Cornell Journal of Law and Public Policy

Volume 22
Issue 3 *Spring 2013*

Article 7

Are the Courts Dividing Puerto Ricans: How the Lack of Voting Rights and Judicial Interpretation of the Constitution Distorts Puerto Rican Identity and Creates Two Classes of Puerto Rican American Citizens

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NOTE

ARE THE COURTS DIVIDING PUERTO RICANS?: HOW THE LACK OF VOTING RIGHTS AND JUDICIAL INTERPRETATION OF THE CONSTITUTION DISTORTS PUERTO RICAN IDENTITY AND CREATES TWO CLASSES OF PUERTO RICAN AMERICAN CITIZENS

*Hiram Marcos Arnaud**

Despite the fact that both Puerto Ricans residing on the United States mainland and on the island of Puerto Rico are United States citizens, the courts of the United States neither view nor treat all Puerto Ricans as equal citizens under the law. Instead, United States case law divides Puerto Ricans into those who reside on the United States mainland and enjoy the full benefits of United States citizenship, and those who reside on the island of Puerto Rico and are unable to vote in Presidential elections or for congressional representation. At the heart of this residency-based distinction are the Insular Cases, which, through judicial interpretation and expansion, have created two groups of Puerto Ricans with different forms of United States citizenship: islanders and mainlanders. The Court's jurisprudence distorts Puerto Rican identity and divides islanders socially and politically from mainlanders. This division is the result of disparate experiences of American citizenship and participation in American democracy. The courts can mend the division among Puerto Ricans by reexamining the Insular Cases—this would cease dividing American citizens based on residency.

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INTRODUCTION

In November of 2012, United States citizens residing on the island of Puerto Rico, who currently lack the right to vote for either President of the United States or for Congressional representation, participated in a plebiscite. This plebiscite attempted to determine the will of the Puerto Rican people regarding the legal status of the island of Puerto Rico and its relationship to the United States.[1] Since the plebiscite, politicians including White House representatives have disagreed over what exactly the results of the plebiscite were or what it determined.[2] Some politicians stated that because a majority of Puerto Ricans who answered the plebiscite question asking voters if they wanted statehood for the island voted affirmatively, this means that a majority of the population desires to become the fifty first state.[3] Others, meanwhile, noted that because a large number of voters merely refused to answer the statehood question and left it blank on the ballot, this demonstrates that a clear majority of

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[1] *See* Richard Winger ed., *Puerto Rico Will Hold Fourth Referendum on its Future Status on November 6, 2012*, BALLOT ACCESS NEWS (Feb. 17, 2012), http://www.ballot-access.org/2012/02/17/puerto-rico-will-hold-fourth-referendum-on-its-future-status-on-november-6-2012/.

[2] *See* Roque Planas, *Puerto Rico Status: White House Gives Mixed Signals on Statehood,* THE HUFFINGTON POST (Dec. 4, 2012, 2:21 PM), http://www.huffingtonpost.com/2012/12/04/puerto-rico-status-white-_n_2237757.html.

[3] *See id.*

Puerto Ricans do not favor statehood.[4] Yet even if in the future policy makers agree on the results of the plebiscite, although Puerto Ricans are United States citizens, it is constitutionally unclear whether Congress must listen to the election results of these United States citizens residing in Puerto Rico.[5] If Congress can ignore the results of this plebiscite, the exercise of voting by Puerto Ricans could be essentially meaningless. The United States voting laws and congressional and judicial policies towards the island of Puerto Rico raise profound questions about what it means to be Puerto Rican, possess United States citizenship, and reside either on the United States mainland or on the island of Puerto Rico.

In 2000, Dean Kevin R. Johnson of University of California Davis School of Law wrote that a "comparison of Puerto Rican experiences on and off the island promises to yield important insights," noting that "[i]t remains . . . uncertain just how different the experiences are between Puerto Ricans on the [United States] mainland and on the island [of Puerto Rico]."[6] While scholars have spilled much ink debating the legal status of Puerto Rico, potential alternatives to the status quo, and the policies that created the current situation, scholars—thirteen years later— still have not yet answered the question Dean Johnson posed in his article of "just how different the experiences are between Puerto Ricans on the mainland and on the island." This Note explores how the voting laws of the United States and its policy decisions toward Puerto Rico have created two groups of Puerto Ricans with distinct experiences with United States citizenship and the American democratic process: islanders and mainlanders.

The policy of denying both presidential and congressional voting rights to Puerto Ricans residing on the island of Puerto Rico (islanders) while granting those living on the United States mainland (mainlanders) full voting rights creates two groups of Puerto Ricans with distinct political interests and experiences. Although the 4.6 million mainlanders[7] are able to fully participate in the United States electoral and democratic systems, the United States Government denies the nearly 3.7 million islanders[8] the right to vote and participate in the democratic system that governs their daily lives even though they share United States citizenship with Puerto Ricans residing on the United States mainland. This disparity in experiences with United States citizenship and participation in the

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4 *See id.*

5 *See infra* notes 53–55, 113.

6 Kevin R. Johnson, *Puerto Rico, Puerto Ricans, and Latcrit Theory: Commonalities and Differences Between Latina/o Experiences*, 6 MICH. J. RACE & L. 107, 120 (2000).

7 It is important to note that although, as of 2010, more Puerto Ricans live in the fifty United States, nearly one-third of them were born on the island of Puerto Rico. *Id.*

8 PEW HISPANIC CENTER, A DEMOGRAPHIC PORTRAIT OF PUERTO RICANS, 2009, 1 (2011), *available at* http://pewhispanic.org/files/reports/143.pdf.

United States democratic process produces a political isolation between these two groups that prevents Puerto Ricans from uniting as a political voice or an ethnic group with common interests. This inability to unite creates an identity crisis regarding which group is "truly" Puerto Rican. Without a Congressional voice, islanders must rely on mainlanders for representation. Yet, the isolation and division created by citizenship rights, voting legislation, and distinct American experiences, which in turn affect cultural and social unity, prevents mainlanders from adequately representing the interests of islanders.

Part I of this Note introduces the historical background of Puerto Rico after the United States' acquisition of the island and analyzes the current legal relationship between the island and the mainland United States, which is necessary to scrutinize the United States citizenship of Puerto Ricans. Part II analyzes United States citizenship of Puerto Ricans and the distinct voting privileges granted to Puerto Ricans depending on their place of residency. Part II also argues that the rights granted to mainland Puerto Ricans who enjoy the full benefits and privileges of United States citizenship are so unique that it leads to the creation of two distinct classes of Puerto Ricans defined both by place of residency and the quantum of rights possessed.

Part III argues that the creation of two distinct classes of Puerto Ricans, defined by differing constitutional rights, prevents the two classes from identifying with each other as a united ethnic group and, in turn, leaves the future of island Puerto Ricans at the mercy of a Congress and a Government that does not represent them. This struggle, at its core defined by distinct rights and American experiences, leads islanders to identify themselves as "truly Puerto Rican" while excluding mainlanders as the unknown "other." The two groups inevitably struggle over the definition of "Puerto Rican" thus further distancing themselves from each other. Finally, Part IV of this Note analyzes the possible alternatives that may remedy the problem of disenfranchisement and differing constitutional rights between the two groups of Puerto Ricans.

I. THE HISTORY OF THE COMMONWEALTH OF PUERTO RICO

A. The United States Takes Colonial Control of Puerto Rico

The Treaty of Paris,[9] signed on December 10, 1898, transferred sovereignty over Puerto Rico from Spain[10] to the United States as one of the spoils of the Spanish–American War. In 1900, after nearly two years of United States military rule,[11] the Foraker Act established a civilian government whose chief executive officer and local cabinet (the Executive Council) were appointed by the President of the United States.[12] The local cabinet operated as an upper legislative house with the lower house elected by the local population.[13] Yet, even after the enactment of the Foraker Act, the status of Puerto Ricans as citizens of the United States remained unclear.[14] In 1901, the Supreme Court decided six cases (the

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[9] Treaty of Paris, U.S.–Spain, Dec. 10, 1898, 30 Stat. 1754. *See generally* José A. Cabranes, *Citizenship and the American Empire: Notes on the Legislative History of the United States Citizenship of Puerto Ricans*, 127 U. PA. L. REV. 391, 391 n.1 (1978) (noting that, "[b]etween 1900 and 1932, Puerto Rico was officially misspelled as 'Porto Rico'—a result of the incorrect spelling of the island's name in the English version of the Treaty of Paris. . . . It took the Puerto Ricans 32 years to persuade Congress that the island should have its rightful name restored. Congress changed the island's name to 'Puerto Rico' by joint resolution on May 17, 1932.") (citing Act of May 17, 1932, ch. 190, 47 Stat. 158 (1932)).

[10] For a brief history of the 400 years of Spanish Colonization of the island of Puerto Rico *see* Pedro A. Malavet, *Puerto Rico: Cultural Nation, American Colony*, 6 MICH. J. RACE & L. 1, 12–20 (2000).

[11] *See id.* at 23 ("Between September 1898 and April 12, 1900, Puerto Rico was under military rule, supervised by the War Department.").

[12] Foraker Act, ch. 191, 31 Stat. 77, 81 (1900) (codified as amended in various sections of Title 48 of the United States Code). *See also* Cabranes, *supra* note 9, at 426–35 (discussing the legislative history of the Foraker Bill and the changes it went through in Congress).

[13] § 25 of the Organic Act of 1917, 39 Stat. 954, 958 (1917). *See also* Malavet, *supra* note 10, at 24 n.99.

[14] Malavet, *supra* note 10, at 25. Malavet cites the text of the Treaty of Paris at art. IX:

> Spanish subjects, *natives of the Peninsula*, residing in the territory over which Spain by the present treaty relinquishes or cedes her sovereignty, may remain in such territory or may remove therefrom, retaining in either event all their rights of property, including the right to sell or dispose of such property or of its proceeds; and they shall also have the right to carry on their industry, commerce and professions, being subject in respect thereof to such laws as are applicable to other foreigners.

