A POLITICAL SOLUTION TO PUERTO RICO'S DISENFRANCHISEMENT: RECONSIDERING CONGRESS'S ROLE IN BRINGING EQUALITY TO AMERICA'S LONG-FORGOTTEN CITIZENS

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ABSTRACT

Despite the close relationship between the Commonwealth of Puerto Rico and the United States, the U.S. citizens of Puerto Rico continue to be excluded from the federal political process, as they remain unable to vote in presidential elections. This exclusion prevents Puerto Ricans from choosing among those competing ideologies, policies, and party platforms that directly affect them. In light of this perennial disenfranchisement, this Note argues that the United States is violating its international legal obligations under the International Covenant on Civil and Political Rights and customary international law to guarantee all of its citizens the right to vote for the leaders that represent them. This Note seeks to demonstrate that in addition to the traditional alternatives of statehood or a constitutional amendment, it is possible to devise a formal mechanism that guarantees substantive compliance with international law. Judge Pierre N. Leval's Pro-Rata Proposal is an example of said mechanism as it directly enfranchises all territorial residents by taking the votes cast by U.S. citizens in the territories for each presidential candidate and allocating them according to each state's proportion of the total U.S. population or proportion of the total electoral votes. Finally, this Note argues that the Pro-Rata Proposal is both a legally feasible and effective solution to Puerto Rico's disenfranchisement problem. In light of the courts' failure to provide a remedy in recent decades, this Note places the burden on Congress to bring equality to America's long-forgotten citizens.

I. INTRODUCTION

> We have not come to make war upon the people of a country that for centuries has been oppressed, but, on the contrary, to bring you protection, not only to yourselves, but to your property; to promote your prosperity, and bestow upon you the immunities and blessings of the liberal institutions of our government . . . This is not a war of devastation, but one to give all within the control of its military and naval forces the advantages and blessings of enlightened civilization.

Major General Nelson A. Miles[1]

In 1952, the U.S. citizens of Puerto Rico agreed to become an associated state of the United States known as *Estado Libre Asociado de Puerto Rico* ("Commonwealth of Puerto Rico").[2] Sixty years later, Puerto Ricans find themselves largely polarized as to their commitment to the island's current political status.[3] Puerto Rico's unique political status continues to be the central issue driving party politics and political mobilization.[4] It is unclear whether certain features of the Commonwealth arrangement, even if consistent with U.S. municipal law, satisfy international law. One of these features, and likely the most problematic, is Puerto Ricans' perennial disenfranchisement from U.S. presidential elections and their limited participation in federal lawmaking processes.[5]

Because Article II of the U.S. Constitution bestows exclusive authority to elect the President upon state electors, the U.S. citizens of Puerto Rico are unable to participate in the election of the President and Vice-President of

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[1] KARL STEPHEN HERRMANN, A RECENT CAMPAIGN IN PUERTO RICO BY THE INTERNATIONAL REGULAR BRIGADE UNDER COMMAND OF THE BRIG. GENERAL SCHWAN 33 (1907).

[2] PUERTO RICO CONST. The United States Congress approved the new Constitution that established the Commonwealth of Puerto Rico. Pub. L. No. 447 of July 3, 1952, ch. 567, 66 Stat. 327 (1952).

[3] On November 6, 2012, around 53.97% of the Puerto Rican electorate expressed their desire to change the island's current political status. In this plebiscite, 1,878,969 of the 2,402,941 registered voters cast ballots, for a turnout rate of 78.19%. STATE ELECTIONS COMMISSION, GENERAL ELECTIONS 2012 AND PLEBISCITE ON PUERTO RICO POLITICAL STATUS (San Juan, Puerto Rico 2012) *available at* http://div1.ceepur.org/REYDI_Escrutinio/index.html#es/default/CONDICION_POLITICA_TERRITORIAL_ACTUAL_ISLA.xml. [hereinafter 2012 PLEBISCITE ON PUERTO RICO POLITICAL STATUS].

[4] The two main political parties in Puerto Rico are the Popular Democratic Party ("PDP"), which supports the current Commonwealth status or an "enhanced" version of the arrangement, and the New Progressive Party ("NPP"), which supports statehood. A minor third party is the Puerto Rican Independence Party ("PIP"). *See* Ángel R. Oquendo, *Liking to Be in America: Puerto Rico's Quest for Difference in the United States*, 14 DUKE J. COMP. & INT'L L. 249, 252-53 (2004) (describing the centrality of Puerto Rico's political status in the island's party structure).

[5] Puerto Ricans are not able to participate in U.S. presidential elections and their participation at the federal level is limited to the presence of a non-voting Resident Commissioner in the House of Representatives. Amber L. Cottle, *Silent Citizens: United States Territorial Residents and the Right to Vote in Presidential Elections*, 1995 U. CHI. LEGAL F. 315, 316-317, 320 (1995); *see* José A. Cabranes, *Puerto Rico: Out of the Colonial Closet*, 33 FOREIGN POL'Y 66, 68-69 (1979) ("[N]o word other than 'colonialism' adequately describes the relationship between a powerful metropolitan state and an impoverished overseas dependency, *disenfranchised from the formal lawmaking processes* that shape its people's daily lives.") (emphasis added).

the United States.[6] This constitutional provision inevitably leads to a strange and seemingly inequitable dichotomy between the 3.7 million disenfranchised Puerto Ricans that reside in the island and the nearly 5 million Puerto Ricans who live in one of the fifty states and enjoy full voting rights.[7] Further, since territorial residents possess limited voting rights, their participation in matters of national interest is in many ways restricted.[8] As a matter of policy, the absence of the federal franchise prevents these residents from choosing among those ideologies, policies, and party platforms that directly affect them.[9]

Federal courts, however, have continuously held that because the Constitution itself specifically grants the right to appoint electors to the states, the exclusion of U.S. citizens in the territories cannot be unconstitutional.[10] Nevertheless, even if the absence of a presidential vote is constitutionally permissible, this scenario of disenfranchisement and limited participation is at least questionable as a matter of international law.[11]

The right to vote and to equal political participation is a fundamental

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[6] "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors. . . ." U.S. CONST. art. II, § 1.

[7] *See* Eduardo Guzmán, *Igartúa de la Rosa v. United States The Right of the United States Citizens to Vote for the President and the Need to Re-evaluate America's Territorial Policy*, 4 U. PA. J. CONST. L. 141, 146 (2001) (arguing that the claim of a right to participate in presidential elections highlights this dichotomy by "raising questions about the kind of citizenship that Puerto Ricans possess").

