens and to provide for the well-being of the acquired territory by such enactments as may in view of its condition be essential, is, in effect, to say that the United States is helpless in the family of nations, and does not possess that authority which has at all times been treated as an incident of the right to acquire.”204

- **Under the Constitution and related text:**

  - *The Declaration of Independence*: ‘As free and independent states, [the United States of America] have full power to levy war, conclude peace, contract alliances, establish commerce, and to do all other acts and things which independent states may of right do;’205

  - Therefore, Justice White asserted, “it seems to me impossible to conceive that the treaty-making power by a mere cession can incorporate an alien people into the United States without the express or implied approval of Congress;”206

  - Addressing the argument that “is impossible to acquire territory by treaty without

202 Id. at 298-99.
203 Id. at 300.
204 Id. at 306.
205 Id. at 302.
206 Id. at 312.
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immediate and absolute incorporation,” Justice White wrote “it is said that the spirit of the Constitution …excludes the acquisition of any territory which is not in a position to be treated as an integral part of the United States. But this reasoning is based on political, and not judicial, considerations. Conceding that the conception upon which the Constitution proceeds is that no territory, as a general rule, should be acquired unless the territory may reasonably be expected to be worthy of statehood, the determination of when such blessing is to be bestowed is wholly a political question, and the aid of the judiciary cannot be invoked to usurp political discretion in order to save the Constitution from imaginary or even real dangers. The Constitution may not be saved by destroying its fundamental limitations;”

• Justice White went on to examine the meaning of the term “United States”: “at the adoption of the Constitution, the United States, as a geographical unit and as a governmental conception both in the international and domestic sense, consisted not only of states, but also of territories… and, except as to political advantages, all enjoying equal rights and freedom, and safeguarded by substantially similar guaranties, all being under the obligation to contribute their proportionate share for the liquidation of the debt and future expenses of the general government;”

- In historical context:

  • Studying the Louisiana Purchase, Justice White made several observations regarding Jefferson and Madison’s views as to how the territory would be incorporated, noting that even though the treaty promised swift incorporation, Jefferson believed only a constitutional amendment could incorporate it;

  • Furthermore, he added, as to Florida, Mexico, and Alaska, where the treaty promised incorporation and Congress recognized the treaty, its provisions were immediately enforced;

- Following judicial precedent:

  • *American Ins. Co. v. 356 Bales of Cotton*: Justice Marshall wrote that “[t]he Constitution confers absolutely on the government of the Union the powers of making war and of making treaties; consequently, that government possesses the power of acquiring territory, either by conquest or by treaty.” Furthermore, “If [conquered territory] be ceded by the treaty, the acquisition is confirmed, and the ceded territory becomes a part of the nation to which it is annexed, either on the terms stipulated in the treaty of cession or on such as its new master shall impose;”

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207 Id. at 311-12.
208 Id. at 321.
209 Id. at 332-33.
210 Id. at 333-36.
211 Id. at 303 (citing *Am. Ins. Co. v. Canter* (Marshall, J.)).
212 Id. at 302 (citing *Am. Ins. Co. v. Canter* (Marshall, J.)).
o **Latter Day Saints:** Justice Bradley announced, “[t]he power to acquire territory…is derived from the treaty-making power and the power to declare and carry on war. The incidents of these powers are those of national sovereignty, and belong to all independent governments. The power to make acquisitions of territory by conquest, by treaty, and by cession is an incident of national sovereignty;”\(^{213}\)

o **United States v. Huckabee:** Justice Clifford explained, “Power to acquire territory either by conquest or treaty is vested by the Constitution in the United States;”\(^{214}\)

o **Fleming v. Page:** “The United States, it is true, may extend its boundaries by conquest or treaty, and may demand the cession of territory as the condition of peace… But this can be done only by the treaty-making power or the legislative authority.”\(^{215}\)

o **Jones:** “By the law of nations, recognized by all civilized states, dominion of new territory may be acquired by discovery and occupation, as well as by cession or conquest; and when citizens or subjects of one nation [take possession] of territory unoccupied by any other government or its citizens, *the nation to which they belong may exercise such jurisdiction and for such period as it sees fit over territory so acquired.*”\(^{216}\)

o **Cross v. Harrison:** “By the ratification of the treaty California became a part of the United States. And, as there is nothing differently stipulated in the treaty with respect to commerce, it became instantly bound and privileged by the laws which Congress had passed to raise revenue from duties on imports and tonnage.”\(^{217}\)

### Conclusion – Puerto Rico has not been incorporated:

o Summarizing his arguments among the categories above, Justice White concluded: “It is…indubitably settled by the principles of the law of nations, by the nature of the government created under the Constitution, by the express and implied powers conferred upon that government by the Constitution, by the mode in which those powers have been executed from the beginning, and by an unbroken lien of decisions of this court” that:
  - The treaty-making power cannot and does not incorporate territory into the United States without the express or implied assent of Congress;
  - Congress may stipulate conditions in a treaty against the immediate incorporation of a certain territory;
  - And when a treaty offers conditions leading imminent incorporation, and is not repudiated by Congress, the provisions regarding incorporation will have the force of the law of the land, and therefore, when the conditions are

\(^{213}\) *Id.* at 303-04 (citing *Latter Day Saints* (Bradley, J.).)

\(^{214}\) *Id.* at 54-55. *See also Tidewater,* supra note 36, 337 U.S. at 600 (Jackson, J., plurality opinion).

\(^{215}\) *Id.* at 338 (citing *Fleming v. Page* (Taney, J.).)

\(^{216}\) *Id.* at 307 (citing *Jones v. United States*, 137 U.S. 202 (Gray, J.).)

\(^{217}\) *Id.* at 338 (citing *Cross v. Harrison* (Wayne, J.).)
fulfilled, the territory will be incorporated.

- However, “where a treaty contains no conditions for incorporation, and, above all, where it not only has no such conditions, but expressly provides to the contrary, that incorporation does not arise until in the wisdom of Congress it is deemed that the acquired territory has reached that state where it is proper that it should enter into and form a part of the American family.”\(^\text{218}\)

  o Finally, examining the treaty of cession between Spain and the United States, Justice White found that, because Article IX of the treaty provided that the “civil rights and political status of the native inhabitants of the territories hereby ceded” shall be determined by Congress, “the express purpose of the treaty was not only to leave the status of the territory to be determined by Congress, but to prevent the treaty from operating to the contrary.”\(^\text{219}\)

  o Therefore, “while in an international sense Porto Rico was not a foreign country, since it was subject to the sovereignty of and was owned by the United States, it was foreign to the United States in a domestic sense, because the island had not been incorporated into the United States, but was merely appurtenant thereto as a possession. As a necessary consequence, the impost in question assessed on coming from Porto Rico into the United States after the cession was within the power of Congress, and that body was not, moreover, as to such impost, controlled by the clause requiring that imposts should be uniform throughout the United States; in other words, the provision of the Constitution just referred to was not applicable to Congress in legislating for Porto Rico.”\(^\text{220}\)

The \textit{Insular Cases} remain good law in the United States, and are still cited by the Court: in Justice Harlan’s concurrence in \textit{Reid v. Covert}, he created the “impractical and anomalous” test for constitutional application to go along with the “basis of free government” test articulated by Justice White; Justice Kennedy applied that test in his controlling concurring opinion in \textit{United States v. Verdugo-Urquidez}, and extensively cited the \textit{Insular Cases}.\(^\text{221}\) Because Congress may choose at its discretion when or whether to extend constitutional protections to the territories, “there has never been any pretense concerning the Fourteenth Amendment’s

\(^{218}\) \textit{Id.} at 340.

\(^{219}\) \textit{Id.} at 341.

\(^{220}\) \textit{Id.} at 341-42.

applicability or equality for that matter. These individuals did not receive citizenship through the Fourteenth Amendment, the vehicle used to grant or impose such status on virtually all other groups who have attained it;” their citizenship is acquired through the Territory Clause, which gives Congress plenary power over these people, and “[i]n turn, the Court and Congress have kept this group in a subordinate and disenfranchised status.”\textsuperscript{222} The cases discussed below dealing with specific territories will bring this concept into sharper focus.

c) \textbf{Puerto Rican history and jurisprudence}

After gaining sovereignty over Puerto Rico from Spain in 1898, the United States established a civil government for Puerto Rico in the Foraker Act of 1900, for which the U.S. President appointed most officials and over which the U.S. Congress had supreme authority.\textsuperscript{223} The Foraker Act also imposed a tariff on “all merchandise coming into Puerto Rico from the United States,” which was the major source of controversy that led to the Supreme Court’s decisions in the Insular Cases.\textsuperscript{224} The Foraker Act was amended by the Jones Act in 1917, which created a “Bill of Rights” for Puerto Rico (minus Fifth and Sixth Amendment protections) and granted U.S. citizenship to all present residents of in the territory.\textsuperscript{225} Despite what seemed like progress toward incorporating Puerto Rico as a state, the Supreme Court upheld the withholding of the right to a criminal jury trial in Balzac v. Porto Rico, holding that the grant of citizenship was “entirely consistent with non-incorporation” of the territory and as such, the U.S. Constitution was not required to apply fully to Puerto Rico citizens: “It is locality that is determinative of the application of the Constitution, in such matters as judicial procedure,

\textsuperscript{222} E. Roman, Citizenship, \textit{supra} note 8, at 585-86.
\textsuperscript{223} Organic Act of 1900, ch. 191, 31 Stat. 77, amended by the Organic Act of 1917, ch. 145, 39 Stat. 951. \textit{See also} Guzman, Igartua, \textit{supra} note 34, at 149-51;
\textsuperscript{224} Id. \textit{See also} Guzman, Igartua, \textit{supra} note 34, at 151.
\textsuperscript{225} Organic Act of 1917, ch. 145, 39 Stat. 951. \textit{See also} Cleveland, Sovereignty, \textit{supra} note 20, at 238; Guzman, Igartua, \textit{supra} note 34, at 153-55.
and not the status of the people who live in it.\textsuperscript{226}

In 1952, Congress passed the Immigration and Nationality Act, granting citizenship to all people born in Puerto Rico. Additionally, by mutual consent under Public Law 600, Congress allowed the people of Puerto Rico to draft their own constitution and acquire Commonwealth status. Courts and scholars have argued the significance of this transformation \textit{ad nauseam}, with little consensus.\textsuperscript{227} As a Puerto Rican district court judge put it,

Whatever the actual status of Puerto Rico may be in all of its details, its present status is certainly not that of a State of the Union; nor is it that of a Territory, unincorporated or incorporated into the Union preparatory to statehood. Thus, it has happened that legal conclusions regarding the Commonwealth of Puerto Rico have varied from one extreme to the other. Public Law 600 did not abridge what sovereign powers Puerto Rico had been granted under the Foraker and Jones Acts but rather continued them and, if anything, amplified them. Puerto Rico has neither been incorporated into the United States nor been made a State of the Union nor an independent republic. The Commonwealth of Puerto Rico is a body politic which has received, through a compact with the Congress of the United States, full sovereignty over its internal affairs in such a manner as to preclude a unilateral revocation, on the part of Congress, of that recognition of powers.\textsuperscript{228}

In \textit{United States v. Sanchez}, the court distinguished territorial residents, whose legal self-governing status may be subject to congressional repeal, from citizens of states admitted into the Union by Congress, which transformed them from territories to permanent separate sovereigns,

\textsuperscript{226} \textit{Balzac v. Porto Rico}, 258 U.S. 298, 308, 309 (1922). \textit{See also} Cleveland, Sovereignty, \textit{supra} note 20, at 238. \\
\textsuperscript{227} \textit{Compare Rodríguez v. Popular Democratic Party}, 457 U.S. 1, 8 (1982) (“Puerto Rico, like a state, is an autonomous political entity, ‘sovereign over matters not ruled by the Constitution.’”) (quoting \textit{Caledo-Taledo v. Pearson Yacht Leasing Co.}, 416 U.S. 663, 673 (1974)); \textit{and Cordova & Simonpietri Ins. Agency Inc. v. Chase Manhattan Bank}, 649 F.2d 36, 41 (1st Cir. 1981) (“Puerto Rico’s status changed from that of a mere territory to the unique status of Commonwealth. And the federal government’s relations with Puerto Rico changed from being bounded merely by the territorial clause...’); \textit{and Mora v. Torres}, 113 F. Supp. 309, 313-14 (D.P.R. 1953) (concluding that a new relationship was established between Puerto Rico and the United States because Congress could no longer exercise plenary jurisdiction over the Island), \textit{with Harris v. Rosario}, 446 U.S. 651, 651-52 (1980) (“Congress, which is empowered under the Territory Clause of the Constitution...to ‘make all needful Rules and Regulations respecting the Territory...belonging to the United States,’ may treat Puerto Rico differently from States so long as there is a rational basis for its actions.”); \textit{and Dávila-Pérez v. Lockheed Martin Corp.}, 202 F.3d 464, 468 (1st Cir. 2000) (Puerto Rico is “still subject to the plenary powers of Congress under the territorial clause.”); \textit{and Detres v. Lions Bldg. Corp.}, 234 F.2d 596, 600 (7th Cir. 1956) (“The mere change of the name of Puerto Rico to the Commonwealth of Puerto Rico did not change Puerto Rico from a territory to a commonwealth unless its form of government was so changed as to actually make it a commonwealth.”). \textit{See also} Guzman, Igartua, \textit{supra} note 34, at 158-59. \\
protected by the Tenth Amendment. The court noted that “cases concerning the status of territorial courts demonstrate that territories do not possess [an] inherent sovereignty” similar to that of admitted states. Disagreeing with the First Circuit’s decisions that Puerto Rico in an “autonomous political entity” under the Supreme Court’s dicta in Rodriguez, the Sanchez court went on to follow Judge Torruella’s concurrence in U.S. v. Lopez-Andino, an oft-cited discussion of the status of Puerto Rico’s courts which concludes that, despite Commonwealth status, Puerto Rico is still a territory for constitutional purposes. As explained by a “noted constitutional scholar” and cited by Judge Torruella,

Though the formal title has been changed, in constitutional theory Puerto Rico remains a territory. This means that Congress continues to possess plenary but unexercised authority over Puerto Rico. Constitutionally, Congress may repeal Public Law 600, annul the Constitution of Puerto Rico and veto any insular legislation which it deems unwise or improper. From the perspective of constitutional law the compact between Puerto Rico and Congress may be unilaterally altered by the Congress. The compact is not a contract in a commercial sense. It expresses a method Congress chose to use in place of direct legislation ... Constitutionally, the most meaningful view of the Puerto Rican Constitution is that it is a statute of the Congress which involves a partial and non-permanent abdication of Congress’ territorial power.

