Equal Enfranchisement: Extending Complete Voting Rights in the U.S. Territories

Julia Wang*

Almost four million territorial residents experience the unique circumstance of being in the only places in the universe where U.S. citizens cannot vote in federal elections. The constitutional distinction between the states and territories creates two sets of voting rights for U.S. citizens depending on their place of residence: one in which citizens can vote for their president, vice president, and congressmembers, and another in which citizens have no effective federal representation.

In a series of cases stemming from the racist rationales of the Insular Cases*, federal courts have created a doctrine that excludes territorial residents from federal elections, thus entrenching their political subordination. The courts have based their decisions on three main principles: First, because the constitutional provisions regarding federal elections refer only to states and are silent as to territories, territorial residents have no right to vote in federal elections. Second, because territorial residents are not a suspect class and do not have a fundamental right to vote, their disenfranchisement is subject to only rational basis review. Third, only statehood or a constitutional amendment can provide such a right.*

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This Note challenges all three principles to provide a constitutional justification for equal enfranchisement. First, although no provision affirmatively gives territorial residents the right to vote, nothing in the Constitution prohibits the federal government from granting that right. Second, territorial residents should be considered a "discrete and insular minority," and their disenfranchisement should be subject to strict scrutiny. Finally, while statehood or constitutional amendment would certainly provide a constitutional guarantee of territorial residents' right to vote in federal elections, there are limitations with both, and they are not the only methods.

The constitutional arguments in favor of equal enfranchisement strongly support remedying the federal disenfranchisement of territorial residents that perpetuates their second-class status. Whatever the solution, it must advance the ultimate goal of self-determination for the peoples of the U.S. territories, who directly experience the effects of this purposeful territorial discrimination.

INTRODUCTION

Basic tenets of our democratic government provide for "consent of the governed"[1] and "one person, one vote."[2] Upon signing the Voting Rights Act of

1. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).
2. Reynolds v. Sims, 377 U.S. 533, 558 (1964).

1965, President Lyndon B. Johnson proclaimed that the right to vote is "the basic right without which all others are meaningless. It gives people, people as individuals, control over their own destinies."[3] The Supreme Court has long explained that the right to vote is "a fundamental political right, because [it is] preservative of all rights."[4] Under these principles, one might expect that all U.S. citizens possess the same political rights, regardless of where they live in the United States.

But one would be mistaken. U.S. citizens and nationals residing in American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands cannot vote for president, vice president, or congressmembers. As such, the U.S. territories are the only places in the universe where U.S. citizens cannot elect representatives who can speak for their interests on the federal level. Yes, the *universe*—U.S. citizens can vote for these representatives from outside of the country[5] and even from space,[6] but not from the U.S. territories.

Our current constitutional framework disenfranchises almost four million territorial residents[7] from federal elections.[8] Although individuals born in Guam, the Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands are U.S. citizens,[9] they can vote in federal elections only if they reside in one of the fifty states or Washington, D.C.[10] If they live in a territory, they can vote only in local

3. President Lyndon B. Johnson, Remarks in the Capitol Rotunda at the Signing of the Voting Rights Act (Aug. 6, 1965) (transcript available at *Remarks in the Capitol Rotunda at the Signing of the Voting Rights Act*, AM. PRESIDENCY PROJECT, https://www.presidency.ucsb.edu/documents/remarks-the-capitol-rotunda-the-signing-the-voting-rights-act [https://perma.cc/3JRV-3CLD]).

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

5. *See* Uniformed and Overseas Citizens Absentee Voting Act, 52 U.S.C. §§ 20301–20311.

6. *See* Alex Brown, *How Do Astronauts Vote from Space?*, ATLANTIC (Oct. 8, 2014), https://www.theatlantic.com/technology/archive/2014/10/how-do-astronauts-vote-from-space/381253/ [https://perma.cc/P5R9-2J95].

7. I use the term "territorial residents" to mean U.S. citizens residing in American Samoa, Guam, the Commonwealth of the Northern Mariana Islands (CNMI), the Commonwealth of Puerto Rico, and the U.S. Virgin Islands, as well as persons born in American Samoa who are considered U.S. nationals as opposed to citizens. Because noncitizens largely do not have the right to vote in U.S. elections, I do not include noncitizen residents of the territories in the scope of this Note.

8. This population is based on figures from the 2020 Census. *See Puerto Rico Population Declined 11.8% from 2010 to 2020*, U.S. CENSUS BUREAU (Aug. 25, 2021), https://www.census.gov/library/stories/state-by-state/puerto-rico-population-change-between-census-decade.html [https://perma.cc/F4VB-JN3A]; Steven Wilson, William Koerber & Evan Brassell, *2020 Population of U.S. Island Areas Just Under 339,000*, U.S. CENSUS BUREAU (Oct. 28, 2021), https://www.census.gov/library/stories/2021/10/first-2020-census-united-states-island-areas-data-released-today.html [https://perma.cc/786C-JH97]. I use the term "federal elections" in this Note to mean elections for president, vice president, senators, and House representatives.

9. 8 U.S.C. § 1407 (Guam); 48 U.S.C. § 1801 (Northern Mariana Islands); 8 U.S.C. § 1402 (Puerto Rico); 8 U.S.C. § 1406 (U.S. Virgin Islands).

10. *See* Tom C.W. Lin, *Americans, Almost and Forgotten*, 107 CALIF. L. REV. 1249, 1255–63 (2019); *see also* Mar-Vic Cagurangan, *The US Election That Doesn't Count: Guam Goes to the Polls But Votes Won't Matter*, GUARDIAN (Oct. 30, 2020), https://www.theguardian.com/world/2020/oct/31/the-us-election-that-doesnt-count-guam-goes-to-the-polls-but-votes-wont-matter [https://perma.cc/XK2Z-Q9PN].

elections and elections for a House delegate, a member who can introduce bills and push for the territory's agenda but has no vote on the floor.[11] And although these territories can participate in U.S. presidential nominating events, they have no say in the final choice of who becomes president and vice president.[12] Individuals born in American Samoa, who are U.S. nationals and not citizens,[13] cannot vote in federal elections at all and are further denied the right to run for federal or state office outside American Samoa and the right to serve on federal and state juries.[14]

This disenfranchisement results from the fact that the territories and states are constitutionally distinct entities.[15] The Admissions and Territorial Clauses of the U.S. Constitution grant Congress emphatically broad plenary powers to admit new states and govern territories and their residents.[16] The Organic Acts further establish each territory and specify how it is to be governed.[17] Each territory has an executive, legislative, and judicial branch,[18] but is ultimately subject to the laws of the U.S. Congress, a body in which territorial residents have no vote.[19]

Moreover, through the *Insular Cases*, the United States created legal fictions to justify the perpetual subordination of the territories and their residents. In *Downes v. Bidwell*, the U.S. Supreme Court decided 5–4 that the former Spanish colonies annexed by the United States through the 1898 Treaty of Paris

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11. Lin, *supra* note 10, at 1255–63.

12. *See* Cagurangan, *supra* note 10.

13. 8 U.S.C. § 1408; Fitisemanu v. United States, 1 F.4th 862, 865 (10th Cir. 2021), *cert. denied*, 143 S. Ct. 362 (2022).

14. *Fitisemanu*, 1 F.4th at 865; *see also* U.S. CONST. art. I, §§ 2–3; *id.* art. II, § 1.

15. Cesar A. Lopez-Morales, *Making the Constitutional Case for Decolonization: Reclaiming the Original Meaning of the Territory Clause*, 53 COLUM. HUM. RTS. L. REV. 772, 786 (2022).

16. U.S. CONST. art. IV, § 3, cls. 1–2; Lopez-Morales, *supra* note 15, at 776. Congress has never used its plenary powers to give Congressional voting rights to representatives from the Territories on legislation, regulation, and treaties. Lin, *supra* note 10, at 1265.

17. *See* Foraker Act, Pub. L. No. 56-191, 31 Stat. 77 (1900), *superseded by* Jones-Shafroth Act, Pub. L. No. 64-368, 39 Stat. 951 (1917) (codified as amended at 48 U.S.C. §§ 731–916); Organic Act of the Virgin Islands of the United States of 1936, Pub. L. No. 74-749, 49 Stat. 1807 (1936), *superseded by* Revised Organic Act of the Virgin Islands, Pub. L. No. 83-517, 68 Stat. 497 (1954) (codified as amended at 48 U.S.C. §§ 1541–1645); Guam Organic Act, Pub. L. No. 81-630, 64 Stat. 384 (1950) (codified as amended 48 U.S.C. §§ 1421–1428e). American Samoa is self-governing under a constitution and considered "unorganized" because Congress has not passed an Organic Act for the territory. *See* AM. SAMOA CONST. Its constitution is subject to unilateral change by the federal government. Pub. L. No. 98-213, § 12, 97 Stat. 1459, 1462 (1983) (codified at 48 U.S.C. § 1662a). The Commonwealth of the Northern Mariana Islands is established pursuant to the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States. Pub. L. No. 94-241, 90 Stat. 263 (1976) (codified at 48 U.S.C. § 1801 note) [hereinafter Marianas Covenant].

18. *See* P.R. CONST. arts. III–V; 48 U.S.C. §§ 1422–1424c (Guam); *id.* §§ 1571–1617 (U.S. Virgin Islands); Marianas Covenant art. II § 203 (Northern Mariana Islands); AM. SAMOA CONST. arts. II–IV.

19. *See* 48 U.S.C. §§ 1711, 1731, 1751 (detailing the nonvoting representatives of Guam and the U.S. Virgin Islands, American Samoa, and the Northern Mariana Islands, respectively); *id.* §§ 891–894 (detailing the Resident Commissioner of Puerto Rico).

"belong[ed] to . . . but [were] not a part of the United States."[20] Justice Henry Billings Brown, writing for the Court, described the territories' residents as "alien races, differing from us in religion, customs, laws, methods of taxation, and modes of thought" and feared that the "differences of race, habits, laws, and customs" raised "grave questions" about the rights that should be afforded to these residents.[21] Justice Edward Douglass White, in his concurrence, found it self-evident that citizenship could not be extended to "those absolutely unfit to receive it."[22] And the Court repeated this language in several later cases, further institutionalizing its assumption that the inhabitants of the territories were incapable of self-government because of their races and ethnicities.[23]

Thus, at the height of an imperialist period in U.S. history, and alongside growing congressional and public objection to granting citizenship to territorial residents,[24] the Court invented a "distinction between incorporated territories, which were on their way to statehood, and unincorporated territories, which might never become states."[25] While prior territories had all been "incorporated" into the United States, these newly annexed territories—Puerto Rico, the Philippines, and Guam—were deemed "unincorporated."[26] Importantly, nothing in the Constitution's text, in the Territorial Clause or elsewhere, creates this distinction among territories.[27] This "atextual,"[28] ahistorical, and racially motivated doctrine of territorial incorporation thus sanctioned "indefinite

20. 182 U.S. 244, 287 (1901). While various authorities include different cases in the *Insular Cases*, they generally consider *Downes* to be one of the seminal cases, along with *De Lima v. Bidwell*, 182 U.S. 1 (1901); *Goetze v. United States*, 182 U.S. 221 (1901); *Dooley v. United States*, 182 U.S. 222 (1901); *Armstrong v. United States*, 182 U.S. 243 (1901); and *Huus v. New York & Porto Rico Steamship Co.*, 182 U.S. 392 (1901). *See* Juan R. Torruella, *One Hundred Years of Solitude: Puerto Rico's American Century*, *in* FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION, AND THE CONSTITUTION 241, 243 n.14 (Christina Duffy Burnett [Ponsa-Kraus] & Burke Marshall eds., 2001) [hereinafter FOREIGN IN A DOMESTIC SENSE]; José Trías Monge, *Injustice According to Law: The* Insular Cases *and Other Oddities*, *in* FOREIGN IN A DOMESTIC SENSE, *supra*, at 226 n.1; Efrén Rivera Ramos, *Deconstructing Colonialism: The "Unincorporated Territory" as a Category of Domination*, *in* FOREIGN IN A DOMESTIC SENSE, *supra*, at 105 n.4; Lin, *supra* note 10, at 1284–85.

21. *Downes*, 182 U.S. at 282, 287.

22. *Id.* at 306 (White, J., concurring).

23. For example, in *De Lima v. Bidwell*, the Court asked how it might distinguish between the "civilized and uncivilized" to determine "who [was] capable of self-government" and who [was] not." 182 U.S. at 219. In *Diamond Rings*, the Court criticized the "uncivilized tribes" in the Philippines that had dared defy the Spanish monarchy. 183 U.S. 176, 180 (1901). And in *Dorr v. United States*, the Court approved of President William McKinley's instructions to the Philippine Commission to reserve the right to trial by jury, which "uncivilized parts of the archipelago were wholly unfitted to exercise." 195 U.S. 138, 145 (1904).

24. Juan R. Torruella, *The* Insular Cases*: The Establishment of a Regime of Political Apartheid*, 77 REVISTA JURÍDICA UNIVERSIDAD DE PUERTO RICO [REV. JURID. U. P.R.] 1, 5–7, 12–14 (2008).