[8] With respect to Puerto Rico, the founder of the Commonwealth, Governor Luis Muñoz Marín, recognized that "[o]ne thing that is basically lacking . . . is the very important principle of participation by the people of Puerto Rico in federal legislation that applies to them, a fact that is bound in the long run to accumulate irritations." Luis Muñoz Marín, Governor of Puerto Rico, Speech at the University of Kansas 6-8 (Apr. 23, 1955), *available at* http://www.flmm.org/discursos/1955-04-23.pdf; *see* Cottle, *supra* note 5, at 316 ("[Territorial residents] are shut out of the debate and decision-making process of the executive branch of the Federal Government.").

[9] Cottle, *supra* note 5, at 316.

[10] Igartúa De La Rosa v. United States (Igartúa III), 417 F.3d 145, 148 (1st Cir. 2005) (en banc) ("That the franchise for choosing electors is confined to 'states' cannot be 'unconstitutional' because it is what the Constitution itself provides."); Attorney Gen. of the Territory of Guam v. United States, 738 F.2d 1017 (9th Cir. 1984); *but see* Guzmán, *supra* note 7, at 172-182 (noting that the term "states" in Article II has evolved to a point that might encompass the U.S. territories).

[11] *See infra* Part III; *see also* Gary Lawson & Robert D. Sloane, *The Constitutionality of Decolonization by Associated Statehood: Puerto Rico's Legal Status Reconsidered*, 50 B.C.L. Rev. 1123 (2009) (questioning whether Puerto Rico's current political status fully complies with the requirem8ents of associated statehood imposed by international law); 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 (1994).

right guaranteed and protected not only by the U.S. Constitution,[12] but also by several sources of international law.[13] Nonetheless, because the U.S. Constitution does not expressly grant this right to territorial citizens, Puerto Rico's relationship with the United States reflects an ongoing tension between U.S. municipal law and international law.[14] To the extent that Puerto Rico's current arrangement fails to comply with international law, it is worth asking whether there is any *formal* constitutional mechanism, in addition to statehood or a constitutional amendment, that could guarantee *substantive* compliance with international human rights law.[15] Whether such a formal solution exists is the main question that this Note intends to explore and address.

This Note argues that international human rights law requires all citizens of a State to vote and participate in that State's formal political processes. Because the President and Vice-President are privileged constitutional players in the United States' formal lawmaking and political process, international law would seem to require all U.S. citizens, including Puerto Ricans and other territorial residents, to participate in their democratic election. Moreover, even though Puerto Ricans also lack voting representation in Congress, this Note will only address their exclusion from participating in presidential elections.

This particular exclusion has been "the cause of immense resentment in th[e] territories – resentment that has been especially vocal in Puerto

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[12] *See*, *e.g.*, Wesberry v. Sanders, 376 U.S. 1, 17 (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."); Bush v. Gore, 531 U.S. 98, 104 (2000).

[13] *See, e.g.*, Universal Declaration of Human Rights ("UDHR") G.A. Res. 217A (III), U.N. Doc A/810 (1948) [hereinafter UDHR]; International Covenant on Civil and Political Rights, art. 25, Dec. 19. 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

[14] Lawson & Sloane, *supra* note 11 (describing how international law and U.S. constitutional law "collide" in Puerto Rico's current legal arrangement with the United States).

[15] International law is exclusively concerned with a State's substantive compliance of its rules and norms. On the other hand, U.S. constitutional law is also concerned with the formal compliance of its rules, standards, and principles. The important task is to come up with "creative mechanisms to ensure *substantive*, even if not *formal*, international legal compliance . . . in a fashion that elides perennially debated issues of constitutional law and theory." *Id*. at 1130 (emphasis in original). Professor Lawson argues, for example, that Puerto Rico's current legal arrangement is unconstitutional because the Constitution's Appointments Clause requires that the President, with the advice and consent of the Senate, appoint the island's principal government officers. As a solution to this problem, Professors Lawson and Sloane suggest presidential pro forma appointments to the winning candidates as an example of a *formal* mechanism that ensures in part *substantive* compliance with international law's principle of self-governance. *Id.* at 1131.

Rico."[16] The importance of this exclusion rests on the fact that not only does the President sign bills into law that fully apply throughout the United States, including Puerto Rico, but also exercises authority as Commander-in-Chief of the Armed Forces over thousands of Puerto Ricans in active service.[17] In addition, the United States has suffered from an "impaired reputation in the community of nations" after being consistently criticized in the United Nations for "hypocritically preaching democracy to the world while practicing nineteenth-century colonialism at home."[18]

Since the U.S. Constitution grants the power to elect the President to state electors, as opposed to citizens, coming up with formal mechanisms that ensure substantive compliance with international law is a difficult and tricky task. Two undisputed and universally acknowledged formal solutions are statehood and a constitutional amendment akin to the Twenty-Third Amendment, which gave the District of Columbia the power to appoint presidential electors. Contrary to the widespread assumption that statehood or a constitutional amendment are prerequisites to the federal enfranchisement of territorial residents,[19] this Note contends that there are other formal mechanisms, such as Judge Pierre N. Leval's Pro-Rata Proposal, that increase the participation of these residents at the federal level.[20] The Pro-Rata Proposal directly enfranchises all U.S. territorial residents by taking the number of votes cast by U.S. citizens in the territories for each presidential candidate and allocating them according to each state's proportion of the total U.S. population or proportion of the total electoral votes.[21]

This Note proceeds in three substantive parts. Part II provides a general background of Puerto Rico's relationship with the United States since 1898. It focuses particularly on those events relevant to Puerto Rico's

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[16] Romeu v. Cohen, 265 F.3d 118, 127 (2nd Cir. 2001) (Leval, J., writing separately) (citing Igartúa de la Rosa v. United States (Igartúa II), 229 F.3d 80, 85-90 (1st Cir. 2000) (Torruella, J., concurring)).

[17] Section 9 of the Puerto Rican Federal Relations Act provides, "The statutory laws of the United States not locally inapplicable, except as hereinbefore or hereinafter otherwise provided, shall have the same force and effect in Puerto Rico as in the United States . . . ." 48 U.S.C. § 734 (2006).

[18] Romeu, 265 F.3d at 128 (Leval, J. writing separately) (citing *Special Committee on Decolonization Hears Petitioners on the Question of Puerto Rico*, United Nations Press Release GA/COL/2970, 19 June 1997).

[19] *See, e.g.*, Igartúa De La Rosa v. United States (Igartúa III), 417 F.3d 145, 148 (1st Cir. 2005); Igartúa II, 229 F. 3d 80, 83-84 (1st Cir. 2000); Igartúa I, 32 F.3d 8, 10 (1st Cir. 1994); Attorney Gen. of the Territory of Guam v. United States, 738 F.2d 1017, 1019-1020 (9th Cir. 1984).

[20] Romeu, 265 F.3d at 127-130 (Leval, J., writing separately).