In (a different) Sanchez v. United States, a Puerto Rican citizen challenged the constitutionality of the statute allowing Puerto Rico to choose commonwealth status on the basis that it did not explicitly include the right to vote in presidential elections. While acknowledging Puerto Rico’s new commonwealth status, the district court dismissed the claim because “Puerto Rico continues to be a duly constituted, existing political entity, but it is not a State in the federal union as are the other 50 States,” and “the Constitution does not, by its terms,

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230 Id. at 1150.
232 United States v. Lopez-Andino, 831 F.2d 1164, 1172-1177 (1st Cir. 1987).
grant citizens the right to vote, but leaves the matter entirely to the States.\textsuperscript{235} The Court noted that if voting rights were essential to citizenship, the four constitutional amendments granting the right to vote to four classes of citizens (including women, former slaves, District of Columbia residents, and people between the ages of eighteen and twenty-one) would have been unnecessary.\textsuperscript{236}

The major jurisprudence addressing the Puerto Rican right to vote are the \textit{Igartua} cases, two recent lawsuits in which Puerto Rican residents challenged the constitutionality of their lack of access to presidential elections.\textsuperscript{237}

\textbf{(1) \textit{Igartua I} (1994)}

In \textit{Igartua I}, the plaintiffs alleged that their inability to vote for president and vice president of the United States violated their constitutional rights; they argued that Puerto Rico had become a “de facto” state and was thus entitled to electoral votes.\textsuperscript{238} Furthermore, Puerto Rican residents who had moved from a state challenged the constitutionality of the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), arguing that they should be allowed to vote as absentee voters do, since absentee voting was wholly regulated by federal law, and not left to the states.\textsuperscript{239} The district court dismissed the plaintiffs’ case for failure to state a claim upon which relief can be granted, citing \textit{Sanchez v. United States} for the proposition that

under the Constitution of the United States the President is not chosen directly by the citizens, but by the electoral colleges in the States and the District of Columbia…The whole thrust of this is that the Constitution does not by its terms, grant \textit{citizens} the right to vote, but leaves the matter entirely to the \textit{States}.\textsuperscript{240}

\begin{flushleft}
\textsuperscript{235} \textit{Id.} at 241.  \\
\textsuperscript{236} \textit{Id.} at 241. \textit{See also} U.S. Const. amends. XV (former slaves), XIX (women), XXIII (District of Columbia residents), and XXVI (persons aged eighteen to twenty-one). \textit{See also} Guzman, \textit{Igartua}, \textit{supra} note 34, at 1697-98.  \\
\textsuperscript{237} \textit{Igartua I, supra} note 43; \textit{Igartua II, supra} note 46. \textit{See also} Guzman, \textit{Igartua, supra} note 34, at 159-62; J. Roman, Oval Shaped Island, \textit{supra} note 41, at 1698-1702.  \\
\textsuperscript{238} \textit{Igartua I}, 842 F.Supp. at 608.  \\
\textsuperscript{239} \textit{Id.} at 610 (citing UOCAVA, 42 U.S.C. §§ 1973ff-1973ff(6)).  \\
\textsuperscript{240} \textit{Id.} at 608 (\textit{quoting Sanchez v. United States}, 376 F.Supp. at 241).
\end{flushleft}
The court then found that “granting U.S. citizens in Puerto Rico the right to vote in presidential elections would require either that Puerto Rico become a state, or that a constitutional amendment, similar to the Twenty-Third Amendment, be adopted.”\(^{241}\) The court refused to consider the question of whether Puerto Rico was a “de facto” state, deeming it a nonjusticiable political question wholly committed to Congress in the Constitution: “New States may be admitted by the Congress into this Union.”\(^ {242}\) As to the residents who had previously lived in states, the court directed them to contact the states to see if they would be allowed to vote on an absentee ballot, and if not, to seek relief in that state (and one Puerto Rican resident did so unsuccessfully in New York in *Romeu v. Cohen*).\(^ {243}\) The First Circuit affirmed the district court’s dismissal.\(^ {244}\)

(2) *Igartua II* (2000)

Six years later, the same group of residents brought another lawsuit to the same district court. The residents who had always lived in Puerto Rico argued, again, that they had a right to vote in Presidential elections because they were U.S. citizens and, as such, were “vested with the inherent power to vote for those who represent them.”\(^ {245}\) The residents who had previously lived in states complained that they had been eligible to vote in Presidential elections but became ineligible to do once they moved to Puerto Rico.\(^ {246}\) All plaintiffs asserted that the United States Constitution and the International Covenant on Civil and Political Rights (ICCPR), a treaty

\(^{241}\) Id. at 609.

\(^{242}\) Id. at 609-10 (quoting U.S. Const. art. IV, § 3; citing *Baker v. Carr*, 386 U.S. 186, 210 (1962), for the nonjusticiable political question doctrine).

\(^{243}\) *Id.* See also *Romeu v. Cohen*, 265 F.3d 118 (2nd Cir. 2001) (considering “whether Equal Protection is violated by the UOCAVA, in that it provides presidential voting rights to former residents of States residing outside the United States but not to former residents of States residing in Puerto Rico,” and applying the rational basis test because of Congress’s plenary power over the territories, the court held that Romeu’s constitutional rights to equal protection, travel, and the privileges and immunities of citizenship had not been deprived.”

\(^{244}\) *Igartua I*, 32 F.3d at 8.

\(^{245}\) *Igartua II*, 113 F.Supp. 2d at 230.

\(^{246}\) Id.
which the United States has signed, guarantee their right to vote in Presidential elections.\cite{247} The former state residents once more challenged the constitutionality of the absentee voting act UOCAVA, under which Puerto Rico is considered to be within the United States, thus leaving Puerto Rican residents ineligible to be absentee voters.\cite{248} The court dismissed the claims under the ICCPR and UOCAVA at the summary judgment stage because the plaintiffs lacked causes of action under these bodies.

The district court first explored the fundamental nature of the right to vote, stating the Supreme Court’s view that “the right to vote constitutes a national right guaranteed by the principles of freedom of association as articulated in the First Amendment to the Constitution and protected by the Due Process and Equal Protection Clauses.”\cite{249} Arguing that this right to vote would exist even if Article II were stricken from the Constitution, the court added the Supreme Court’s statement that voting in presidential elections “implicate[s] a uniquely important national interest, because the President and Vice President are the only elected officials who represent all the voters in the Nation.”\cite{250} The court also noted that the passage of UOCAVA established that “a citizen’s right to vote in Presidential elections does not depend on his or her place of residence, but on his or her national citizenship.”\cite{251} Furthermore, because they phrase the right to vote as a “right of citizens of the United States,” the court said that the Twenty-Fourth and Twenty-Sixth Amendments support [the idea] that the right to participate in Presidential elections is not a function of State residence, but rather an individual right of

\begin{thebibliography}{99}
\bibitem{247} Id.
\bibitem{248} Id.
\bibitem{249} Id. at 232 (citing \textit{Dunn v. Blumstein}, 405 U.S. 330 (1972), \textit{Bullock v. Carter}, 405 U.S. 134 (1972)).
\bibitem{250} Id. at 232 (quoting \textit{Anderson v. Calabrezze}, 460 U.S. 780, 794-95 (1983)).
\bibitem{251} Id.
\end{thebibliography}
citizenship.\textsuperscript{252}

The district court then turned to the Supreme Court’s treatment of territories and enclaves, including \textit{Evans v. Cornman} (holding that residents of a federal enclave in Maryland had the right to vote as residents of Maryland), \textit{Downes v. Bidwell} (holding in part that Congress cannot act pursuant to the Territory Clause without being restricted by “those fundamental limitations in favor of personal rights which were formulated in the Constitution and in its amendments”), and \textit{Reid v. Covert} (holding that “when the United States acts against citizens abroad it [cannot] do so free of the Bill of Rights. The United States is a creation of the Constitution. Its powers and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution”).\textsuperscript{253}

The district court argued that when the Constitution was ratified, “the only political subdivisions capable of conducting national elections were the States. Thus, the use of the term State in Article II does not mean that the United States citizens of the territories could not cast their ballots in Presidential elections. The Article is the product of its time.”\textsuperscript{254} The court also elaborated several other creative arguments, including the application of the full Faith and Credit Clause to the territories, the extension of Article III diversity jurisdiction to their citizens, the Ninth Amendment caveat that “[t]he enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people,” and the Supreme Court trend of incorporating non-enumerated fundamental rights through substantive due process.\textsuperscript{255}

The district court found that the plaintiffs had standing to bring the case, and that

\textsuperscript{252} Id. at 233 (quoting U.S. Const. amend. XXIV (no poll taxes), XXVI (right to vote for citizen eighteen years of age and older)).

\textsuperscript{253} Id. at 234-35 (quoting \textit{Evans v. Cornman}, 398 U.S. 419, 421 (1970); \textit{Downes v. Bidwell}, 182 U.S. 244, 269 (1901); \textit{Reid v. Covert}, 354 U.S. 1, 5-6 (1957) (holdings listed are as summarized by the court).

\textsuperscript{254} Id. at 234-35.

\textsuperscript{255} Id. at 235 (citing U.S. Const. art. II, § 2, cl. 1, amend. IX; 28 U.S.C § 1738; \textit{Griswold v. Connecticut}, 381 U.S. 479, 482-83 (1965)).
injunctive relief or a declaratory order would serve as appropriate relief for their injury.\textsuperscript{256} As to whether the issue was a nonjusticiable political question, the court acknowledged that that challenges under the Guarantee Clause (guaranteeing to the states a republican form of government) are always held to be nonjusticiable “because if a State's government were declared unconstitutional, then all of its actions would be void and would result in chaos.”\textsuperscript{257} However, the court asserted that this was not the plaintiffs’ case, which was being brought under the umbrella of individual liberties, which the Supreme Court considers justiciable—especially the issues of legislative reapportionment.\textsuperscript{258} The court stated, “[t]here is no distinction between the instant case and the cases of gerrymandering, voting rights, and segregation insofar as justiciability is concerned. As in those cases, the instant case calls for the recognition of the existence of a fundamental right and its implementation,” and therefore it must be justiciable.\textsuperscript{259}

The district court argued that the use of the term “State” in the Twelfth Amendment, which laid out the procedure by which electoral votes should be counted, was merely another symptom of its time: it had been ratified in 1804, “before the inception and invention of the relationship between an unincorporated territory, like Puerto Rico, and the United States.”\textsuperscript{260} The district court thus held that U.S. citizens in Puerto Rico had the right to vote in presidential elections and that their electoral votes must be counted by Congress,\textsuperscript{261} and therefore ordered the Puerto Rican government to organize U.S. citizens in Puerto Rico for a popular vote, and to designate presidential electors, following the procedure laid out in the Twelfth Amendment.\textsuperscript{262}

The district court offered one last justification for its holding:

\textsuperscript{256} Id. at 236-37.
\textsuperscript{257} Id. at 237-38 (citing U.S. Const. art. IV, § 4; Luther v. Borden, 48 U.S. 1 (1849)).
\textsuperscript{258} Id. at 238 (citing, e.g., Smith v. Allwright, 321 U.S. 649 (1944); O’Brien v. Brown, 409 U.S. 1 (1972)).
\textsuperscript{259} Id. at 238.
\textsuperscript{260} Id. at 240 (quoting U.S. Const. amend. XII).
\textsuperscript{261} Id.
\textsuperscript{262} Id. at 241.
Voting is inherent to citizenship, not political status, and therefore recognizing that United States citizens residing in Puerto Rico may vote in Presidential elections and the implementation of such right does not alter or tend to alter the political status of Puerto Rico. The people of Puerto Rico obtained U.S. citizenship in 1917 and became natural born citizens under the Nationality Act. … To establish that Puerto Rico’s political status changes with the implementation of the Presidential vote would suggest that the political status of foreign countries changed with the enactment of UOCAVA, which recognizes the right of United States citizens residing abroad to vote in their last State of residence.  

Puerto Rican citizens rejoiced, and they received absentee ballot material from the Puerto Rican government two months later, in October 2000, in order to participate in the presidential elections in November of that year.  

However, the First Circuit quickly acted to reverse the district court’s holding.

(3) **Igartua II reversed (and Judge Torruella’s concurrence)**

The First Circuit reversed and vacated the district court’s judgment and remanded with orders to dismiss the case with prejudice, reasoning that since *Igartua I* had been handed down, Puerto Rico had not become a state, nor had a constitutional amendment been passed granting them the right to vote in presidential elections, and therefore *Igartua I* was still binding.  

More significantly, Circuit Judge Torruella, while concurring in the result, wrote an impassioned plea for the residents of the territories. He explained that for one hundred years, the United States had exercised “almost unfettered power” over Puerto Rico’s four million residents, who, despite being U.S. citizens at birth, enjoy fewer rights while living in Puerto Rico than the citizens residing in the United States or in foreign countries, the most unfair example being their disenfranchisement.  

Disparaging the *Insular Cases, Balzac v. Porto Rico*, and even Puerto Rico’s Commonwealth status, he argued that this indefinite holding of territories was the exact

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263 *Id.* at 241-42.
264 Guzman, *Igartua*, *supra* note 34, at 141.
265 *Igartua II*, 229 F.3d at 83-85.
266 *Id.* at 86 (Torruella, J., concurring).
concern expressed by the Court in *De Lima v. Bidwell*; citing Harlan’s dissent in *Downes v. Bidwell*, Judge Torruella wrote that “[t]he perpetuation of this colonial condition runs against the very principles upon which this Nation was founded. *Indefinite* colonial rule is not something that was contemplated by the Founding Fathers nor authorized *per secula seculorum* by the Constitution.”

267 Admitting that this case was not the proper venue to change the injustice, he nonetheless argued that “it is time to serve notice upon the political branches of government that it is incumbent upon them, in the first instance, to take appropriate steps to correct what amounts to an outrageous disregard for the rights of a substantial segment of its citizenry,” or possibly subject themselves to corrective action by the courts (à la *Brown v. Board of Education*).

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As explained above, the 84,000 residents of the Northern Mariana Islands live in a commonwealth of the United States and are U.S. citizens, both of which were established in the Covenant negotiated between the U.S. and the Northern Mariana Islands, ratified by Congress in 1976 (“Covenant”). In *U.S. ex. rel. Richards v. De Leon Guerrero*, the district court considered issues in the tax arena, and included a general overview of the applicability of federal law in the Covenant. In the Covenant, the people of the Commonwealth of the Northern Mariana Islands (“CNMI”) “voluntarily ceded full sovereignty to the United States, [which] necessarily includes application of all United States law to the CNMI, unless elsewhere expressly excluded by the Covenant or by Congress;” however, the Covenant reserved certain “fundamental provisions”

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267 *Id.* at 86-89.