Id. He then concludes that the native inhabitants

> lost the Spanish citizenship that had been granted in late 1897. Yet again, the native inhabitants of the island become subjects of a colonial power, but not citizens thereof. Despite the language of the treaty, until Congress acted on the matter, defining the legal citizenship of the non-Spanish inhabitants of Puerto Rico would be left to the United States courts."

Id. The original drafts of the Foraker Act included a proposal granting United States citizenship to the natives of Puerto Rico. *See* Cabranes, *supra* note 9, at 432–33. It was Foraker's idea to eliminate this provision. *See id.* As Cabranes explains,

> [Foraker] explained the proposal to eliminate United States citizenship as one prompted by the suggestion that the grant of American citizenship would have the effect of making Puerto Rico an incorporated territory rather than a dependency or possession. The citizenship provision was therefore eliminated in order to avoid

Insular Cases), which dealt with the legal status of the island of Puerto Rico and its inhabitants.[15] Summarizing the cases, one scholar noted that "Basically, they all ruled that Puerto Rico was an unincorporated territory of the United States, i.e., part of the United States, but subject to absolute Congressional legislative authority under [Article I, Section 8] of the United States Constitution."[16] Unlike incorporated territories, "[u]nincorporated territories are not intended for statehood and are only subject to fundamental parts of the [United States] Constitution."[17] In *Downes v. Bidwell*,[18] one of the Insular Cases, the Court explained that these fundamental parts included "those fundamental limitations in favor of personal rights which are formulated in the Constitution and its amendments; but these limitations would exist rather by inference and the general spirit of the Constitution . . . than by any express and direct application of its provisions."[19] Concurring in *Downes*, Justice White noted that the question is not whether the Constitution "is operative . . . but whether the provision relied on is applicable."[20]

In 1917, the Jones Act amended the Foraker Act and granted Puerto Ricans United States citizenship.[21] Under the Jones Act, the Governor of the island rather than the President of the United States appointed the cabinet,[22] and appeals from the Puerto Rico Supreme Court went to the United States First Circuit Court of Appeals.[23] The Act also provided for

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conveying the idea 'that we were incorporating [Puerto Rico] into the Union . . . thus putting it in a state of pupilage for statehood.'"

Id.

15 The six Insular Cases are 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); Downes v. Bidwell, 182 U.S. 244 (1901); and Huus v. New York & Porto Rico S.S. Co., 182 U.S. 392 (1901). *See* Juan Torruella, *The Insular Cases: The Establishment of a Regime of Political Apartheid*, 29 U. PA. J. INT'L L. 283, 284 n.4 (2008). Judge Torruella also states that *Downes v. Bidwell* "would prove to be the central case in establishing Puerto Rico's status within the American polity." *Id*. at 19. *See also* Malavet, *supra* note 10, at 25.

16 Malavet, *supra* note 10, at 26. U.S. CONST. art. I, § 8 cl. 18 is the Necessary and Proper Clause.

17 Lisa Napoli, *The Legal Recognition of the National Identity of a Colonized People: The Case of Puerto Rico*, 18 B.C. THIRD WORLD L.J. 159, 171 (1998) (citing Dorian A. Shaw, Note, *The Status of Puerto Rico Revisited: Does the Current U.S.-Puerto Rico Relationship Uphold International Law?*, 17 FORDHAM INT'L L.J. 1006, 1007–08 n.8 (1994) (citing *Downes*, 182 U.S. at 268, 339–41; United States v. Verdugo-Urquidez, 494 U.S. 259, 268–69 (1990); Balzac v. Porto Rico, 258 U.S. 298, 304, 312–13 (1922))).

18 182 U.S. 244 (1901).

19 *Id.* at 364.

20 *Id.* at 292.

21 Jones Act of 1917, 39 Stat. 951, 953 (1917). A more in depth discussion of Puerto Rican citizenship is developed in Part II. *See infra* Part II.

22 *See* Jones Act, *supra* note 21, at 955.

23 *See id.* at 966.

a non-voting member of Congress—the "Resident Commissioner."[24] Despite these changes, questions remained concerning Puerto Rican citizenship.[25]

After the enactment of the Jones Act, the Supreme Court decided *Balzac v. People of Porto Rico*,[26] which clarified issues concerning United States citizenship for Puerto Ricans.[27] The *Balzac* Court held that only some constitutional rights applied to residents of the island of Puerto Rico.[28] Fundamental rights, such as the deprivation of life, liberty, or property without due process of law, automatically applied to islanders,[29] but other freedoms, such as the Sixth Amendment right to trial by jury, did not apply to islanders even though they were now United States citizens.[30] Judge Torruella notes that the "very fact that the Court would conclude that the right to trial by jury was not a fundamental constitu-

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[24] *Id.* at 959. *See* Torruella *supra* note 15, at 320.

[25] Professor Román noted the shortcomings of the Jones Act concerning United States citizenship for Puerto Ricans. *See* Malavet, *supra* note 10, at 28–29 n.121 (quoting Ediberto Román, *The Alien-Citizen Paradox and Other Consequences of U.S. Colonialism*, 26 FLA. ST. U. L. REV. 1, 19, n.146 (1998) ("[This] initial grant of [United States] citizenship did not come without confusion. The Jones Act of 1917 did not make any provision for persons born in Puerto Rico after the passage of the Act. The Immigration and Nationality Act of 1952 generally resolved this confusion: All persons born in Puerto Rico on or after April 11, 1899, and prior to January 13, 1941, subject to the jurisdiction of the United States, residing on January 13, 1941, in Puerto Rico or other territory over which the United States exercises rights of sovereignty and not citizens of the United States under any other Act, are declared to be citizens of the United States as of January 13, 1941. All persons born in Puerto Rico on or after January 13, 1941, and subject to the jurisdiction of the United States, are citizens of the United States at birth.")).

[26] 258 U.S. 298 (1922).

[27] *Id. See also* Torruella, *supra* note 15, at 323 ("Jesus M. Balzac was the editor of a daily newspaper in Arecibo, Puerto Rico. He wrote an article indirectly referring to the governor of Puerto Rico, which was considered libelous by the local authorities. Consequently, he was charged with criminal libel, a misdemeanor under the Puerto Rican criminal code. When Balzac requested a jury trial, claiming that the Jones Act entitled him to this procedure pursuant to the Sixth Amendment of the U.S. Constitution, the Supreme Court of Puerto Rico denied his request. Balzac was tried on two counts, found guilty by a judge, and sentenced to five and six months in jail on the charges. On appeal to the Supreme Court of the United States, Balzac's convictions were affirmed unanimously in an opinion by Chief Justice Taft based essentially on his views of what was the effect of the grant of citizenship to Puerto Ricans in the Jones Act." (citations omitted)).

[28] *See Balzac*, 258 U.S. at 309. The Court noted that, in

> Porto Rico, however, the Porto Rican can not insist upon the right of trial by jury, except as his own representatives in his legislature shall confer it on him. The citizen of the United States living in Porto Rico cannot there enjoy a right of trial by jury under the federal Constitution, any more than the Porto Rican. It is locality that is determinative of the application of the Constitution, in such matters as judicial procedure, and not the status of the people who live in it.

Id.

[29] *See id*. at 312–13.

[30] *See id*. at 305. Judge Torruella notes that "Taft conveniently overlooked the fact that civil and criminal jury trials had been conducted in the U.S. District Court for Puerto Rico for twenty-three years, since 1899." Torruella, *supra* note 15, at 326.

tional right was in itself an astonishing conclusion which would not hold water in the mainland . . . ."[31] Academics have suggested various theories as to why the Court reached this decision.[32] Nevertheless, as a result of the Court's decision in *Balzac*, United States citizens on the island of Puerto Rico do not enjoy the same constitutional rights as those on the United States mainland.[33]

B. The Commonwealth: More of the Same?

As a result of various laws and measures enacted in the 1950s, Puerto Rico is now officially the Commonwealth of Puerto Rico (*Estado Libre Asociado*).[34] In 1950, Congress passed Public Law 600, which gave Puerto Rican islanders the right to form an elected self-government.[35] The law required a referendum in Puerto Rico that approved the creation of a constitutional convention.[36] Complying with Public Law 600, the people of Puerto Rico adopted a draft constitution, which they submitted to Congress for approval.[37] On July 3, 1952, Congress amended and approved the new Puerto Rican Constitution.[38] Among the amendments imposed by Congress were the elimination of Article II § 20 of the draft Puerto Rican Constitution, which was a declaration of Human Rights[39] and the requirement that Article VIII § 3 "should have added to it language that essentially would require Congressional ap-

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31 Torruella, *supra* note 15, at 327.

32 *See id.* at 326–27. Another likely reason was the Court's desire to rule that despite granting Puerto Ricans United States citizenship, Congress did not mean to incorporate Puerto Rico into the United States, and it thus remained an unincorporated territory at the discretion of Congressional power. *See id. See also* Malavet, *supra* note 10, at 30 n.126; Lisa Maria Perez, Note, *Citizenship Denied: The* Insular Cases *and the Fourteenth Amendment*, 94 VA. L. REV. 1029, 1041 (2008).

33 *See* 258 U.S. at 309, 311.

34 Act of July 3, 1950, ch. 446, 64 Stat. 319 (1950) (codified at 48 U.S.C. §§ 731–731e (2006)). *See also* Adriel I. Cepeda Derieux, Note, *A Most Insular Minority: Reconsidering Judicial Deference to Unequal Treatment in Light of Puerto Rico's Political Process Failure*, 110 COLUM. L. REV. 797, 811 (2010); Malavet, *supra* note 10, at 33.

35 Act of July 3, 1950. The purpose of the act was "fully recognizing the principle of government by consent, this Act is now adopted in the nature of a compact so that the people of Puerto Rico may organize a government pursuant to a constitution of their own adoption." *Id.* § 1.

36 Puerto Rican voters overwhelmingly supported the referendum. *See* FERNANDO BAYRON TORO, ELECCIONES Y PARTIDOS POLITICOS DE PUERTO RICO: 1809-2000, 215 (4th ed. 1989) (noting law as approved by 76.5% of vote, with 65% eligible voter participation); RONALD FERNANDEZ, THE DISENCHANTED ISLAND: PUERTO RICO AND THE UNITED STATES IN THE TWENTIETH CENTURY 183 (2d ed. 1996) (creation of constitutional convention passed with 76% of the vote).