[21] *Id.* at 130.

disenfranchisement and its unique political status. Part III explains the underlying tension that exists between U.S. municipal law and international human rights law with respect to the right to vote and equal political participation. More importantly, this Part argues that excluding territorial residents from participating in presidential elections violates both international law and U.S. international treaty obligations. Part IV emphasizes the need to come up with a formal mechanism that addresses U.S. non-compliance with international law. This Part will focus on the feasibility and effectiveness of the Pro-Rata Proposal. This Part will argue that Judge Pierre N. Leval's Pro-Rata Proposal is a feasible option because Congress may enact a statute compelling the several states to include the pro rata share of votes cast in the territories as part of their popular vote. This Note posits that because the states of the Union do not have "unfettered authority" to appoint their respective electors and because Congress has enacted voting rights legislation preempting state voting laws in the past, there is no reason why Congress cannot enact a statute embracing the aforementioned proposal pursuant to its powers under the Territorial Clause and Treaty Clause of the Constitution.[22] Moreover, the Proposal is effective because it guarantees substantive compliance with international law.

II. HISTORICAL BACKGROUND OF PUERTO RICO'S DISENFRANCHISEMENT PROBLEM

Puerto Rico's relationship with the United States has shaped the island's modern political history and socio-economic development. The programmatic nature and ideology of the main political parties in Puerto Rico continue to revolve around the island's political status. As a matter of international law, Puerto Rico evolved from being a U.S. colony in the traditional sense to a self-governing territory under the unique status of "Commonwealth."[23] As a matter of constitutional law, it is unclear that the U.S. Constitution recognizes anything beyond the "mutually exclusive categories of 'State' and 'Territory'"[24] and, even if it does, it is highly

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[22] *Id.* at 128 (noting that the Uniformed and Overseas Citizens Absentee Voting Act compels the several states to accept overseas absentee votes); *see also* Oregon v. Mitchell, 400 U.S. 112 (1970) (banning state law residency requirements and compelling states to accept absentee votes).

[23] Lawson & Sloane, *supra* note 11, at 1152 ("Puerto Ricans approved Public Law 600 and the Puerto Rican Constitution in free and fair referenda, thus exercising their right as a former colony to external self-determination by choosing associated statehood in connection with the United States of America."); *see also* Letter from Luis Muñoz Marín, Governor of Puerto Rico, to the President of the United States (Jan. 17, 1953), *in* 28 DEP'T ST. BULL. 563, 588 (Apr. 1953).

[24] Lawson & Sloane, *supra* note 11, at 1127 (quoting T. ALEXANDER ALEINIKOFF,

unlikely that the "Commonwealth" ceased to be a "Territory."[25] Regardless of the legal identity of Puerto Rico's political status, the United States continues to violate international law and its treaty obligations by excluding Puerto Ricans and other territorial citizens from participating in presidential elections.[26]

A. Puerto Rico-U.S. Relations: The Struggle for Self-Determination (1898-1952)

Following the mysterious sinking of the *USS Maine* in Havana in 1898, the United States declared war against Spain and immediately targeted Spain's few remaining colonial possessions.[27] General Nelson A. Miles led the American invasion of Puerto Rico and quickly gained control of the island. Miles, influenced by a Manifest Destiny mindset and a civilizing mission-like rhetoric, promised Puerto Ricans a large "measure of [political] liberty" that would bestow upon them the "immunities and blessings" of the American civilization.[28] After a few months of military occupation, Spain and the United States signed the Treaty of Paris, which brought an end to the Spanish-American War and effectively ceded Spain's colonies to the United States.[29] Pursuant to the Treaty of Paris and the Territorial Clause of the Constitution, the U.S. Congress now had plenary

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SEMBLANCES OF SOVEREIGNTY: THE CONSTITUTION, THE STATE, AND AMERICAN CITIZENSHIP 89-90 (2002)).

[25] The majority view among academics and among the three branches of the Federal Government is that Puerto Rico remains a federal territory. *See e.g.*, JOSÉ TRIAS MONGE, PUERTO RICO: THE TRIALS OF THE OLDEST COLONY IN THE WORLD (1997); Juan R. Torruella, *¿Hacia Dónde vas Puerto Rico?*, 107 YALE L.J. 1503, 1514 (1998) (quoting David M. Helfeld, *Congressional Intent and Attitude Toward Public Law 600 and the Constitution of the Commonwealth of Puerto Rico*, 21 REV. JUR. U.P.R. 255, 307 (1952)) (stating that Congress continues to possess plenary power over Puerto Rico, and may in theory "annul the Constitution of Puerto Rico and veto any insular legislation which it deems unwise or improper"); *but see* Rafael Hernández Colón, *On the nature of the Commonwealth V*, CARIBBEAN BUSINESS (San Juan), Oct. 14, 2004, at 27, 28-29 (arguing that Puerto Rico is no longer a Territory for constitutional purposes because Congress relinquished its plenary authority over Puerto Rico when the Commonwealth was created).

[26] *See infra* Part III.

[27] *See* Sylvia R. Lazos Vargas, *History, Legal Scholarship, and LatCrit Theory: The Case of Racial Transformations Circa the Spanish-American War, 1896-1900*, 78 DENV. U. L. REV. 921, 926 (2000).

[28] HERRMANN, *supra* note 1, at 33.

[29] Pursuant to the signing and ratification of the Treaty of Paris, the United States acquired Cuba and Puerto Rico in the Atlantic and Guam and the Philippines in the Pacific. Cuba was immediately granted independence, while the other possessions became territories of the United States. Treaty of Peace between the United States of America and the Kingdom of Spain, Dec. 10, 1898, U.S.-Spain, art. IX, 30 Stat. 1754, 1759.

authority to determine "[t]he civil rights and political status of the native inhabitants of the [new] territories."[30]

In 1900, Congress passed the Foraker Act, which provided for the establishment of a civil government for Puerto Rico that consisted of a governor and supreme court appointed by the President of the United States, a limited elected legislature, and an elected non-voting Resident Commissioner in Congress.[31] Since most of the authority of this civil government was concentrated in the hands of a presidentially appointed governor and executive council, the Foraker Act failed to meet local expectations among those who sought political inclusion into the federal Union and among those who advocated for greater autonomy from the metropolis.[32] In 1917, Congress passed the Jones Act, which transformed the legislature into a fully elected bi-cameral legislature with more powers.[33] More importantly, § 5 of the organic act granted U.S. citizenship to the residents of Puerto Rico.[34] Despite this statutory grant of U.S. citizenship and the strengthening of the local government, little else changed regarding Puerto Rico's colonial relationship with the United States.[35]

Shortly after the United States acquired Puerto Rico, the U.S. Supreme Court held that, while all constitutional protections apply to incorporated territories, only those constitutional rights that are fundamental extend to unincorporated territories like Puerto Rico.[36] Without any legal explanation

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[30] *Id.*; The Territorial Clause of the Constitution provides, "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 . . . ." U.S. CONST. art. IV, § 3, cl. 2.