268 *Id.* at 90.

which could not be modified without the consent of the government of CNMI.\textsuperscript{270} These fundamental provisions included their right to local self-government in § 103, and the application of the certain provisions of U.S. Constitution to the CNMI, “to the extent that they are not applicable of their own force,” as if the CNMI “were one of the several States,” in § 501.\textsuperscript{271} The court noted the significance of the use of the phrase “of their own force,” which implied that parts of the U.S. Constitution might be independently applicable without inclusion in the Covenant or extension by Congress.\textsuperscript{272}

In the controversy at bar, the CNMI argued that given the Covenant’s provisions, the Territory Clause does not apply to the CNMI of its own force, because such application would violate the right of self-government in Covenant § 103.\textsuperscript{273} The U.S. countered that the Territory Clause (along with the Interstate Commerce Clause, the Supremacy Clause, and others) must apply because Congress has no other source of power over the CNMI.\textsuperscript{274} The court agreed with the U.S., asserting that if these clauses did not apply, the CNMI would be “a de facto freely associated state or quasi-independent republic rather than a Commonwealth ‘in political union with and under the sovereignty of the United States of America.’” as is provided in Covenant §

\textsuperscript{270} Id. at *23 (citing Covenant §§ 101 (cession of sovereignty), 105 (limitation on Congress; provisions reserved include §§ 103 and 501)).
\textsuperscript{271} Id. at *23 (citing Covenant §§ 103 (“The people of the Northern Mariana Islands will have the right of local self-government and will govern themselves with respect to internal affairs in accordance with a Constitution of their own adoption”), and 501 (“(a) To the extent that they are not applicable of their own force, the following provisions of the Constitution of the United States will be applicable within the Northern Mariana Islands as if the Northern Mariana Islands were one of the several States: Article I, Section 9, Clauses 2, 3, and 8; Article I, Section 10, Clauses 1 and 3; Article IV, Section 1 and Section 2, Clauses 1 and 2; Amendments 1 through 9, inclusive; Amendment 13; Amendment 14, Section 1; Amendment 15; Amendment 19; and Amendment 26; provided, however, that neither trial by jury nor indictment by grand jury shall be required in any civil action or criminal prosecution based on local law, except where required by local law. Other provisions of or amendments to the Constitution of the United States, which do not apply of their own force within the Northern Mariana Islands, will be applicable within the Northern Mariana Islands only with approval of the Government of the Northern Mariana Islands and of the Government of the United States.”)).
\textsuperscript{272} Id. at *24.
\textsuperscript{273} Id. at *25.
\textsuperscript{274} Id. at *25.
101; under that ratio, “[t]he Congressional right to legislate with respect to the CNMI would be rendered meaningless.” 275

Because the CNMI raised a “voting rights” argument which had been circumvented in a previous case, the court chose to address the denial of the right to vote to CNMI residents. 276 The court held: 277

It is not surprising that the Congress has not chosen to provide equal federal legislative representation to the fewer than 45,000 inhabitants (approximately 20,000 U.S. citizens) of the CNMI that it has to the more than 500,000 constituents of each member of the U.S. House of Representatives. 278 The Constitution does not, by its terms, grant congressional representation to a non-state, Art. I, § 2, cl. 1, and voting for presidential electors is done by states and the District of Columbia. 279 The lack of CNMI representation has no effect on the applicability of validly promulgated congressional legislation. 280

The court added that because the people of the CNMI chose to associate themselves as a territory the United States, the “voting rights” argument was an attack on the very constitutionality of the Covenant itself, and on the constitutionality of the power of Congress to legislate anywhere pursuant to the Territory Clause. The indigenous people of the CNMI have exercised their self-determination by voluntarily affiliating with the United States, see Legislative History of the Covenant, Part VI.B., infra, as permitted under international law. A voluntary surrender of sovereignty is not tantamount to an unconstitutional denial of voting rights. 281

Thus, the voting rights of the people of the CNMI were permanently decided.


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275 Id. at *26.
276 Id. at *26 (citing Hillblom v. United States, 896 F.2d 426, 429-430 (9th Cir.1990)).
277 Id. at *26.
279 (Court’s citation) U.S. Const. art. II, § 1, cl. 2; U.S. Const. amend. XII; U.S. Const. amend. XXIII. See Attorney General of Guam v. United States, 738 F.2d 1017, 1019 (9th Cir.1984), cert. denied, 469 U.S. 1209 (1985) (no right to vote for President); Sanchez v. United States, 376 F.Supp. 239 (D.P.R.1974) (same).
280 (Court’s citation) See Alicea v. United States, 180 F.2d 870 (1950) (Selective Service Act applicable in Puerto Rico, notwithstanding lack of voting Congressional representation).
As mentioned above, the residents of the U.S. Virgin Islands were granted U.S. citizenship in 1927, merely ten years after they were purchased from Denmark. Currently, the 108,000 citizens residing in the U.S. Virgin Islands do not have the right to vote, although they have a non-voting delegate to the U.S. House of Representatives.\footnote{U.S. Virgin Islands, World Factbook: CIA, available at https://www.cia.gov/library/publications/the-world-factbook/geos/vq.html (last accessed January 27, 2008).} In 2006, a former stateside resident, who had been reassigned to the U.S. Virgin Islands in 1973 in connection with his employment as a United States Marshall and remained there since that time, brought suit alleging that (1) he had a right under the Constitution to vote in presidential elections; (2) he had the right to be represented in Congress by a voting member, (3) the Revised Organic Act of 1954 is unconstitutional, (4) Congress does not have the power to confer citizenship upon persons born in the Virgin Islands after 1917, and (5) the International Covenant on Civil and Political Rights provides residents of the Virgin Islands with substantive rights, including the right to vote for the President of the United States.\footnote{Ballentine \textit{v. United States}, 2006 U.S. Dist. LEXIS 96631 (2006), \textit{aff’d}, 486 F.3d 806, 809 (3rd Cir. 2007) (district court’s opinion adopted in full).} In \textit{Ballentine \textit{v. U.S.}}, the court found that Ballentine did not have standing to bring counts four and five, and they were not considered in the analysis.\footnote{Ballentine, 2006 U.S. Dist. LEXIS at *14-*19. However, this article considers the international law issues raised regarding the ICCPR in Section II.B.4, beginning \textit{infra} page 99).} 

The district court’s analysis was affirmed and adopted in full by the Third Circuit court of appeals, so the district court opinion is the language cited. On the first count regarding presidential elections, the court held that, because the right to vote for the president is reserved to the states, and the U.S. Virgin Islands is not a state, but an unincorporated territory of the United States, residents in the U.S. Virgin Islands did not have the right to participate in presidential elections.\footnote{\textit{Id.} at *5-*7.} As to congressional voting representation, the court stated:

Since 1972, the Virgin Islands has been represented in Congress by an elected, nonvoting Delegate in the House of Representatives who, unlike the House’s
voting membership, serves pursuant to legislation, not the Constitution. The Delegate from the Virgin Islands is not entitled to vote because the Virgin Islands is not a state and, pursuant to Article I of the Constitution, only states are entitled to regular voting members.\textsuperscript{286}

The court quoted \textit{Michel v. Anderson}, which held that, as regarded a challenge to voting delegates from the District of Columbia, Guam, American Samoa, and the Virgin Islands,

\begin{quote}
[o]ne principle is basic and beyond dispute. Since the Delegates do not represent States but only various territorial entities, they may not, consistently with the Constitution, exercise legislative power (in tandem with the United States Senate), for such power is constitutionally limited to “Members chosen…by the People of the several States.” It is not necessary here to consider an exhaustive list of the actions that might constitute the exercise of legislative power; what is clear is that the casting of votes on the floor of the House of Representatives does constitute such an exercise. Thus, unless the areas they represent were to be granted statehood, the Delegates could not, consistently with the Constitution, be given the authority to vote in the full House.\textsuperscript{287}
\end{quote}

Regarding Ballentine’s challenge that the 1954 act is unconstitutional because the Constitution applies to the territories and Congress did not have the authority to determine is application, the court reluctantly held that “[u]nder the unincorporation doctrine developed in the Insular Cases, the Court finds Congress did not exceed its constitutional authority in designating the Virgin Islands as an unincorporated territory in the Revised Organic Act of 1954,” adding that “this Court regrets the enduring “vitality” of the Insular Cases which articulate the Constitution’s limits on the government's ability to intrude in the lives of its citizens, depending on the physical location of those citizens.”\textsuperscript{288} The court unenthusiastically cited \textit{Reid v. Covert} for the proposition that “[i]t is the locality that is determinative of the application of the

\begin{footnotes}
\textsuperscript{287} Id. at *9-*10 (quoting Michel, 817 F.Supp. at 140 (quoting U.S. Const. art. I, § 8, cl. 1)).
\textsuperscript{288} Id. at *12.
\end{footnote}
\end{footnotes}
Constitution…and not the status of the people who live in it.”289

Thus, residents of the U.S. Virgin Islands have also been denied the right to vote in presidential and congressional elections.


As explained earlier, Guam residents received U.S. citizenship in 1950. These 173,000 citizens are also denied the right to participate in the electoral process for president, and do not have a voting representative in Congress, though they do have a non-voting delegate to the U.S. House of Representatives. In 1984, several residents of Guam who were qualified to vote in local elections filed suit, asking the court to declare that they had a right to vote in U.S. Presidential elections as part of the privileges and immunities of citizenship; the district court dismissed, and the Ninth Circuit affirmed that dismissal.290 Cited by all the other territorial voting rights cases in this section, the Ninth Circuit explained in Attorney General of the Territory of Guam v. U.S. that Guam is an unincorporated territory subject to Congressional plenary power under the Territory Clause and pursuant to the Organic Act of 1950, which incorporated the privileges and immunities clause of the Constitution and the equal protection clause of the Fourteenth Amendment, and that Guamanians are American citizens.291 The court held that:

[t]he Constitution does not grant to American citizens the right to elect the President, however…the right to vote inheres not in citizens but in states: citizens vote indirectly for the President by voting for state electors. Since Guam concededly is not a state, it can have no electors, and plaintiffs cannot exercise individual votes in a presidential election. There is not constitutional violation.292

Thus, U.S. citizens in Guam have also been denied access to the electoral franchise.

289 Id. at *12-*13 (quoting Reid v. Covert, 354 U.S. 1, 67 (1957)).
292 Id. at 1019 (citing U.S. Const. art. II, § 1, cl. 2).
g) American Samoa

American Samoans have had their own constitution since 1967, but have not received citizenship.293 A “national of the United States” is defined by federal statute as “(A) a citizen of the United States, or (B) a person who, though not a citizen of the United States, owes permanent allegiance to the United States.”294 As such, the 57,000 residents there are “nationals,” with fewer rights than their counterparts in other territories. They do have a non-voting delegate to the U.S. House of Representatives, but no voting rights, an issue which has yet to be contested in the courts.

D. Conclusion: United States in the District and the Territories Do Not Have the Right to Elect Voting Representation, so No, Their Domestic Right to Vote is Not Being Violated

Clearly, the status of the District and the territories has evoked serious controversy. But federal courts have been—and remain—clear on the point that the Constitution does not grant individuals in the United States the right to vote; that right is granted only indirectly to residents of the several states. Thus, (1) a constitutional amendment granting these citizens the right to elect the president (like the Twenty-Third Amendment for the District) and voting representation in Congress, or (2) statehood for each area desiring to vote, are the only existing options for residents in the District and the territories. It does not seem, however, that the Constitution bars Congress from legislating a new definition of “State” in the Constitution to include territories and federal enclaves. Such legislation, and other possible remedies (since judicial relief is barred), for these citizens will be revisited in the conclusion to Part II.F considering the U.S.’s obligations under the ICCPR, infra page 102, and explored in Part III.D, beginning infra page

293 American Samoa, World Factbook: CIA, supra note 147.
294 8 U.S.C. § 1101(a)(22). See also Igartua II (reversal), 229 F.3d at 86-87, n. 12 (per curiam).
Part II: Does this denial violate the International Covenant on Political and Civil Rights and/or the American Convention on Human Rights?

A. Answer: In A Word? No

Briefly, the ICCPR is not being violated because—combined with the attached U.S. reservations—it obligates the federal government to grant Covenant rights by taking only those necessary steps which accord with U.S. constitutional processes, and the Constitution restricts the federal government’s unilateral power to grant District and territory residents the right to vote. However, the ACHR is not being violated because the United States has not ratified it, and thus does not constitute an international obligation on the U.S. Despite the best efforts of the Inter-American Commission on Human Rights to bind the United States using the American Declaration on the Rights and Duties of Man, that document is merely a “noble statement of the human rights aspirations of the American States,” not a “binding set of obligations.”

B. Introduction: Sources of International Law

To understand whether U.S. federal action violates international treaties, one must first understand the nature of U.S. international obligations. This section will serve as a primer for the application of international law in the United States, though by no means a comprehensive one. As Justice McLean defined it in his dissenting opinion in *Dred Scott*,

International law is founded in the opinions generally received and acted on by civilized nations, and enforced by moral sanctions. It becomes a more authoritative system when it results from special compacts, founded on modified rules, adapted to the exigencies of human society; it is in fact an international morality, adapted to the best interests of nations…The laws of nations are but the

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Interpretation of the American Declaration of the Rights and Duties of Man
Within the Framework of Article 64 of the American Convention on Human Rights,
Like he hinted, there are two primary sources of international law: treaties and customary international law.

The Vienna Convention on the Law of Treaties (1969) defines a treaty as “an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.” States must first sign a treaty, and then officially “consent to be bound” by ratifying it (among other options). A treaty enters into force once a predetermined number of states have expressed their consent to be bound through ratification. Once it has entered into force, the tenet *pacta sunt servanda* is applicable: “Every treaty in force is binding upon the parties to it and must be performed by them in good faith.” But due to the difficulty in negotiating a perfect compromise between many parties, a state is allowed to attach reservations to its ratification, “whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State”; many states, including the U.S., consistently attach limiting reservations to their ratification of treaties. Noteworthy is the fact that the U.S. has yet to ratify the Vienna Convention on the Law of Treaties.

Customary international law, however, arises when the common practice among states is so well-established as to be considered a rule of international law; formed by magical thinking of sorts, the existence of customary international law requires not only the widespread state practice, but also *opinio juris*: the states’ common belief that this practice is legally required.

296 *Scott v. Sandford*, 60 U.S. 393, 556 (1856) (McLean, J., dissenting) (internal citation and quotation marks omitted).
298 VCLT arts. 2(1)(b), 14.
299 VCLT § 3.
300 VCLT art. 26.
301 VCLT art. (2)(1)(d), § 2.
From under this umbrella of customary international law comes the concept of *jus cogens*: peremptory norms considered so essential to humanity that a state cannot derogate from its obligation to protect them, such as the prohibitions on torture or genocide. These norms trump all other international law: if a ratified treaty conflicts with one of these norms, the norm prevails. Like treaties, customary international law is considered binding on states; however, once proven, *all* states must follow customary international law (unless a state can demonstrate that it has persistently objected to the practice).

There are a few other sources of persuasive international norms. One is the idea of “general principles of law,” or procedural legal norms which seem to arise in most countries (for example, allowing a criminal defendant to confront his accuser, or limiting the death penalty to legal adults). These general principles of law (legally distinct from so-called “international law”) are typically explained by respected jurists in treatises. Another source, called “soft law,” comes from international bodies like the UN’s General Assembly, which passes resolutions encouraging states to adopt a certain policy or practice. These resolutions are not binding on states, but are considered persuasive authority. Decisions by the International Court of Justice are given similar “soft law” weight.\(^\text{302}\)

Because the questions presented in this research include a general question as to possible remedies where U.S. judicial decisions contravene an international convention, both U.S. treaty law and the application of customary international law in the United States are relevant to the discussion. The following sections will briefly survey the implementation of customary international law in domestic U.S. law and the foundations of treaty law in the United States.