37 *See* Act of July 3, 1950, *supra* note 34, § 3.

38 *See* Pub. L. No. 447, ch. 567, 66 Stat. 327 (1952). The proposed Puerto Rican Constitution was debated in Congress, and members of Congress disagreed with provisions of the draft. *See* Cepeda Derieux, *supra* note 34, at 812 n.87.

39 *See* Pub. L. No. 447, *supra* note 38; *see also* Malavet, *supra* note 10, at 34–35 n.146.

proval of amendments to the Puerto Rican Constitution."[40] After the Congressional amendments, the Constitution returned to Puerto Rico on July 10, 1952 for review and ratification.[41] Finally, on July 25, 1952, the Puerto Rican Constitution took effect.[42]

Even after the establishment of the *Estado Libre Asociado*, the legal relationship of Puerto Rican islanders to the United States remains uncertain. Historically, courts viewed Puerto Rico as an "unincorporated territory,"[43] but as Professor Helfeld, former dean of the University of Puerto Rico Law School, noted:

> Though the former title has been changed, in constitutional theory Puerto Rico remains a territory. This means that Congress continues to possess plenary but unexercised authority over Puerto Rico. Constitutionally, Congress may repeal Public Law 600, annul the constitution of Puerto Rico and veto any insular legislation which it deems unwise or improper.[44]

At times, however, the Supreme Court has suggested that it considers Puerto Rico to function similarly to a state.[45] For example, the Court has noted that "Puerto Rico, like a state, is an autonomous political entity."[46] Nonetheless, Judge Juan Torruella concluded that "Puerto Rico remains an unincorporated territory of the United States even if *de facto* it has been *allowed* by Congress to exercise internal autonomy similar to that to which the states are *entitled.*"[47] The Supreme Court has also noted that "Congress . . . may treat Puerto Rico differently from the States so long as there is a rational basis for its actions."[48] Thus, the

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[40] Malavet, *supra* note 10, at 35 n.147. *See also* Pub. L. No. 447, *supra* note 38.

[41] *See* BAYRON TORO, *supra* note 36, at 215. The Constitution was approved by 81.5% of those who voted, with 59% of eligible voters participating in the polls; *see also* Examining Bd. of Eng'rs, Architects & Surveyors v. Flores de Otero, 426 U.S. 572, 594–95 (1976); Rodriguez v. Puerto Rico Fed. Affairs Admin., 435 F.3d 378, 379 (D.C. Cir. 2006).

[42] *Examining Bd. of Eng'rs, Architects & Surveyors*, 426 U.S. at 593–94.

[43] See the discussion on the Insular Cases, *supra* notes 14–17 and accompanying text.

[44] David M. Helfeld, *Congressional Intent and Attitude Toward Public Law 600: The Constitution and the Commonwealth of Puerto Rico*, 21 REV. JUR. U.P.R. 255, 307 (1952).

[45] *See* Napoli, *supra* note 17, at 171; Adam D. Chandler, Comment, *Puerto Rico's Eleventh Amendment Status Anxiety*, 120 YALE L.J. 2183, 2186 (2011); Cepeda Derieux, *supra* note 34, at 814.

[46] Grieco v. Dep't of Treasury of Puerto Rico, 685 F. Supp. 2d 309, 311 (D.P.R. 2010) (citing Rodriguez v. Popular Democratic Party, 457 U.S. 1, 8 (1982)).

[47] JUAN R. TORRUELLA, THE SUPREME COURT AND PUERTO RICO—THE DOCTRINE OF SEPARATE AND UNEQUAL 159 (1985) (emphasis in original).

[48] Harris v. Rosario, 446 U.S. 651, 651–52 (1980) (per curiam); *see also* STANLEY K. LAUGHLIN, JR., THE LAW OF UNITED STATES TERRITORIES AND AFFILIATED JURISDICTIONS 344 (1995) ("As a matter of raw, naked constitutional power, Congress (with the consent of the President of the United States or over his veto) could probably override the compact and nullify the autonomy of Puerto Rico's government. However, given both the domestic and

extent to which the establishment of the *Estado Libre Associado* has altered Congress's power over Puerto Rico and its inhabitants is still unknown.[49] Yet "the weight of the authority" suggests that Puerto Rico remains subject to Congress's plenary power under the Constitution's Territorial Clause.[50] Hence, one reason Puerto Rico is different from a state is because only certain provisions of the Constitution apply to it, and Congress can exert plenary power over the island.

II. CITIZENSHIP AND VOTING RIGHTS FOR PUERTO RICAN UNITED STATES CITIZENS

A. *Citizenship: Second-Class Citizenship for Those Who Remain on the Island*

The Fourteenth Amendment to the United States Constitution in part addresses the rights of United States citizenship.[51] Yet, as a result of the Insular Cases, Article IV of the United States Constitution (the Territorial Clause) rather than the Fourteenth Amendment appears to determine the rights and citizenship of Puerto Rico's inhabitants.[52] As occupants of an unincorporated territory, Puerto Ricans born on the island of Puerto Rico are neither born nor naturalized in the United States pursuant to the Fourteenth Amendment.[53] Thus, Puerto Rican citizenship does not appear to be constitutionally grounded in the Fourteenth Amendment but rather is statutorily based.[54] This means that not only

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international political ramifications of so doing, it seems extraordinarily unlikely that such a thing would happen.").

[49] *See Grieco*, 685 F. Supp. 2d at 311 ("As a result, albeit courts have recognized that 'the legal relationship between Puerto Rico and the United States is far from clear and fraught with controversy' . . . ." (quoting U.S. v. Vega Figueroa, 984 F. Supp. 71, 76 (1997) (citing U.S. v. Lopez Andino, 831 F.2d 1164 (1st Cir. 1987)); Malavet *supra* note 10, at 37–38 (stating that despite "these carefully worded acts of obfuscation before the United Nations, and notwithstanding some lower court decisions, the real American view of Puerto Rico's status was conclusively expressed by the United States Supreme Court in three very terse per curiam opinions: *Califano v. Torres*, *Torres v. Puerto Rico*, and *Harris v. Rosario*. In these cases the Court ruled that Puerto Rico was still an organized but unincorporated territory of the United States, subject to almost limitless Congressional power.") (internal citations omitted); Napoli, *supra* note 17, at 171; Cepeda Derieux, *supra* note 34, at 814.

[50] U.S. CONST. art. IV, § 3, cl. 2; *see* TORRUELLA, *supra* note 47, at 159; Gary Lawson & Robert D. Sloane, *The Constitutionality of Decolonization by Associated Statehood: Puerto Rico's Legal Status Reconsidered*, 50 B.C. L. REV. 1123, 1127 (2009); Napoli, *supra* note 17, at 171.

[51] U.S. CONST. amend. XIV, § 1.

[52] *See, e.g.*, De Lima v. Bidwell, 21 S. Ct. 743, 753 (1901).

[53] *See* JOSÉ LÓPEZ BARALT, THE POLICY OF THE UNITED STATES TOWARDS ITS TERRITORIES WITH SPECIAL REFERENCE TO PUERTO RICO 235–36 (1999) (arguing that Puerto Ricans did not gain U.S. citizenship before the Jones Act of 1917 because the Fourteenth Amendment only extends throughout the United States and the United States does not include unincorporated territories such as Puerto Rico).

[54] *See* T. ALEXANDER ALEINIKOFF, BETWEEN PRINCIPLES OF POLITICS: THE DIRECTION OF U.S. CITIZENSHIP POLICY 14 n.21 (1998). Yet, the Court has not clearly articulated this posi-

does the Territorial Clause, instead of the Fourteenth Amendment, apply to the rights of citizenship of Puerto Ricans but also that Congress possesses wide discretionary powers to define the limits of that citizenship.

The Territorial Clause permits Congress to make any necessary rules for United States territories, including Puerto Rico, so long as it has a rational basis for doing so.[55] Under the Clause, Congress "may treat Puerto Rico differently from States so long as there is a rational basis for its actions."[56] As already noted, only the Constitution's fundamental rights apply to Puerto Ricans who remain on the island of Puerto Rico.[57] Thus, one commentator states that it "creates a distinction between the rights of United States citizens living in Puerto Rico and United States citizens living in 'the United States proper.'"[58] Puerto Ricans who choose to live on the island of Puerto Rico are still subject to many of the responsibilities of United States citizenship such as taxation,[59] military service, and adherence to the criminal laws of the United States,[60] but they receive reduced benefits from the United States government when compared to mainlanders.[61]

For instance, in *Harris v. Rosario*,[62] the Supreme Court held that Congress could constitutionally allot a lower level of reimbursement and a monetary cap for Aid to Families with Dependent Children (AFDC) to islanders.[63] The Court reasoned that the funding cap did not violate the Fifth Amendment's Equal Protection Clause because Congress derives its power from the Territorial Clause, which permits the federal government to treat residents of the island of Puerto Rico differently from residents of states on the mainland United States as long as Congress has a rational basis for doing so.[64] Thus, if Puerto Ricans subject to the funding cap relocated to any state on the mainland United States, they would

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tion. *See* Eduardo Guzmán, Comment, Igartúa De La Rosa v. United States*: The Right of the United States Citizens of Puerto Rico to Vote for the President and the Need to Re-Evaluate America's Territorial Policy*, 4 U. PA. J. CONST. L. 141, 164 (2001).

55 *See* Harris v. Rosario, 446 U.S. 651, 651–52 (1980). The Territorial Clause of the Constitution reads as follows: "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State." U.S. CONST. art. IV, § 3, cl. 2.

56 *Harris*, 466 U.S. at 651–52.

57 *See supra* notes 28–33 and accompanying text.

58 Malavet, *supra* note 10, at 30.

59 Although Puerto Ricans do not pay federal income tax, they do pay other federal taxes. *See* Napoli, *supra* note 17, at 176–77 (noting Puerto Ricans pay an "elevated rate of local income tax which amounts to an indirect payment of the federal income tax"); Malavet, *supra* note 10, at 44–45 n.192.