[31] Foraker Act, ch. 191, 31 Stat. 77, 79-86 (1900); Torruella, *supra* note 25, at 1509.

[32] Unlike the Charter of Autonomy enacted during the final years of Spanish rule, the real authority of the Foraker's civil government was centralized in hands of a presidentially appointed Executive. The Foraker Act reaffirmed U.S. colonial rule over Puerto Rico by refusing to either incorporate it as a state or facilitate the island's transition towards self-government. 1 ANTONIO QUIÑONES Calderón, HISTORIA POLÍTICA DE PUERTO RICO 85-86 [POLITICAL HISTORY OF PUERTO RICO] (2002).

[33] The Jones Act decentralized the authority and strengthened the local government by transferring some legislative functions that belonged to the Executive to the new bi-cameral legislature. Jones Act, Pub. L. No. 64-368, ch. 145, 39 Stat. 951 (1917) (codified as amended at 48 U.S.C. §§ 737 *et seq.* (2006)).

[34] *Id.*

[35] José A. Cabranes, *Citizenship and the American Empire*, 127 U. PA. L. REV. 391, 396-398 (1978);

Torruella, *supra* note 26, at 1511.

[36] *See, e.g.*, DeLima v. Bidwell, 182 U.S. 1 (1901); Goetze v. United States, 182 U.S. 221 (1901); Downes v. Bidwell, 182 U.S. 244 (1901); *see also* Adriel I. Cepeda Derieux, *A Most Insular Minority: Reconsidering Judicial Deference to Unequal Treatment in Light of Puerto Rico's Political Process Failure*, 110 COLUM L. REV. 797, 798 (2010).

as to which constitutional rights qualify as "fundamental," the Court decided on a case-by-case basis, in a series of cases known as the *Insular Cases*,[37] which constitutional protections applied to the new territories. In 1922, Chief Justice Taft explained in the Court's decision of *Balzac v. Porto Rico* that, despite the enactment of the Jones Act, only fundamental constitutional rights extended to Puerto Rico because, "[h]ad Congress intended to take the important step of changing the treaty status of Porto Rico by incorporating it into the Union, it is reasonable to suppose that it would have done so by the plain declaration, and would not have left it to mere inference."[38]

Without suggesting a formal analogy to the infamous *Plessy v. Ferguson* decision, the *Plessy*-like rationale of the *Insular Cases* doctrine[39] led the Court to hold that Congress can discriminate against an unincorporated territory and its citizens "so long as there is a rational basis for its actions."[40] Since the *Insular Cases* have never been overruled,[41] *Balzac*'s

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[37] *See* Cepeda Derieux, *supra* note 36.

[38] 258 U.S. 298, 306 (1922) (holding that the Sixth Amendment right of trial by jury is not a fundamental right applicable in Puerto Rico).

[39] The analogy of the Insular Cases to the Supreme Court's decision in Plessy v. Ferguson, 163 U.S. 537 (1896), revolves around the complicity of the federal courts in the perpetuation of injustice and inequality. JUAN R. TORRUELLA, THE SUPREME COURT AND PUERTO RICO: THE DOCTRINE OF THE SEPARATE AND UNEQUAL 3 (1985); *see also* Igartúa III, 417 F.3d 145, 162 (1st Cir. 2005) (Torruella, J. dissenting) (citation omitted) ("There is no question that the Insular Cases are on par with the Court's infamous decision in [Plessy] in licencing the downgrading of the rights of discrete minorities within the political hegemony of the United States."); Consejo de Salud de Playa de Ponce v. Rullán, 586 F. Supp. 2d 22, 30 (D.P.R. 2008) ("[T]he Balzac decision made no common sense and again showed extreme racism as well as ignorance of the realities of the island at the time."); Gerald L. Neuman, *Constitutionalism and Individual Rights in the Territories*, *in* FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION, AND THE CONSTITUTION 193-194 (Christina Duffy Burnett & Burke Marshall eds., 2001) ("The harm done by the Insular Cases doctrine in the Twentieth Century is undeniable. [It] . . . was a vehicle of injustice . . . and their presence in the United States Reports is painful to citizens of both the territories and the states."). Commentators have noted that it is no surprise that with the exception of two justices, all of the Court's members that decided the Insular Cases also joined the Court's decision in Plessy. Juan R. Torruella, *The Insular Cases: The Establishment of a Regime of Political Apartheid*, 29 U. PA. J. INT'L. L. 283, 300-302 (2007).

[40] Harris v. Rosario, 446 U.S. 651, 651-652 (1980) (holding that lower level of economic aid to families with dependent children to residents of Puerto Rico did not violate the Equal Protection Clause); *see also* Califano v. Torres, 435 U.S. 1 (1978) (denying Supplemental Security Income to U.S. citizens who moved to Puerto Rico).

[41] The Supreme Court relied on the Insular Cases in its recent case of Boumediene v. Bush, 553 U.S. 723 (2008) to hold that detained enemy combatants in the U.S. Naval Station in Guantanamo Bay, Cuba were entitled to the protection of the writ of *habeas corpus*. *See* Lawson & Sloane, *supra* note 11, at 1146 (noting that "no current scholar, from any

precedent of "gradations of citizenship" means that U.S. citizens in Puerto Rico still do not enjoy some of the constitutional rights and protections guaranteed to their fellow citizens in the states.[42]

With the emergence of international human rights law and the creation of the United Nations at the end of World War II, colonial powers could no longer ignore the local and international criticism of their practices overseas. As a result, Congress passed a law in 1947 allowing Puerto Ricans to elect their own governor by popular vote,[43] and, three years later, Congress enacted Public Law 600 authorizing Puerto Ricans to draft their own constitution.[44] An overwhelming majority of Puerto Ricans favored the new, congressionally approved constitution that provided for the establishment of the Commonwealth of Puerto Rico.[45]

B. Puerto Rico-U.S. Relations: Post-Colonial Era of Disenfranchisement (1952-2013)

The Commonwealth's establishment in 1952 did not fully abrogate the preexisting statutory framework governing relations between Puerto Rico and the United States.[46] It did not change, for example, Puerto Rico's participation at the federal level, which still consists of an elected non-voting Resident Commissioner in Congress.[47] Puerto Rico's Governor Luis Muñoz Marín and his fellow party members strongly believed that the new political status could only be dissolved by mutual consent and that it

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methodological perspective, defends the Insular Cases" *even though* "*they remain good law*.") (emphasis added).

[42] Torruella, *supra* note 25, at 1511.

[43] Lawson & Sloane, *supra* note 11, at 1147 (citing Elective Governor Act of Aug. 5, 1947, Pub. L. No. 80-362, ch. 490, § 1, 61 Stat. 770, 770-71).