\(^\text{302}\) Some theorists, particularly those in the Third World, hoped that later such “soft law” sources would be treated as binding, under the assumption that they would be considered so widely accepted as to reflect customary international law. The idea was to use the massive participation in the General Assembly as an alternative means of international law-making, a concept which did not catch on.
C. Customary International Law in the United States: Subject to Judicial Interpretation

1. Theories of International Law as Federal and/or State Common Law in the United States: the Constitution, Charming Betsy, and Swift v. Tyson

There are two prevailing views as to how customary international law was originally incorporated into U.S. domestic law: the statehood position and the inheritance position. The statehood view posits that international law adhered to the United States upon independence, because “[a]n entity that becomes a State in the international system is ipso facto subject to international law”; as such, international law became binding on the United States as a nation, but not on the several states, even though the states were the entities that could legislate the country’s international obligations. Conversely, the inheritance position explains that customary international law was received as part of the British common law inherited after independence in 1776, since the law of nations was part of English law; customary international law would thus have been inherited by each of the states independently, “either as state common law, or by incorporation pursuant to the state’s international obligations or those of the United States,” remaining state law until the Constitution or Congress rendered it federal law.

The U.S. Constitution did not expressly incorporate customary international law as domestic law, although it acknowledged the existence of common international obligations in several places, including the grant of power to Congress to “define and punish Offenses against the Law of Nations,” and the grant of original Supreme Court jurisdiction over cases involving treaty interpretation, maritime law, and foreign parties (including ambassadors, foreign states and

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304 Henkin, International Law as Law, supra note 303, at 1555-57.
their citizens). The legislative and judicial branches of the federal government took these references to mean that the U.S. had some sort of obligation to international law, but subject to constitutional (and congressional) limitations: in 1804, the Supreme Court declared in *Murray v. Schooner Charming Betsy* that “an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains,” and Congress vacillated between incorporating international law and explicitly supplanting it with federal legislation.

The question of whether international law was state or federal law also remained unanswered by Congress and the judiciary. Under the 1842 Supreme Court case *Swift v. Tyson*, federal and state courts determined and applied the common law separately, but both systems interpreted international law to be incorporated into “the common law,” whether state or federal. The Supreme Court agreed: Chief Justice Marshall stated in *The Nereide* that until Congress has passed an act stating otherwise, “the Court is bound by the law of nations which is a part of the law of the land,” and Justice McLean noted in *Dred Scott* that “[i]n 1816, the common law, by statute, was made a part of the law of Missouri; and that includes the great principles of international law. These principles cannot be abrogated by judicial decisions.”

It seemed that “[c]ommon law was neither federal nor state, as it did not pertain to any sovereign, but was common to all.”

### 2. Judicial Application of Customary International Law as Federal (Common)

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305 U.S. Const. art. I, § 8, cl. 10 (Congressional power over the offenses against the law of nations); art. III, § 2 (original Supreme Court jurisdiction). See also Henkin, International Law as Law, *supra* note 303, at 1558; Stephens, Law of Our Land, *supra* note 303, at 404-08.


309 Scott v. Sandford, 60 U.S. at 556 (McLean, J., dissenting).

310 Stephens, Law of Our Land, *supra* note 303, at 410 (and see also accompanying footnotes).

The historical application of customary international law in the United States is best illustrated by the Supreme Court’s decision in *The Paquete Habana*, in which the Court considered whether to apply in the United States the longstanding international law rule that coast fishing vessels were exempt from capture as a prize of war.\(^{311}\) Without reference to state or federal law, the Court first observed that “International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination.”\(^{312}\) The Court explained the procedure for this inquiry: “where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations.”\(^{313}\) The Court added that to prove these customs and usages, courts must refer to “the works of jurists and commentators, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.”\(^{314}\) After exploring in depth the customary application of the rule by European nations at war (as evidenced by European judicial conclusions and the observations of expert maritime jurists), the Court concluded that

\[\text{A}t\] the present day, by the general consent of the civilized nations of the world, and independently of any express treaty or other public act, it is an established rule of international law, founded on considerations of humanity to a poor and industrious order of men, and of the mutual convenience of belligerent states, that coast fishing vessels…are exempt from capture as prize of war.\(^{315}\)

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\(^{311}\) *The Paquete Habana*, 175 U.S. 677 (1900).

\(^{312}\) *Id.* at 700. *See also* Stephens, Law of Our Land, *supra* note 303, at 448-53.

\(^{313}\) *Id.*


\(^{315}\) *Id.* at 708.
This holding encapsulates the essence of customary international law: general consent of the states to a certain practice as international law despite no express agreement establishing it as one. The Court went on to hold that such a “rule of international law is one which…courts, administering the law of nations, are bound to take judicial notice of, and to give effect to, in the absence of any treaty or other public act of their own government in relation to the matter.”

The conditional aspect of a custom’s binding nature is important: customary international law applies only where there is no public act by the state’s domestic government and where there is no treaty discussing the issue. This aspect will be essential to the analysis of the right to vote for U.S. citizens as rooted in an international norm of democracy.

The Supreme Court overturned *Swift v. Tyson* in *Erie Railroad v. Tompkins*, holding that separate state and federal common law doctrines violated the very notion of federalism by invading those areas reserved to the states by the Constitution. Justice Brandeis declared: “Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state...there is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a state…” This proclamation profoundly changed the judicial process, even with regard to international law: federal courts began to assume international law was part of the state common law, and were to bound to interpret international law as had the courts of the state where the federal court sat. Even stranger, the Supreme Court was assumed to have no authority to review state

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316 Id.
318 *Erie Railroad v. Tompkins*, 304 U.S. at 78 (Brandeis, J.).
interpretation of international law as an independent “federal question.”\textsuperscript{320} Shortly after Erie was passed, Philip C. Jessup (later a judge on the International Court of Justice) argued against the destruction of “federal common law” with regard to international law:

\begin{quote}
[A]ny attempt to extend the doctrine of the Tompkins case to international law should be repudiated by the Supreme Court. Mr. Justice Brandeis was surely not thinking of international law when he wrote his dictum. Any question of applying international law in our courts involves the foreign relations of the United States and can thus be brought within a federal power...The duty to apply [international law] is one imposed upon the United States as an international person. The several states of the Union are entities unknown to international law. It would be as unsound as it would be unwise to make our state courts our ultimate authority for pronouncing the rules of international law.\textsuperscript{321}
\end{quote}

Judge Jessup’s formulation is largely the construction used by federal courts today, approved by the Supreme Court in 1964 in Banco Nacional de Cuba v. Sabbatino, and confirmed in the human rights arena by the Second Circuit in Filártiga v. Peña-Irala in 1980.\textsuperscript{322}

Considering whether to apply the Act of State doctrine to preclude justiciability over whether Cuba’s expropriation of alien property violated international law in Sabbatino, the Supreme Court noted that its conclusions might be the same whether international law were a part of state or federal law, but then cited Judge Jessup to shed light on the domestic status of international law. The Court disclosed:

\begin{quote}
However, we are constrained to make it clear that an issue concerned with a basic choice regarding the competence and function of the Judiciary and the National Executive in ordering our relationships with other members of the international community must be treated exclusively as an aspect of federal law...rules of international law should not be left to divergent and perhaps parochial state
\end{quote}


The Court went on to create a federal common law rule to govern when a federal court may incorporate international law, comprising what some have called a “sliding scale”: “the greater the degree of codification and consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it…”\(^{324}\) In \textit{Sabbatino}, the Court found that the purported “norm” regarding private property expropriation was actually a principle of international law which admitted different interpretations by various political systems (i.e., capitalism vs. communism).\(^{325}\) The Court thus distinguished between unsettled areas of international law and “areas of international law in which consensus as to standards is greater and which do not represent a battleground for conflicting ideologies.”\(^{326}\) Furthermore, the Court committed itself to the development of enclaves of “federal common law”: “a few areas involving uniquely federal interests so committed…to federal control that state law is pre-empted and replaced, by federal law…prescribed (absent explicit statutory directive) by the courts.”\(^{327}\) Since the Court’s clarification in \textit{Sabbatino}, four general principles have been considered “well-established” for the purposes of interpreting international law in the United States:\(^{328}\)

1. International law incorporated into domestic U.S. law is federal law, not state law, and as such, incorporated international law is part of “the Laws of the United States”;

2. Hence, Article III grants federal courts jurisdiction over cases arising under international law, and international law is the “supreme Law of the Land” under Article IV;

3. And therefore, international law is to be determined by the federal courts, and ultimately by the Supreme Court, and these determinations are binding on state


\(^{326}\) \textit{Sabbatino}, 376 U.S. at 430 n. 34.

\(^{327}\) \textit{Boyle v. United Techs. Corp.}, 487 U.S. 500, 504 (1988) (internal citations and quotations marks omitted).

\(^{328}\) The first three principles are adapted from Henkin, International Law as Law, \textit{supra} note 303, at 1559-60; the fourth is from Goodman & Jinks, \textit{Filártiga’s Firm Footing}, \textit{supra} note 321, at 483-85. \textit{See also} Koh, Is International Law Really State Law?, \textit{supra} note 319, at 1835; Stephens, Law of Our Land, \textit{supra} note 303, at 445-46.
courts; a state court’s determination of international law is subject to Supreme Court review.

4. Furthermore, Sabbatino established limited enclaves of federal common law for U.S. foreign relations, due to unique federal interests and the need for national uniformity in interpreting international law; hence, if a claim is based on “bona fide” norms of customary international law, it is justiciable.

Scholars are quick to distinguish customary international law from federal common law: both are superior to state law, binding on the states, and subject to Supreme Court appellate review, but customary international law, unlike federal common law, is not independently created by the federal courts, but rather “found” and interpreted by the courts in accordance with the legacy of state practice.\textsuperscript{329} The distinction is important: the hierarchical position of federal common law is low, subject to judicial overturning; customary international law as part of the “laws of the United States” is self-executing, occupying a place similar to treaties and statutes and safeguarding its federal supremacy.\textsuperscript{330}

The lone dissenting voice to this construction is the revisionist view, which argues that the characterization of customary international law as federal common law under the “modern position” is flawed, because the Constitution grants Congress and the president the power to enact customary international law through statutes and treaties, and not by any other manner; in fact, the repetitive attachment of reservations to the U.S. signature on treaties emphasizes that the U.S. did not and does not intend for international obligations to trump constitutional grants and limitations on power.\textsuperscript{331} Furthermore, the critique of the “modern position” asserts that the development of a federal common law was halted in \textit{Erie} not because it was judicial legislation, but rather because certain decisions amounted to \textit{unauthorized} judicial lawmaking, and nothing in the Constitution or federal legislation authorizes the creation of a federal common law for the

\begin{footnotesize}
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\item \textsuperscript{329} Henkin, International Law as Law, \textit{supra} note 303, at 1561-62.
\item \textsuperscript{330} Henkin, International Law as Law, \textit{supra} note 303, at 1565-66.
\end{itemize}
\end{footnotesize}
application of international law; considering that the U.S. is a representative democracy, and customary international law is created and applied without the consent of the governed people, it simply cannot be a source of federal law.\textsuperscript{332}


However, the courts have not followed the revisionist view, and neither have most scholars.\textsuperscript{333} The so-called “modern position” created in \textit{Sabbatino} has been accepted in the Restatement (Third) of Foreign Relations Law: § 102 states that “Customary international law results from a general and consistent practices of states followed by them from a sense of legal obligations” and § 112 implements such customary international law in the U.S., subject to an element of reasonableness: “Where fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States,” a construction drawn from \textit{Charming Betsy}.\textsuperscript{334}

The fundamental nature of customary international law has even prevailed even in the human rights arena, where the United States and its judiciary are especially skittish about incorporating international law. In 1980, the Second Circuit considered an appeal by Dolly Filártiga, a political refugee from Paraguay living in Washington D.C., who was suing Paraguayan citizen Americo Peña-Irala, former Inspector General of Police in Asunción,

\textsuperscript{332} Bradley & Goldsmith, Critique, \textit{supra} note 331, at 855-57. \textit{See also} Goodman & Jinks, \textit{Filártiga’s Firm Footing}, \textit{supra} note 321, at 476-79 (summarizing the critique); Koh, Is International Law Really State Law?, \textit{supra} note 319, at 1827-30 (explaining the basic foundation of the critique).


\textsuperscript{334} Restatement (Third) of Foreign Relations Law (1987), §§ 102, 112. \textit{See also} \textit{Charming Betsy}, 6 U.S. 64, 118 (1804).
In 1978, Filártiga had sued Peña-Irala (who had arrived in New York on a visitor’s visa) for damages to compensate her for torturing and subsequently wrongfully killing her brother in his line of duty in 1976, and the district court had dismissed the case for lack of subject matter jurisdiction. In the appeal, Filártiga argued that because the torture committed on her brother violated the emerging prohibition against torture under the law of nations, federal jurisdiction was granted by the Alien Tort Claims Act, which gave district courts “original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”

Citing “the universal condemnation of torture in numerous international agreements, and the renunciation of torture as an instrument of official policy by virtually all of the nations of the world (in principle if not in practice),” the court held that “an act of torture committed by a state official against one held in detention violates established norms of the international law of human rights, and hence the law of nations.” This holding confirmed the *Sabbatino* sliding scale for incorporating international law and created a three-prong test to evaluate whether a norm of customary international law is judicially cognizable: it must be (1) universal, (2) definable, and (3) obligatory (a standard which effectively limits incorporated norms to those bearing the *jus cogens* label).

Applying this test, the court held that because “courts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today,” the Court ruled that, *inter alia*, the United Nations Charter, the Universal Declaration of Human Rights, the Charter of the Organization of American States, the American Convention on Human Rights, and the ICCPR, provided justification for allowing a

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335 Filártiga, 630 F.2d at 878-79.
336 Filártiga, 630 F.2d at 878-79.
337 Alien Tort Claims Act, 28 U.S.C. § 1350; Filártiga, 630 F.3d at 880.
338 Filártiga, 630 F.2d at 880.
339 Filártiga, 630 F.2d at 885-87. See also Goodman & Jinks, Filártiga’s Firm Footing, supra note 321, at 495.
judicial remedy for torture in the United States for crimes committed elsewhere by citizens of other states.\textsuperscript{340} The court then concluded that according to these bodies, “international law confers fundamental rights upon all people vis-à-vis their own governments[, and] the right to be free from torture is now among them.”\textsuperscript{341} The court explicitly rejected the proposition that the law of nations is part of the law of the United States only to the extent that Congress has enacted it, citing a long line of U.S. jurisprudence interpreting rules of international law without express authorization by an act of Congress.\textsuperscript{342} Proponents of the modern position soften the effect of such judicial legislation by touting political oversight as the saving grace of customary international law in a democratic society: “federal common law rules of customary international law are perennially subject to a democratic check: supervision, revision, and endorsement by the federal political branches.”\textsuperscript{343}

Following the \textit{Filártiga} line, then, the \textit{Paquete Habana} is still good law in the United States, regularly cited by the Supreme Court and lower federal courts for the proposition that—for the limited purpose of a federal common law of foreign relations—international law is part of our law; that is, universal customary international law is federal common law unless and until the executive or the legislative branches expressly limit the scope of its application to U.S. law.\textsuperscript{344} The effect of this jurisprudence will be considered below in the discussion of the contemporary application of human rights norms in the United States (Section II.D, beginning \textit{infra} at page 92).