60 *See* Malavet, *supra* note 10, at 44–45 n.192.

61 *See id.*

62 446 U.S. 651 (1980) (per curiam).

63 *See id.* at 651–52.

64 *See id.*; Napoli, *supra* note 17, at 178.

receive AFDC benefits without worrying about a funding cap so long as they qualify for the benefits.[65] Similarly in *Califano v. Torres*,[66] the Court held that federal disability benefits were only payable to residents of the fifty states and the District of Columbia.[67] Thus, when comparing the United States citizenship rights of islanders to mainlanders, the "people of Puerto Rico are not full U.S. citizens because they do not share the same rights held by other U.S. citizens . . . ."[68] Hence, a legal division exists between Puerto Ricans depending on where they choose to reside.[69]

B. Voting Rights: Disenfranchisement and Lack of Representation

The second-class citizenship bestowed upon islanders is most apparent in United States voting rights policies and legislation regarding the island. Unlike mainlanders, islanders do not possess the right to vote for a representative in the House of Representatives or the United States Senate even though they are United States citizens and subject to the laws of the United States.[70] Their representation is limited to one non-voting member of the House of Representatives,[71] known as the Resident Commissioner.[72] Furthermore, islanders are unable to vote for the President of the United States,[73] even though the President possesses the power to draft islanders into the military—the power to send islanders to die in the United States' wars.[74] Thus, islanders are without representation in any branch of the United States Government and are at the will of Congress, which "may decide the rights of Puerto Ricans and the status of Puerto Rico."[75]

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65 *See* Napoli, *supra* note 17, at 178.

66 435 U.S. 1 (1978).

67 *See id.* at 2.

68 Román, *supra* note 25, at 10.

69 Part of the division is likely a result of where Puerto Ricans who reside in Puerto Rico constitutionally derive their citizenship rights. *See id.*

70 *See* Napoli, *supra* note 17, at 176 n.66.

71 *See* Román, *supra* note 25, at 10 n.64.

72 *See* 48 U.S.C. § 891 (2006).

73 Arguably, United States citizens who have the right to vote may elect to vote for a different President if they do not agree with that individual's decisions. Puerto Ricans do not have such a right.

74 *See* Igartua De La Rosa v. United States, 32 F.3d 9 (1st Cir. 1994) (per curiam) (discussing Puerto Rican voting rights). The Puerto Rico National Cemetery is the resting ground for many Puerto Ricans who have served in the United States Armed services. *See* UNITED STATES DEPARTMENT OF VETERANS AFFAIRS, *Cemeteries—Puerto Rico National Cemetery*, http://www.cem.va.gov/cems/nchp/puertorico.asp (last visited Jan. 5, 2013). Many of these heroes died defending American rights and liberties, many of which they themselves never enjoyed.

75 Napoli, *supra* note 17, at 178.

While the Supreme Court has held that the right to vote is a "fundamental political right, because [it is] preservative of all rights,"[76] it is clear that the right to vote changes with residency for United States citizens who reside on the island of Puerto Rico.[77] In *Igartua De La Rosa v. United States*, United States citizens residing on the island of Puerto Rico—and, thus, no longer able to vote for President of the United States—challenged the Uniformed and Overseas Citizens Absentee Act on Due Process and Equal Protection grounds.[78] This statute granted United States citizens and Puerto Rican islanders who moved to a foreign jurisdiction the right to vote in United States presidential elections.[79] A United States citizen who decided to move to the island of Puerto Rico, however, lost the ability to vote under the statute.[80] Applying a rational basis standard of review, the United States Court of Appeals for the First Circuit held that "the consequences of the Act were not due to the Act itself, but to the absence of any constitutional right of Puerto Rican residents to vote in presidential elections."[81] The outcome in the case led one commentator to note that "[t]his is a recurring outcome: one loses the rights of citizenship as one steps onto the soil of Puerto Rico and one accrues rights as one steps onto the United States."[82]

In 2000, Igartua de la Rosa once again brought suit in the United States District Court for Puerto Rico in *Igartua de la Rosa v. United States*.[83] The district court distinguished the present case from the earlier *Igartua* decision by explaining that, while the previous case "centered on Plaintiff's inability to vote for the President and Vice President, the instant case revolves around their inability to elect delegates to the Electo-

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76 Reynolds v. Sims, 377 U.S. 533, 562 (1964) ("The right to vote freely for the candidate of one's choice is of the essence of a democratic society and any restrictions on that right strike at the heart of representative government."). *See also* Lisa M. Kömives, Comment, *Enfranchising a Discrete and Insular Minority: Extending Federal Voting Rights to American Citizens Living in United States Territories*, 36 U. MIAMI INTER-AM. L. REV. 115, 134 (2004).

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

78 *Igartua De La Rosa*, 32 F.3d. at 10.

79 *See id.*

80 *See id.*

81 *See id.* at 10–11; Napoli, *supra* note 17, at 177.

82 Napoli, *supra* note 17, at 177.

83 Igartua de la Rosa v. United States, 113 F. Supp. 2d 228 (D.P.R. 2000), Rev'd, 229 F.3d 80 (1st Cir. 2000). There are many articles analyzing the Courts decision in *Igartua de la Rosa v. United States*. Among the most interesting are Eduardo Guzman, Comment, Igartua de la Rosa v. United States*: The Right of the United States Citizens of Puerto Rico to Vote for the President and the Need to Re-evaluate America's Territorial Policy*, Comment, 4 U. PA. J. CONST. L. 141 (2001) and Arnold J. Janicker, Comment, *Extending the Federal Franchise to the Commonwealth of Puerto Rico:* Igartua De La Rosa v. United States, 75 ST. JOHN'S L. REV. 509 (2001).

ral College."[84] Departing from well-established case law[85] interpreting the fundamental right to vote and Article II of the Constitution,[86] the court found that United States citizens who reside on the island of Puerto Rico have a right to vote in presidential elections and that Congress must count Puerto Rico's electoral votes.[87]

The court supported its holding with various theories and believed that the right to vote was derived from "the principles entrenched in the Bill of Rights"[88] rather than from Article II of the Constitution.[89] Also, because the Supreme Court had recognized the right to vote as a right guaranteed by the First Amendment and the Fourteenth Amendment's Due Process and Equal Protection Clauses,[90] United States citizens would still have a right to vote for President of the United States regardless of the provisions contained within Article II.[91] Finally, the court concluded that the word "state" in the Constitution was not limited to only the fifty states of the Union, but rather had evolved in understanding and meaning.[92] To support this proposition, the court noted that "Congress was not precluded from extending diversity of citizenship jurisdiction from applying to Puerto Rico despite that Article III of the Constitution vests federal courts with the jurisdiction to hear suits 'between Citizens of different States.'"[93] Notwithstanding the district court's reasoning and strong arguments, the United States Court of Appeals for the First Circuit reversed without addressing the lower court's reasoning.[94] The appellate court believed that the first *Igartua* case presented the identical legal question as the subsequent suit and thus was binding authority.[95] The difference between the right to vote for President of the United States and the right to vote for the electors that cast their vote for President of the United States was insignificant in the eyes

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84 107 F. Supp. 2d 140, 145 (D.P.R. 2000).

85 *See* Igartua De La Rosa v. United States, 32 F.3d 9 (1st Cir. 1994) (per curiam); Romeu v. Cohen, 121 F. Supp. 2d 264 (S.D.N.Y. 2000); Janicker, *supra* note 83, at 511 n.23 (listing cases supporting the contrary position to that taken by the United States District Court of Puerto Rico).

86 *See* U.S. CONST. art. II, § 1.

87 *See De la Rosa*, 113 F. Supp. 2d at 242.

88 *Id.* at 232.

89 *See* U.S. CONST. art II, § 1, cl. 2.

90 *See De la Rosa*, 113 F. Supp. 2d at 232.

91 *See id.* (citing Dunn v. Blumstein, 405 U.S. 330, 336 (1972)); Bullock v. Carter, 405 U.S. 134 (1972) (when the right to vote is at issue, the Equal Protection Clause comes into play).

92 *See De la Rosa*, 113 F. Supp. 2d at 235.

93 *Id.* at 235. *See* 28 U.S.C. §1738.

94 *See* Igartua de la Rosa v. United States, 229 F.3d 80, (1st Cir. 2000).

95 *See id.* at 83.

of the appellate court.[96] The two *Igartua* cases[97] strongly suggest that the fundamental nature of the right to vote for President of the United States is altered and malleable for Puerto Ricans depending on where they reside.[98] Thus, when United States citizens affirmatively choose to reside on the island of Puerto Rico, those citizens also decide to relinquish their right to vote for the President of the United States.

Interestingly, residents of the island of Puerto Rico may participate in presidential primaries even though they are unable to vote in presidential elections. For example, on June 1, 2008, islanders participated in the 2008 Puerto Rico Democratic Primary.[99] Sixty-three Puerto Rican delegates also took part in the 2008 Democratic Presidential Primary.[100] Both then-Senators Barack Obama and Hilary Clinton visited Puerto Rico during the primary season,[101] and a total of 384,578 islanders participated in the primary.[102] One can observe the significance of the number of islanders exercising their right to vote in a presidential primary by comparing the number of Puerto Ricans who voted in the primaries with the number of Iowans who voted in the primaries.[103] Iowa, the first-in-the-nation caucus, had only forty-five delegates, ten fewer than what Puerto Rico had.[104] In 2008, the Iowa caucuses saw a record turnout, with only approximately 239,000 voters participating in the Democratic cau-

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96 *See id.*

97 It is important to note that these are not the only two Igartua de la Rosa v. United States cases. In 2005, the plaintiffs brought another action "claiming that their inability to vote in presidential elections violated their constitutional rights and ran contrary to international obligations of the United States." The District Court dismissed and the Court of Appeals affirmed. *See* Igartua-De La Rosa v. United States, 417 F.3d 145 (1st Cir. 2005). Most recently, in 2011, the Court of Appeals denied petitions for rehearing and rehearing en banc. The Court concluded that the third *Igartua* decision controlled this case. *See* Igartua v. United States, 654 F.3d 99 (1st Cir. 2011).