25. Christina Duffy Ponsa-Kraus, *The* Insular Cases *Run Amok: Against Constitutional Exceptionalism in the Territories*, 131 YALE L.J. 2449, 2454 (2022).

26. *Id.*

27. Lopez-Morales, *supra* note 15, at 781–82.

28. *Id.* at 783.

colonial rule over majority-non-White populations at the margins of the American empire."[29]

Today, this distinction and its racist foundation remain, even as these decisions have received widespread condemnation.[30] American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands are still considered "unincorporated" territories.[31] And although the Supreme Court has moved away from this doctrine, it has never explicitly overruled the *Insular Cases*,[32] and lower courts "reflexively rely on and often misapply" these decisions.[33] Time and time again, the Court has failed to address calls to overturn the *Insular Cases*.[34]

This distinction fundamentally implicates the field of voting rights.[35] Just as the Supreme Court concocted the doctrine of territorial incorporation, federal

29. Ponsa-Kraus, *supra* note 25, at 2452, 2454; *see* Lopez-Morales, *supra* note 15, at 783; KAL RAUSTIALA, DOES THE CONSTITUTION FOLLOW THE FLAG?: THE EVOLUTION OF TERRITORIALITY IN AMERICAN LAW 86 (2009); *see, e.g.*, *Downes*, 182 U.S. at 282, 287; *id.* at 306 (White, J., concurring). In earlier territories, the United States had "pursued a combined policy of [W]hite settlement and forceful removal" of nonwhite inhabitants. Ponsa-Kraus, *supra* note 25, at 2452, 2454 n.8; *see also* KATHRYN WALKIEWICZ, *Introduction*, *in* READING TERRITORY: INDIGENOUS AND BLACK FREEDOM, REMOVAL, AND THE NINETEENTH-CENTURY STATE 11 (2023) (describing the conflation of race and space in the nineteenth century and today: "First, in order to be fully incorporated into the United States, a space must be whitewashed. Second, African Americans, migrants of color, and Indigenous people cannot be fully incorporated into the U.S. colonial project."). That policy would be more difficult to implement in these new territories, so the United States settled for the territorial incorporation doctrine.

30. Ponsa-Kraus, *supra* note 25, at 2452.

31. *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO/HRD-91-18, U.S. INSULAR AREAS: APPLICABILITY OF RELEVANT PROVISIONS OF THE U.S. CONSTITUTION 43–52 (1991). Currently, the only "incorporated" U.S. territory, where the Constitution applies in full, is Palmyra Atoll, an uninhabited coral atoll in the middle of the Pacific Ocean. *Palmyra Atoll*, U.S. DEP'T OF THE INTERIOR, https://www.doi.gov/oia/islands/palmyraatoll [https://perma.cc/J4S9-FPDW].

32. Adriel I. Cepeda Derieux & Neil C. Weare, *After* Aurelius*: What Future for the* Insular Cases*?*, 130 YALE L.J. F. 284, 286 (2020); *see, e.g.*, United States v. Verdugo-Urquidez, 494 U.S. 259, 268 (1990) (citing the *Insular Cases* approvingly to explain its reversal of court of appeals decision).

33. Cepeda Derieux & Weare, *supra* note 32, at 293–94; United States v. Vaello Madero, 596 U.S. 159, 186 (2022) (Gorsuch, J., concurring) ("Lower courts continue to feel constrained to apply [the *Insular Cases*]."); *see, e.g.*, Northern Mariana Islands v. Atalig, 723 F.2d 682, 688–90 (9th Cir. 1984) (following *Insular Cases* framework in analyzing and upholding jury trial exemption); Wabol v. Villacrusis, 958 F.2d 1450, 1459 (9th Cir. 1990) (applying *Insular Cases* approach in land rights); Tuaua v. United States, 788 F.3d 300, 306–07 (D.C. Cir. 2015) (stating that although the Insular Cases are "sometimes contentious" and "may now be deemed politically incorrect," their "framework remains both applicable and of pragmatic use in assessing the applicability of rights to unincorporated territories."); Conde Vidal v. Garcia-Padilla, 167 F. Supp. 3d 279, 282, 286–87 (D.P.R. 2016) (invoking territorial incorporation doctrine to decline extending constitutional right of same-sex couples to marry to Puerto Rico residents), *mandamus granted sub nom*, *In re* Conde Vidal, 818 F.3d 765 (1st Cir. 2016); Fitisemanu v. United States, 1 F.4th 862, 875 (10th Cir. 2021) (applying *Insular Cases* framework to determine "whether a constitutional provision applies to unincorporated territories 'by its own terms.'"), *cert. denied*, 143 S. Ct. 362 (2022).

34. *See, e.g.*, *Vaello Madero*, 596 U.S. at 189 (Gorsuch, J., concurring); *id.* at 194 n.4 (Sotomayor, J., dissenting); Insular Cases Resolution, H.R. Res. 279, 117th Cong. (2021).

35. Bartholomew H. Sparrow, *The Centennial of* Ocampo v. United States*: Lessons from the Insular Cases*, *in* RECONSIDERING THE INSULAR CASES: THE PAST AND FUTURE OF THE AMERICAN EMPIRE 39, 45 (Gerald L. Neuman & Tomiko Brown-Nagin eds., 2015).

courts have misapplied the holdings of the *Insular Cases* to exclude territorial residents from federal elections and entrench their political subordination.[36] Under this system, territorial residents cannot enjoy the same rights, privileges, and benefits that state residents enjoy.[37] Nor do they have the same structural protections against abuses of power that the Framers deemed fundamental to our democracy—in particular, those protections rooted in federalism and the separation of powers.[38] As cautioned in the Federalist Papers, the "accumulation of all powers" in Congress's hands to govern the territories indefinitely "may justly be pronounced the very definition of tyranny"—what the Framers feared most.[39] Here, without complete voting rights, territorial residents cannot elect representatives or consent to rules that govern them.[40] This subordinate, inferior set of voting rights relegates territorial residents to second-class participation in their own affairs.[41] And it is because of this very democratic deficit that territorial residents enter another century of colonial status without any resolution in sight.[42]

Part I of this Note describes some of the constitutional and statutory challenges that territorial residents have brought in efforts to gain complete voting rights. It also explains the main principles that courts have applied in rejecting these claims. Part II lays forth the constitutional arguments for equal enfranchisement[43] and argues that equal enfranchisement is both constitutionally permissible and consistent with the original understanding of the Territorial Clause. It also asserts that the disenfranchisement of territorial residents should be subject to strict scrutiny because voting is a fundamental right and territorial residents are a discrete and insular minority. Part III offers four constitutional and statutory methods to achieve the goal of equal enfranchisement and examines some of the obstacles to each approach.

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36. *See infra* Part II.

37. Lopez-Morales, *supra* note 15, at 786. American Samoans, as non-citizen nationals, are also ineligible for many government jobs, benefits, and privileges that are afforded only to U.S. citizens. Lin, *supra* note 10, at 1259 (citing Rose Cuison Villazor, *American Nationals and Interstitial Citizenship*, 85 FORDHAM L. REV. 1673, 1676 (2017)).

38. Lopez-Morales, *supra* note 15, at 786–87.

39. *Id.* at 787 (citing THE FEDERALIST NO. 47, at 324 (James Madison) (J. Cooke ed., 1961)).

40. *Id.* (citing THE FEDERALIST NO. 47, at 324 (James Madison) (J. Cooke ed., 1961)); *see also* Lin, *supra* note 10, at 1266 ("Given their lack of political power in Washington, the Territories are frequently subjected to legislation, executive action, and regulation that damage their interests without their consent or input.").

41. Petition for a Writ of Certiorari at 31, Fitisemanu v. United States, 143 S. Ct. 362 (2022).

42. Igartúa-De La Rosa v. United States (*Igartúa III Rehearing*), 417 F.3d 145, 168 (1st Cir. 2005) (Torruella, J., dissenting). In fact, the United Nations Special Committee on Decolonization lists American Samoa, Guam, and the U.S. Virgin Islands as three of the last seventeen remaining non-self-governing colonies in the world. *See Non-Self-Governing Territories*, UNITED NATIONS & DECOLONIZATION, https://www.un.org/dppa/decolonization/en/nsgt [https://perma.cc/78PU-NBE4].

43. I use the terms "equal enfranchisement" and "complete voting rights" in this Note to describe the situation in which territorial residents have the same right to vote in federal elections as do state residents.

I.
STRUGGLES FOR EQUAL ENFRANCHISEMENT

To contextualize the arguments for equal enfranchisement, it is important to first understand how the federal courts have ruled on claims that territorial residents have brought in past decades. Although there have been several challenges to the constitutional structure and federal and state statutes that disenfranchise territorial residents, none have been successful.

Throughout these decisions, the lower federal courts have consistently applied three principles when analyzing territorial residents' right to vote. First is the primacy of the text of the relevant constitutional provisions. Section 2 of Article I provides: "The House of Representatives shall be composed of Members chosen . . . by *the People of the several States*."[44] The Seventeenth Amendment provides: "The Senate of the United States shall be composed of two Senators from each *State*, elected by *the people thereof*."[45] And Section 1 of Article II provides: "Each *State* shall appoint . . . Electors," who subsequently choose the president and vice president.[46] Because these provisions affirmatively include only the states, courts assume that the exclusion of the territories prohibits territorial residents' from having the right to vote.

Second, courts have determined that territorial residents' equal protection claims regarding their voting rights are not subject to strict scrutiny because territorial residents are not a suspect class and their claims do not implicate a fundamental right.[47] In fact, it may even be the opposite: the risk of creating a class of "super citizen" territorial residents whose ability to vote in federal elections would turn on prior residence in a state could exacerbate inequities between the states and territories.[48] And third, courts have ruled that either a grant of statehood to a territory or constitutional amendment is necessary for equal enfranchisement. In the absence of either form of congressional action, territorial residents do not and cannot have the right to vote in federal elections.[49]

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44. U.S. CONST. art. I, § 2, cl. 1 (emphasis added).

45. *Id.* amend. XVII (emphasis added).

46. *Id.* art. II, § 1, cl. 2 (emphasis added).

47. *See, e.g.*, Igartua De La Rosa v. United States (*Igartúa I*), 32 F.3d 8, 10 (1st Cir. 1994), *cert. denied*, 514 U.S. 1049 (1995).

48. Borja v. Nago (*Borja I*), Civ. No. 20-00433 JAO-RT, 2022 WL 4082061, at *10 (D. Haw. Sept. 6, 2022), *aff'd,* 115 F.4th 971 (9th Cir. 2024).

49. *See* Att'y Gen. of Territory of Guam v. United States, 738 F.2d 1017, 1019 (9th Cir. 1984), *cert. denied*, 469 U.S. 1209 (1985); *Igartúa I*, 32 F.3d at 9–10; *see also* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 31, at 5 n.9 (stating that "[t]o extend such constitutional rights [as the right to vote in national elections], which apply only to residents of states, to the insular areas, would require admission to the Union or amending the Constitution"); *Igartúa III Rehearing*, 417 F.3d at 151 (characterizing the right of territorial residents to vote in federal elections as a "political" issue that "must be [achieved] through political means").

A. Structural Challenges

Federal courts have categorically rejected territorial residents' challenges to constitutional structure, usually relying on the argument that the Constitution prohibits their enfranchisement in federal elections.

In 1984, the Attorney General of Guam and four Guam residents sued the United States, seeking a judgment declaring the right of these citizens to vote in the U.S. presidential and vice-presidential elections.[50] The district court dismissed the complaint for failure to state a claim upon which relief can be granted.[51] In affirming the district court's decision, the Ninth Circuit explained that even though Guamanians are U.S. citizens, the Constitution does not grant citizens the right to elect the president.[52] Instead, electors appointed by "each State" elect the president and vice president.[53] Because Guam is not a state, it can have no electors, and plaintiffs thus cannot exercise individual votes in a presidential election.[54] A constitutional amendment would be required to permit plaintiffs to vote in a presidential election.[55] Because plaintiffs' constitutional rights were not violated by the prohibition against voting in presidential and vice-presidential elections, plaintiffs did not state a legally cognizable claim, and the judiciary could not provide plaintiffs effective relief.[56]

In Puerto Rico and the U.S. Virgin Islands, residents were likewise unsuccessful in gaining the right to vote in federal elections.[57] In 1994, Puerto Rico residents brought an action alleging that their inability to vote in the U.S. presidential election violated their constitutional rights.[58] The district court dismissed the action, and the First Circuit affirmed the district court's decision, citing the Ninth Circuit's holding in *Attorney General of Territory of Guam v. United States*.[59] Because Puerto Rico is not a state, it is not entitled to choose electors. Only a constitutional amendment or grant of statehood could provide

50. *Att'y Gen. of Guam*, 738 F.2d at 1018.

51. *Id.*

52. *Id.* at 1018–19.

53. U.S. CONST. art. II, § 1, cl. 2 ("Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress . . . .").

54. *Att'y Gen. of Guam*, 738 F.2d at 1019.

55. *Id.*; *see also* Sanchez v. United States, 376 F. Supp. 239, 240 (D.P.R. 1974) (holding that a suit by American citizens residing in Puerto Rico to vote in presidential elections did not present a substantial constitutional question); U.S. CONST. amend. XXIII (granting D.C. residents the right to participate in presidential elections).