\section*{D. Application of Treaties as Law in the United States: Not Nearly so Subject to Judicial Interpretation}

\begin{footnotesize}
\begin{enumerate}
\item Filártiga, 630 F.2d at 882-85. \textit{See also} Goodman & Jinks, \textit{Filártiga’s Firm Footing}, supra note 321, at 495.
\item Filártiga, 630 F.2d at 885 (citing \textit{United States v. Smith}, 18 U.S. 153, 158-60 (1820)).
\item Koh, Is International Law Really State Law?, supra note 319, at 1855.
\end{enumerate}
\end{footnotesize}
1. Treaty-Making Power in the Constitution

Contrary to the ambiguous nature of customary international law, the Constitution explicitly grants the President the authority, “by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur; “to make it perfectly clear, states are expressly prohibited from entering into treaties.” Treaties are declared by the Constitution to be “supreme Law of the Land,” along with the “Constitution and the Laws of the United States.” The equal authority of statutes and treaties is often repeated by the Supreme Court; it is not unconstitutional for Congress to pass a law which conflicts with an earlier treaty, nor is it unconstitutional for the president to sign a treaty that conflicts with a previous congressional act—the last treaty or statute enacted will simply govern the law in that area (the “later-in-time” rule), subject to the superior constraints of the Constitution. However, a statute inconsistent with the Constitution is void, while a treaty inconsistent with the Constitution is merely unenforceable in the U.S., though still binding internationally.

2. The Self-Executing Caveat: Foster v. Neilson

The limitation on a treaty’s equal status with a statute springs from whether it is self-executing: whether the treaty operates as law in the United States without Congressional

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345 U.S. Const. art. I, § 10 (prohibition on states entering into treaties); art. II, § 2, cl. 2 (presidential treaty-making power).
346 U.S. Const. art. VI, § 2.
347 Henkin, International Law as Law, supra note 303, at 1562-64. See also Stephens, Law of our Land, supra note 303, at 397-98. Additionally, as summarized by De Lima v. Bidwell (1901), see, e.g., United States v. The Peggy, 5 U.S. 103 (1801) (Marshall, C.J.) (“Where a treaty is the law of the land, and as such affects the rights of parties litigating in court, that treaty as much binds those rights, and is as much to be regarded by the court, as an act of Congress.”); Foster v. Neilson, 27 U.S. 253, 314 (1829) (“The Constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision.”); Whitney v. Robertson, 124 U.S. 190 (1888) (“By the Constitution a treaty is placed on the same footing, and made of like obligation, with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other. When the two relate to the same subject the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either; but if the two are inconsistent, the one last in date will control the other, provided always that the stipulation of the treaty on the subject is self-executing.”); Cherokee Tobacco, 78 U.S. 616 (1870); et al.
348 Henkin, International Law as Law, supra note 303, at 1562-63.
legislation enacting its provisions. The Supreme Court distinguished between self-executing and non-self-executing treaties as early as 1829 in *Foster v. Neilson.*[^349] In *Foster,* Chief Justice Marshall explained that under the law of nations, a treaty is a contract between two nations, and not a legislative act; it must be enacted before it becomes law.[^350] He then noted that this principle does not hold in the United States: “Our constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision,”[^351] that is, whenever it is self-executing. The Court then defined a non-self-executing treaty: “when either of the [state] parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court.”[^352] In Marshall’s view, non-self-executing treaties merely “pledge the faith of the United States to pass acts which shall ratify and confirm them.”[^353]

Scholars argue as to whether the Supremacy Clause creates a presumption that all treaties are self-executing, under which non-self-executing treaties comprise a limited and rare exception, or if Marshall created two categories under which all treaties must be classified: one category for self-executing treaties, and other categories for treaties trespassing on Congressional powers within Article I, § 8 of the Constitution. Nearly all scholars assert that the Supremacy Clause requires the courts to enforce treaties without Congressional legislation, arguing that the “tendency in the Executive branch and in the courts to interpret treaties and treaty provisions as non-self-executing runs counter to the language, and spirit, and history of Article VI of the

[^350]: Id. at 314.
[^351]: Id.
[^352]: Id.
[^353]: Id. See also Yoo, Globalism, supra note 349, at 2088.
Furthermore, they add, constitutional amendments declaring all treaties to be non-self-executing have been consistently rejected by Congress, most recently in the defeated Bricker Amendment in 1953. Critics argue that the Constitution’s text, the framers’ intent and the legislative history prove that the President, the Senate, and House were meant to play equal roles in the adoption of international obligations, and that the need for legislative enactment is a crucial democratic check on the executive treaty power. Requiring congressional implementation for treaties, then, respects the fundamental separation of powers in the Constitution, ensure that treaties do not assume an unbounded legislative power, and promotes the democratic aims of the Constitution by ensuring that domestic legislation is approved by the people (through their elected representatives). Regardless of their scope, the two categories exist; and the U.S. tenaciously attaches reservations classifying human rights treaties as non-self-executing (making the point moot for the purposes of this research).

A noted international law scholar aptly sums up the prevailing view on treaties, statutes, and customary international law in the U.S. federal system:

the uniquely federal area of foreign relations operates on an entirely federal plane, with statutes and treaties providing the positive law framework and federal common law rules (interpreting statutes, treaties, and customary international law) filling the interstices. As Congress and the executive branch exercise their supervisory powers, federal common law doctrine evolves and mutates to reflect

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357 Yoo, Treaties, supra note 356, at 2218.
the changing face of international law.\textsuperscript{358}

As such, both norms of customary international law and mandates of treaties are sources of United States obligations under international law.

E. International Human Rights Obligations: An Overview


Following World War II, the latter half of the twentieth century has seen a dramatic shift in the international promulgation of individual rights. The Nazi Holocaust moved human rights from the sphere of domestic concern to the world stage, prompting states to incorporate protection for human rights in the Charter for the United Nations itself. Article 1 of the Charter requires member states to “achieve international cooperation…in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion.”\textsuperscript{359} In Articles 55 and 56 of the Charter, the UN promised to promote “universal respect for, and observance of, human rights and fundamental freedoms,” and the signatory states “pledge[d] themselves to take joint and separate action” to do so.\textsuperscript{360} To that end, Article 68 of the Charter mandated a Commission on Human Rights under the UN Economic and Social Council’s oversight “for the promotion of human rights.”\textsuperscript{361}

Two other UN Charter articles are relevant to this research: member states’ responsibilities towards territories and the provision regarding the jurisdiction of the UN’s judiciary, the International Court of Justice (ICJ). As to territories, the UN Charter declares in Article 73 that member states responsible for “the administration of territories whose peoples have not yet attained a full measure of self-government” must, \textit{inter alia}, “ensure, with due

\textsuperscript{358} Koh, Is International Law Really State Law?, \textit{supra} note 319, at 1839.
\textsuperscript{359} UN Charter art. 1.
\textsuperscript{360} UN Charter arts. 55, 56.
\textsuperscript{361} UN Charter art. 68.
respect for the culture of the peoples concerned, their political, economic, social, and educational advancement, their just treatment, and their protection against abuses,” and also “develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory…”362 The UN considers American Samoa, Guam, and the U.S. Virgin Islands to be three of the sixteen remaining non-self-governing territories in the world.363

The UN Charter also declares members states to be ipso facto parties to the ICJ Statute under Article 93, and in Article 94, member states agree “to comply with the decision of the International Court of Justice in any case to which it is a party,” and allow recourse to the Security Council if a state “fails to perform the obligations incumbent upon it under a judgment rendered by the Court.”364 However, under the ICJ Statute, acceptance of this compulsory jurisdiction was optional, and the U.S. chose to attach certain conditions to its acceptance: the U.S. stated that the ICJ’s jurisdiction shall not extend to matters essentially within the domestic jurisdiction of the United States (a reservation consistent with the UN Charter), and then qualified that limitation with the declaration that the United States, not the ICJ, would make the decision as to whether a matter fell within U.S. domestic jurisdiction. This reservation prompted many other states to attach a similar condition to ICJ jurisdiction, severely limiting the ICJ’s ability to determine its docket and decide cases. As will be explored below, the U.S.’s continued exemption from the jurisdiction of international tribunals effectively eliminates judicial remedies for violations of international obligations.

362 UN Charter art. 73.
364 UN Charter arts. 93, 94.
The Commission on Human Rights, chaired by Eleanor Roosevelt, began work immediately in 1945 drafting the Universal Declaration of Human Rights (UDHR), a project to enumerate the fundamental rights held by all people in the world.\footnote{Universal Declaration of Human Rights, G.A. res. 217 A (III) (1948).} The UDHR was adopted by the UN’s General Assembly on December 10, 1948, proclaiming in the preamble that “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,” and affirming that “it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law.” The adoption of the UDHR led to the creation of the two elaborating bodies in 1966, the International Covenant on Civil and Political Rights (“ICCPR” or “Covenant”) and the International Covenant on Economic, Social, and Cultural Rights (“ICESCR”), and the three documents together are considered the International Bill of Rights.\footnote{International Covenant on Civil and Political Rights (ICCPR), G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976; International Covenant on Economic, Social and Cultural Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, entered into force Jan. 3, 1976.} For monitoring and implementation purposes, the ICCPR created the Human Rights Committee (HRC), which was granted jurisdiction by the First Optional Protocol to the ICCPR to hear individual complaints about State violations of Covenant rights; as with the ICJ, the United States has not ratified this protocol and thus is not subject to the HRC’s review process (though the HRC still has oversight powers, discussed infra page 111).

2. Regional historical background: The Organization of American States and the Inter-American System

The Charter of the Organization of American States (OAS) was signed by 21 states in the North, Central, and South Americas and the Caribbean in 1948 to promote fulfillment of the
American States’ obligations under the UN Charter, among which the Charter included the “promot[ion] and consolidat[ion] of representative democracy, “with due respect for the principle of nonintervention.”367 The OAS Charter created the Inter-American Commission on Human Rights (the Commission), which monitors the American States’ implementation of its international obligations. The signing of the OAS Charter was accompanied by the adoption of the American Declaration of the Rights and Duties of Man (American Declaration), which included the entitlement in Article 20 “to participate in the government of his country, directly or through his representatives, and to take part in popular elections, which shall be by secret ballot, and shall be honest, periodic and free.”368 The American Declaration also guaranteed equal protection before the law for all people in Article 2, along with a judicial remedy for the violation of “fundamental constitutional rights” in Article 18. As a Declaration (like the UDHR), however, it is not binding on states—it just affirms their commitment to the principles expressed.

In 1969, the OAS opened for signature the American Convention on Human Rights (ACHR or the Convention), which—following the example of the UDHR—enumerated lists of civil and political rights similar to those in the ICCPR, along with economic, social and cultural rights found in the ICESCR.369 The ACHR also expanded the role of the Commission to review disputes, and also established the Inter-American Court of Human Rights, requesting that ratifying states accept its compulsory jurisdiction to hear matters regarding the application and interpretation of the Convention. The ACHR entered into force in 1976 (although the United States still has not ratified it since signing in 1978). Finally, in 2001, the OAS adopted a

resolution entitled the “Inter-American Democratic Charter,” which—like the UN Charter and the OAS Charter—affirms the democratic principles upon which these international organizations are established, but does not create binding obligations on member states.\(^{370}\) It does, however, go into great detail as to the ideal nature of a representative democracy, which includes the following “essential elements”:

- respect for human rights and fundamental freedoms, access to and the exercise of power in accordance with the rule of law, the holding of periodic, free, and fair elections based on secret balloting and universal suffrage as an expression of the sovereignty of the people, the pluralistic system of political parties and organizations, and the separation of powers and independence of the branches of government.\(^{371}\)

Furthermore, the IADC threatens suspension from the OAS if the member state undergoes an “unconstitutional alteration of the constitutional regime that seriously impairs the democratic order.”\(^{372}\)

These institutions and treaties make up the international legal framework under which States interact to create and interpret international human rights law. The ICCPR and the ACHR, as the legally binding international bodies under the present inquiry, will be explored in greater detail *infra*. However, the methods by which international human rights law is domestically implemented (or not) in the United States must be explored first.

### 3. Methods of Human Rights Integration Generally

A noted human rights scholar distinguishes three aspects of legal rights (as opposed to natural or God-given rights): (1) the consensual aspect stemming from the domestic enacting of positive law establishing the right; (2) the suprapositive element rooted in the right’s normative

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\(^{371}\) IADC art. 3.

\(^{372}\) IADC arts. 20, 21.
character, independent of such enactment; and (3) the institutional quality of a right as enacted, creating compliance and enforcement mechanisms.\(^\text{373}\) International human rights, and their dependence on customary international law and conventions, are especially weighted on the suprapositive element, resulting in a high likelihood of divergence between the domestic enactment of the right, and the international framing of the norm. Rather than creating rules of state interaction as most treaties do, international human rights law governs the way states treat their own people; as such, “[t]he central purpose of international human rights law is to call into question the positive legal practices that fail to respect universal values.”\(^\text{374}\)

To discover how this purpose of international human rights law is accomplished, another scholar gives five possible reasons why nations obey international law: (1) power; (2) self-interest (rational choice); (3) to establish legitimacy or political identity; (4) sense of duty as a part of the global community; or (5) negotiated sense of obligation as part of the horizontal legal process (discussions between governments) or the vertical legal process (discussions among governments, nongovernmental organizations, and private citizens, also known as the transnational legal process).\(^\text{375}\) He argues that of the five, the transnational legal process is the most successful method by which human rights are integrated: their promotion begins with private grassroots organizations that mobilize networking and awareness movements, which in turn encourage governments and nongovernmental organizations to declare and interpret new human rights norms, resulting in the internalization—and ultimately the institutionalization—of these norms in both domestic and international legal frameworks.\(^\text{376}\) The involvement of all these


\(^{374}\) Id. at 85. See also Neuman, HR & CR, supra note 373, at 1869.


\(^{376}\) Koh, How Enforced?, supra note 375, at 1409-11.
actors results in a default pattern of compliance, since they are invested in the new norm’s success.\textsuperscript{377} This largely theoretical approach, however, has seldom resulted in the creation of new norms.\textsuperscript{378} Furthermore, even states like the U.S., whose individual rights framework has heavily influenced the development of international human rights, tend to limit the creation of new norms by curbing the influence of newly ratified human rights treaties.

4. Application of Human Rights Norms in the United States

a) U.S. Reservations, Understandings and Declarations (RUDs) to Human Rights Conventions

As mentioned above, states are permitted to attach packages of RUDs to their treaty ratification in order to limit that treaty’s legal effects within their borders. The United States uses this permission most broadly in the human rights arena, where its ratification is subject to the five following principles:\textsuperscript{379}

1. The United States will not undertake any treaty obligation that it will not be able to carry out due to its conflict with the U.S. Constitution;
2. United States ratification of an international human rights treaty will not change (or promise to change) existing U.S. law or practice; rather, its obligations will be undertaken to the extent that the Constitution already creates those obligations;
3. The United States will not submit to the jurisdiction of the International Court of Justice to decide disputes over interpretation or proper application of human rights conventions;
4. Human rights treaties must be subject to a “federalism clause” to reserve implementation of their obligations to the several states, as required by the Constitution; and
5. International human rights agreements must be non-self-executing.