98 *But see De La Rosa*, 417 F.3d at 154 (Torruella, J., dissenting). Judge Torruella believed that, due to the constitutional law that had deemed the right to vote as fundamental, this right "should apply fully to U.S. Citizens residing in Puerto Rico" because the Court had long held "that the Constitution extends fundamental rights to Puerto Rico." *Id.* at 170.

99 *See* DEMOCRATIC PARTY OF THE COMMONWEALTH OF P.R., COMMONWEALTH OF PUERTO RICO AMENDED DELEGATE SELECTION PLAN FOR THE 2008 DEMOCRATIC NATIONAL CONVENTION 1, 4 (Mar. 6, 2008), *available at* http://s3.amazonaws.com/apache.3cdn.net/b530e5620707656454_ivm6bnzcw.pdf.

100 *Primary Calendar: Democratic Nominating Contests*, N.Y. TIMES, http://politics.nytimes.com/election-guide/2008/primaries/democraticprimaries/index.html (last visited Jan. 25, 2013).

101 *See Clinton, Obama Court Puerto Rican Voters,* CNN (May 24, 2008), http://articles.cnn.com/2008-05-24/politics/campaign.wrap_1_obama-court-mccain-campaign-john-mccain?_s=PM:POLITICS.

102 *Puerto Rico Nominating Contest Results,* N.Y. TIMES, http://politics.nytimes.com/election-guide/2008/results/states/PR.html (last visited Jan. 25, 2013).

103 *See Why the Iowa Caucuses are so Important: 5 Theories*, THE WEEK (Jan. 3, 2012, 9:42 AM), http://theweek.com/article/index/222944/why-the-iowa-caucuses-are-so-important-5-theories.

104 *See Primary Calendar: Democratic Nominating Contests*, *supra* note 100.

cus.[105] Thus, although the presidential candidates rarely campaign on the island of Puerto Rico, Puerto Ricans turned out in higher numbers than Iowans even though the islanders were unable to vote in the presidential election. However, even after displaying their desire to participate in the voting system, residents of the island of Puerto Rico were once again excluded from the general presidential election.[106] Thus, allowing islanders to participate in a primary election seems to conflict with a right that they cannot currently posses under the Supreme Court's understanding and interpretation of American territorial and constitutional law.

The voting rights of United States citizens who permanently reside on the island of Puerto Rico are further diminished by their inability to elect a Congressional representative who can vote on their behalf. Currently, islanders are limited to electing a Resident Commissioner[107] who is a non-voting member of Congress.[108] The Resident Commissioner's role in Congress is determined by the House Rules, which permit him to introduce bills and speak on the House floor, but only allow him to participate in three House committees.[109] The current Resident Commissioner's (Pedro Pierluisi) website states the following: "I take my responsibility of serving the 4 million [United States] citizens of Puerto Rico very seriously and I represent them in Congress with pride."[110] However, because he is unable to vote on critical matters affecting the island of Puerto Rico, Pierluisi's ability to represent his constituents is often limited to merely advising and speaking on behalf of Puerto Rican interests.[111] In contrast, if the same Puerto Ricans who voted for the Resident Commissioner moved to any state on the mainland United States, they would be able to elect a Congressional Representative with actual voting power who could represent their interests in both Congress and the Senate. Law professor Pedro Malavet concludes:

> [A] few years into the second century of United States occupation, Puerto Ricans are subject to the almost total

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105 Adam Nagourney, *Obama Takes Iowa in a Big Turnout as Clinton Falters; Huckabee Victor*, N.Y. TIMES (Jan. 4, 2008), http://www.nytimes.com/2008/01/04/us/politics/04elect.html?pagewanted=all.

106 *See* Indira A.R. Lakshmanan, *U.S. Election Highlights Puerto Rico's 'Unequal' Status*, N.Y. TIMES (May 20, 2008), http://www.nytimes.com/2008/05/20/world/americas/20ihtletter.1.13044789.html.

107 *See* 48 U.S.C § 891 (2006) (permitting Puerto Rico to choose a "Resident Commissioner").

108 *See* ARNOLD H. LEIBOWITZ, DEFINING STATUS: A COMPREHENSIVE ANALYSIS OF UNITED STATES TERRITORIAL RELATIONS 224 (1989).

109 *See id.*

110 Pedro Pierluisi, *Pedro Pierluisi, Puerto Rico,* U.S. HOUSE OF REPRESENTATIVES, http://pierluisi.house.gov (last visited Jan. 11, 2012).

111 *See* LEIBOWITZ, *supra* note 108, at 224–25.

> discretion of the United States Congress in constructing their legal rights. So far, that construction has made the United States citizenship of Puerto Ricans living in Puerto Rico second class, because it does not entitle the holders thereof to the same political and civil rights as those living in "the United States proper," the 50 states.[112]

Thus, residency on the island of Puerto Rico grants Puerto Ricans the ability to vote for a representative who can neither fully represent their interests nor vote for legislation. Under the current framework, nothing guarantees that members of Congress will either listen to or act on the Resident Commissioner's words when he speaks for the interests of Puerto Ricans. Essentially, the Resident Commissioner speaks without the crucial ability to wield a power to vote, a weapon that is necessary in order to be properly heard.

C. Two Unique Classes of Puerto Rican American Citizens

The different rights and privileges available to Puerto Ricans are contingent on residency and, thus, create two classes of Puerto Ricans defined by the different rights bestowed on them by United States law. Professor Ediberto Román notes that the "grant of citizenship is the formal recognition and guarantee of certain rights and duties, including the right to suffrage and other important constitutional rights."[113] However, not all Puerto Ricans enjoy the full rights of suffrage that stem from United States citizenship, since only fundamental rights, regardless of their importance, apply to residents of the island of Puerto Rico. Thus, if Professor Román is correct that "[c]itizenship has become a central component of the very identity of individuals in this society since citizenship defines the relationship between the individual and the state,"[114] then United States citizenship creates a different relationship among Puerto Ricans as a group.

Within the Puerto Rican group, individual identity and relationships to the state are crafted not as a result of identifying as Puerto Rican, but rather as a result of the type of citizenship an individual possesses.[115] Similarly, citizenship also defines the political community of the individ-

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112 Malavet, *supra* note 10, at 40.

113 EDIBERTO ROMÁN, THE OTHER AMERICAN COLONIES: AN INTERNATIONAL AND CONSTITUTIONAL LAW EXAMINATION OF THE UNITED STATES' NINETEENTH AND TWENTIETH CENTURY ISLAND CONQUESTS 68 (2006) (citing Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1262–84 (1992)).

114 *Id.*

115 *See generally id.*

ual.[116] As a result of the two distinct forms of citizenship, Puerto Ricans participate in the United States democratic process in different ways. The most evident difference between these two classes of Puerto Ricans is the ability to vote. The restrictions on voting dilute the meaning of citizenship for islanders because they cannot advocate or vote for representation in the national legislature. Thus, although "[t]he status of citizen recognizes that such a person is ordinarily one who possesses legal, social, and political power"[117] under the law, Puerto Ricans are divided into two groups. One group—islanders—possesses minimal legal, social, and political power, and the other group—mainlanders—possesses the power to petition their representatives in Congress and exert a political power unattainable by their island counterparts. The different legal and political mechanisms available to mainlanders allow members of this group to identify themselves as political beings and relate to the state and political process in a way foreclosed to islanders. Thus, these different citizenship rights inherently create two distinct classes of Puerto Ricans.[118]

D. Differing American Experiences for Mainland and Island Puerto Ricans Affect Who is Viewed as Puerto Rican

For the most part, mainlanders are bilingual, i.e., they have some knowledge of both English and Spanish.[119] Due to their mainland United States residency, mainlanders have also adopted some elements of United States culture while maintaining some of their traditional Puerto Rican culture.[120] María E. Pérez y Gonzalez refers to this as adapting to one's context without assimilating.[121] She notes that the majority of young mainlanders view themselves as having a dual and bicultural identity that is both American and Puerto Rican.[122] Yet, merely labeling mainlanders as Puerto Rican Americans "'runs against the grain of both daily experience and ideological commitment' because for Puerto Ricans 'one either is or is not Puerto Rican.'"[123]

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116 *See id.*

117 *Id.* at 69.

118 While there are other factors that can enhance the creation of two classes of Puerto Ricans, this Note focuses on how citizenship and voting rights entrench cultural differences, as these are direct creations of United States law and its judicial interpretations. At a fundamental level, the distinction is between those who enjoy the constitutional rights of citizenship as interpreted by the Fourteenth Amendment and those who receive rights as interpreted by the Territorial Clause. Furthermore, while the two groups do share many cultural characteristics, my view is that, legally, they are viewed as distinct groups. While an argument for dividing the groups along racial identity may be advanced, that is not the focus of this Note.

119 *See* MARÍA E. PÉREZ Y GONZÁLEZ, PUERTO RICANS IN THE UNITED STATES 58 (2000).

120 *See id.*

121 *Id.*

122 *Id.*

123 *Id.* at 59.

Mainlanders also differ from islanders in their experiences with American society. For instance, Puerto Ricans who were both born and raised in the United States are influenced by mainstream culture, African American culture, and the cultures of other Latin American groups who reside in Puerto Rican neighborhoods.[124] Unlike islanders, mainlanders have faced challenges such as adapting to a new country, embracing their status as an ethnic minority, discrimination, and racism as a result of their migration to the mainland United States.[125] These challenges have likely shaped them as a people in a distinct way from islanders.