56. *Att'y Gen. of Guam*, 738 F.2d at 1019.

57. In an earlier suit, a Puerto Rico resident challenged the constitutionality of Public Law 600, which prohibited U.S. citizens residing in Puerto Rico from voting for president and vice president of the United States. *Sanchez*, 376 F. Supp. at 240. The district court rejected plaintiff's argument, stating that "[a]lthough citizenship may be a prerequisite to voting, the right to vote is not an essential right of citizenship." *Id.* at 241.

58. *Igartúa I*, 32 F.3d 8, 9 (1st Cir. 1994), *cert. denied*, 514 U.S. 1049 (1995).

59. *Id.* at 9–10 (citing *Att'y Gen. of Guam*, 738 F.2d at 1019; *Sanchez*, 376 F. Supp. at 241).

Puerto Ricans the right to vote in presidential elections.[60] The District Court of the Virgin Islands later rejected a similar action for largely identical reasons, which the Third Circuit affirmed.[61]

The Puerto Rican plaintiffs had a short-lived victory in 2000 when the district court ruled in their second action that plaintiffs' disenfranchisement in federal elections was unconstitutional, focusing on the ability to elect delegates as opposed to the right to vote as individuals.[62] In doing so, the district court held that the underlying arguments supporting the ratification of the Twenty-Third Amendment, which granted D.C. residents the right to vote for president and vice president,[63] should also grant the right to vote to Puerto Rico residents.[64] The court explained that like many D.C. residents, many Puerto Ricans have "fulfilled the highest calling of citizenship, fighting and dying in the battlefields in two world wars, [and] the Korean, Vietnam, and Gulf wars."[65] The court distinguished between *Igartua de la Rosa v. United States* (*Igartúa I*), which centered on plaintiffs' inability to vote for president and vice president, and the instant case, about plaintiff's inability to elect delegates to the Electoral College.[66] It further determined that the political subordination of Puerto Rico residents was repugnant to the U.S. Constitution and that the Constitution protected their fundamental right to vote.[67] On September 10, 2000, the Legislature of Puerto Rico subsequently enacted Law No. 403 to allow U.S. citizens domiciled in Puerto Rico to vote in presidential and vice-presidential elections, which was signed into law and became effective immediately.[68]

However, the First Circuit reversed the district court's decision. It rejected the lower court's attempt to distinguish *Igartúa I* and held that there had been no constitutional amendment or change in the status of Puerto Rico that would provide plaintiffs the right to vote. The court further held that no subsequent case law supported the argument that the right to vote in the presidential election could be derived from any source other than Article II.[69] Because *Igartúa I* was

60. *Id.* (citing *Att'y Gen. of Guam*, 738 F.2d at 1019–20).

61. Ballentine v. United States, No. Civ. 1999-130, 2006 WL 3298270, at *2 (D.V.I. Sept. 21, 2006), *aff'd and adopted*, 486 F.3d 806 (3d Cir. 2007) (citing *Igartúa III Rehearing*, 417 F.3d 145, 147 (1st Cir. 2005); *Att'y Gen. of Guam*, 738 F.2d at 1019).

62. Igartua de la Rosa v. United States, 107 F. Supp. 2d 140, 145 (D.P.R. 2000).

63. U.S. CONST. amend. XXIII.

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

65. *Id.* In every war since World War II involving the United States, people from the territories have enlisted and died at one of the highest per capita rates relative to their peers from the states. Indeed, American Samoa has "the highest rate of military enlistment of any U.S. state or territory." Lin, *supra* note 10, at 1275 (citing Mark Joseph Stern, *The Supreme Court Needs to Settle Birthright Citizenship*, SLATE (June 6, 2016), https://slate.com/news-and-politics/2016/06/the-supreme-court-needs-to-settle-birthright-citizenship.html [https://perma.cc/3Q7E-P9N2]).

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

67. *Id.* at 147–49.

68. *See* 2000 P.R. Laws 499, 518.

69. Igartua de la Rosa v. United States (*Igartúa II*), 229 F.3d 80, 82–85 (1st Cir. 2000).

binding, the district court erred in not dismissing the action.[70] Even though the court declined to decide the validity of Law 403 under Puerto Rico law,[71] the Puerto Rico Supreme Court later struck down the law because of the First Circuit's decision.[72]

In 2004, plaintiffs brought their constitutional claims a third time, which the court dismissed based on *Igartúa I* and *Igartúa II*.[73] Upon rehearing en banc, the First Circuit rejected plaintiffs' adjacent treaty claims on the grounds that the Universal Declaration of Human Rights, Inter-American Democratic Charter, and International Covenant on Civil and Political Rights did not impose any legal obligations on the United States.[74] Even if they did, no statute or treaty—even one with the force of domestic law—could override the Constitution.[75] Moreover, these treaty claims were likely nonjusticiable because the court could not provide effective relief.[76] The court reiterated that only the political branches could give Puerto Ricans the right to vote in presidential elections.[77] In the plaintiffs' fourth action, the First Circuit reaffirmed the district court's dismissal, holding that its conclusions in *Igartúa III* remained binding law.[78]

Regardless of the legal theory, whether concerning electors, individual voters, or disenfranchisement generally, federal courts have systematically struck down every constitutional argument presented, simply because of the label of "Territory."

B. Statutory Challenges

Territorial residents have been similarly unsuccessful in challenging their lack of federal voting rights under the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA). The UOCAVA allows U.S. citizens who move abroad, even permanently, to vote in federal elections, but does not grant that right to those who move to Puerto Rico, Guam, the U.S. Virgin Islands, or

70. *Id.* at 85.
71. *Id.* at 83.
72. Báez Galib v. Comisión Estatal de Elecciones, 152 D.P.R. 382, 401 (P.R. 2000).
73. Igartúa-de la Rosa v. United States (*Igartúa III*), 386 F.3d 313, 313 (1st Cir. 2004).
74. *Igartúa III Rehearing*, 417 F.3d 145, 150 (1st Cir. 2005) (citing Sosa v. Alvarez-Machain, 542 U.S. 692 (2004) (Universal Declaration of Human Rights); Remarks of U.S. Ambassador Roger Noriega at Organization of American States Permanent Council Meeting (Sept. 6, 2001), 2001 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW, ch. 6, §I(1) at 347 (Inter-American Democratic Charter); 138 CONG. REC. S4781–84 (Apr. 2, 1992) (ICCPR)).
75. *Id.* at 148.
76. *Id.* at 149.
77. *Id.* at 151.
78. Igartúa v. United States (*Igartúa IV*), 626 F.3d 592, 606 (1st Cir. 2010).

American Samoa.[79] States themselves can extend the right to former state residents who now reside in those territories, but most have failed to do so.[80]

In *Igartúa I*, plaintiffs living in Puerto Rico challenged the UOCAVA on due process and equal protection grounds.[81] The First Circuit rejected these claims, holding that the statute did not distinguish between overseas residents and Puerto Rico residents, but instead between those who reside overseas and those who move anywhere within the United States.[82] Given that such a distinction neither affected a suspect class nor infringed a fundamental right, rational basis review applied.[83] Congress had a rational basis for seeking to protect the absentee voting rights of only those voters who moved overseas and could therefore lose their right to vote entirely. This is distinct from voters who moved within the United States and would be eligible to vote in a federal election in their new place of residence, thus not needing statutory protection.[84]

Efforts to challenge similar state laws in New York and Illinois also failed. In *Romeu v. Cohen*, the court held that the plaintiff, a former New York resident now living in Puerto Rico, did not suffer a violation of his constitutional rights because the alleged deprivation is created by the Constitution.[85] Moreover, because of the deference owed to Congress in its treatment of the territories, UOCAVA's distinction between former state residents now living outside the United States and those now living in the U.S. Territories was subject to only rational basis review.[86] Finally, the court stated that the statutes did not violate the right to travel because a citizen's choice to move away from their state of residence would inevitably involve certain losses, and the disenfranchisement resulting from a citizen's choice to move to a territory is not an unconstitutional burden.[87] In *Segovia v. United States*, former Illinois residents living in Puerto Rico, Guam, and the U.S. Virgin Islands brought due process and equal protection challenges to the UOCAVA and analogous Illinois statute.[88] Had they

79. *See* 52 U.S.C. §§ 20301–20311. The UOCAVA provides that U.S. citizens, including residents of Puerto Rico, who reside outside the United States retain the right to vote via absentee ballot in their last place of U.S. residence if these citizens otherwise qualify to vote under the laws of their last place of residence. *See* 52 U.S.C. §§ 20310. It does not apply, however, to citizens who move from one jurisdiction to another within the United States. The UOCAVA defines the United States as "the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, and American Samoa." *Id.*

80. Advisory Memorandum from the Conn. State Advisory Comm. to the U.S. Comm'n on C.R. (Oct. 4, 2021) [hereinafter Advisory Memorandum], https://www.usccr.gov/files/2021-11/voting-rights-in-the-territories-advisory-memo-ct-sac.pdf [https://perma.cc/387D-PE9H].

81. *Igartúa I*, 32 F.3d 8, 9 (1st Cir. 1994).

82. *Id.* at 10.

83. *Id.*

84. *Id.* at 10–11.

85. Romeu v. Cohen, 265 F.3d 118, 122 (2d Cir. 2001). Romeu additionally alleged that the UOCAVA and New York Election Law violated his rights under the Privileges and Immunities Clause, which the court also rejected. *Id.* at 127.

86. *Id.* at 124.

87. *Id.* at 126–27.

88. Segovia v. United States, 880 F.3d 384, 386 (7th Cir. 2018).

moved instead to American Samoa or the Northern Mariana Islands, Illinois law would consider them to be "overseas" residents entitled to ballots.[89] Again, the district court rejected their claims because there was a rational basis for the state to include some territories but not others in the definition of the United States.[90] The Seventh Circuit further concluded that plaintiffs lacked standing to challenge the UOCAVA because their injuries were not traceable to the federal statute.[91]

Most recently, in 2020, former residents of Hawai'i living in Guam and the U.S. Virgin Islands challenged the distinction in UOCAVA and Hawai'i state law between U.S. citizens residing in the Northern Mariana Islands, other insular territories, or a foreign country, and those residing in Guam, the U.S. Virgin Islands, American Samoa, or Puerto Rico.[92] Plaintiffs alleged that these statutes unconstitutionally distinguished among former state residents by protecting voting rights on the basis of residence overseas or in specified territories.[93]

Just as in prior cases, the district court determined that the statutes survived rational basis review.[94] The federal government had a legitimate interest in including Guam, the U.S. Virgin Islands, Puerto Rico, and American Samoa in its definition of the "United States," as that would place state residents who move to one of these territories on equal footing with residents already there. Moreover, extending absentee voting to all former state residents who move to a territory would risk creating a class of "super citizens" whose ability to vote in federal elections—a right not given to territorial residents—would turn on prior residence in a state, which "could result in wealth-based inequity."[95] The court also detailed the long history of the federal government's different treatment of and among territories.[96] And just like in *Segovia*, the federal and state governments had a legitimate interest in extending absentee voting rights to those who move to foreign countries and would otherwise lose the right to vote

89. Whereas the UOCAVA includes "the Commonwealth of Puerto Rico, Guam, the Virgin Islands, and American Samoa" as part of the United States, Illinois law excludes American Samoa and the Northern Mariana Islands. *Id.* at 387.

90. *Id.* at 386–87.

91. *Id.* at 387. Regarding the UOCAVA, the Seventh Circuit stated that while federal law requires Illinois to provide absentee ballots for its former residents living in the Northern Mariana Islands, it does not prohibit Illinois from providing such ballots to former residents in Guam, Puerto Rico, and the Virgin Islands. *Id.* at 388. Because Illinois has discretion to determine eligibility for overseas absentee ballots under its election laws, Illinois, not the federal government, has caused their injuries by failing to provide them ballots. *Id.* at 389.

92. Reeves v. Nago, 535 F. Supp. 3d 943, 949 (D. Haw. 2021); *Borja I*, 2022 WL 4082061, at *1 (D. Haw. Sept. 6, 2022), *aff'd,* 115 F.4th 971 (9th Cir. 2024).

93. *Reeves*, 535 F. Supp. 3d at 949; *Borja I*, 2022 WL 4082061, at *3. Like in *Segovia*, because of the federal and state statutes, U.S. citizens who have never resided in the United States can vote in Hawai'i's federal elections, while former Hawai'i residents lose the right to participate in such elections if they move to Guam, the U.S. Virgin Islands, American Samoa, or Puerto Rico. *Reeves*, 535 F. Supp. 3d at 949; *Borja I*, 2022 WL 4082061, at *2.

94. *Borja I*, 2022 WL 4082061, at *9 (citing *Segovia*, 880 F.3d at 390; *Igartúa I*, 32 F.3d at 10).

95. *Id.* at *10 (citing Romeu v. Cohen, 265 F.3d 118, 125 (2d Cir. 2001)).