[44] Act of July 3, 1950, Pub. L. No. 81-600, 64 Stat. 319.

[45] Act of July 3, 1952, Pub. L. No. 82-447, 66 Stat. 327. The Commonwealth received an almost unanimous approval from the delegates in the Constitutional Delegation. Nearly 80.7% of the Puerto Rican electorate supported the new constitution in a general referendum. QUIÑONES CALDERÓN, *supra* note 32, at 278.

[46] The Puerto Rican Federal Relations Act incorporates several provisions from the previous organic acts and, along with Public Law 600 and the Constitution of Puerto Rico, governs the current legal arrangement between Puerto Rico and the United States. Act of July 3, 1950, Pub. L. No. 81-600, 64 Stat. 319 (codified as amended in scattered sections of 48 U.S.C.).

[47] Professor Gary Lawson once referred to Puerto Rico's Resident Commissioner in Congress as a "glorified lobbyist." Gary Lawson & Robert Sloane, Remarks at the Boston University School of Law Faculty Brown Bag Lunch Talk: The Constitutionality of Decolonization by Associated Statehood: Puerto Rico's Legal Status Reconsidered (Nov. 5, 2012). This seems to be a fair description considering that, even though the Commissioner is allowed to serve on congressional committees, the Commissioner may not vote for the proposed bill once it reaches the House floor.

irrefutably ended the island's colonial relationship with the United States.[48] Others argue that while the Commonwealth brought greater autonomy to the local government, it did not ultimately change Puerto Rico's colonial status.[49]

The United States repeatedly asserted before the United Nations that the recently formed Commonwealth of Puerto Rico became a self-governing, freely associated state pursuant to a "compact of a bilateral nature whose terms may be changed only by common consent."[50] By making these statements, the United States incurred a series of obligations as a matter of international law.[51] The Trusteeship Council concluded that because the United States fulfilled its obligations under Article 73(e) of the United Nations Charter, the United States no longer had to render reports regarding Puerto Rico's progress towards self-governance.[52]

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[48] Speech by Muñoz Marín, *supra* note 8, at 6-7.

[49] "Though the formal title has been changed, in constitutional theory Puerto Rico remains a territory. This means that Congress continues to possess plenary but unexercised authority over Puerto Rico." Helfeld, *supra* note 25, at 307; *see also* TRIAS MONGE, *supra* note 25 (making the case for true self-determination and explaining how Puerto Rico's state of affairs has come about).

[50] Frances P. Bolton, U.S. Rep. to the Gen. Assembly, Nov. 3 Statement by Mrs. Bolton in Committee IV (Trusteeship) (Nov. 3, 1953), *in* 29 DEP'T ST. BULL. 802, 804 (Dec. 1953) (describing the Commonwealth arrangement as a "bilateral compact of association between the people of Puerto Rico and the United States which has been accepted by both and which in accordance with judicial decisions may not be amended without common consent"). However, the Federal Government's position is that Puerto Rico never ceased to be a federal territory for purposes of constitutional law. *See* Harris v. Rosario, 446 U.S. 651, 651-652 (1980) (holding that, because "Congress . . . is empowered under the Territory Clause of the Constitution, . . . [it] may treat Puerto Rico differently from States so long as there is a rational basis for its actions"); *see also* REPORT BY THE PRESIDENT'S TASK FORCE ON PUERTO RICO'S STATUS 26 (2011), *available at* http://www.whitehouse.gov/sites/default/files/uploads/Puerto_Rico_Task_Force_Report.pdf. ("Under the Commonwealth option, Puerto Rico would remain, as it is today, subject to the Territory Clause of the U.S. Constitution.").

[51] The United States bound itself as a matter of international law to its representations in the Trusteeship Council regarding the Commonwealth, "regardless of what Congress may have intended." Lawson & Sloane, *supra* note 11, at 1155 (explaining that "[i]t is well established that a State may, by repeated, public representations intended to induce reliance on the part of other States, . . . bind itself unilaterally") [citing Frontier Dispute (Burk. Faso v. Mali), 1986 I.C.J. 554, 573-74 (Dec. 22); Nuclear Tests (Austl. v. Fr.), 1974 I.C.J. 253, 267-69 (Dec. 20); Arbitral Award Made by the King of Spain on December 23, 1906 (Hond. v. Nicar.), 1960 I.C.J. 192, 213-14 (Nov. 18); Legal Status of South-Eastern Territory of Greenland (Den. v. Nor.), 1933 P.C.I.J. (ser. A/B) No. 53, at 22 (May 11)].

[52] G.A. Res. 748, ¶5, U.N. GAOR, 8th Sess., Supp. No. 17, U.N. Doc. A/2630, at 25 (Nov. 27, 1953) (declaring that the United States fulfilled its international obligations and no longer had to render reports to the Trusteeship Council because the "people of the Commonwealth of Puerto Rico have been invested with attributes of political sovereignty").

Shortly after the Commonwealth's establishment, Puerto Rico's limited participation at the federal level triggered numerous debates between the two main political parties, the pro-Commonwealth Popular Democratic Party ("PDP") and the pro-statehood New Progressive Party ("NPP").[53] In 1960, Governor Luis Muñoz Marín of the PDP led a crusade to enfranchise Puerto Ricans, arguing that the presidential vote was an indispensable feature of the "Commonwealth's culmination."[54] As part of this crusade, Muñoz Marín participated in a congressional public hearing of the House Judiciary Committee regarding the proposed bill of the Twenty-Third Amendment and even met with then-Vice President Richard M. Nixon to discuss the importance of the presidential vote for the Commonwealth's growth.[55] Even though extending the presidential vote to Puerto Rico was official PDP policy, this topic exacerbated divisions within the party between those who supported a closer relationship with the United States and those who advocated for greater autonomy and political liberty.[56] By 1962, the PDP abandoned altogether the enfranchisement discourse in order to mend these intra-party divisions.[57]

As part of a new effort to strengthen Puerto Rico's ties with the United States, Governor Luis A. Ferré of the NPP revived the disenfranchisement debate.[58] In early 1970, Ferré and President Nixon created a jointly appointed ad hoc committee to evaluate the feasibility of granting Puerto Ricans the right to vote for President and Vice President.[59] The committee concluded that the U.S. citizens of Puerto Rico should be able to participate in presidential elections due to: (1) the historically high participation of Puerto Ricans in the Armed Forces and the possibility of a military draft; (2) Puerto Ricans' reliance on federal welfare programs; (3) the fact that the payment of the federal income tax not is not a constitutional prerequisite to the right to vote; and (4) the fact that the territorial incorporation doctrine

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[53] The PDP supports the continuation of Puerto Rico's Commonwealth arrangement with the United States, albeit with some modifications. Party leaders, however, disagree with respect to the changes to the status quo, ranging from more autonomy over domestic issues to greater political participation at the federal level. On the other hand, the NPP supports statehood for Puerto Rico and considers the Commonwealth status to be a continuation of the island's colonial relationship with the United States. *See* Oquendo, *supra* note 4.