In sharp contrast to the adaptations mainlanders have made, islanders still speak mostly Spanish.[126] Furthermore, although mainlanders have dealt with the issues of assimilation and racism, islanders "resisted Americanization and helped to forge a new ethnic identity that elevated the cultural significance of the Spanish language."[127] Jorge Duany notes that unlike the national identity of mainlanders, "since 1898, national identity in Puerto Rico has developed under—and often in outright opposition to—U.S. hegemony."[128]

Also, unlike mainlanders who embrace elements of American culture as part of the assimilation process, islanders imagine themselves as distinct from both Americans and other Latin American groups.[129] The islanders' firm and lasting resistance to Americanization is known as "*puertoriqueñidad*," which when translated comes closest to meaning "Puerto Ricanness."[130] According to Amílcar Antonio Barreto, the term "embraces those sociocultural attributes that are typical of Puerto Rico and its inhabitants."[131] Barreto further notes that "[t]he creation of a new identity was the result of a long process whereby islanders responded to five centuries of the social attitudes and repressive policies of two historic metropolitan sovereignties—the Kingdom of Spain and the United States of America."[132] Thus, by implication, it appears that as the new identity, which ties *puertoriqueñidad* to islanders, evolves, it excludes those Puerto Ricans who reside outside the island, thereby creating an

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124 *See Id.*

125 *See id.* at 61. For an in-depth discussion on the topic, see *id.* at 63–127.

126 *See* Jose Julian Alvarez Gonzalez, *Law, Language, and Statehood: The Role of English in the Great State of Puerto Rico*, *in* FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION, AND THE CONSTITUTION 289, 290 (Christina Duffy Burnett & Burke Marshall eds., 2001).

127 AMÍLCAR ANTONIO BARRETO, THE POLITICS OF LANGUAGE IN PUERTO RICO 6 (2001).

128 JORGE DUANY, PUERTO RICAN NATION ON THE MOVE: IDENTITIES ON THE ISLAND AND IN THE UNITED STATES 16 (2002).

129 *See id.* at 15.

130 BARRETO, *supra* note 127, at 6.

131 *Id.*

132 *Id.* at 7.

identity distinction among Puerto Ricans based on residency and preventing the two groups of Puerto Ricans from uniting.

One of the most significant factors preventing the groups from coalescing under the term "Puerto Rican" is the language distinction between the groups. As Pérez y Gonzalez notes, "[T]he language issue is particularly critical and can serve as a barrier between islanders and those in the United States."[133] For islanders, the Spanish language is a central component of Puerto Rican nationalism.[134] While the acquisition of English was central to Americanization,[135] many islanders "incorporated the defense of the Spanish language as an integral part of safeguarding *puertoriqueñidad* . . . ."[136] Hence, on the island, the "Americanization policy gave the Spanish language a function that it would not have had otherwise."[137] In contrast, "Nuyoricans,"[138] those Puerto Ricans born and raised on the mainland United States, concede, and at times embrace, the influence that the English language has on their identities.[139] Thus, the different views of language are central to the division of the two groups because these differences prevent the groups from effectively communicating with each other. For instance, those islanders who favor a closer relationship with the United States diminish the importance of language, while those favoring independence advocate the importance of the Spanish language to *puertoriqueñidad*.[140]

Furthermore, despite attempts by the United States to establish English as the dominant language of the island of Puerto Rico,[141] many islanders do not speak English.[142] In the 1990's only 23.63% of the island's population spoke English with ease, and 24.1% could speak English with difficulty.[143] Similarly, the 2000 Census reveals that 85.6% of the Puerto Rican population residing on the island of Puerto Rico spoke a language other than English at home, and 71.9% claimed to speak En-

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133 PÉREZ Y GONZÁLEZ, *supra* note 119, at 60.

134 *See* DUANY, *supra* note 128, at 19 (noting that this is in part a reaction to U.S. attempts to establish English as the official language of the island).

135 *See* BARRETO, *supra* note 127, at 8.

136 *Id.* at 10.

137 *Id.* (noting that part of the reaction to Americanization was due to the Official Languages Act of 1902, which was a law of the territory that permitted both English and Spanish to be used in the Puerto Rican government). *See also id.* at 17–18 (noting that the law was viewed as an attack on Puerto Rican cultural identity, and further noting that the law remained intact until 1991 when the Puerto Rican government declared Spanish the only official language, although in 1993 the Puerto Rican government would once again restore the 1902 Act).

138 *See* PÉREZ Y GONZÁLEZ, *supra* note 119, at 60.

139 *See supra* notes 113–18 and accompanying text.

140 *See* BARRETO, *supra* note 127, at 10; Alvarez Gonzalez, *supra* note 126, at 291 (noting that "[m]any Puerto Ricans perceive English as a proxy for attempts at political and cultural domination, which have been resisted since 1898").

141 *See supra* note 128 and accompanying text.

142 *See* Alvarez Gonzalez, *supra* note 126, at 290.

143 BARRETO, *supra* note 127, at 20-21.

glish less than "very well."[144] Meanwhile, many mainlanders—especially those born in the United States—have embraced English or Spanglish, sometimes to the detriment of Spanish as their language of choice.[145] The language distinction between the two groups of Puerto Ricans has led islanders to look down upon the use of Spanglish[146] and many mainlanders' inability to speak Spanish because many islanders tend to believe that "if one loses the Spanish language, then one loses the culture and is no longer Puerto Rican but something else that bears a negative connotation—a Nuyorican . . . ."[147] Furthermore, embracing the Spanish language is crucial to *puertoriqueñidad*, and, on a basic level, the term requires rejecting those who do not speak Spanish from inclusion in the meaning of Puerto Rican identity.[148] Hence mainlanders, such as youth who have limited or no Spanish speaking ability,[149] are excluded from *puertoriqueñidad*.

Another issue preventing group unity is the challenge that Puerto Ricans in the United States present to the contemporary thinking of the national identity of islanders.[150] Mainland and island Puerto Ricans recognize that to some degree their experiences and culture differ,[151] and they often view each other as distinct groups.[152] For example, upon returning to the island of Puerto Rico, mainlanders are often distinguished by islanders.[153] While scholars cannot agree on a common term to refer to Puerto Ricans in the United States,[154] mainland Puerto Ricans who identify as Puerto Rican but nonetheless accept the fact that they are influenced by the culture and society of the United States are often called "Nuyoricans."[155] Furthermore, islanders from different political parties agree that there exists "a clear dichotomy between 'us' and 'them'—that

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144 Hyon B. Shin and Rosalind Bruno, *Language Use and English-Speaking Ability: 2000*, Census 2000 Brief, census.gov (Oct. 2003), *available at* http://www.census.gov/prod/2003pubs/c2kbr-29.pdf.

145 *See* PÉREZ Y GONZÁLEZ, *supra* note 119, at 60. *See also* DUANY, *supra* note 128, at 28.

146 *See* PÉREZ Y GONZÁLEZ, *supra* note 119, at 60 (defining Spanglish as the act of switching between the English and Spanish words in the same sentence).

147 *Id.*

148 *See* DUANY, *supra* note 128, at 29.

149 *See* PÉREZ Y GONZÁLEZ, *supra* note 119, at 60.

150 *See* DUANY, *supra* note 128, at 28.

151 *See* PÉREZ Y GONZÁLEZ, *supra* note 119, at 60.

152 *See* DUANY, *supra* note 128, at 28.

153 *See* PÉREZ Y GONZÁLEZ, *supra* note 119, at 60. As a child, I often spent my summer vacation in Puerto Rico visiting my family. Everywhere I went, the first question I was always asked was, "You're not from here, right?"

154 *See* DUANY, *supra* note 128, at 28. Suggested terms are "Neo-Rican, Nuyorican, Niuyorrican, *nuyorriqueño*, mainland Puerto Rican, U.S.-born Puerto Rican, Boricua, [and] Diaspo-Rican . . . ." *Id.*

155 *See id.*

is, between Puerto Ricans and Americans,"[156] and, "[u]ntil recently, most scholars based in Puerto Rico located the emigrants outside the territorial and symbolic boundaries of their own identity."[157] Marvette Pérez writes that

> [a]lmost all of the Puerto Rican nationalist discourse implicitly excludes Nuyoricans because of their physical and metaphorical proximity to the United States. In these discourses, Nuyoricans are discursively constructed as dangerous, hybrid, and contaminated beings, and in danger of, upon returning to Puerto Rico, contaminating Puerto Ricans.[158]

Not only is it unclear whether islanders will embrace mainlanders as part of their ethnic identity, but Amílcar Antonio Barreto concludes that "[i]n the long run a question remains as to whether Nuyoricans will view themselves as primarily Puerto Rican, American, both, or their own unique entity, or whether they will blend into the category of 'Latino' or 'Hispanic.'"[159] While the two groups struggle to either include or exclude[160] each other, it is clear that Nuyoricans, to some extent, are both legally and culturally distinct from islanders in a way that prevents them from fully uniting as an ethnic group.

E. Different Legal Rights Under United States Law Reinforces the Distinctions

Finally, the entrenchment in American jurisprudence and the political system of the different citizenship and voting rights among Puerto Ricans[161] further reinforces the division that exists between islanders and

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156 DUANY, *supra* note 128, at 18 (citation omitted); *see also* RAMÓN GROSFOGUEL, COLONIAL SUBJECTS: PUERTO RICANS IN A GLOBAL PERSPECTIVE 142 (2003) ("The cultural hybridity of the Puerto Ricans in the United States represents a form of identity that includes elements of African-American culture that threatens island elites' efforts to conceal their African heritage while privileging the Spanish culture.").

157 DUANY, *supra* note 128, at 29.

158 *Id.* (quoting Marvette Pérez, *La "guagua aérea": Política, estatus, nacionalismo y ciudadanía en Puerto Rico, in* AMÉRICA LATINA EN TIEMPOS DE GLOBALIZACIÓN: PROCESOS CULTURALES Y TRANSFORMACIONES SOCIOPOLÍTICAS, 187–200 (Daniel Mato, Martza Montero & Emanuele Amodio eds., 1996).

159 BARRETO, *supra* note 127, at 31; *see also* DUANY, *supra* note 128, at 31–32 (stating that migration does not necessarily equal assimilation, which adds another layer to this already complex and complicated distinction).

160 *See* DUANY, *supra* note 128, at 31 ("It remains unclear whether the bilingual character of the diaspora will undermine what until now has been considered a nonnegotiable aspect of the Puerto Rican nation: the Spanish language. At the very least it will require broadening the boundaries of cultural identity to include the more than 3 million people of Puerto Rican descent living abroad.").