96. *Id.* at *11.

entirely.[97] The fact that territorial residents may have a greater interest in federal elections than former state residents who move abroad, or that the latter have no freestanding right to vote in federal elections, did not, in the court's opinion, invalidate otherwise logical policy reasons supporting the distinctions.[98]

The Ninth Circuit recently affirmed the district court's decision, holding that rational basis review applied. No binding authority required the court to "apply strict scrutiny to voting laws that deny the ability to vote in a unit wide election to those residing outside of that unit."[99] Neither the UOCAVA nor the state analog "changed the basic constitutional reality" that a state conducts statewide federal elections to represent the interests of its people in federal government.[100] Additionally, the plaintiffs "d[id] not bear the 'traditional indicia' of a suspect or quasi-suspect class"[101] because while many territorial residents "'have endured a long history of discrimination' on account of their place of birth, race, or ethnicity, that history [did] not define Plaintiffs as a class in this suit."[102] The court noted the "emerging consensus" of applying rational basis review to such cases[103] and held that the statutes survived rational basis review because there were a slew of conceivable bases upon which Congress and the Hawai'i legislature could have relied to enact them.[104] Finally, despite recognizing that "the vast majority of [territorial residents] are not being afforded a meaningful voice in national governance," the court noted that "[t]his lawsuit is not the proper vehicle to remedy that concern."[105]

* * *

97. *Id.* at *12.

98. *Id.* at *13.

99. Borja v. Nago (*Borja II*), 115 F.4th 971, 980 (9th Cir. 2024) (citing Dunn v. Blumstein, 405 U.S. 330, 334 (1972); Holt Civic Club v. City of Tuscaloosa, 439 U.S. 60, 68–69 (1978)) (distinguishing *Dunn* and *Green v. City of Tucson*, 340 F.3d 891 (9th Cir. 2003), because *Dunn* "trigger[ed] strict scrutiny in only two scenarios: (1) where a law "unreasonably deprive[s] some residents in a geographically defined governmental unit from voting in a unit wide election"; and (2) where a law "contravene[s] the principle of 'one person, one vote' by diluting the voting power of some qualified voters within the electoral unit," neither of which applied in this case (citations omitted)).

100. *Id.* at 981.

101. *Id.* at 982.

102. *Id.*

103. *Id.* (citing *Segovia*, 880 F.3d at 390; *Igartúa I*, 32 F.3d at 10; *Romeu*, 265 F.3d at 124).

104. For example, "Congress could have reasonably determined that it was important to ensure that U.S. citizens living in foreign countries retained some opportunity to participate in federal elections," whereas "U.S. citizens who move from a State to the U.S. Territories . . . [could] still participate in unit wide elections in their new homes." The Hawai'i legislature "also could have reasonably determined that [extending overseas voting rights to the plaintiffs] would harm the interests of [Hawai'i]'s own residents, who arguably have the greatest interest in federal elections conducted in [Hawai'i]." *Id.* at 983–84. The court also noted that the plaintiffs could not provide evidence of "animus" motivating their exclusion. *Id.* at 984.

105. *Id.* (citing *Romeu*, 265 F.3d at 136 (Walker, J., concurring)).

The Supreme Court has never explicitly ruled on the issue of territorial residents' voting rights,[106] letting these lower court decisions stand and perpetuate many of the racist rationales of the *Insular Cases*. Each of these principles, however, is questionable, as explained in Parts II and III. First, constitutional silence does not necessarily demonstrate an affirmative intent to disenfranchise territorial residents, especially considering the original understanding of the Territorial Clause. Second, territorial residents are a "discrete and insular minorit[y]"[107] whose disenfranchisement should be subject to strict scrutiny. Third, Congress has employed several methods to extend the franchise in the past and thus is not confined to either statehood or constitutional amendment to extend complete voting rights to territorial residents now.

II.
THE ARGUMENT FOR EQUAL ENFRANCHISEMENT

The doctrine that disenfranchises territorial residents from federal elections complicates the traditional understanding of the law of citizenship.[108] Parting from the citizen/noncitizen distinction, federal courts have judicially created a new identity: a "second-class" of U.S. citizens and nationals who, by mere virtue of their residence in U.S. Territories, cannot and do not have federal representation.[109]

In rejecting plaintiffs' claims regarding their inability to vote in federal elections, federal courts have relied heavily on two principles. First, the relevant constitutional provisions provide only states with the right to appoint electors, and only the people of the states have the right to vote in federal elections. Second, territorial residents' voting rights claims are not subject to strict scrutiny. This Section challenges these two principles and outlines constitutional arguments for equal enfranchisement.[110] Because equal enfranchisement is constitutionally permissible, historically supported, and more consistent with

106. The closest the Supreme Court appears to have come to addressing this issue is *Torres v. Sablan*, in which the Court affirmed in a memorandum opinion (with no reasoning) the decision of the District for the Northern Mariana Islands holding that the "one person, one vote" standard was not a fundamental constitutional right guaranteed to residents of unincorporated territories. Rayphand v. Sablan, 95 F. Supp. 2d 1133 (D. N. Mar. I. 1999), *aff'd sub nom.* Torres v. Sablan, 528 U.S. 1110 (2000). However, this decision addressed a challenge to the composition of the malapportioned CNMI Senate, not voting rights in federal elections. *Id.* at 1135–36.

107. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

108. *See* Cuison Villazor, *supra* note 37, at 1681. The citizen/noncitizen binary framework is simple: the citizen is one who belongs, whereas the noncitizen is the stranger, the "alien," or one who does not belong. Many sources contribute to this binary, including the common law, the Fourteenth Amendment, citizenship statutes, and naturalization laws. *Id.* at 1681–87.

109. *See* Petition for a Writ of Certiorari, *supra* note 41, at 31; Joseph Fishkin, *Weightless Votes*, 121 YALE L.J. 1888, 1899 (2012) ("Disenfranchisement injures an individual voter by rendering her something less than a full, equal citizen . . . .").

110. *See* Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 U. PA. L. REV. 1391, 1394 (1993).

equal protection principles, there is a constitutional justification for equal enfranchisement.

A. Countering Constitutional Silence

The federal courts have consistently held that the Constitution prohibits the complete enfranchisement of territorial residents because its election provisions are silent as to the territories. No provision in the Constitution, however, expressly prohibits the federal government from granting territorial residents the right to vote. Neither does any constitutional provision grant the federal government the authority to annex a territory and govern it permanently as such.[111] The original understanding of the U.S. government's relationship with its territories did not include their perpetual maintenance and political subordination.[112] The continued colonial status of the territories, as well as the disenfranchisement of their residents, is thus inconsistent with the historical understanding of territorial status. Moreover, the blanket exclusion of territorial residents from federal elections is neither constitutionally required nor historically supported; in fact, both foundational constitutional principles and history support the prospect of equal enfranchisement.

1. Constitutional Permissibility

The U.S. Constitution grants congressional voting representation to the states but is silent as to the territories.[113] The federal courts have understood this silence as a prohibition, which has thus been the major rationale for restricting territorial residents' federal voting rights. Courts have consistently ruled that U.S. citizens cannot vote in federal elections if they live in the territories, relying on the argument that "the text of the Constitution, in several provisions, plainly limits the right to choose members of the House of Representatives to citizens of a *state*," not territory.[114]

The equal enfranchisement of territorial residents, however, is constitutionally permissible. First, although no constitutional provision explicitly enfranchises territorial residents, neither does any provision limit the

111. *See* Dred Scott v. Sandford, 60 U.S. 393, 446 (1857) ("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 . . . [N]o power is given to acquire a Territory to be held and governed permanently in that character.").

112. *Infra* Part II.A.2.

113. *See* U.S. CONST. art. I, § 2, cl. 1 ("The House of Representatives shall be composed of Members chosen every second Year by the People of the several *States*.") (emphasis added).

114. *Igartúa IV*, 626 F.3d 592, 595 (1st Cir. 2010) (emphasis added); *see also* Segovia v. United States, 880 F.3d 384, 390 (7th Cir. 2018) ("The unmistakable conclusion is that, absent a constitutional amendment, only residents of the 50 States have the right to vote in federal elections.").

power of the federal government to provide the right to vote.[115] Like Professor and Congressman Jamin B. Raskin argues, the Constitution is silent regarding whether citizenship is required for federal voting, but this does not show an affirmative intent to create such a requirement.[116] Similarly, the Constitution's silence regarding the federal voting rights of territorial residents does not mean that these rights do not exist.

Even considering Congress's broad authority over the territories pursuant to the Territorial Clause and Organic Acts, no constitutional principles prohibit the federal government from granting the right to vote. Even the constitutional provisions that refer to the states relate only to representation and apportionment, not necessarily to the individual ability to cast a ballot. Granting territorial residents complete voting rights is consistent with the Guarantee Clause and basic republican principles. Under longstanding precedent, the Supreme Court has consistently refrained from striking down government practices alleged to violate the right to a republican form of government on the grounds that such questions are nonjusticiable.[117] With the Court's recent reaffirmation of this assertion in *Rucho v. Common Cause*, there is no reason to think that the federal courts would find the institution of equal enfranchisement to violate the Guarantee Clause.[118] Also, territorial suffrage does not offend the principle of one-person, one-vote because territorial residents, as U.S. citizens, are undeniably part of "the people [who] should choose whom they please to govern them," pursuant to fundamental principles of our representative democracy.[119] The Supreme Court has consistently recognized the significance of the right to vote, calling it "a fundamental political right [that is] preservative of all rights."[120] Furthermore, "granting the franchise to residents on a selective basis always pose[s] the danger of denying some citizens any effective voice in the

115. *See, e.g.*, *Igartúa IV*, 626 F.3d at 607 (Lipez, J., concurring) ("To say that the Constitution does not *require* extension of federal voting rights to Puerto Rico residents does not, however, exclude the possibility that the Constitution may *permit* their enfranchisement under another source of law."); *id.* at 608 ("[R]eferences in Article I to the voting rights of the people of 'the States' are not necessarily negative references to the voting rights of citizens residing in other United States jurisdictions.").

116. *See* Raskin, *supra* note 110, at 1420–21.

117. *See* Luther v. Borden, 48 U.S. (7 How.) 1, 42 (1849); Pac. States Tel. & Tel. Co. v. Oregon, 223 U.S. 118, 133–34, 140 (1912); Rucho v. Common Cause, 588 U.S. 684, 718 (2019) ("This Court has several times concluded, however, that the Guarantee Clause does not provide the basis for a justiciable claim.").

118. *See* Raskin, *supra* note 110, at 1422.

119. Powell v. McCormack, 395 U.S. 486, 547 (1969) (quoting Alexander Hamilton, First Speech at New York Ratifying Convention (June 21, 1788)).

120. Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886); *see also* Wesberry v. Sanders, 376 U.S. 1, 17–18 (1964) ("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 this right.").

governmental affairs which substantially affect their lives."[121] Equal enfranchisement follows naturally from these fundamental principles.

Second, the suffrage amendments further support granting complete voting rights to territorial residents. The extension of the franchise and development of the right to vote have occurred piecemeal through the process of constitutional amendments and statutory enactments.[122] Constitutional amendments have extended the right to vote to African American men, women, D.C. residents, and citizens over eighteen years of age. The UOCAVA has granted that right to those serving in the military or living overseas.[123] The Twenty-Fourth Amendment has further sought to eliminate economic barriers to electoral participation.[124] The constitutional trend toward universal adult suffrage and representation also strongly supports extending complete voting rights and meaningful federal representation to territorial residents.[125]

Finally, the Constitution never defines what a "State" is; it only describes the powers granted and denied to the states and provides that Congress may admit new ones. In several contexts, the federal government has treated some or all the territories as "states." For example, the UOCAVA itself explicitly includes in its definition of "State" "a State of the United States, the District of Columbia, *the Commonwealth of Puerto Rico, Guam, the Virgin Islands, and American Samoa*" (albeit only for the purpose of disenfranchising the residents of those territories).[126] Federal law also extends due process and equal protection to the territories, often by analogizing territories to states.[127] In reporting census data, the Census Bureau lists Puerto Rico alongside states[128] but characterizes American Samoa, Guam, the Northern Mariana Islands, and the U.S. Virgin Islands as "Island Areas."[129]

In sum, the permissibility of extending complete voting rights and the broader constitutional trend toward universal suffrage, combined with the federal government's inconsistent and relatively arbitrary treatment of territories like

121. Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 626–27 (1969).

122. Neil Weare, *Equally American: Amending the Constitution to Provide Voting Rights in U.S. Territories and the District of Columbia*, 46 STETSON L. REV. 259, 267 (2017).

123. *See* U.S. CONST. amends. XV, XVIV, XXIII, XXVI; 52 U.S.C. §§ 20301–20311.

124. *See* U.S. CONST. amend. XXIV.

125. Weare, *supra* note 122, at 267.

126. 52 U.S.C. § 20310(6) (emphasis added).

127. *See* Examining Bd. of Eng'rs v. Flores de Otero, 426 U.S. 572, 600 (1976) (Puerto Rico); Craddick v. Territorial Registrar, 1 Am. Samoa 2d 10, 12 (1980); Pub. L. No. 90-497, § 10, 82 Stat. 847 (1968) (Guam); Pub. L. No. 90-496, § 11, 82 Stat. 841 (1968) (U.S. Virgin Islands); Marianas Covenant, § 501(a).