[54] QUIÑONES CALDERÓN, *supra* note 32, at 356.

[55] *Id*. at 355 (citing ANTONIO QUIÑONES CALDERÓN, SABOTAJE EN EL SENADO [SABOTAGE IN THE SENATE] 85-109 (1972)).

[56] *Id.* at 357; JOSÉ TRIAS MONGE, HISTORIA CONSTITUCIONAL DE PUERTO RICO [CONSTITUTIONAL HISTORY OF PUERTO RICO] 190 (1989).

[57] TRIAS MONGE, *supra* note 56, at 191.

[58] QUIÑONES CALDERÓN, *supra* note 32, at 420-425.

[59] *Id*. at 421.

does not preclude federal enfranchisement.[60] The committee suggested holding a referendum to determine whether a majority of Puerto Ricans in fact desired the presidential vote.[61] The PDP-controlled legislature rejected the committee's recommendations because it preferred an integral and comprehensive approach towards the Commonwealth's development, as opposed to a step-by-step approach that prioritized specific and clearly defined measures, such as the presidential vote for Puerto Rico.[62]

In 1975, a new *ad hoc* committee, jointly appointed by President Nixon and PDP Governor Rafael Hernández Colón, drafted a "Compact of Permanent Union" to "develop the maximum of self-government and self-determination within the framework of the Commonwealth."[63] The committee's final report included in its appendix the findings and recommendations of Ferré's 1971 committee. In addition, the Ad Hoc Advisory Group considered a series of proposals to revise the Puerto Rican Federal Relations Act's provision on the applicability of federal legislation in Puerto Rico.[64] Some of these proposals included that: (1) federal law may only apply "at the request or with the consent of the Government of Puerto Rico;"[65] (2) Puerto Rico and Congress must agree on a specific definition of those federal laws to be applied in Puerto Rico "by generic consent;" and finally that (3) Puerto Rico may delay the application of newly enacted federal laws "until the matter is considered and resolved by a joint committee."[66]

The Committee also stated that alternative mechanisms devising "mutually satisfactory ways by which the people of Puerto Rico may participate more meaningfully in federal decisions affecting them" must take precedence over any proposal requiring an amendment to the U.S.

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[60] THE PRESIDENTIAL VOTE FOR PUERTO RICO: REPORT OF THE AD HOC ADVISORY GROUP ON THE PRESIDENTIAL VOTE FOR PUERTO RICO (1971) 8-9 [hereinafter 1971 ADVISORY GROUP REPORT].

[61] *Id.* at 1; *see also* 5 JOSÉ TRIAS MONGE, HISTORIA CONSTITUCIONAL DE PUERTO RICO [CONSTITUTIONAL HISTORY OF PUERTO RICO] at 88 (1989).

[62] QUIÑONES CALDERÓN, *supra* note 32, at 423-424; 1971 ADVISORY GROUP REPORT, *supra* note 60, at 7-8.

[63] *Puerto Rico's Choice*, WASH. POST, Oct. 31, 1975; *see also* RAFAEL HERNÁNDEZ COLÓN, HACIA LA META FINAL: EL NUEVO PACTO – UN PASO ADELANTE [TOWARDS THE FINAL GOAL: THE NEW COMPACT – A STEP FORWARD] (José A. Hernández Mayoral et al. eds., 2011) (compiling different documents regarding the preparation of the Compact of Permanent Union).

[64] HERNÁNDEZ COLÓN, *supra* note 63, at 192-193.

[65] The Advisory Group noted that this system was employed by Great Britain in the Statute of Westminster. *Id.* at 192.

[66] This arrangement was inspired on similar agreements between the Netherland Antilles and Surinam with Holland since 1954. *Id.* at 193.

Constitution.[67] Because many scholars and government officers at the time, including the committee members, believed that granting Puerto Ricans the right to vote for President required either statehood or a constitutional amendment akin to the Twenty-Third Amendment, the presidential vote essentially became an ancillary matter in Puerto Rico's political status debate.[68] "The Compact," introduced in the U.S. House of Representatives as H.R. 11200, failed to produce any federal legislation and its aspirations gradually vanished after the electoral defeats in 1976 of Governor Hernández Colón and President Gerald Ford.[69]

While the number of Commonwealth supporters has significantly decreased since it was established in 1952, the opposite is true for statehood supporters.[70] In November 2012, Puerto Ricans participated in a non-binding plebiscite that addressed: (1) whether they agreed to continue under the current territorial status, and (2) which non-territorial option they preferred between statehood, independence, and sovereign free-associated state.[71] For the first time in the history of the Commonwealth, 54% of the voters expressed their desire to change the status quo, and, with respect to the second question, approximately 61% preferred statehood compared to 33% that favored free association and 5.5% for independence.[72]

Even though the PDP leadership has strongly criticized the plebiscite and its results, it is indisputable that at least a significant majority of the population favors some kind of permanent relationship with the United States.[73] Interestingly, a poll that was conducted in 2010 revealed that

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[67] *Id*. at 192-193.

[68] Several scholars that contributed to the 1971 Ad Hoc Advisory Group Report on the Presidential Vote agreed that, absent a constitutional amendment, extending the federal franchise to Puerto Rico was neither a legally or politically feasible solution. *See e.g.*, David M. Helfeld, *The Constitutional and Legal Feasibility of the Presidential Vote for Puerto Rico*, *in* SIX SPECIAL STUDIES REQUESTED FOR THE AD HOC ADVISORY GROUP ON THE PRESIDENTIAL VOTE FOR PUERTO RICO 87-117 (1971); Carl J. Friedrich, *Participation versus Autonomy in Puerto Rican Federal Relations*, *in* SIX SPECIAL STUDIES 74-86 (1971).

[69] HERNÁNDEZ COLÓN, *supra* note 63, at 73, 89.

[70] Even though nearly 80.7% of the electorate favored the Commonwealth in the 1952 constitutional referendum, only 48.6% favored the Commonwealth in the 1993 plebiscite, compared to 46.3% supporting statehood. In the 1993 plebiscite, 1,700,990 of the 2,312,912 registered voters cast ballots for a turnout rate of 73.5%. Manuel Álvarez-Rivera, *1993 Status Plebiscite Vote Summary*, ELECTIONS IN PUERTO RICO (January 8, 2013, 8:30PM), http://electionspuertorico.org/1993/summary.html. The 2012 plebiscite results might not be the best indicator of the current support for either the Commonwealth or statehood for reasons that are explained below. *See infra* note 73.

[71] 2012 PLEBISCITE ON PUERTO RICO POLITICAL STATUS, *supra* note 3.