Scholars argue that by attaching these reservations to human rights conventions, the U.S. is “pretending to assume international obligations but in fact is undertaking nothing. It is seen as

\textsuperscript{377} Id.
\textsuperscript{378} See, \textit{e.g.}, Stephens, Law of Our Land, \textit{supra} note 303, at 455-56.
\textsuperscript{379} Adapted from Henkin, Ghost of Senator Bricker, at 341.
seeking the benefits of participation [i.e., Human Rights Committee representation] without assuming any obligations or burdens.”

b) Human Rights Integration in the United States: General Political and Jurisprudential Observations

However, even these proponents of human rights admit that such reservations have solid support in Supreme Court jurisprudence: unlike other constitutional courts, the Supreme Court shies away from finding that the Constitution intended to allow judicial implementation of international human rights obligations; however, “the international human rights regime does not call for implementation at the constitutional level, only compliance…in the U.S. system of government, Congress retains ultimate control over the means of implementing—or breaching—a treaty.” Thus, using international human rights treaties to interpret the Constitution “would deprive the political branches of their authority to choose methods of treaty implementation,” which would itself violate the Constitution. Thus, experts on both sides tend to agree that non-self-executing treaties best protect the separation of powers doctrine and the democratic spirit enshrined in the Constitution.

However, as explained above in the discussion of customary international law, under a limited “federal common law of universal human rights,” the Supreme Court will enforce “bona fide” norms of customary international law. Only seven such jus cogens norms have been duly recognized, including prohibitions on genocide, torture, murder, slavery, and “systemic racial discrimination,” and none are controversial in the United States. A survey of cases under the ATCA shows that courts have consistently permitted jurisdiction to flow under these jus cogens norms.

380 Henkin, Ghost of Senator Bricker, supra note 355, at 344.
381 Neuman, Uses, supra note 306, at 88.
382 Id. at 89.
384 Restatement (Third) § 702. See also Stephens, Law of Our Land, supra note 303, at 455.
norms, while denying it for claims based on like expropriation of property, fraud, or free speech, due to “sharply conflicting views” of these rights across different political systems—a violation of the law of nations must be based on mutual condemnation, rather than a concern merely held by several nations. Thus, the U.S. has accepted a limited set of international obligations, some of which are governed by treaties. The ICCPR and the IADC, however, establish a broad range of civil and political rights, and both collections of international obligations have proven difficult for the U.S. to implement.

F. International Covenant on Civil and Political Rights (ICCPR)


The ICCPR was opened for signature in 1966, and entered into force on March 23, 1976. It created the Human Rights Committee to monitor its implementation in the ratifying states. Several of the Articles in the ICCPR can be read to relate to the right to vote. Article 1(1) guarantees that “All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.” Article 1(3) elaborates on the situation of territories,

The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

In pursuit of Article 1’s goals, Article 25 declares that:

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

385 For a comprehensive analysis of paradigmatic ATCA cases, see Goodman & Jinks, Filártiga’s Firm Footing, supra note 321, at 497-513 (citing Filártiga, 630 F.2d at 881 (“sharply conflicting views), and IIT v. Vencap, Ltd., 519 F.2d 1001 (2d Cir. 1975) (Friendly, J.) (mutual, not several, concern).
386 ICCPR, supra note 366, at art. 1(1).
387 Id. at art. 1(3).
(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;

(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;

(c) To have access, on general terms of equality, to public service in his country.\textsuperscript{388}

If a suit for the right to vote is brought under the ICCPR, Article 25 typically forms the basis for the claim. In a country like the U.S. where the restriction of the right to vote is based on the citizen’s place of residence, it may also implicate Article 12(1), which proclaims: “Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.”\textsuperscript{389} Article 12(3) crystallizes this right to be free from discrimination based on geographic location:

The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (\textit{ordre public}), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.\textsuperscript{390}

Article 2 deals with the enforcement and remedy requirements of the Covenant. Article 2(1) guarantees that a State Party will respect and ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.\textsuperscript{391}

The “other status” plausibly includes geographic location. Article 26 extends equal protection to these classes, declaring all people “equal before the law” and requiring states to enact legislation

\textsuperscript{388} Id. at art. 25.
\textsuperscript{389} Id. at art. 12(1).
\textsuperscript{390} Id. at art. 12(3).
\textsuperscript{391} Id. at art. 2(1).
to “prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground,” enumerating the list from Article 2.392

To enact the rights enumerated in the Covenant, a State Party agrees under Article 2(2) “to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.”393 And to individually enforce these rights, a State party is required by Article 2(3)(a) “[t]o ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy…” should individual Covenant rights be violated.394 The ICCPR also established its own remedy through the First Optional Protocol to the ICCPR, allowing the Human Rights Committee (HRC) to set up a process for individuals to bring complaints against States for violating their Covenant rights.395 The process for doing so will be briefly discussed in Part III.A discussing possible remedies for violations of Covenant rights, infra page 111.

2. United States Reservations to the ICCPR

The U.S. attached its typical comprehensive set of RUDs to the ICCPR upon its ratification in September 1992. For the purposes of this research, the relevant RUDs are as follows:396

- Understanding (1) – Limitation of the equal protection principle to the Supreme Court’s “rational basis test” for all classes of people: “That the Constitution and laws of the United States guarantee all persons equal protection of the law and provide extensive protections against discrimination. The United States understands distinctions based upon race, colour, sex, language, religion, political or other

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392 Id. at art. 26.
393 Id. at art. 2(2).
394 Id. at art. 2(3).
opinion, national or social origin, property, birth or any other status – as those terms are used in article 2, paragraph 1 and article 26 – to be permitted when such distinctions are, at minimum, rationally related to a legitimate governmental objective.”

- **Understanding (5) – Federalism Clause:** “That the United States understands that this Covenant shall be implemented by the Federal Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered therein, and otherwise by the state and local governments; to the extent that state and local governments exercise jurisdiction over such matters, the Federal Government shall take measures appropriate to the Federal system to the end that the competent authorities of the state or local governments may take appropriate measures for the fulfillment of the Covenant.”

- **Declaration (1) – The rights in the ICCPR must be enacted by Congress:** “That the United States declares that the provisions of articles 1 through 27 of the Covenant are not self-executing.”

- **Declaration at the time of ratification – Acceptance of HRC’s following competence as the ICCPR requested in Article 41:** “The United States declares that it accepts the competence of the Human Rights Committee to receive and consider communications under article 41 in which a State Party claims that another State Party is not fulfilling its obligations under the Covenant.”

However, despite accepting the HRC’s competence to receive complaints from one State that another State was violating the Covenant, the United States did not ratify the First Optional Protocol, thus not submitting itself to the ICCPR’s complaint process and denying individual U.S. citizens a remedy on the international plane for violations of the ICCPR.

Furthermore, since the substantive provisions of the ICCPR are not self-executing, the rights enumerated in Articles 1 through 27 cannot be an independent source of obligations on the United States, and thus cannot form the basis for a cause of action for U.S. citizens against the United States. In 2002, the Eleventh Circuit confirmed this understanding in *United States v. Duarte-Acero*:

The ICCPR does not create judicially-enforceable rights. Treaties affect United States law only if they are self-executing or otherwise given effect by congressional legislation. Articles 1 through 27 of the ICCPR are not self-executing. Nor has Congress passed implementing legislation. Therefore, the
ICCPR is not binding on federal courts.\textsuperscript{397}

The United States itself has similarly explained the “non-self-executing” declaration in a report to the Human Rights Committee: “This declaration did not limit the international obligations of the United States under the Covenant. Rather, it means that, as a matter of domestic law, the Covenant does not, by itself, create private rights directly enforceable in U.S. courts.”\textsuperscript{398} The U.S. added that “it was not considered necessary to adopt special implementing legislation to give effect to the Covenant's provisions in domestic law” because the “fundamental rights” in the Covenant “are already guaranteed as a matter of U.S. law, either by virtue of constitutional protections or enacted statutes, and can be effectively asserted and enforced by individuals in the judicial system on those bases.”\textsuperscript{399}

Therefore, despite the ICCPR’s requirement that State Parties enact legislation granting all its citizens the Covenant rights and give them domestic remedies to enforce those rights, through its RUDs the United States has limited the ICCPR rights to extend only as far as they have already been granted by the U.S. Constitution. Regrettably, the RUDs provide ICCPR rights (such as they are) with less protection than their corresponding rights under the Constitution: for example, suspect classifications like racial discrimination need only be “rationally related to a legitimate government interest” in order to satisfy the ICCPR requirement, a much lower level of scrutiny than the Supreme Court has determined it must receive under the Fourteenth Amendment to the Constitution.

\textsuperscript{399} U.S. Initial Report to HRC, para. 8.
3. So, does the denial of the right to elect voting representation to the District and the territories violate the ICCPR?

a) District Judge Moore Says “Yes” in *Ballentine v. United States*…

In *Ballentine v. U.S.*, the Virgin Islands voting rights case discussed in Section I.B.2, *supra* page 65, the original district court case was presided over by Judge Thomas Moore, who issued a comprehensive memorandum discussing the “doctrine of unincorporation” applied by U.S. courts to the territories and analyzed the plaintiff’s claim under the UN Charter and the ICCPR; he concluded by requesting supplemental briefing on the international law issues.\(^{400}\)

Judge Moore argued that because the U.S. did not attach explicit reservations to the articles of the Covenant, the U.S. had “willing and voluntarily” undertaken the obligation to implement the rights in Articles 1, 2, and 25 by providing citizens in the territories the right to vote in federal elections, “or at the very least, be afforded all rights under the Constitution.”\(^{401}\)

Furthermore, he argued, Understanding (5) – promising that the federal government would implement the Covenant “to the extent that it exercises legislative and judicial jurisdiction over the matters covered therein” – actually bound the federal government to grant citizens in the territories the right to vote.\(^{402}\) He noted, however, that the U.S. is not a party to the First Optional Protocol to the ICCPR, which, he said, “specifically would allow a person aggrieved by violations of the covenant to communicate directly with the Committee on Human Rights,” intimating that because the U.S. is not a party to that Protocol, such aggrieved persons do not have international recourse. Even more obliquely, Judge Moore concluded that

Whatever power this Court has to enforce these provisions of the ICCPR, including the United States’ affirmative understanding and acceptance of its

\(^{400}\) *Ballentine v. United States*, 2001 WL 1242571.

\(^{401}\) Id. at *13.

obligation to promote actively the realization of the right to self-determination in the Virgin Islands, these provisions appear to conflict with the unincorporation doctrine of the Insular Cases and the application of that doctrine and those cases to this Territory.

He then requested further briefing on certain issues, of which 5 and 7 are especially enlightening, as they rephrase the question at issue in this Part:

5. How do the international obligations of the United States, and in particular Articles 1 and 2 of the ICCPR, affect the analysis in this case? Is the United States under an affirmative obligation to execute the ICCPR? Is this Court bound by Congress’s declaration that Articles 1 through 27 of the ICCPR are non-self-executing? Does this mean that these obligations are not judicially enforceable?

7. The Supreme Court recently reiterated that an individual citizen does not have the right to vote for the President, see Bush v. Gore, 531 U.S. 98 (2000), even though it has elsewhere hailed the right to vote as “the essence of a democratic society,” Reynolds v. Sims, 377 U.S. 533, 555 (1963). The Court's reasoning in Bush v. Gore, and indeed the structure of the Constitution itself, presumes that an individual citizen will be represented in a presidential election by her state electors, in a manner directed by her (elected) state legislature. See U.S. Const. art. II. In this way, the Constitution grants every United States citizen residing in a state at the very minimum an indirect voice in the presidential election. In contrast, citizens residing in an unincorporated territory, as the Virgin Islands are presently categorized, do not even have an indirect voice in presidential elections, and further, have no vote in the Congress that might consider amending the Constitution to rectify the discriminatory impact.

Does such an arrangement violate international law in that it prevents, by Constitutional structure coupled with the unilateral power of Congress, the United States citizen residing in the Virgin Islands from voting for those who make the laws that directly affect her? See ICCPR art. 25. If, as held by the district court in Igartua de la Rosa v. United States, 107 F.Supp.2d 140 (D.P.R.2000), the non-self-executing provisions of the ICCPR cannot be enforced by a federal court, has the United States violated international law by persistently failing to implement the ICCPR?

b) …Rejected by the Third Circuit (and the Supreme Court) for Lack of Jurisdiction: Sosa v. Alvarez-Machain

Despite Judge Moore’s thoughtful analysis, the district court judge who replaced him, Judge Anne Thompson, refused to hear the international law claims for want of jurisdiction, and the Third Circuit agreed with her (adopting her opinion in full). Judge Thompson found that the

\[403 Id. at *14-15.\]
district court lacked “jurisdiction over any ICCPR claim, as beyond the province of the federal judiciary.”

In essence, her answer to Judge Moore’s question 5 was, “no, the U.S. is not under an affirmative, judicially enforceable obligation to implement the ICCPR, because yes, the Court is bound by Congress’s “non-self-executing” declaration” – and thus, Judge Moore’s question 7 could not be answered. She elaborated,

The obligations of the ICCPR raised by Judge Moore such as “afford[ing] the people of non-self-governing territories such as the Virgin Islands the right to self-determination” turn upon whether the Senate intended the ICCPR to be justiciable. Evidently, it did not…As such, the rights articulated in ICCPR are aspirational until “the discretion of the Legislature and Executive Branches” deem otherwise…Therefore, this Court refrains from passing judgement[ sic] upon these international law obligations.

In support, Judge Thompson quoted the 2004 Supreme Court case *Sosa v. Alvarez-Machain.* In *Sosa,* the Court considered a claim under the Alien Tort Claims Act in which an alien appellant argued that “false (or arbitrary) arrest” qualified as a tort violating the law of nations, for which he cited customary international law in the form of the UDHR and the ICCPR. Justice Souter held, “although the Covenant does bind the United States as a matter of international law, the United States ratified the Covenant on the express understanding that it was not self-executing and so did not itself create obligations enforceable in the federal courts.” Thus, the appellant could not argue “that the Declaration and Covenant themselves establish the relevant and applicable rule of international law;” rather, he had to prove that the right he wanted to vindicate—in his case, the right to freedom from arbitrary arrest—had “attained the status of binding customary international law.”

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404 Id. at *18 (internal citation omitted).
405 Id. at *18-19 (citing *Igartua II* (rev’ld), 417 F.3d at 147; *Sosa v. Alvarez-Machain,* 542 U.S. 692 (2004)).
407 Id. at 695.
408 Id. at 735.
409 Id.
In its holding, the Court delivered three categories of reasoning as to why it chose to limit private rights of action under international law to recognized *jus cogens* norms: First, the historical context of the ATCA shows that at the time it was passed, Congress contemplated such a limited scope, noting only three primary areas for such torts: “violation of safe conducts, infringement of the rights of ambassadors, and piracy.”\(^{410}\) Second, “a decision to create a private right of action is one better left to legislative judgment in the great majority of cases,” especially “[s]ince many attempts by federal courts to craft remedies for the violation of new norms of international law would raise risks of adverse foreign policy consequences.”\(^{411}\) And most importantly, the Court held that it had “no congressional mandate to seek out and define new and debatable violations of the law of nations.”\(^{412}\) In fact, the Court added, although the ATCA had been left intact to allow suits based on existing or future customary international law norms, Congress as a body has done nothing to promote such suits. Several times, indeed, the Senate has expressly declined to give the federal courts the task of interpreting and applying international human rights law, as when its ratification of the International Covenant on Civil and Political Rights declared that the substantive provisions of the document were not self-executing.\(^{413}\)

Thus, the ICCPR does not grant rights to U.S. citizens unless Congress specifically enacts legislation granting those rights.