161 *See supra* Part II (describing different rights based on citizenship).

mainlanders.[162] Through different forms of citizenship and voting rights, the United States legal system embraces the view that, at the very minimum, two groups of Puerto Ricans exist. The first group resides in the United States and enjoys the full benefits of American citizenship,[163] and the second resides on the island of Puerto Rico and does not enjoy those benefits. If the law only saw one group as "Puerto Rican," then the judicial system would treat them equally. Yet not only have court decisions treated Puerto Ricans differently based on residency, but American policy towards Puerto Ricans also tends to favor assimilation into the United States while opposing independence for the island of Puerto Rico.[164] By denying some Puerto Ricans the right to vote while still referring to them as citizens of the United States, the United States legal system recognizes that Puerto Ricans are not all equal.

The legal recognition of two groups of Puerto Ricans means that in the key areas of citizenship and voting rights, United States jurisprudence has developed along two distinct paths. The first path protects and defines the rights of American citizens and includes mainlanders, while the second (inferior) path defines the rights and protections of islanders. Thus, the development of two canons of jurisprudence based on residency instead of citizenship serves as a legal affirmation of the belief among Puerto Ricans that they are distinct from each other because of where they reside. Through distinct court rulings and government policies, United States jurisprudence both sanctions and reinforces divisions among Puerto Ricans by telling them that the law will view and treat them differently no matter how "Puerto Rican" they may feel. According to Professor Gerald López, "[w]hat it means to be Puerto Rican—on the island and on the mainland— seems very much in dispute, constitutionally and culturally."[165]

Because islanders lack the right to vote or represent their interests in both the United States House of Representatives and Senate, they must look to mainlanders for assistance. Yet the experiences of islanders and mainlanders are culturally and socially distinct. The language barrier,

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162 The divisions that I explore at their surface are those culturally and language-related discussed in Part II.B., supra. *See* Malavet, *supra* note 10, at 54 ("It is noteworthy that, because of the ongoing colonial experience, one can speak of Puerto Rican cultures: one for the island and another for the culture of the Puerto Ricans who reside on the mainland.") (citation omitted).

163 While I am aware that arguments exist that Puerto Ricans do not enjoy citizenship or voting rights equal to other Americans, this Note is concerned with the idea that, under the law, Puerto Rican islanders should have the opportunity to possess the same voting rights as mainlanders. *See generally* Katherine Culliton-González, *Time to Revive Puerto Rican Voting Rights*, 19 BERKELEY LA RAZA L.J. 27 (2008) (discussing the voting rights of Mainland Puerto Ricans).

164 Malavet, *supra* note 10, at 69.

165 Johnson, *supra* note 6, at 120 (citation omitted).

which affects how Puerto Ricans view each other, plays a central role in preventing Puerto Rican unity. While mainland political discourse develops in English, island politics occur in Spanish,[166] which results in the exclusion of many mainlanders from the island's political dialogue due to the decreasing number of fluent Spanish speakers among mainlanders.

In the context of cultural and language differences, the structures of the political parties on the mainland and on the island also pose additional problems for the unification of Puerto Ricans. For instance, while most islanders claim to support the mainland Democratic Party,[167] the island's political structure is not divided into the two-party structure of the Democratic and Republican parties, and most conflicts on the island are not "over liberal or conservative policy issues."[168] Rather, the island's three main political parties are the following: (1) *Partido Popular Democrático* (PPD or Popular Democratic Party), which is also the party of the *Estado Libre Associado*, the current governing structure of the island; (2) *Partido Nuevo Progresista* (PNP or New Progressive Party), which favors statehood for the island; and (3) *Partido Independentista Puertorriqueño* (PIP or Puerto Rican Independence Party), the smallest party.[169] Barreto notes that "[r]ather than the common left-right ideological continuum found in most countries, Puerto Rican politics is fought along a center-periphery divide."[170] Most importantly, the future legal status of the island "drives Puerto Rican electoral behavior"[171] and is the main issue that distinguishes the different political parties.[172] Finally, unlike in the mainland United States, the mainland Democratic and Republican parties operate primarily for the "purposes of U.S. presidential primaries" on the island of Puerto Rico.[173] As Lisa Napoli concludes, the "political expression of Puerto Rico is unlike that of the United States."[174]

Unlike islanders, mainlanders are more prone to participate in the left-right ideological framework since they "tend to vote on issues rather than along party lines, and they are receptive to those who demonstrate a genuine interest in them as a community, regardless of the race/ethnicity of the candidate."[175] Thus, on a structural basis, mainlanders are separated politically from islanders since both groups operate on distinct ide-

166 *See* BARRETO, *supra* note 127, at 36.
167 *See id.*
168 *Id.*
169 *See id.* at 36–37; *see also* Napoli, *supra* note 17, at 174–75.
170 BARRETO, *supra* note 127, at 37.
171 *Id.*
172 *See id.*; *see also* Napoli, *supra* note 17, at 174.
173 Napoli, *supra* note 17, at 174; *see also* BARRETO, *supra* note 127, at 36–37.
174 Napoli, *supra* note 17, at 174.
175 PÉREZ Y GONZÁLEZ, *supra* note 119, at 132; *see also* BARRETO, *supra* note 127, at 37.

ological and issue-based frameworks. Barreto notes that "the separation of the United States and Puerto Rican party systems is reinforced by the fact that Puerto Rico's only elected federal office is the post of resident commissioner."[176]

Now that islanders have voted in the November 2012 plebiscite, it is imperative—given the political and cultural differences among Puerto Ricans—that mainlanders not only allow islanders to interpret the results of the plebiscite for themselves, but also permit islanders to determine the legal future of the island of Puerto Rico uninfluenced by mainlanders. Because different issues affect the daily lives of Puerto Ricans depending on where they reside, the political system should not expect mainlanders to adequately and effectively represent the interests of islanders. Thus, mainlanders should permit islanders to independently determine the legal future of the island. Although the strategy of permitting residents of the United States to speak for islanders at times has produced limited success,[177] in this regard, we must take note of Linda Alcoff's work *The Problem of Speaking for Others.*[178]

Alcoff identifies as one of several problems in speaking for others "a growing recognition that where one speaks from affects the meaning and truth of what one says, and thus that one cannot assume an ability to transcend one's location."[179] An individual's location, which includes their social identity,[180] has "an impact on that speaker's claims and can serve either to authorize or disauthorize one's speech."[181] As noted in the preceding sections, Puerto Ricans are uncertain about their social identity, since they cannot agree on who is included or excluded when the word Puerto Rican is used to identify the group. With a fluctuating Puerto Rican social identity, allowing mainlanders to serve as the spokespersons for islanders in the United States is not only dangerous to the interests of islanders but can also serve to "disauthorize" mainlanders and how they are perceived by islanders. A result of permitting one group to speak for the other further contributes to the identity crisis that Puerto Ricans are currently experiencing.

The status quo is not a tenable long-term solution to the disenfranchisement of over three million United States citizens.[182] The politi-

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176 BARRETO, *supra* note 127, at 36.

177 In 1996, Representative Don Young, a Republican from Alaska, proposed that Puerto Rico hold a plebiscite in 1998 to decide its status. *See* Napoli, *supra* note 17, at 165. In 1998, Representative Gerald Solomon, a Republican from New York, forced the House to address the status issue. *See* Álvarez Gonzaléz, *supra* note 126, at 293.

178 Linda Alcoff, *The Problem of Speaking for Others,* 20 CULTURAL CRITIQUE 5 (Winter 1991–1992).

179 *Id.* at 6–7.

180 *See Id.*

181 *Id.*

182 *See supra* Part II.

cal system should permit the island's residents to advocate on their own behalf and not through an intermediary (in this case, mainlanders). Noteworthy, although beyond the scope of this Note, is the idea that the status quo, which currently allows mainlanders to speak and advocate on behalf of islanders through the political process, may result "in increasing or reinforcing the oppression of the group spoken for."[183] This suggests that the growth of the political voice of mainlanders in the United States may come at the cost of further diminishing the political dialogue and narrative of islanders. Since the political discourse of Puerto Ricans differs depending on where they reside, the advocacy of the island's residents and their interests must come from their own political dialogue.[184]

To some extent, the problem of speaking for others is solved by granting the population some political representation.[185] Yet, under the current governmental and political framework, islanders are left without any political representation. Even the presence of the Resident Commissioner in Congress produces a scenario in which he or she is unable to act on behalf of the individuals who elected him or her. Islanders are therefore left without any representation in a political system that determines their future, rights, and privileges. The United States political system, jurisprudence, and laws should facilitate an advocacy platform in order to enfranchise the many who currently lack a voice rather than depending on others to advocate on their behalf.

III. STATUS QUO ALTERNATIVES

What is to be done about the representation and colonial[186] situation in Puerto Rico is a question that has puzzled academics for years. In 1998, in Puerto Rico's previous plebiscite, over half the voters declared that they neither wanted statehood for the island nor independence from the United States by voting for "none of the above."[187] What remains clear is that the current situation denies a voice and representation in our political system to over three million United States citizens.[188]

A. Statehood

Incorporating Puerto Rico as a state would initially appear to solve the representation issue that leaves millions of Puerto Ricans without a

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183 *See* Alcoff, *supra* note 178, at 7.

184 *See id*.

185 *See id*. at 10.

186 *See* Luis Fuentes-Rohwer, *The Land That Democratic Theory Forgot*, 83 IND. L.J. 1525, 1556 (2008). *See also* Malavet, *supra* note 10, at 40.

187 *See* DUANY, *supra* note 128, at 13.