[72] The voter turnout rate in the 2012 plebiscite was 78.19%. *Id*.

[73] PDP President and current Governor of Puerto Rico, Alejandro García Padilla, claimed that the results of the plebiscite did not produce a clear result because "more than

79.4% of Puerto Rico's electorate favored voting for the President of the United States and considered their U.S. citizenship to be "very important."[74] Since it is not clear whether a simple majority of the population favors statehood or whether Congress has the political will to admit Puerto Rico into the Union, addressing the existing disenfranchisement problem remains a crucial issue that cannot be further postponed.

III. INTERNATIONAL LAW AND TERRITORIAL CITIZENS' RIGHT TO VOTE

International human rights have become a sort of "secular religion" in the international legal system.[75] International human rights law has undergone a process of universalization and internationalization,[76] and, as a result, human rights have become a matter of "international concern," as opposed to a matter "essentially within the domestic jurisdiction of states."[77] Moreover, popular sovereignty, the idea that political legitimacy and governmental authority are grounded "on the consent of the people in the territory in which a government purported to exercise power," has become

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half of the Commonwealth supporters left the second ballot blank since that ballot did not include as an alternative the Commonwealth as we know it." García Padilla also claimed that "if you consider that 470,000 chose to leave the second ballot blank, the votes for statehood, while officially reported as 61%, fall under the 50% mark (43.85%)." Letter from Governor Alejandro García Padilla to President Barack Obama (Nov. 9, 2012); Pete Kasperowicz, *Congress expected to ignore Puerto Rico's vote for statehood*, THE HILL (Washington, D.C.), Nov. 8, 2012, *available at* http://thehill.com/blogs/floor-action/house/266799-congress-expected-to-ignore-puerto-ricos-statehood-vote (confirming that the "61 percent vote in favor of statehood is seen by some in Congress as a 'statistical fiction'").

[74] Rafael Hernández Colón, *A recent survey on voting for the President in the Commonwealth (II)*, CARIBBEAN BUSINESS (San Juan), Sept. 30, 2010, at 27.

[75] Elie Wiesel, Remarks at the White House 7th Millennium Evening of The Perils of Indifference: Lessons Learned From a Violent Century (Apr. 12, 1999), *available at* http://www.pbs.org/eliewiesel/resources/millennium.html.

[76] Louis Henkin describes the distinct phenomena of "universalization" and "internationalization" in international human rights law. He explains,

> 'Universalization' has brought acceptance, at least in [moral] principle and rhetoric, of the concept of individual human rights by all societies and governments and is reflected in national constitutions and law. [On the other hand,] '[i]nternationalization' has brought agreement, at least in political-legal principle and in rhetoric, that individual human rights are of 'international concern' and a proper subject for diplomacy, international institutions, and international law.

LOUIS HENKIN, THE AGE OF RIGHTS 17 (1990).

[77] U.N. Charter art. 2, para. 7 provides, "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are *essentially within the domestic jurisdiction of any state* . . . ." (emphasis added).

one the basic tenets of international human rights law.[78] It follows that the right to equal political participation in a state's formal political processes has become an indispensable feature of this basic principle of popular sovereignty.[79] Similarly, this fundamental right of equal political participation is at the very essence of modern democratic regimes.[80]

The right to vote is the political-legal manifestation of this basic principle of equal political participation in a constitutional democracy, such as the United States. Several important Supreme Court decisions acknowledge the unique and almost sacrosanct role of the right to vote in a democratic system.[81] Federal courts have been eager to protect the right to vote as a fundamental constitutional right because it is "critical to the functioning of an open and effective democratic process."[82] Furthermore, aggressive judicial review of this fundamental right responds to the needs of "clearing the channels of political change" and participating in "the design and administration of [those] political institutions" at the federal level.[83]

The recognition of the right to vote and equal political participation in U.S. municipal law is inextricably linked to the principle of popular sovereignty in international human rights law. The relationship between U.S. municipal law and international human rights law results from the fact that the U.S. legal system incorporates international law into its jurisprudence.[84] Thus, because international law is part of U.S. municipal law, the fundamental right to vote and to equal political participation

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[78] W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 AM. J. INT'L L. 866, 867 (1990) ("[B]y the end of the Second World War, popular sovereignty was firmly rooted as one of the fundamental postulates of political legitimacy.").

[79] *See generally* Gregory H. Fox, *The Right to Political Participation in International Law*, 17 YALE J. INT'L L. 539 (1992).

[80] "That the will of the people is to be the basis of the authority of government is as good a summary as any of the basic democratic idea." James Crawford, *Democracy and the Body of International Law*, *in* DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW 92 (Gregory Fox & Brad R. Roth eds., 2000).

[81] *See e.g.*, Wesberry v. Sanders, 376 U.S. 1, 17 (1964); Reynolds v. Sims, 377 U.S. 533, 555 (2004) ("[H]istory has seen a continuing expansion of the scope of the right of suffrage in this country. 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.").

[82] JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 105 (1980).

[83] *Id*. at 82, 105.

[84] Sosa v. Alvarez-Machain, 542 U.S. 692 (2004) (citations omitted) ("For two centuries we have affirmed that the domestic law of the United States recognizes the law of nations."); The Paquete Habana, 175 U.S. 677, 700 (1900) ("International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction . . . .").

enshrined in international human rights law binds the United States both domestically and internationally.

The United States has in fact violated its international legal obligations towards the U.S. citizens residing in Puerto Rico by excluding them from participating in presidential elections. Even if the U.S. Constitution does not expressly grant territorial citizens the power to elect the President, the United States must extend the federal franchise to all of its citizens in order to comply with international human rights law.[85] In order to do so, the United States must devise formal and legally feasible mechanisms that ensure substantive compliance with international human rights law.

A. Declarations and Treaties in International Human Rights Law

International human rights law is comprised of both international and regional instruments, whose enforcement mechanisms vary in terms of effectiveness.[86] These instruments include non-binding agreements, such as declarations and resolutions, and legally binding agreements, such as treaties or conventions. Declarations and resolutions are non-binding agreements that may describe aspirational principles and make recommendations regarding a specific issue that states agree to work towards.[87] Some provisions, however, may ripen into binding norms of customary international law if there is widespread state practice that corroborates the legal nature of the provision.[88] On the other hand, an international treaty creates binding law between the member-states.[89] Under the international legal norm of *pacta sunt servanda*, the parties must adhere to all treaty provisions in good faith.[90] Because treaty obligations are binding as a matter of international law, a State cannot invoke its municipal

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[85] Vienna Convention on the Law of Treaties art. 46(1), May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention] ("A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.").

[86] "Regional human rights enforcement is more effective in some respects than global attempts, because regional treaties are more likely to reflect shared normative expectations, heightening compliance by member states. However, not all regional human rights treaties provide the same degree of protection of participatory rights as the European Convention: the standards contained in the African Charter, for example, are significantly weaker." Fox, *supra* note 79, at 561 n. 95.