128. *See Puerto Rico Population Declined 11.8% from 2010 to 2020*, U.S. CENSUS BUREAU (Aug. 25, 2021), https://www.census.gov/library/stories/state-by-state/puerto-rico-population-change-between-census-decade.html [https://perma.cc/F4VB-JN3A].

129. *2020 Island Areas Censuses Data Products*, U.S. CENSUS BUREAU, https://www.census.gov/programs-surveys/decennial-census/decade/2020/planning-management/release/2020-island-areas-data-products.html [https://perma.cc/AHC4-GWBY].

states, demonstrate that there is no constitutional limitation to implementing equal enfranchisement.

2. Lack of Original Intent

In prioritizing the language of Article I, courts have devalued the importance and applicability of other parts of the Constitution—in particular, the Territorial Clause.[130] Congress concededly has greater latitude in governing the territories than in legislating for the states because the territories and the States are distinct constitutional entities.[131] But constitutional text, historical practice, and judicial precedents show that the Constitution permits the unequal treatment of the territories *only* because such inequality was meant to be temporary.[132]

At the time of the framing, territorial status under the Constitution was meant to be transitory.[133] The text of Section 3 of Article IV begins with the Admissions Clause, which provides: "New States may be admitted by the Congress into this Union . . . ." Immediately follows the Territorial Clause, which provides: "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory . . . ."[134] The textual integration of these two clauses is a "powerful indicator of the original meaning of Congress's power to govern the territories as states-in-waiting, not as permanent possessions."[135] The Supreme Court recognized as much in *O'Donoghue v. United States*, explaining that "[s]ince the Constitution provides for the admission by Congress of new states, it properly may be said that the outlying continental public domain, of which the United States was the proprietor, was, from the beginning, destined for admission as a state or states into the Union."[136]

Second, historical government practice further informs the original understanding of the Territorial Clause. The founding generation, having been

130. *Igartúa IV*, 626 F.3d 592, 615 (1st Cir. 2010) (Torruella, J., concurring in part, dissenting in part) ("The lead opinion makes much of the language in Article I of the Constitution, but conveniently devalues the importance and applicability of other parts of this document. This is a strategy that is not acceptable, for the Constitution is not an instrument that can be picked at, or chosen from, at random. The principled implementation of the Constitution requires that it be honored in its totality, and in an integrated way.").

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

132. Lopez-Morales, *supra* note 15, at 794.

133. *Id.* at 796.

134. *See* U.S. CONST. art. IV, § 3, cls. 1–2.

135. Lopez-Morales, *supra* note 15, at 797; *see* GARY LAWSON & GUY SEIDMAN, THE CONSTITUTION OF EMPIRE: TERRITORIAL EXPANSION & AMERICAN LEGAL HISTORY 4 (2004) (noting that while the Constitution "provides ample authorization for the acquisition of new territory for the purpose of creating new states, . . . there are serious questions about the ability of the United States to add territories that are not slated for statehood"); AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 274 (2005) (explaining that "the fact that Article IV addressed both federal territory and new states in a single integrated section both reflected and reinforced a general expectation that territories would indeed mature into new states that in due course would be admitted on equal terms").

136. 289 U.S. 516, 537 (1933) (internal citations omitted).

treated as colonists, "vowed not to mistreat their own new colonies," as England had done to them.[137] In the century between the American Revolutionary and Spanish-American Wars, every American territory had a distinct path into the Union.[138] Without exception, Congress had acquired and governed every territory as a temporary entity on the path to statehood.[139] The federal government had consistently and deliberately invested in territories' eventual inclusion, whether through encouraging settlements, investing in infrastructure, or appealing to nationalist pride in growing the number of states that encompassed the United States.[140] Such historical practices likewise reflect the original meaning of the United States' relationship with its territories.

Lastly, judicial precedent reinforces this original understanding. Although the Constitution contains no express guarantee of statehood, early federal case law repeatedly explained that the United States only had the power to acquire territories that would eventually become states.[141] In the early nineteenth century, the Supreme Court likened territorial status to "infancy advancing to manhood, looking forward to complete equality [as a state] so soon as that stat[us] of manhood shall be attained."[142] Even in *Dred Scott v. Sandford*, the Court held that no constitutional provision authorized "the Federal Government to establish or maintain colonies . . . to be ruled and governed at its own pleasure" or "to acquire a Territory to be held and governed permanently in that character."[143] In 1894, right before the Spanish-American War, the Court explicitly stated that "territories acquired by Congress . . . are held with the object, as soon as their population and condition justify it, of being admitted into the Union as states."[144] All these statements accurately described the uncontroversial original understanding of Congress's governance of the territories: that Congress has no constitutional authority to keep the U.S. Territories indefinitely as territories.[145]

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137. AMAR, *supra* note 135, at 273.

138. *See* PETER S. ONUF, STATEHOOD AND UNION: A HISTORY OF THE NORTHWEST ORDINANCE 72 (2d ed. 2019) (describing the developmental model as "central to the very idea of 'territory'" and the assumption that "[a]n American colony *became* a state while being administered as a territory") (emphasis in original); Craig Green, *Beyond States: A Constitutional History of Territory, Statehood, and Nation-Building*, 90 U. CHI. L. REV. 813, 816–17 (2023) (citing Puerto Rico v. Sanchez Valle, 579 U.S. 59, 69 n.4 (2016)) (characterizing territories as "essential to the constitutional origin stories of statehood and the United States" and as "a mechanism for producing new states and changing the country's identity").

139. Lopez-Morales, *supra* note 15, at 798.

140. *Voting Rights and Election Administration in the U.S. Virgin Islands and Other Territories: Hearing Before the Subcomm. on Elections of the H. Comm. on H. Admin.*, 116th Cong. 22 (2020) (statement of Guamanian Congressman Michael F.Q. San Nicolas).

141. Ediberto Román & Theron Simmons, *Membership Denied: Subordination and Subjugation Under United States Expansionism*, 39 SAN DIEGO L. REV. 437, 457–58 (2002) (citing Loughborough v. Blake, 18 U.S. (5 Wheat.) 317 (1820); Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857)).

142. *Loughborough*, 18 U.S. at 324.

143. 60 U.S. at 446.

144. Shively v. Bowlby, 152 U.S. 1, 49 (1894).

145. Lopez-Morales, *supra* note 15, at 800.

It was only after the annexation of Puerto Rico, the Philippines, Guam, Hawai'i, and American Samoa in 1898, however, that the United States shifted its motivations regarding its newest possessions' largely non-White inhabitants and planned to use the territories for economic exploitation and military strategy.[146] Through the *Insular Cases*, the Supreme Court invented an atextual and ahistorical doctrine to promote an imperialist agenda and sanction indefinite colonial status based on racist rationales.[147] Federal courts used this reasoning to decide that territorial residents are entitled to only the Constitution's "fundamental rights" (as unclear as that term may be);[148] can be denied or limited Social Security, Medicaid, or other federal benefits;[149]and still do not have the right to vote in federal elections over a century after becoming a U.S. Territory.[150]

The Constitution has always contemplated that the territories would become states, not remain in an indefinite "unincorporated" limbo. By virtue of Congress holding onto these territories way past its authority, the territories should be considered functionally as states. And with statehood would come the representation granted to states pursuant to the Constitution and the equal enfranchisement of their residents.[151] Complete enfranchisement for territorial residents is thus more consistent with the constitutional text, historical practice, and court precedents that demonstrate the original understanding of what territorial status entailed. If political actors refuse to act on the question of

146. Sarah M. Kelly, *Toward Self-Determination in the U.S. Territories: The Restorative Justice Implications of Rejecting the Insular Cases*, 28 MICH. J. RACE & L. 109, 117 (2023).

147. RUBIN FRANCIS WESTON, RACISM IN U.S. IMPERIALISM: THE INFLUENCE OF RACIAL ASSUMPTIONS ON AMERICAN FOREIGN POLICY, 1893–1946 15 (1972) ("Those who advocated overseas expansion faced this dilemma: What kind of relationship would the new peoples have to the body politic? Was it to be the relationship of the Reconstruction period, an attempt at political equality for dissimilar races, or was it to be the Southern 'counterrevolutionary' point of view which denied the basic American constitutional rights to people of color? The actions of the federal government during the imperial period and the relation of the Negro to a status of second-class citizenship indicated that the Southern point of view would prevail. The racism which caused the relegation of the Negro to a status of inferiority was to be applied to the overseas possessions of the United States.")

148. Balzac v. Puerto Rico, 258 U.S. 298, 309–10 (1922); *see also* Alan Tauber, *The Empire Forgotten: The Application of the Bill of Rights to U.S. Territories*, 57 CASE W. RSRV. L. REV. 147, 167 (2006) (explaining that "the Court's distinction between fundamental and procedural rights seems highly strained and arbitrary"); Brief of the Government of the U.S. Virgin Islands as Amicus Curiae in Support of Respondent at 3, United States v. Vaello-Madero, 596 U.S. 159 (2022) (No. 20-303) (noting that "[w]hich rights the courts consider 'fundamental' [regarding the unincorporated territories] have been determined case by case—with no apparent pattern or discernible rule").

149. *See* Califano v. Gautier Torres, 435 U.S. 1, 4–5 (1978); Harris v. Rosario, 446 U.S. 651, 651–52 (1980); MEDICAID & CHIP PAYMENT & ACCESS COMM'N, MEDICAID AND CHIP IN THE TERRITORIES 3 (2021), https://www.macpac.gov/wp-content/uploads/2019/07/Medicaid-and-CHIP-in-the-Territories.pdf [https://perma.cc/7PYF-AU8C]; Brief of the Government of the U.S. Virgin Islands, *supra* note 148, at 8–10.

150. *See* Att'y Gen. of Guam v. United States, 738 F.2d 1017, 1019 (9th Cir. 1984); *Igartúa IV*, 626 F.3d 592, 594 (1st Cir. 2010).

151. *See* U.S. CONST. art. I, § 2, cl. 1; *id.* amend. XVII; *id.* art. II, § 1, cl. 2.

statehood, then equal enfranchisement is a method of executing that promise and fulfilling the original purpose of the Territorial Clause.

B. Applying Strict Scrutiny

Federal courts have consistently applied only rational basis review to territorial residents' voting rights claims on the grounds that their claims do not implicate a fundamental right and that they are not a suspect class.[152] However, both assumptions are deeply flawed and ignore the histories of the territories at the margins of the American empire.

The Fifth and Fourteenth Amendments require the federal and state governments to practice equal protection.[153] Ordinarily, courts apply rational basis scrutiny in an equal protection challenge and uphold the classification if it is rationally related to a legitimate state interest.[154] But where the challenged law burdens a fundamental right or targets a suspect class, courts apply heightened scrutiny.[155]

Here, territorial residents' disenfranchisement implicates the fundamental right to vote. Moreover, territorial residents are a suspect class because they possess immutable characteristics, have been subjected to long histories of purposeful unequal treatment, and are relegated to a position of political powerlessness by virtue of having no vote in federal elections. Either of the fundamental right and antidiscrimination lines of equal protection jurisprudence is sufficient to establish that territorial residents' disenfranchisement should be subject to strict scrutiny.[156]

1. Voting as a Fundamental Right

Territorial residents' disenfranchisement in federal elections should be subject to strict scrutiny because their challenges implicate a fundamental right. First, the right to vote is a fundamental right. In 1874, the Supreme Court stated that voting is not a privilege of citizenship.[157] Despite this, Congress has continuously expanded the franchise through piecemeal amendments and statutory enactments.[158] The Court has also repeatedly characterized voting as a

152. *Igartúa I*, 32 F.3d at 10.

153. U.S. CONST. amends. V, XIV; *see* Bolling v. Sharpe, 347 U.S. 483, 498–99 (1954); Examining Bd. of Eng'rs v. Flores de Otero, 426 U.S. 572, 600 (1976).

154. FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 313 (1993).

155. Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 272 (1979).

156. *See also* Gerald L. Neuman, *Territorial Discrimination, Equal Protection, and Self-Determination*, 135 U. PA. L. REV. 261, 263, 265 (1987) (describing legal discriminations based on residence or other geographic factors as "territorial discriminations" and explaining that "territorial discriminations impinging upon fundamental rights should presumptively be subject to the same heightened scrutiny as any other fundamental rights discriminations"). Because territorial residents' disenfranchisement is based solely on their residence in a territory, this discrimination is also a form of "territorial discrimination."

157. Minor v. Happersett, 88 U.S. (21 Wall.) 162, 178 (1874).

158. Weare, *supra* note 122, at 267.

fundamental right,[159] declaring that any voting rights restriction "strike[s] at the heart of representative government."[160] As such, "[o]ur Constitution leaves no room for classification of people in a way that unnecessarily abridges this [fundamental] right."[161] Because the right to vote is "implicitly guaranteed by the Constitution," it is fundamental.[162] Abridging the right to vote by completely denying territorial residents that right in federal elections thus appears to plainly violate the Constitution, despite lower federal courts' insistence to the contrary.