188 *See supra* Part II.B.

voice in the decision-making process that governs their daily lives. Yet, since the majority of the island's population does not speak English, adequate representation must accommodate the use of the Spanish language in any representative scheme. As noted in Part II.D, *supra*, the most important aspect of Puerto Ricanness is the use of the Spanish language,[189] and "[t]he strong connection between language and Puerto Ricanness stands, regardless of partisan preferences."[190] Furthermore, the New Progressive Party, which advocates for statehood, believes that the language of the island of Puerto Rico is nonnegotiable.[191] Thus, it appears that Puerto Ricans are unwilling to abandon the use of Spanish in order to incorporate as a state. Since the Constitution is silent regarding the language of the federal government,[192] it is unclear whether Congress would accommodate the use of the Spanish language if Puerto Rico were admitted as a state.[193] Jose Julian Álvarez González writes that:

> Congress has imposed English-language requirements on new states four times: Louisiana in 1811, Oklahoma in 1906, and New Mexico and Arizona in 1910, all states with a substantial number of non-English speakers. Evidently, Congress believes that the plane of equality among the states presupposes a common language. It seems unlikely that the Supreme Court would intervene to invalidate whatever decision Congress made on government language in a state of Puerto Rico.[194]

Furthermore, for generations the United States has attempted to impose English on the Puerto Rican population.[195] Yet the forced teaching of English in public schools has had limited success,[196] and Puerto Ricans have resisted learning English by instead adopting Spanish as a central component of their cultural identity. For a population that communicates in Spanish and views Spanish as integral to its cultural identity, statehood may not provide the most viable solution to the repre-

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189 *Id.*; *see also* BARRETO, *supra* note 127, at 9–11.

190 BARRETO, *supra* note 127, at 10.

191 *See* Ángel Ricardo Oquendo, *Puerto Rican National Identity and United States Pluralism, in* FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION, AND THE CONSTITUTION 315, 318 (Christina Duffy Burnett & Burke Marshall eds., 2001).

192 *See* Álvarez González, *supra* note 126, at 294.

193 *See id.* at 295.

194 *Id.*

195 *See* CATHERINE E. WALSH, PEDAGOGY AND THE STRUGGLE FOR VOICE ISSUES OF LANGUAGE, POWER, AND SCHOOLING FOR PUERTO RICANS 5 (1991) ("Through the social and linguistic policies of English imposition, deculturation, and the implantation of American values, schools have attempted to refashion the voices of the Puerto Rican masses, debilitating their history and national identity and promoting a dependence on and an alliance with imperialist rule."). *See also id.* at 25; *supra* note 137.

196 *See supra* notes 126, 141–147 and accompanying text.

sentation problem, since it may require islanders to sacrifice the language that they view as integral to the Puerto Rican identity. As Pedro Malavet wrote, "Puerto Ricans should not be presented with a choice between being culturally Puerto Rican and legally American."[197]

B. Independence

The independence of Puerto Rico from the United States would allow the residents of the island of Puerto Rico to participate in a political process that governs their island and would give them the representation that they currently lack. Although this may seem like an attractive solution, the likelihood that Congress would grant Puerto Rico its independence, or that the residents of the island would demand it, are very low.[198] Since the 1950s, the Independence Party has lost support among the Puerto Rican population and now receives the fewest votes during elections.[199] Furthermore, independence would produce problems, such as the future of United States citizenship for island residents, that the parties would need to discuss.[200]

C. Amendments to the Constitution and Electoral College

Aside from statehood, a constitutional amendment granting Puerto Rico the power to appoint electors as if the territory were a state would achieve limited voting rights for the residents of the territory.[201] Through this method, the Twenty-Third Amendment[202] to the United States Constitution enfranchised the residents of the District of Columbia. Yet, while granting the residents the right to vote in presidential elections, such a solution would not solve the lack of representation that Puerto Ricans currently experience in the House of Representatives, a problem also faced by the residents of the District of Columbia.[203] Others have proposed abandoning the Electoral College as the "most effective means of providing relief and extending the federal franchise to all territorial residents."[204] Although these solutions may prove effective, they are more easily written about than accomplished in practice. Constitutional amendments are difficult to pass[205] and require large amounts of organizational and political momentum. With the situation in

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197 Malavet, *supra* note 10, at 99.

198 Perez, *supra* note 32, at 1079.

199 *See* Oquendo, *supra* note 191, at 319*; see also* BARRETO, *supra* note 127, at 37.

200 *See* Malavet, *supra* note 10, at 98.

201 *See* Kömives, *supra* note 76, at 136; *see also* Janicker, *supra* note 83, at 539.

202 U.S. CONST. amend. XXIII, § 1.

203 Timothy Cooper, *The District of Columbia v. the 50 States: A 21st Century Lawsuit to Remedy an 18th Century Injustice,* 14 U. D.C. L. REV. 43, 43 (2011).

204 Janicker, *supra* note 83, at 539.

205 *See* U.S. CONST. art. V; *see also* Kömives, *supra* note 76, at 136.

Puerto Rico stalemated since the 2012 plebiscite, the chances of this occurring are very low.[206]

D. Judicial Interference

The most feasible mechanism for remedying the deficiencies in voting rights and privileges that the status quo has produced for islanders is for the judicial branch to protect the United States citizens who reside on the island of Puerto Rico. Currently, much of the United States territorial policy has developed as a result of the Court's interpretation of United States citizenship, voting rights, and constitutional law.[207] The Supreme Court should cease creating two canons of constitutional law—one for Puerto Ricans who reside on the mainland United States and another for those who reside on the island of Puerto Rico. The privileges inherent in United States citizenship should not change merely because a citizen chooses to reside on the island of Puerto Rico. As the Supreme Court in *Wesberry v. Sanders* stated, "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 undetermined."[208] Instead, the Court should unify its jurisprudence and treat Puerto Ricans, regardless of residency, as full United States citizens with a fundamental right to vote.

Although such a solution would require a sharp break with precedent, such a scenario would not be the first situation in which a court has broken with precedent while addressing the rights of islanders.[209] Ediberto Román argues that "if the people of Puerto Rico are to approach equal citizenship, as a first step the incorporated/unincorporated territory distinction of the Insular Cases must be overturned."[210] In the year 2000, although reversed by the First Circuit Court of Appeals, the district court

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206 Ediberto Román writes that, in "an era when the United States no longer views Puerto Rico as strategically important, it is questionable whether the United States will ever free or fully incorporate the people of Puerto Rico and end their alien-citizen status." Román, *supra* note 25, at 47. Along the same lines, Luis Fuentes-Rohwer writes that, "The real question . . . should not be about what Congress *can* do but, rather, why Congress would *ever* do anything at all." Luis Fuentes-Rohwer, *Bringing Democracy to Puerto Rico: A Rejoinder*, 11 HARV. LATINO L. REV. 157, 168 (2008) (emphasis in original). Fuentes-Rohwer further notes that there is "simply no direct incentive for Congress to respond to the wishes of the people of Puerto Rico or to resolve the status question at all. Worse yet, Congress is effectually insulated from any direct political pressure coming from Puerto Rico, leading Judge Torruella to contend that the island will be relegated to a state of 'perpetual inequality.'" *Id.* (quoting Igartua De La Rosa v. United States, 386 F.3d 313, 316 (1st Cir. 2004) (Torruella, J., dissenting)).

207 *See supra* Part II.A–B.

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

209 *See supra* Part II.B (discussing judicial development of current legal framework).

210 Román, *supra* note 25, at 39.

in *Igartua De La Rosa v. United States* provided a legal framework from which to begin to remedy the dire situation facing islanders.[211] Lisa Kömives believes that "[t]he Court should broaden the definition of fundamental rights espoused in the Insular Cases to make it coextensive with contemporary jurisprudence on fundamental rights of other national citizens, such as the right to vote in national elections and to travel and settle interstate."[212] Similarly, if the Court held the right to vote to be fundamental for islanders, Congress would no longer possess full plenary power over Puerto Rico.[213]

While criticizing the majority for overlooking the issue presented in *Igartúa-De La Rosa,* Judge Torruella wrote, "[T]he majority seeks to avoid what I believe is its paramount duty over and above these stated goals: to do justice to the civil rights of the four million United States citizens who reside in Puerto Rico."[214] While challenging the legal footing of the Insular Cases,[215] Judge Torruella believed that the court could "declare that the United States has failed to take any steps to meet obligations that are cognizable as the supreme law of the land."[216] Such a judicial solution appears appealing because the actors that helped create the problem, the courts, would play a central role in the solution. Yet convincing the Court to hear the type of case required to solve the current problems and to rule in a fashion that would remedy the harms of the status quo may prove to be this remedy's greatest challenge.

CONCLUSION

Puerto Ricans are currently divided between those who enjoy the full benefits of United States citizenship and those who do not. This division has left approximately 3.7 million United States citizens who reside in Puerto Rico unable to affect, influence, or change the laws passed by the federal government through the political process, despite the fact that they must abide by them. Although the Supreme Court has stated that "[t]he right to vote freely for the candidate of one's choice is the essence of a democratic society, and any restrictions on that right strike at the heart of representative government,"[217] millions of United States citizens remain disenfranchised. This Note argues that due to differing experiences with United States citizenship and American democracy, Puerto Rican identity is distorted, and mainlanders cannot

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211 *See supra* Part II.B.

212 Kömives, *supra* note 76, at 137.

213 *See id.* at 137–38.

214 Igartúa-De La Rosa v. United States, 417 F.3d 145, 159 (1st Cir. 2005) (Torruella, J., dissenting).

215 *Id.* at 169.

216 *Id.* at 159.

217 Reynolds v. Sims, 377 U.S. 533, 555 (1964).

adequately represent the interests of islanders. Yet the division among Puerto Ricans explored here raises interesting questions that are beyond this Note's scope. For instance, if Puerto Ricans are divided into at least two groups, how has the struggle for equal rights in the United States affected Puerto Rican identity? Furthermore, has the unequal application of other laws, aside from voting laws, imperative to an individual's rights as a citizen, created divisions among Puerto Ricans? Finally, in *Balzac,* the Court made clear that residents of Puerto Rico do not enjoy the same constitutional rights as Americans who reside on the mainland. How has the unequal application of the United States Constitution divided Puerto Ricans and distorted Puerto Rican identity? It is important that legal scholars explore the divisions that the laws of the United States have created among Puerto Ricans. A deeper understanding of both these divisions and of Puerto Rican identity will ultimately contribute to answering the most important question of all—that concerning the legal and political status of Puerto Rico.