4. **Conclusion: No, the ICCPR is not being violated, because existing constitutional processes in the United States do not allow the federal government to unilaterally grant these citizens the right to vote**

Contrary to popular opinion, then, the articulation of a sweeping assortment of fundamental rights in the UDHR and the ICCPR did not automatically grant those rights to all the people in the world. U.S. citizens in the District and the territories alike simply do not have

\(^{410}\) *Id.* at 724.
\(^{411}\) *Id.* at 727-28.
\(^{412}\) *Id.* at 728.
\(^{413}\) *Id.* See also Davis, Realizing, *supra* note 402, at 365.
the right to elect voting representation in Congress. However, Judge Moore might have hit on something important: the U.S. did agree, without reservation, “to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant” under Article 2(2), and furthermore to give individuals an effective remedy when those rights, (“as herein recognized” in the ICCPR, not “as enacted by the State”), have been violated, in Article 2(3)(a). Thus, it seems to me, though District and territory residents do not actually have the right to vote, they do have the right to have the right to vote—the right to the “necessary steps” by the United States to give them the right to vote (previously noted above as an international treaty’s requirement of compliance by political implementation, supra page 93). Thus, their right to vote under the ICCPR is not being violated, but the U.S. might appear to be violating its obligation to give that right to them.

The rub is in the Article 2(2) qualification to the “necessary steps” requirement, which is to be effected “in accordance with [the State’s] constitutional processes.” As this research concluded in Part I, the only existing constitutional processes by which the domestic right to vote may be granted are constitutional amendments granting the District and the territories the right to vote for the president (like the Twenty-Third Amendment for the District) and to elect voting representation, or statehood for each of the areas desiring the right to vote. However, both these processes require the participation and approval of entities outside the federal government’s control: a constitutional amendment requires the ratification of (or constitutional convention requested by) three-quarters of the states, and statehood is a six-step process requiring extensive participation by local citizens, including a popular vote by referendum proving that a majority of
citizens in the area desire statehood. However, because the federal government has exclusive control over U.S. foreign relations, it is solely the federal government that is obligated to carry out international obligations of the United States: it cannot coerce the states to pass a constitutional amendment or call a constitutional convention—the crucial point of the “Federalism clause” attached to the ICCPR—nor can it force the residents of a proposed state to vote for statehood. Since Congress and the President cannot enact these “other measures” without such state or popular approval, the federal government alone does not have the power to grant citizens of the District and the territories the right to vote for the president or elect voting representation to Congress without violating U.S. “constitutional processes.” And so, finally, under this line of reasoning, the U.S. cannot be violating its obligation under ICCPR Article 2(2), because there exist no “necessary steps” which can be taken “in accordance with [U.S.] constitutional processes.”

However, this research concluded that a constitutional amendment or statehood are the only existing options for residents in these regions. The present research also previously mentioned that although the judiciary was not prepared to do so, Congress could pass legislation redefining “State” in the Constitution, for the purposes of the right to vote for president and/or elect voting representation to Congress, as including the territories and federal enclaves like the

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414 U.S. Const. art. V (“The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate”); Price, Unfulfilled Ideal, at 101-02: (six-step process for D.C. statehood: “(1) a majority of the citizens to pass a referendum exhibiting their desire for statehood; (2) election of representatives or delegates to a state constitutional convention; (3) citizens of the District of Columbia ratifying the state constitution via a referendum; (4) presentation of the state constitution to the United States Congress along with a request for admission as a state; (5) Congressional deliberation of admission terms, conditions, and state boundaries; and (6) a majority vote of Congress.”). See also Guzman, Igartua, supra note 34, at 177 (requiring majority popular vote for statehood); Raskin, Is This America?, supra note 11, at 52-53 (same).
District. The President could also sign an Executive Order declaring the same definition. Such legislation (or order) would not prima facie violate the Constitution, which does not undertake to define the word “State” for its own purposes. If such legislation is constitutional, then, that legislation is the “necessary step” that the U.S. is required to take under Article 2(2) of the ICCPR to grant citizens living in the District and the territories the right to vote. But if cases like *Hepburn v. Ellzey* continue to control (arguing that Article I and II of the Constitution evince an intent to use “State” in the Constitution to designate only members of the union, thus excluding the District and the territories from provision aimed at states), such legislation would be held unconstitutional by the Supreme Court, and the new definition would only be effective if added to the Constitution by amendment.\(^{415}\) So it is currently unclear whether there are any “necessary steps” Congress (or the President) could take to comport with the ICCPR Article 2(2) requirement to enact the right to vote without violating the Constitution—but Supreme Court jurisprudence points to the absence of any such steps.

**G. The American Convention on Human Rights (ACHR)**


As in the ICCPR, several articles in the ACHR may be read to relate to the right to vote. Article 22, entitled “Freedom of Movement and Residence,” states, “[e]very person lawfully in the territory of a State Party has the right to move about in it, and to reside in it subject to the provisions of the law;” however, these rights may be limited “to the extent necessary in a democratic society…to protect national security [inter alia],” and they “may also be restricted by law in designated zones for reasons of public interest.”\(^{416}\) Article 23 officially proclaims the


\(^{416}\) ACHR art. 22, cls. 1, 3, 4.
“Right to Participate in Government,” which includes the rights and opportunities: “to take part in the conduct of public affairs, directly or through freely chosen representatives,” “to vote and to be elected in genuine periodic elections, which shall be by universal and equal suffrage and by secret ballot that guarantees the free expression of the will of the voters,” and “to have access, under general conditions of equality, to the public service of his country.”  

However, the ACHR allows for laws regulating these rights “only on the basis of age, nationality, [and] residence,” *inter alia.*

To enforce these rights, Article 24 establishes that all persons are entitled to equal protection before the law, “without discrimination.” Article 25 further guarantees “effective [judicial] recourse…for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention,” even if it state action is involved, along with assured enforcement of the judicial decision. Interestingly, Article 28 contains a “Federal Clause” similar to that attached by the U.S. to the ICCPR: “Where a State Party is constituted as a federal state, the national government of such State Party shall implement all the provisions of the Convention over whose subject matter it exercises legislative and judicial jurisdiction.” However, unlike the U.S. reservation, only those subjects reserved to the nation’s “states” have the provision that suitable measures shall be taken by the federal government “in accordance with its constitution and its laws” in order to allow the states to adopt Convention provisions. The ACHR makes the Inter-American Commission on Human Rights (“Commission”) competent to hear petitions by individuals or nongovernmental organizations

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417 ACHR art. 23, cl. 1.
418 ACHR art. 23, cl. 2
419 ACHR art. 24.
420 ACHR art. 25.
421 ACHR art. 28, cl. 1.
422 ACHR art. 28, cl. 2.
alleging violations of the Convention in Article 44, and established the Inter-American Court of Human Rights to hear cases brought by the Commission or State Parties to the Convention in Article 61. Under Article 64, the Court may also deliver advisory opinions for member states who request aid in “interpretation of this Convention or of other treaties concerning the protection of human rights in the American states.” Under this provision, the Court has held that it is allowed to interpret all the agreements signed by OAS member states, including the American Declaration on the Rights and Duties of Man, which, though not a treaty, “contains and defines the fundamental human rights referred to in the Charter,” and thus it would be impossible to interpret the Charter and OAS treaties without reference to the American Declaration.

2. So, does the denial of the right to elect voting representation to the District and the territories violate the ACHR?

The United States has not ratified the ACHR, although it did sign the Convention in 1978. Since the U.S. has not ratified, the ACHR does not constitute binding law in the United States, and thus there are no international obligations to violate. However, even if the U.S. had ratified the Convention, Article 25 says quite plainly that member states may regulate the rights and opportunities related to participation in government “on the basis of…residence,” and since both the District and the territories are restricted from voting because the reside in those places, the U.S. would not be violating its obligations under the Convention (whether self-executing or not). Furthermore, the tangential claim that the restriction on the right to vote restricts the Article 22 freedom of movement and residence also allows restrictions in “in designated zones for reasons of public interest”; (1) the need for a federal district with no influence on the federal

423 ACHR arts. 44, 61.
424 ACHR art. 64.
425 Interpretation of the American Declaration, para. 43.
government and (2) the unincorporation of territories as states (where the Constitution limits voting to “states”) would make it easy to label the District and the territories as such zones. So even if the U.S. were bound by the Convention, the answer would be: No, it is not violating the terms of the ACHR.

a) The Inter-American Commission of Human Rights Says “Yes” in its Case Report “Statehood Solidarity Committee v. United States” (2003) by applying similar rights in the American Declaration on the Rights and Duties of Man...

As regards member states that are not parties to the ACHR, the Commission is empowered by Article 20 of the Statute of the Inter-American Commission on Human Rights to monitor their behavior surrounding the rights referred to in Articles 1-4, 18, 25, and 26 of the American Declaration, and to hear complaints, address the government, and make recommendations as to the implementation of those “fundamental human rights,” provided all domestic remedies have been exhausted. In 1993, the Statehood Solidarity Committee and 23 residents of the District of Columbia petitioned the Commission to review alleged violations of Articles 2 (right to equality before the law) and 20 (right to participate in government) of the American Declaration by the United States stemming from the continued denial of the right to elect voting representation in Congress to District residents.

The Commission issued its report ten years later in 2003, after the 2000 decision in Adams v. Clinton. After considering several threshold issues and surveying a history of the District of Columbia similar to the one above, the Commission explained the importance of representative democracy to the OAS, emphasizing the importance of “universal suffrage” as a

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right of “all people,” and stating the view that the American Declaration’s provisions “must be interpreted and applied so as to give meaningful effect to exercise of representative democracy in this Hemisphere.”\(^{429}\) The Commission then explained the parallel between the rights to participate in government expressed in Article 20 of the American Declaration and Article 23 of the ACHR, and proceeded to make its findings under its interpretations of Article 23 of the ACHR (even though the U.S. has not ratified the ACHR, and believes the American Declaration to be merely a “noble statement,” not a “legal instrument”).\(^{430}\)

In evaluating violations of the right to vote under Article 23, the Commission must ensure that differential treatment “lacks any objective and reasonable justification.” To that end, the Commission laid out the following test to ensure equal protection for human rights (remarkably similar to the rational basis test):

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\text{[S]tates may draw distinctions among different situations and establish categories for certain groups of individuals, so long as it pursues a legitimate end, and so long as the classification is reasonably and fairly related to the end pursued by the legal order…[R]estrictions or limitations upon the right to participate in government must be justified by the need of them in the framework of a democratic society, as demarcated by the means, their motives, reasonability and proportionality.}^{431}\]

To give due deference to state sovereignty, the Court limited its interference to those occasions “where the State has curtailed the very essence and effectiveness of a petitioner’s right to participate in his or her government.”\(^{432}\)

After finding that residents of the District of Columbia are in fact restricted—according to their place of residence—by the U.S. in exercising their right to participate in government, and thus are denied an equal right when compared to similarly situated citizens living elsewhere in

\(^{429}\) Statehood Solidarity Committee, at paras. 85-87.
\(^{430}\) Id. at para. 87 et seq. See also Interpretation of the American Declaration, para. 12.
\(^{431}\) Id. at para. 90.
\(^{432}\) Id.
the United States, the Commission declared that such unequal treatment was no longer justifiable. The Commission cited the following passage from *Adams v. Clinton*:

> [T]he historical rationale for the District Clause – ensuring that Congress would not have to depend upon another sovereign for its protection – would not by itself require the exclusion of District residents from the congressional franchise…We do not disagree that defendants have failed to offer a compelling justification for denying District residents the right to vote in Congress. As the dissent argues, denial of the franchise is not necessary for the effective functioning of the seat of government.\footnote{Id. at para. 106 (citing *Adams v. Clinton*, 90 F.Supp.2d at 56).}

The Commission argued that because even the judicial branch of the United States has admitted there is no present-day need for disenfranchisement, the U.S. had failed to justify the unequal treatment, and that the United States was thus acting “contrary to” Articles 2 and 20 of the American Declaration.\footnote{Id. at para. 105.} The Commission noted that “no other federal state in the Western Hemisphere denies the residents of its federal capital the right to vote for representatives in their national legislature.”\footnote{Id. at para. 108 (citing Canada, Argentina, Brazil, Venezuela, and Mexico as countries with federal enclaves like D.C. who allow residents voting representation in their national legislatures).} The Commission recommended that the United States give the residents of the District “an effective remedy, which includes adopting the legislative or other measures necessary to guarantee to [them] the effective right to participate, directly or through freely chosen representatives and in general conditions of equality, in their national legislature.”\footnote{Id. at para. 119.}

b) ...But the United States is not bound by the American Declaration on the Rights and Duties of Man

The United States argued in front of the Commission in 1989,

The American Declaration of the Rights and Duties of Man represents a noble statement of the human rights aspirations of the American States.

Unlike the American Convention, however, it was not drafted as a legal instrument and lacks the precision necessary to resolve complex legal questions. Its normative value lies as a declaration of basic moral principles and broad
political commitments and as a basis to review the general human rights performance of member states, not as a binding set of obligations.

The United States recognizes the good intentions of those who would transform the American Declaration from a statement of principles into a binding legal instrument. But good intentions do not make law. It would seriously undermine the process of international lawmaking—by which sovereign states voluntarily undertake specified legal obligations—to impose legal obligations on states through a process of ‘reinterpretation’ or ‘inference’ from a non-binding statement of principles.437

Despite the Commission’s best efforts, then, the United States does not intend to be bound by the American Declaration of the Rights and Duties of Man, and will not give force to the Commission’s report.

3. Conclusion: No, the ACHR is not being violated, and neither the American Declaration nor the Report by the Commission binds the United States

To answer the question posed above, the ACHR is not being violated because the United States has not ratified it, and thus does not constitute an international obligation on the U.S. Furthermore, the United States has declared that the American Declaration on the Rights and Duties of Man is merely a “noble statement of the human rights aspirations of the American States,” not a “binding set of obligations,” and it is not bound by the principles enumerated therein.438 Therefore, the U.S. is not violating any existing obligations it owes under the Inter-American System.

Part III: Remedies for violations of international obligations: Should the Supreme Court’s interpretation of a U.S. constitutional provision be found to be in conflict with an international convention to which the United States is a party, what remedy exists?

A. Available Remedy Processes for the ICCPR and the Inter-American System


438 Id.
Because the United States is not violating any of its international obligations under the ICCPR or the Inter-American System, and more importantly, because the U.S. is not a party to the First Optional Protocol’s remedy process for the ICCPR or the American Convention on Human Rights (providing remedies to the Commission and the Inter-American Court of Human Rights), there are currently no existing (and enforceable) international remedies or relief for the citizens of the District and the territories.\textsuperscript{439} The first step in changing this depressing situation is to advocate for ratification of the ACHR and the ICCPR’s First Optional Protocol.