Furthermore, the Court has repeatedly held that a severe burden on the fundamental right to vote is subject to strict scrutiny.[163] For example, in *Kramer v. Union Free School District Number 15*, the Court ruled that a law restricting the right to vote in a school board election to those "primarily interested" in school affairs—i.e., those who owned or leased property in the school district or those with a child enrolled in a district school—was subject to strict scrutiny.[164] Using a similar rationale, the Court struck down poll taxes in *Harper v. Virginia Board of Elections* because "wealth or fee paying" has no relation to voting qualifications and "the right to vote is too precious, too fundamental to be so burdened or conditioned."[165] Beyond these, the Court has closely scrutinized "all manner of qualifications erected as total barriers to the franchise."[166]

The Court has further elaborated on this understanding with the *Anderson-Burdick* framework,[167] which is the proper legal standard for evaluating constitutional challenges to state election regulations.[168] Under this framework:

> A court considering a challenge to a state election law must weigh "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate" against "the precise interests put forward by the State as justifications for the burden imposed by its rule," taking into

159. Williams v. Rhodes, 393 U.S. 23, 38 (1968); Reynolds v. Sims, 377 U.S. 533, 562 (1964); Wesberry v. Sanders, 376 U.S. 1, 17 (1964); Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886); *see also* City of Mobile v. Bolden, 446 U.S. 55, 113–14 (1980) (Marshall, J., dissenting) (explaining that "our cases recognize a fundamental right to equal electoral participation that encompasses protection against vote dilution"); United States v. Classic, 313 U.S. 299, 309–10 (1941) (finding that the right to vote in primary elections is one of the "rights, privileges, or immunities secured or protected by the Constitution and laws of the United States").

160. *Reynolds*, 377 U.S. at 555.

161. *Wesberry*, 376 U.S. at 17–18.

162. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 33–34 (1973).

163. Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 626 (1969).

164. *Id.* at 632.

165. 383 U.S. 663, 670 (1966).

166. *See* Neuman, *supra* note 156, at 292 & n.137 (citing Dunn v. Blumstein, 405 U.S. 330 (1972) (durational residence requirement); Evans v. Cornman, 398 U.S. 419 (1970) (residence in federal enclave); *Kramer* (lack of property ownership and not being parent of child attending school); Carrington v. Rash, 380 U.S. 89 (1965) (membership in armed forces)).

167. The *Anderson-Burdick* framework is derived from two Supreme Court cases, *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Burdick v. Takushi*, 504 U.S. 428 (1992).

168. *See* Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 190 (2008); Norman v. Reed, 502 U.S. 279, 288–89 (1992).

> consideration "the extent to which those interests make it necessary to burden the plaintiff's rights."
>
> Under this standard, the rigorousness of [a court's] inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights. Thus, as we have recognized when those rights are subjected to "severe" restrictions, the regulation must be "narrowly drawn to advance a state interest of compelling importance." But when a state election law provision imposes only "reasonable, nondiscriminatory restrictions" upon the First and Fourteenth Amendment rights of voters, "the State's important regulatory interests are generally sufficient to justify" the restrictions.[169]

Applying these principles, the disenfranchisement of territorial residents should be subject to strict scrutiny. Following the Court's precedent,[170] strict scrutiny applies to territorial classifications infringing upon a fundamental right.[171] Strict scrutiny also applies to state laws posing severe burdens or restrictions on the right to vote.[172] And there is no more severe burden than the complete denial of the right to vote, like that which territorial residents experience because they are completely disenfranchised in federal elections.[173] Finally, residence in a territory has no relation to voting qualifications in federal elections.[174] In fact, territorial residents have historically often displayed much stronger loyalty, patriotism, and sacrifice in favor of U.S. interests than have state residents, which supports extending complete voting rights.[175] Because the right to vote is fundamental and severe burdens on that right are subject to strict scrutiny, any federal or state statute that effectively disenfranchises citizens from federal elections based on their residence in the territories, such as the UOCAVA and analogous state laws, should be subject to strict scrutiny.

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169. *Burdick*, 504 U.S. at 434.

170. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 17 (1973).

171. Neuman, *supra* note 156, at 275 & n.65 (citing *Rodriguez* and explaining that strict scrutiny would have applied were education a fundamental right).

172. *Kramer*, 395 U.S. at 632; *Burdick*, 504 U.S. at 434.

173. *See Kramer*, 395 U.S. at 626.

174. *See Harper*, 383 U.S. at 670.

175. *See, e.g.*, Sarah A. Topol, *The America that Americans Forget*, N.Y. TIMES MAG., https://www.nytimes.com/2023/07/07/magazine/guam-american-military.html [https://perma.cc/B6M4-ZD7L] (noting that Guam has one of the highest per capita rates of veterans in the nation but ranks at the bottom for veteran services); Conor Knighton, *On the Trail: Living in American Samoa*, CBS NEWS (Nov. 6, 2016), https://www.cbsnews.com/news/on-the-trail-living-in-american-samoa/ [https://perma.cc/Z2V4-LX5F] (describing American Samoa as the territory where, "per capita, more of our sons and daughters proudly wear the uniform of the U.S. Armed Forces than any other state or territory").

2. *Histories of Purposeful Unequal Treatment and Political Powerlessness in the Territories*

Territorial residents' lack of complete voting rights should also be subject to strict scrutiny because territorial residents are a suspect class. Like laws that burden a fundamental right, laws that target "discrete and insular minorities" are subject to stricter standards of review.[176] Courts have argued that territorial residents are not a suspect class because they neither possess an immutable characteristic, nor have they been "subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."[177] Thus, their disenfranchisement is subject to only rational basis review.[178]

However, this argument fails on both parts because it ignores the demographic and socioeconomic makeups of the territories, as well as their long histories of colonization. First, race and ethnicity are immutable characteristics,[179] and ninety-eight percent of territorial residents are members of racial or ethnic minorities.[180] Moreover, while it is true that a territorial resident (besides American Samoans[181]) could technically move to a U.S. state or the District of Columbia and thus gain complete voting rights, the current system effectively forces territorial residents to move thousands of miles if they want a political voice.[182] Relocating is often practically difficult, expensive, and time-consuming—even more so when considering the vast disparities between the

176. United States v. Carolene Prods., 304 U.S. 144, 152 n.4 (1938); *see also* Lin, *supra* note 10, at 1282 (noting that "[t]he Territories are in many ways the quintessential 'discrete and insular minorities' of constitutional law's famous *Carolene Products* footnote 4 who need the protection of 'more searching judicial inquiry'").

177. Segovia v. United States, 880 F.3d 384, 390 (7th Cir. 2018) (citing Frontiero v. Richardson, 411 U.S. 677, 686 (1973); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973)).

178. *See id.*

179. *Frontiero*, 411 U.S. at 686.

180. Jesús A. Rodríguez, *How the GOP Came to Represent the U.S. Territories*, POLITICO (Mar. 7, 2023), https://www.politico.com/newsletters/the-recast/2023/03/07/us-territories-republican-delegates-moylan-00085892 [https://perma.cc/2BKV-TEPV]. For example, in Puerto Rico, 98.9 percent (over 3.2 million people) are Hispanic or Latino. In Guam, 46 percent (70,809 people) are Pacific Islander, and 35.5 percent (54,586 people) are Asian. In the U.S. Virgin Islands, 71.4 percent (62,183 people) are Black. In American Samoa, 88.7 percent (44,090 people) are Pacific Islander. In the Northern Mariana Islands, 46.6 percent (22,054 people) are Asian, and 43.7 percent (20,665 people) are Pacific Islander. *2020 Island Areas Censuses Data Products*, U.S. CENSUS BUREAU, https://www.census.gov/programs-surveys/decennial-census/decade/2020/planning-management/release/2020-island-areas-data-products.html [https://perma.cc/AJT6-S2WY].

181. As mentioned earlier, American Samoans are U.S. nationals and would therefore need to go through the naturalization process to become U.S. citizens before being able to vote in federal elections. *See supra* note 37.

182. *See* Oregon v. Mitchell, 400 U.S. 112, 239, 285–92 (1970); Amber L. Cottle, Comment, *Silent Citizens: United States Territorial Residents and the Right to Vote in Presidential Elections*, 1995 U. CHI. LEGAL F. 315, 333–34 (1995).

mainland and its territories.[183] Although federal courts have held that territorial residents' disenfranchisement does not violate their right to travel,[184] that reasoning appears to conflict with Congress's very intent in enacting the Voting Rights Act Amendments and UOCAVA: to prevent citizens from having to choose between exercising the right to travel and the right to vote.[185]

Second, this argument ignores the long history of colonization, imperialism, and political powerlessness in the territories. The federal government invented the territorial incorporation doctrine in the *Insular Cases* with the sole purpose of finding a way to indefinitely subordinate the largely non-White residents of its newly annexed territories.[186] And it succeeded. Territorial residents have been systematically subjected to war, internment, dangerous medical experiments, resource extraction, and general erasure from our history books.[187] The invisibility of this purposeful separate and unequal treatment of territorial residents is further exacerbated by their political powerlessness.[188] Simply by virtue of living in a territory, these U.S. citizens and

183. *See* Neuman, *supra* note 156, at 293 ("Most distinctions based on geographical location will in fact fall most heavily on residents of the disfavored locality, particularly indigent residents, who cannot afford to travel for the purpose of exercising a fundamental right."); *see also* Orlando Rodríguez-Vilá, Sudhakar V. Nuti & Harlan M. Krumholz, *Healthcare Disparities Affecting Americans in the US Territories: A Century-Old Dilemma*, 130 AM. J. MED. E39, e39–41 (2017) (describing disparities in federal healthcare funding, quality of care and outcomes, and healthcare infrastructure); Manuel Roman-Basora & James Travis Bland, *Separate and Unequal: A Sample of Disparities in Five American Unincorporated Territories*, 23 PUB. INTEGRITY 426, 430–38 (2021) (describing disparities in political representation, emergency management, and welfare assistance); Andrew Hammond, *Territorial Exceptionalism and the American Welfare State*, 119 MICH. L. REV. 1639, 1661–62 (2021) (describing economic disparities like higher unemployment rates, lower median incomes, and weaker public infrastructure, as well as greater vulnerability to extreme weather events); Press Release, U.S. House Comm. on Nat. Res., Grijalva, Territorial Delegates Introduce Bipartisan Bill to Address Disparities in Data Collection for U.S. Territories (Mar. 7, 2023), https://democrats-naturalresources.house.gov/media/press-releases/grijalva-territorial-delegates-introduce-bipartisan-bill-to-address-disparities-in-data-collection-for-us-territories [https://perma.cc/7CYY-Y8CZ] (proposing bill to address disparities in available data and data collection methods that lead to underfunding and underrepresentation of the territories in certain federal programs).

184. *See, e.g.*, Romeu v. Cohen, 265 F.3d 118, 126 (2d Cir. 2001) (finding that plaintiffs' inability to vote did not infringe on their right to travel); Segovia v. United States, 880 F.3d 384, 391–92 (7th Cir. 2018) (same); *see also Borja II*, 115 F.4th 971, 980 (9th Cir. 2024) (noting that the UOCAVA and similar state laws exclude former state residents "based upon the common-sense principle that once an individual moves elsewhere within the territorial United States, she has abandoned her right to vote in [state]-specific elections in favor of a right to vote in the elections that are specific to the jurisdiction within which she has newly taken up residence").

185. Cottle, *supra* note 182, at 333–34.

186. Ponsa-Kraus, *supra* note 25, at 2454; Lopez-Morales, *supra* note 15, at 783.

187. *See generally* DANIEL IMMERWAHR, HOW TO HIDE AN EMPIRE: A HISTORY OF THE GREATER UNITED STATES (2019) (explaining the rise of the United States' colonial empire since the nineteenth century).

188. Natalie Gomez-Velez, *De Jure Separate and Unequal Treatment of the People of Puerto Rico and the U.S. Territories*, 91 FORDHAM L. REV. 1727, 1753 (2023); Gustavo A. Gelpí, *The* Insular Cases: *A Comparative Historical Study of Puerto Rico, Hawai'i, and the Philippines*, 58 FED. LAW. 22, 22–23 (2011) (comparing *Downes v. Bidwell*, 182 U.S. 244 (1901), with *Plessy v. Ferguson*, 163 U.S.

nationals are devoid of political power because they have no voice in federal elections.[189] This design allows the United States "to maintain its exploitative colonial treatment of the territories with little effective resistance."[190] Because territorial residents are a discrete and insular minority, they should be considered a suspect class. The purposeful unequal treatment and political powerlessness of territorial residents commands extraordinary protection. Therefore, the various federal and state laws that disenfranchise them in federal elections should be subject to strict scrutiny.[191]

* * *

As in many cases, it would be very difficult for federal and state governments to demonstrate that laws disenfranchising territorial residents are narrowly tailored to achieve a compelling government interest. The government has no compelling interest in discriminating among its own citizens based simply on their place of residence or race. Indeed, the Fifth and Fourteenth Amendments exist for the very opposite reason: to guarantee equal protection for all U.S. citizens.[192] Because these laws could not satisfy strict scrutiny, they would be unconstitutional under the Fifth and Fourteenth Amendments.

III.
METHODS FOR EQUAL ENFRANCHISEMENT

This Section briefly reviews four methods for implementing equal enfranchisement. The first two methods, statehood and amendment, explore conventional pathways to enfranchisement. The second two offer approaches through the states and the judicial system. This Section does not purport to suggest which solution is most desirable—that is a question that should be answered by the peoples of the U.S. Territories.[193] Nor does it presume to propose all possible methods of achieving equal enfranchisement. Notably, what is needed most is for Congress to facilitate the self-determination process of all

537 (1886)); JUAN R. TORRUELLA, THE SUPREME COURT AND PUERTO RICO: THE DOCTRINE OF THE SEPARATE AND UNEQUAL 3–4 (1985).

189. *See Igartúa IV*, 626 F.3d 592, 614 (1st Cir. 2010) (Torruella, J., concurring in part, dissenting in part) ("The suggestion that Appellants seek a political rather than a judicial remedy to correct the grievous violation of their rights claimed in this action, is, at a minimum, ironic given that it is precisely the *lack of political representation* that is the central issue in this case. It is this lack of any political power by these disenfranchised U.S. citizens, and the cat and mouse games that have been played with them by the United States government, including its courts, that have resulted in their interminable unequal condition.") (emphasis in original).

190. Gomez-Velez, *supra* note 188, at 1753.

191. *See* United States v. Carolene Prods., 304 U.S. 144, 152 n.4 (1938); Graham v. Richardson, 403 U.S. 365, 371–72 (1971); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973).

192. *See* U.S. CONST. amends. V, XIV.

193. *See* Kelly, *supra* note 146, at 111–14; Van Jackson, *Trapped by Empire*, DISSENT MAG. (Feb. 8, 2023), https://www.dissentmagazine.org/online_articles/trapped-by-empire/ [https://perma.cc/YW99-DHMJ].

the territories.[194] Rather, it mainly serves to question the federal courts' position that only statehood or constitutional amendment could grant territorial residents complete voting rights and suggest proposals that could achieve equal enfranchisement within the limitations of the current territorial regime.

A. Statehood

Granting statehood to the U.S. Territories would be the most direct way to grant complete enfranchisement for territorial residents. In that case, territorial residents would be part of "the People of the several States" who are explicitly granted the right to choose their congressmembers and president in the text of the Constitution.[195]

Considering the past cases of Hawai'i and Alaska and the current state of Congress, however, many barriers stand in the way of granting the territories statehood. Unlike the current U.S. Territories, Hawai'i and Alaska were deemed "incorporated" and were thus slated for statehood, albeit in a nonbinding way.[196] Notably, the "incorporated" statuses of Hawai'i and Alaska were based on the expectation of White settlement, which had not occurred to the extent anticipated.[197] By the end of World War II, Alaska remained about half Native and half White, and Hawai'i was majority nonwhite.[198] As such, "[e]nding the colonial status of Hawai'i and Alaska required overcoming racism of a different sort": accepting the "prospect of states not firmly under [W]hite control."[199]

In 1898, the fear of non-[W]hite states created the legal fictions justifying an American empire.[200] During the Jim Crow era, it stymied Hawaiian and Alaskan statehood.[201] And today, although the Supreme Court has arguably eroded the foundations of the territorial incorporation doctrine in recent years,[202] its racist rationale continues to hinder efforts to allow territorial residents greater

194. Carlos Iván Gorrín Peralta, *Past, Present, and Future of U.S. Territories: Expansion, Colonialism, and Self-Determination*, 46 STETSON L. REV. 233, 253–57 (2017). This could result in statehood, a treaty of free association, or full independence and a treaty of friendship and cooperation. *Id.* at 256.

195. U.S. CONST. art. I, § 2, cl. 1; *id.* art. II, § 1, cls. 2–3.

196. Hawai'i v. Mankichi, 190 U.S. 197, 210–11 (1903); Rassmussen v. United States, 197 U.S. 516, 522 (1905); IMMERWAHR, *supra* note 187, at 238. Interestingly enough, the Court held that the incorporation of Hawai'i and Alaska took place once their residents were made citizens, which again raises the question of why the territorial incorporation doctrine exists. *Mankichi*, 190 U.S. at 210–11; *Rassmussen*, 197 U.S. at 522.

197. IMMERWAHR, *supra* note 187, at 238.

198. *Id.*

199. *Id.*

200. *Id.*; *see also* Downes v. Bidwell, 182 U.S. 244, 287 (1901) (creating, with the other *Insular Cases*, the territorial incorporation doctrine).

201. IMMERWAHR, *supra* note 187, at 238.

202. Boumediene v. Bush, 553 U.S. 723, 765 (2008) (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)) ("The Constitution grants Congress and the President the power to acquire, dispose of, and govern territory, not the power to decide when and where its terms apply . . . To hold the political branches have the power to switch the Constitution on or off at will . . . would . . . lead[] to a regime in which [they], not this Court, say 'what the law is.'").

self-determination.[203] For example, in Puerto Rico, that fight has lasted decades. The federal government has largely ignored the results of several Puerto Rican referenda on the issue of self-determination.[204] Politicians have voiced (unfounded) fears that a Puerto Rican state would result in the election of more Democrats[205] and concerns about a new state with higher poverty levels and where most residents' primary language is Spanish.[206] Only in December 2022 did the House vote for the first time to allow Puerto Rican residents to choose, in a binding referendum, "a permanent, non-territorial, fully self-governing political status" for Puerto Rico, such as statehood, independence, or sovereignty in free association with the United States.[207] This bill was reintroduced in 2023 after the Senate failed to consider it in 2022[208] and will need to overcome significant Republican opposition,[209] a fractured Congress,[210] and other barriers.[211] Statehood is an even more distant prospect for other territories. For example, federal courts recently prohibited Guam from even holding a political status plebiscite on the grounds that it impermissibly restricted participation to the Territory's "Native Inhabitants."[212]

B. Constitutional Amendment

Another direct way to constitutionally guarantee the right to vote in federal elections is by amendment.[213] Article V establishes two ways of amending the

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203. *See* Emily Cochrane & Patricia Mazzei, *House Passes Bill That Could Pave the Way for Puerto Rican Statehood*, N.Y. TIMES (Dec. 15, 2022), https://www.nytimes.com/2022/12/15/us/politics/house-puerto-rican-statehood.html [https://perma.cc/Z83K-PQUA].

204. Adrian Florido, *In Puerto Rico, Young Voters Are Trying To Shake Up Traditional Party Politics*, NPR (Nov. 2, 2020), https://www.npr.org/2020/11/02/930323316/in-puerto-rico-young-voters-are-trying-to-shake-up-traditional-party-politics [https://perma.cc/SJ3T-YVSU]; Vann R. Newkirk II, *Puerto Rico's Plebiscite to Nowhere*, ATLANTIC (June 13, 2017), https://www.theatlantic.com/politics/archive/2017/06/puerto-rico-statehood-plebiscite-congress/530136/ [https://perma.cc/2VWE-LA5M].

205. Rodríguez, *supra* note 180.

206. Cochrane & Mazzei, *supra* note 203.

207. *Id.*; Puerto Rico Status Act, H.R. 8393, 117th Cong. § 3 (2022).

208. Puerto Rico Status Act, H.R. 2757, 118th Cong. (2023); Puerto Rico Status Act, S. 2944, 118th Cong. (2023).

209. Rafael Bernal, *Push to Change Puerto Rico Status Faces New Challenges*, HILL (Apr. 21, 2023), https://thehill.com/latino/3963153-push-to-change-puerto-rico-status-faces-new-challenges/ [https://perma.cc/BNQ6-F34Z].

210. *See* Carl Hulse, *The Functional Dysfunctional Congress*, N.Y. TIMES (Mar. 8, 2024), https://www.nytimes.com/2024/03/08/us/politics/congress-dysfunction-spending-bills.html [https://perma.cc/Y4CD-X97G]; Scott Wong, *"Totally Dysfunctional": Congress Leaves Town with Chaos in Its Wake, but Little Actual Legislation*, NBC NEWS (Nov. 18, 2023), https://www.nbcnews.com/politics/congress/totally-dysfunctional-congress-rcna125572 [https://perma.cc/D9QH-8G22].

211. Lin, *supra* note 10, at 1287–89.

212. Davis v. Guam, 932 F.3d 822, 843 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 2739 (2020).

213. *See* U.S. CONST. amend. XXIII.

U.S. Constitution,[214] but practically speaking, all amendments have initiated in Congress using the first path,[215] which requires both the House and Senate to propose a constitutional amendment.[216]

Amending the Constitution also requires congressional approval and may be even more difficult than granting statehood.[217] Moreover, a constitutional amendment may not even achieve equal enfranchisement. The Twenty-Third Amendment gives D.C. residents only the right to vote for president and vice president.[218] It does not grant D.C. residents voting rights in Congress or the right to participate in the constitutional amendment process.[219] The "simplest" and perhaps most effective amendment would constitutionalize what already exists in some form and grant both territorial and D.C. residents the right to elect the president, vice president, and a voting House representative.[220] Making any such proposal a reality, however, will be challenging on a practical level and require significant effort and political capital.[221] And while such a compromise may be more politically feasible, this solution would still result in territorial residents having lesser voting rights than do state residents.

C. Federal or State Statutory Changes

Because of the constitutional mandates relating to the election of the president, courts widely assume that territorial residents cannot vote in the presidential election in the absence of statehood or a constitutional amendment.[222] As mentioned before, either statehood or amendment would certainly provide a constitutional guarantee of territorial residents' right to vote; however, there may also be other statutory methods.[223]

As an initial matter, the Territorial Clause gives Congress the power to "make all needful Rules and Regulations respecting the territory."[224] Under

214. *Id.* art. V.

215. Jill Lepore, Keynote Address at the California Law Review Symposium: The Philosophy of Amendment (Oct. 26, 2023).

216. *Id.*

217. *See* Richard Albert, *The World's Most Difficult Constitution to Amend?*, 110 CALIF. L. REV. 2005, 2006–07 (2022) (calling proposals to amend the Constitution "dead on arrival" because they are "unlikely to be approved by either two-thirds of Congress or three-quarters of the states" and noting that only 0.002% of proposals have become official).

218. U.S. CONST. amend. XXIII.

219. *See id.*

220. *See* Colin P.A. Jones, *The Territorial and District Representation Amendment: A Proposal*, 36 BYU J. PUB. L. 175, 176, 178–80, 187 (2022) (proposing a Territorial and District Representation Amendment that would simply convert "[t]he non-voting delegates currently elected to the House of Representatives by territories" to "voting members who participate fully in the activities of that chamber").

221. *Id.* at 187.

222. *Igartúa II*, 229 F.3d 80, 83–84 (1st Cir. 2000); *Igartúa I*, 32 F.3d 8, 10 (1st Cir. 1994); Att'y Gen. of Guam v. United States, 738 F.2d 1017, 1019 (9th Cir. 1984).

223. Romeu v. Cohen, 265 F.3d 118, 128 (2d Cir. 2001) (Leval, J., writing separately).

224. U.S. CONST. art. IV, § 3.

Article I, Congress also has the authority to regulate states' power to appoint electors.[225] Pursuant to that authority, it has banned the use of literacy tests,[226] required states to provide bilingual voting materials,[227] and prohibited state durational residency requirements.[228] It has also required mandatory absentee ballot eligibility for residents who have recently abandoned residence in a state and imposed on states the obligation to accept the votes of former residents now residing abroad.[229] Through these requirements, Congress has compelled states to accept voters who are not residents of that state in their elections for presidential electors.

Here, Congress can act similarly and require states to accept the presidential votes of certain U.S. citizens who are nonresidents of the state residing in the U.S. Territories.[230] At a minimum, it could adopt the model of the UOCAVA to require states to accept the votes of former residents who now live in the territories.[231] Indeed, federal law requires states to extend absentee voting rights to former state residents currently living in the Northern Mariana Islands,[232] but makes extending voting rights to former residents in Puerto Rico, Guam, the U.S. Virgin Islands, and American Samoa discretionary.[233] Even without a congressional mandate, a state can afford its former residents now residing in a territory the right to participate in its federal elections.[234] Most states, however, have failed to do so.[235] Federal or state legislative action to extend complete voting rights, such as changing how absentee voting laws define the "United States,"[236] can directly grant the right to vote at least to territorial residents who formerly lived in a state.