The Human Rights Committee (HRC) has the duty of monitoring the implementation of the ICCPR, and to that end, it requests periodic reports from State Parties under Article 40 of the Covenant, and issues Concluding Observations after reading those reports.\textsuperscript{440} The U.S. reports include an overview of the U.S. federal system and the Constitution (including the situation of the District and the territories), an explanation of the RUDs, and a discussion of the specific implementation of each of the ICCPR provisions.\textsuperscript{441} After reading the Initial, Second and Third Reports of the U.S., the HRC made the following Concluding Observation in 2006 regarding the District’s disenfranchisement:

The Committee, having taken note of the responses provided by the delegation, remains concerned that residents of the District of Columbia do not enjoy full representation in Congress, a restriction which does not seem to be compatible with article 25 of the Covenant…The State party should ensure the right of residents of the District of Columbia to take part in the conduct of public affairs, directly or through freely chosen representatives, in particular with regard to the

\textsuperscript{439} For an overview of the complaint procedures for the ICCPR and other human rights bodies, see Bayefsky, “How to Complain About Human Rights Treaty Violations,” available at \url{http://www.bayefsky.com/tree.php/area/complain} (last accessed Feb. 12, 2008). For an explanation of the procedures of the Commission and the Inter-American Court of Human Rights, \textit{see} Commission Statute, supra note 426, and ACHR, supra note 369, arts. 52-82.

\textsuperscript{440} ICCPR art. 40.

\textsuperscript{441} \textit{See} Core Document Forming Part of the Reports of States Parties, United States of America, U.N. Doc. HRI/CORE/1/Add.49 (1994); U.S. Initial Report to HRC, \textit{supra} note 398; Second and Third Periodic Report of the United States of America to the UN Committee on Human Rights Concerning the International Covenant on Civil and Political Rights, October 21, 2005, U.N. Doc. CCPR/C/USA/3, all of which are available at the online University of Minnesota Human Rights Library, \url{http://www1.umn.edu/humanrts/us_docs.html}. 

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House of Representatives.\textsuperscript{442}

However, the U.S. has traditionally paid little heed to the Human Rights Committee, so it is unlikely that these (unenforceable) Concluding Observations will encourage a change in the District’s voting status. However, there may be some domestic remedies available (though they are not likely to be implemented through the U.S. judiciary).

\textbf{B. Applying Human Rights Treaties as Law in the United States (Redux): Constitutional Constraints on the Supreme Court}

The Supreme Court has a long history of invoking principles of international law in its decisions, both to interpret enumerated powers in the Constitution (such as the treaty-making power) and to affirm national actions as part of the rights and duties inherent in international states (like the right to acquire new territory by discovery or occupation).\textsuperscript{443} However, as explored above, the Supreme Court refuses to encroach upon the political branch’s powers to create causes of action in international human rights treaties, preferring to implement only those few fundamental human rights which have been held to be universal across borders. Because these treaties are non-self-executing, the Constitution leaves it to Congress and the President to execute them. Regardless of the inherent value in adopting the norms laid out in the ICCPR and the ACHR, the Supreme Court cannot violate the Constitution to implement them, as Justice Scalia famously stated:

\begin{quote}
We must never forget that it is a Constitution for the United States of America that we are expounding. … \[W\]here there is not first a settled consensus among our own people, the views of other nations, however enlightened the Justices of this Court may think them to be, cannot be imposed upon Americans through the Constitution.\textsuperscript{444}
\end{quote}


\textsuperscript{443} Neuman, Uses of International Law, supra note 306, at 82-83.

That said, the following sections will first briefly explore ways in which U.S. courts have been urged to find existing constitutional provisions and legislation that implement the right to vote guaranteed by the ICCPR and the ACHR, and then turns to other (i.e., non-judicial) methods by which the right to vote may be granted.

C. Attempts at Judicial Relief: Constitutional and Legislative Grounds for the Universal Right to Vote in the United States

This article has explored several ways in which the federal courts have been asked to find the universal right to vote in existing constitutional provisions and legislation, including the judicial expansion of the term “State” in the Constitution to incorporate the territories and federal enclaves like the District, the construction of the Voting Rights Act and the Uniformed and Overseas Citizens Absentee Voting Act to include residents in these areas, and the implementation of the Guarantee Clause in the Constitution to provide all citizens “a republican form of government.” As exhausted above, courts have refused to take these steps, preferring to leave such determinations to the political branches of U.S. government.

Voting rights cases on behalf of the District and the territories have also relied on the Fifth Amendment’s Due Process clause to incorporate the Equal Protection and Privileges and Immunities Clauses in the Fourteenth Amendment against the federal government, as allowed by the Supreme Court in Bolling v. Sharpe.\textsuperscript{445} To be considered under the Equal Protection clause, a class of people must allege that they are receiving different treatment than other citizens similarly situated. As explained above, the U.S. citizens in the District and the territories share the same burdens of citizenship as citizens in the several states, and are often treated by

Congressional legislation as if they reside in states, yet they are denied the right to elect voting representation to the national legislature.\textsuperscript{446} This status qualifies as disparate treatment.

The level of scrutiny under the Equal Protection depends on the natures of the classification and the right being claimed. The highest standard, strict scrutiny, is only received by classifications according to race or national origin and fundamental rights.\textsuperscript{447} Intermediate scrutiny covers classifications based on gender, illegitimacy, and alienage, while all other classifications are reserved to the rational basis test.\textsuperscript{448} This article determined above that the Court has moved towards considering the right to vote to be fundamental, but that the trend is not complete. If the Court were to consider it fundamental, citizens in the District and the territories would have a strong case, because the strict scrutiny test requires that the restriction be narrowly tailored and necessary to achieve a compelling governmental interest. The federal government would have a difficult time establishing a compelling interest for disenfranchisement, since it does not seem to serve any vital government objective. However, should the right to vote be denied fundamental status, the rational basis test is far easier to meet: the government must provide a legitimate objective to which the restriction is rationally related, and not arbitrary or capricious.

Advocates have also argued that these restrictions have a disparate impact on racial minorities—African-Americans in the District, and Hispanic- and Asian-Americans in the territories—which violates the Equal Protection clause. In \textit{Washington v. Davis}, the Supreme Court held that a law is race-neutral on its face may be unconstitutional if it has a discriminatory impact on minorities; however, the “disparate impact” test requires that the restrictive legislation

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\item \textsuperscript{446} \textit{Cleburne v. Cleburne Living Ctr.}, 473 U.S. 432, 439 (1985).
\item \textsuperscript{447} \textit{Korematsu v. United States}, 323 U.S. 216, 216 (1944).
\end{itemize}
\end{footnotesize}
be motivate by a legislative intent to discriminate, which might be difficult to prove in the voting rights arena. The Supreme Court did strike down congressional districts in North Carolina drawn along racial lines in Shaw v. Reno, holding that the Equal Protection clause applies where voting legislation “bears an uncomfortable resemblance to political apartheid.” Activists have claimed that “Shaw and its progeny have established a new kind of constitutional claim whenever voting rights are subjected to wrongful configurations of political and racial geography,” because, in the case of the District, for example, “an oddly drawn majority-African American district where no one has the right to vote or run for office” resembles political apartheid even more than the majority-African American districts in North Carolina where everyone at least had the right to vote. The racial aspect seems to comprise the most compelling argument for judicial relief, but an in-depth look at its implications is a large research project in itself—I strongly recommend that another project be commenced to investigate the available resources and arguments in that vein.

The Fourteenth Amendment’s Privileges and Immunities Clause protects those rights “which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments.” Though it declares that “No State shall make or enforce any law which shall abridge the Privileges or Immunities of citizens of the United States,” it too may be applied against the federal government through the Fifth Amendment’s Due Process Clause. The government must satisfy the intermediate standard of review for discrimination under the Privileges and Immunities Clause: the restriction must be substantially related to an important

451 Raskin, Is This America?, supra note 11, at 65-66.
452 Price, Unfulfilled Ideal, at 97 (quoting Corfield v. Coryell, 6 F.Cas. 546, 551 (C.C.E.D. Pa. 1823).
453 U.S. Const. amend. XIV, § 1.
governmental objective. As discussed above, it will be difficult for the government to point to an important objective serve by disenfranchisement.

Finally, the Due Process Clauses in the Constitution have been the sources of many new fundamental rights as a result of substantive due process, by which the Supreme Court elevates certain rights to heightened scrutiny because they are “implicit in the concept of ordered liberty.” As quoted above from Wesberry v. Sanders,

No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined. Our Constitution leaves no room for classification of people in a way that unnecessarily abridges that right.

This statement, combined with the “one person, one vote” standard from Reynolds v. Sims, makes a solid case for the right to elect voting representation to Congress as a fundamental right under substantive due process. However, the Supreme Court has decided to cease finding new fundamental rights, and—as exhaustively demonstrated—is nonetheless unwilling to do so in the voting rights context.

A brief note seems necessary to distinguish between the Supreme Court’s eventual willingness to find fundamental rights when the mood of the country persuades it to do so though Congress will not, as occurred, for example, with segregation and the overturning of “separate but equal” in Brown v. Board of Education. The Supreme Court’s ruling in Brown did not violate the separation of powers doctrine in the Constitution, because the Constitution did not explicitly give Congress (or the states) the right to keep the races segregated, and thus

456 Wesberry v. Sanders, 376 U.S. 1, 17-18 (1964) (Black, J.). See also Raskin, Is This America?, supra note 11, at 39; Raskin, Symposium, supra note 53, at 610 (Professor Rosen).
segregation was not a political question. However, the Constitution does explicitly reserve the election of House representatives to the “people of the several States,” the selection of Senators to the Legislature of each State (and then by amendment to the “people” of each State), and the appointment of electors for the President to the Legislature of each State. Furthermore, Congress is given the power to “exercise exclusive Legislation” over the District of Columbia, and to “make all needful Rules and Regulations respecting the Territory” of the United States. This distinction is crucial: when it comes to the voting franchise, the District and the territories, control is explicitly and exclusively reserved to the political branches of government, and they may be legislated only by those branches, and not the judiciary.

D. Then, what methods exist to remedy the conflict between Supreme Court voting rights jurisprudence and the contended fundamental nature of the right to vote in international law?

The answer to this question is deceptively simple: there are none, because the conflict is not actually between the Supreme Court and international law, but rather stems from the federal government’s decision not to enact implementing legislation of international law principles. This question, then, does not necessarily seek an international remedy to convince the Supreme Court to change its rulings (because, remember, to do so would be to violate the Constitution); it seeks the constitutional means by which the federal government might make the right universal in the United States. Because the judiciary cannot violate the Constitution nor encroach upon the powers of the political branches of government, other ways to achieve voting rights for the District and the territories must be pursued. One of the following steps must be taken in order for the United States to satisfy its international obligation to grant all its citizens the right to vote: congressional legislation of executive order, statehood for each individual territory and the District, or constitutional amendment granting these citizens the right to vote.
1. Congressional Legislation or Executive Order

Four main avenues exist for constitutionally granting the right to vote to residents of the District and the territories: federal legislation, executive order, statehood, or constitutional amendment. Congress may act pursuant to its Article I, § 8 powers, the District of Columbia Clause, the Territory Clause, § 5 of the Fourteenth Amendment, and the Necessary and Proper Clause. Under the District Clause or the Territory Clause, it is plausible that Congress could constitutionally grant citizens in these regions the right to vote. Congress could also legislate to expand the definition of “state” in the Constitution. The President could even direct by executive order that all U.S. citizens be granted the right to vote for the president and elect voting representation for Congress. However, as noted above, the Supreme Court may find such acts or orders unconstitutional, as they challenge the very nature of the Constitution and may be better suited for constitutional amendment (as was effected for the District to elect the president in the Twenty-Third Amendment). Thus, statehood and constitutional amendment stand as the most effective means of achieving the right to vote in the District and the territories, with activists arguing passionately for either as the “best” means.

2. Statehood

Statehood is a six-step process requiring the participation of citizens, delegates to a constitutional convention, and Congress. First, a majority of the citizens must pass a referendum declaring their desire for statehood. Then delegates to a state constitutional

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459 U.S. Const. Art. I, §§ 8 (enumerated powers, including cl. 18, Necessary and Proper Clause), 9 cl. 4, (District of Columbia Clause); Art. IV, §2 (Territory Clause); amend. XIV, § 5 (enforcement powers). See also Price, Unfulfilled Ideal, supra note 306, at 105-06.
460 Price, Unfulfilled Ideal, supra note 306, at 106.
461 See, e.g., Guzman, Igartua, supra note 34; Raskin, Symposium, supra note 53.
462 Price, Unfulfilled Ideal, supra note 306, at 106-07.
463 Id. See also Guzman, Igartua, supra note 34; Raskin, Symposium, supra note 53.
464 Adapted from Price, Unfulfilled Ideal, supra note 306, at 101-03.
convention must be elected, and the constitution they draft must be ratified by the citizens by referendum, and then presented to the Congress to request admission as a state. Finally, Congress must deliberate to decide the terms and conditions of admission, and decide to admit the state by a majority vote. The District has attempted statehood, as has Puerto Rico. In fact, Puerto Rico cannot satisfy the first step, garnering only a 48.3% vote by citizens to become a state.\textsuperscript{465} To achieve automatic voting representation through statehood, advocates must educate citizens in these territories about their rights and encourage them to establish and vote in statehood referendums.

3. Constitutional Amendment

Finally, the two-step constitutional amendment process under Article V is a means by which many classes of people have won the right to vote. Both the House and the Senate must approve a proposed constitutional amendment by a two-thirds majority, and then 38 of the 50 States must ratify the proposed amendment as well, within a congressionally approved period (after which the proposal is rejected without 38 ratifying states).\textsuperscript{466} Because of the previous success of this method, many hail constitutional amendment as the best option for the District and the territories, whether the amendment grants them the right to vote (as in the Twenty-Third Amendment) or clarifies the definition of “state” in the Constitution to include them.\textsuperscript{467}

Conclusion

The disenfranchised status of these U.S. citizens and nationals is deplorable. Unfortunately, the U.S. has taken the proper steps—both in Supreme Court cases challenging the treatment of the territories, and in ratification attachments invalidating the franchise guarantee—

\textsuperscript{465} Initial U.S. Report to HRC, at 5.
\textsuperscript{466} U.S. Const. amend. V.
\textsuperscript{467} See, e.g., Guzman, Igartua, \textit{supra} note 34; Raskin, Symposium, \textit{supra} note 53.
to ensure that this disenfranchisement does not technically violate U.S. constitutional and international obligations. However, common sense dictates that the fundamental nature of the right to vote strongly encourages U.S. action to ensure these people are represented in the government which decides their political, social, and economic fates. If residents in the District of Columbia and the U.S. territories are expected to do their military and civic duties by serving in American wars and obeying American laws, they deserve to reap the benefits of the American system: full participation and representation in that pinnacle of democracy, the United States of America.