To go even further, if Congress can constitutionally enact the UOCAVA and other limitations outlined above, it may be inclined to impose an additional requirement: Congress could grant territorial residents the right to vote for president by requiring every state that chooses its electors by popular vote to include in its popular vote the state's pro rata share of the votes cast by territorial residents.[237] The reason to consider this additional proposal is that many territorial residents have never formerly lived in a state. A pro rata plan may be most promising in avoiding the inequity of having complete voting rights turn

225. U.S. CONST. art. I, §§ 2, 4.
226. 52 U.S.C. § 10501; *see also* Katzenbach v. Morgan, 384 U.S. 641, 657–58 (1966).
227. 52 U.S.C. § 10503.
228. *Id.* § 10502; *see also* Oregon v. Mitchell, 400 U.S. 112, 150 (1970).
229. 52 U.S.C. §§ 20301–20311.
230. Romeu v. Cohen, 265 F.3d 118, 129–30 (2d Cir. 2001) (Leval, J., writing separately).
231. *Id.*
232. 52 U.S.C. § 20310.
233. *See id.*; Advisory Memorandum, *supra* note 80.
234. Advisory Memorandum, *supra* note 80.
235. *Id.*
236. *See, e.g.*, 52 U.S.C. § 20310; 10 ILL. COMP. STAT. 5/20-1 (2015); N.Y. ELEC. LAW § 11-200(1) (McKinney 2023).
237. Romeu v. Cohen, 265 F.3d 118, 129–30 (2d Cir. 2001) (Leval, J., writing separately).

on prior state residence. Critics, however, argue that such statutory changes would commandeer the states.[238] And, although excluding territorial residents from the vote for electors has a disproportionately discriminatory effect, the Fifth, Fourteenth, and Fifteenth Amendments bar only intentional discrimination.[239] Nevertheless, if Congress has the power to regulate elections, and the UOCAVA's mandate that states count nonresidents' votes is constitutional,[240] it is difficult to distinguish why other laws based on a similar framework would be unconstitutional.[241] Additionally, as described in Part II, the very foundation of the current state of voting rights was based on the intentionally racist rationales of the *Insular Cases*.[242] Finding nondiscriminatory reasons today to justify the current voting rights structure does not absolve the system of its illegitimate bases.

Although this Section does not discuss all possible statutory proposals, it lays out a fundamental counterargument to the federal courts' position that only statehood or a constitutional amendment can expand the franchise. Based on past practice, Congress or the states can again exercise their constitutional authority to extend complete voting rights to territorial residents.

D. Judicial Intervention

The matter of who votes is a central question in defining the "political community."[243] Scholars like Paul Brest have rightfully emphasized that "[c]onstitutional discourse and decision-making are the most fundamental prerogatives and responsibilities of citizens."[244] It is clearly more democratic to permit citizens, rather than judges, to decide who may enter the political community.[245] This problem has become a reality for the territories: since the *Insular Cases*, the federal courts have continuously excluded territorial residents from the political community.

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238. *See, e.g.*, *id.* at 132–33 (Walker, C.J., concurring).

239. Washington v. Davis, 426 U.S. 229, 242 (1976); Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265 (1977); City of Mobile v. Bolden, 446 U.S. 55, 62 (1980).

240. *But see* Brian C. Kalt, *Unconstitutional but Entrenched: Putting UOCAVA and Voting Rights for Permanent Expatriates on a Sound Constitutional Footing*, 81 BROOK. L. REV. 441, 442–43 (2016).

241. *But see Romeu*, 265 F.3d at 135–36 (Walker, C.J., concurring) (arguing that the Constitution assigns the power to select electors to the states exclusively, and as such, "this power may not be shared, pooled, or otherwise diluted even with a state's consent").

242. *Supra* Part II.B.

243. *See* Pamela S. Karlan, *Undoing the Right Thing: Single-Member Offices and the Voting Rights Act*, 77 VA. L. REV. 1, 5 (1991) ("[V]oting, regardless of whether one's views prevail, announces that the voter is a full member of the political community.")

244. Paul Brest, *Further Beyond the Republican Revival: Toward Radical Republicanism*, 97 YALE L.J. 1623, 1628 (1988) (emphasis omitted).

245. Raskin, *supra* note 110, at 1439–40; *see also Igartúa III Rehearing*, 417 F.3d at 151 (characterizing the right of territorial residents to vote in federal elections as a "political" issue that "must be [achieved] through political means").

However, allowing the questions of citizenship and participation in the political community "to be resolved based upon majoritarian sentiment" is problematic because it "fundamentally devalues the importance of constitutional *rights* in the territories—where the rights that [*are not*] supported by a majority are perhaps the *most* in need of judicial incorporation."[246] It is precisely because this discrete population of U.S. citizens and nationals is kept in a voteless limbo by federal political institutions that have plenary powers over the territories that a political solution is not a realistic option.[247]

And relying on "political solutions" has resulted in very real "separate and unequal" impacts in the territories. Across the board, territorial residents face lags in healthcare, education, public infrastructure, and economic opportunities.[248] The United States' own role in causing these disparities often goes ignored.[249] These higher levels of poverty and deprivation will only be exacerbated due to the territories' disproportionate vulnerability to the ravages of the climate crisis, as well as the general ignorance and political erasure of the U.S. territories.[250] In the wake of the devastation of Hurricanes Harvey, Irma, and Maria, the U.S. federal government responded unequally and spent more money and resources more expediently in Florida and Texas than it did in Puerto Rico, even though Hurricane Maria, which hit Puerto Rico, was the most severe out of the three.[251] And although Puerto Ricans were far more likely to die from storm damage, they saw "fewer federal personnel, markedly less media coverage, and only a fraction of the charitable giving."[252] When Typhoon Yutu, the worst storm to strike the United States since 1935 and the fifth strongest in global history, struck the Northern Mariana Islands, it destroyed thousands of homes and caused widespread power and water shortages.[253] Yet U.S. media outlets barely covered the devastation that occurred, nor the recovery that will

246. *Cf.* Cassandra Burke Robertson & Irina D. Manta, *Integral Citizenship*, 100 TEX. L. REV. 1325, 1372 (2022) (citing Steve Vladeck, *Three Problems with Justice Brown's Opinion in* Tuaua, JUST SEC. (June 7, 2015), https://www.justsecurity.org/23572/three-problems-tuaua/ [https://perma.cc/Z6JZ-WYBP]).

247. *Igartúa III Rehearing*, 417 F.3d 145, 168 (1st Cir. 2005) (Torruella, J., dissenting).

248. *See* sources cited *supra* note 183.

249. *See, e.g.*, IMMERWAHR, *supra* note 187, at 387–88; Anita Hofschneider, *Guam Residents Who Suffered 1940s War Atrocities To Receive Compensation*, PBS NEWS HOUR (Feb. 27, 2020), https://www.pbs.org/newshour/nation/guam-residents-who-suffered-1940s-war-atrocities-receive-compensation [https://perma.cc/APP7-PRWE].

250. Hammond, *supra* note 183, at 1643–44; UNREPRESENTED NATIONS & PEOPLES ORG., UNREPRESENTED PEOPLE OF THE U.S.A. 4–5 (2019), https://unpo.org/downloads/2573.pdf [https://perma.cc/65ZM-B3BU].

251. Charley E. Willison, Phillip M. Singer, Melissa S. Creary & Scott L. Greer, *Quantifying Inequities in U.S. Federal Response to Hurricane Disaster in Texas and Florida Compared with Puerto Rico*, 4 BMJ GLOB. HEALTH 1, 1 (2019).

252. IMMERWAHR, *supra* note 187, at 399.

253. Alia Wong & Lenika Cruz, *The Media Barely Covered One of the Worst Storms to Hit U.S. Soil*, ATLANTIC (Nov. 14, 2018), https://www.theatlantic.com/science/archive/2018/11/super-typhoon-yutu-mainstream-media-missed-northern-mariana-islands/575692/ [https://perma.cc/TU74-4D7C].

last for years to come.[254] The territories' systematic exclusion from and invisibility in most conversations in Washington make it difficult to even adequately recognize the issues that must be addressed, let alone remedy them.[255] The very "wealth-based inequity" that has concerned federal courts is exactly what results from the complete denial of the ability to vote in federal elections.[256]

In the context of this separate and unequal treatment, it is the "very essence of judicial duty"[257] to declare when the United States has failed to take any steps to meet obligations that are cognizable as the supreme law of the land regarding territorial residents' voting rights.[258] Territorial residents are caught in an "untenable Catch-22."[259] The federal disenfranchisement of these citizens and nationals ensures that they will never, through the political process, be able to rectify the denial of their civil rights.[260] "At the root of this problem is the unacceptable role of the courts," which were responsible for the creation of this inequality in the *Insular Cases* and complicit in the territories' perpetual subjugation by "cloth[ing] this noxious condition in a mantle of legal respectability," as the late Judge Juan R. Torruella has described.[261] Because the political branches have refused to rectify the injustice the courts have created, the courts can no longer "avert their gaze."[262] The courts have intervened to remedy separate and unequal treatment before,[263] and it is high time that they do so again.

254. *Id.*

255. *See* Press Release, U.S. House Comm. on Nat. Res., *supra* note 183; Brief of the Government of the U.S. Virgin Islands, *supra* note 148, at 11 (quoting DISABILITY RTS. CTR. OF THE VIRGIN ISLANDS, SHADOW CITIZENS: CONFRONTING FEDERAL DISCRIMINATION IN THE U.S. VIRGIN ISLANDS 7 (2021)) (stating that the "lack of a meaningful, equal voice in Washington D.C. means that federal law or policymaking that excludes U.S. territories is more likely to go unnoticed or unchallenged until it is too late").

256. In *Borja I*, the court stated that "the disparity that would result from the creation of super citizen territorial residents who could vote in federal elections is a plausible policy reason for treating the subject territories as part of the 'United States.'" Civ. No. 20-00433 JAO-RT, 2022 WL 4082061, at *10 (citing Segovia v. United States, 880 F.3d 384, 391 (7th Cir. 2018)). Moreover, "[t]he creation of a "super citizen" group of territorial residents who previously lived in states and are now eligible to vote in federal elections could result in wealth-based inequity." *Id.* (citing Romeu v. Cohen, 265 F.3d 118, 125 (2d Cir. 2001))).

257. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 178 (1803).

258. *Igartúa III Rehearing*, 417 F.3d 145, 159 (1st Cir. 2005) (Torruella, J., dissenting).

259. *Igartúa II*, 229 F.3d 80, 89 (1st Cir. 2000) (Torruella, J., concurring).

260. *Id.*

261. *Igartúa IV*, 626 F.3d 592, 612–13 (1st Cir. 2010) (Torruella, J., concurring in part, dissenting in part).

262. *Igartúa III Rehearing*, 417 F.3d 145, 183 (1st Cir. 2005) (Torruella, J., dissenting) (citing Sosa v. Alvarez-Machain, 542 U.S. 692, 730 (2004)).

263. *See, e.g.*, Brown v. Bd. of Educ. of Topeka, 347 U.S. 483 (1954).

CONCLUSION

Nearly four million territorial residents now "belong" to the United States through colonization and imperialism.[264] Yet, over a century later, these U.S. citizens and nationals are still not "part of" the United States' political community.[265] Since the *Insular Cases*, the federal courts have systematically denied territorial residents the right to vote in federal elections,[266] thus continuing to subject them to governance without federal representation simply by virtue of their geography.[267]

However, the courts' most prominent arguments for the disenfranchisement of territorial residents in federal elections are neither constitutionally required nor historically supported. The Constitution does not expressly prohibit the enfranchisement of territorial residents or limit the federal government's power to provide the right to vote. Nor does this disenfranchisement comport with the original understanding of the Territorial Clause, pursuant to which the current state of prolonged colonial rule of the territories would have been unacceptable. Moreover, the implication of the fundamental right to vote, as well as the historical purposeful subjugation and political powerlessness of the territories, mean that territorial residents' disenfranchisement should be subject to strict scrutiny.

Even within the limitations of the current territorial regime, there are several potential methods to achieve equal enfranchisement. With any of these proposals, the federal government can take a vital step toward remedying the unending colonial status that subjugates and disenfranchises these U.S. citizens and nationals. Other barriers to representation, like vote dilution, will no doubt remain,[268] but equal enfranchisement can at the very least give the territories some degree of "control over their own destinies."[269] And with agency and control comes the ultimate goal of self-determination for those who experience firsthand the unique effects of this separate and unequal discrimination.[270]

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264. *See* IMMERWAHR, *supra* note 187, at 73–87; Downes v. Bidwell, 182 U.S. 244, 287 (1901).

265. *See Downes*, 182 U.S. at 287.

266. *See, e.g.*, Fitisemanu v. United States, 1 F.4th 862 (10th Cir. 2021), *cert. denied*, 143 S. Ct. 362 (2022); *Igartúa IV*, 626 F.3d at 595; Segovia v. United States, 880 F.3d 384, 390 (7th Cir. 2018).

267. *See* Brief of the Government of the U.S. Virgin Islands, *supra* note 148, at 33 (citing League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 511 (2006) (Roberts, C.J., concurring in part, concurring in the judgment in part, and dissenting in part)) ("Within the United States, the rights and incidents of citizenship are not parceled out geographically. '[D]ivvying up' American citizens by where they decide to live in the United States and its Territories 'is a sordid business.'"); *see also* Bernhard Grossfeld, *Geography and Law*, 82 MICH. L. REV. 1510, 1512 (1984) (explaining that "geography is fate").

268. *See, e.g.*, Heather Gerkin, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663, 1667–69 (2001); Fishkin, *supra* note 109, at 1900; Dale Ho, *Minority Vote Dilution in the Age of Obama*, 47 U. RICH. L. REV. 1041, 1048–49 (2013).

269. Johnson, *supra* note 3.

270. Peralta, *supra* note 194, at 253–57; Kelly, *supra* note 146, at 114.