[87] INTERNATIONAL LAW NORMS, ACTORS, PROCESS: A PROBLEM-ORIENTED APPROACH 36 (Jeffrey L. Dunoff et al. eds., 2010) [hereinafter INTERNATIONAL LAW NORMS].

[88] *Id.* at 77-81.

[89] Vienna Convention, *supra* note 85, art. 26 ("Every treaty in force is binding upon the parties to it and must be performed by them in good faith.").

[90] *Id.*

law to justify a breach of these obligations.[91] The following subsections discuss several non-binding and binding instruments that the United States has signed, which are relevant to Puerto Rico's disenfranchisement.

1. International and Regional Instruments: Universal Declaration of Human Rights and the Inter-American Democratic Charter

The Universal Declaration of Human Rights ("UDHR"), adopted by the United Nations General Assembly in 1948, recognized the importance of participatory rights in the design and management of the State's formal lawmaking processes.[92] The UDHR's formal expression of a right to vote and equal political participation triggered the emergence of popular sovereignty as an international legal norm. UDHR Article 21 provides:

> (1) *Everyone* has the right to take part in the government of his country, directly or through freely chosen representatives; [and that] . . .
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> . . . .
>
> (3) The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by *universal and equal suffrage* and shall be held by secret vote or by equivalent free voting procedures.[93]

It is true that the UDHR "does not of its own force impose obligations as a matter of international law."[94] Nevertheless, in light of the widespread state practice corroborating Article 21, it seems appropriate to claim that Article 21's recognition of a right to vote and equal political participation has ripened into a binding norm of customary international law.[95]

An example of a regional instrument acknowledging the importance of the right to vote and equal political participation is the Inter-American Democratic Charter ("IADC"), which was adopted in 2001 by the United States and thirty-four other members of the Organization of American

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[91] *Id.* art. 27 ("A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.").

[92] UDHR, *supra* note 13, art. 21.

[93] *Id.* (emphasis added).

[94] Sosa v. Alvarez-Machain, 542 U.S. 692, 734-35 (2004) (citing John P. Humphrey, *The UN Charter and the Universal Declaration of Human Rights*, *in* THE INTERNATIONAL PROTECTION OF HUMAN RIGHTS 39, 50 (Evan Luard ed.1967)) (quoting Eleanor Roosevelt calling the Declaration "a statement of principles . . . setting up a common standard of achievement for all peoples and all nations" and "not a treaty or international agreement . . . impos[ing] legal obligations").

[95] *See infra* Part III (B).

States.[96] The IADC contains several provisions that address this fundamental right. First, Article 3 provides: "Essential elements of representative democracy include, *inter alia* . . . the holding of periodic, free and fair elections based on secret balloting and universal suffrage as an expression of the sovereignty of the people. . . ."[97] Furthermore, Article 6 provides: "It is the *right* and responsibility of *all citizens* to participate in decisions relating to their own development. This is also a necessary condition for the full and effective exercise of democracy."[98] In conclusion, the IADC reaffirmed the region's commitment to the promotion and preservation of democracy, as well as the right to vote and equal participation of all citizens.

2. Binding Treaty Obligations: International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights ("ICCPR" or "Covenant") is one of the key pillars of international human rights law and the primary international legal instrument for civil and political rights.[99] As of March 2013, 167 states, including the United States, have ratified the Covenant, which entered into force on March 23, 1976.[100] The ICCPR "establishes the right to vote as a matter of international human rights law."[101] The ICCPR creates a binding obligation upon all parties to the treaty to comply with these provisions as a matter of international law.[102]

Article 25 of the ICCPR, which recognizes the right to vote and equal political participation as a matter of international human rights law, provides:

> *Every citizen* shall have the right and the opportunity, without any of the distinctions mentioned in Article 2 and without unreasonable restrictions:
> (a) To take part in the conduct of public affairs, directly or through

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[96] Inter-American Democratic Charter of the Organization of American States ("IADC"), 28th Spec. Sess., OAS Doc. OEA/ Ser. P/AG/RES.1 (XXVIII – E/01) (OAS General Assembly) (Sept. 11, 2001).

[97] *Id.* art. 3.

[98] *Id.* art. 6. (emphasis added).

[99] ICCPR, *supra* note 13.

[100] U.N. Multilateral Treaties Deposited with the Secretary General, ch. IV, section 4, *available at* http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en.

[101] Caroline Carter, *The Right to Vote for Non-Resident Citizens: Considered Through the Example of East* Timor, 46 TEX. INT'L L.J. 655 (2011); *see also* Fox, *supra* note 79.

[102] "Protection of civil and political rights is a binding obligation from the time a state becomes party to that covenant . . . ." INTERNATIONAL LAW: CASES AND MATERIALS 990 (Louis Henkin et al., eds., 1987).

> freely chosen representatives;
> (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors . . . .[103]

Furthermore, Article 2 of the ICCPR provides in part:

> Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status . . . .[104]

These two provisions stand for the proposition that a State may not rely on unreasonable restrictions or any of the Article 2 "distinctions" to limit its citizens' right to vote and participate in the design and administration of the institutions that govern them.

Article 25 seems to suggest that *all* United States citizens must be able to participate in the presidential elections regardless of whether they reside in one of the fifty states or in the territories.[105] Before one may reach this conclusion definitively, however, it is important to address the following two issues: (1) what kind of legal obligation, if any, does the ICCPR impose on the United States with respect to its citizens residing in Puerto Rico; and (2) whether the restrictions in place, viewed in light of the totality of Puerto Rico's circumstances, are, in fact, "reasonable," even if not an ideal situation, under the ICCPR.

Issue #1: U.S. International Legal Obligations under the ICCPR.

As discussed in the previous subsection, the U.S. citizens of Puerto Rico are entitled as a matter of international law to the rights to vote and equal political participation that their fellow citizens in the fifty states enjoy. Since the ICCPR extends the Article 25 rights to the citizens of a State, the island's unique political status does not vitiate the United States' international legal obligations under the ICCPR.[106] It is worth noting, however, that the United States ratified the ICCPR in 1992, along with a series of reservations, understandings, and declarations ("RUDs").[107]

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[103] ICCPR, *supra* note 13, art. 25 (emphasis added).

[104] *Id.* art. 2(1).

[105] *Id.* art. 25; *see also* Igartúa, 417 F.3d 145, 173-75 (1st Cir. 2005) (Torruella, J., dissenting); Lawson & Sloane, *supra* note 11, at 1185-86.

[106] *See* Vienna Convention, *supra* note 85, art. 46(1).

[107] Igartúa III, 417 F.3d 145 at 173-74 n. 42 (Torruella, J., dissenting) (citing 138 Cong. Rec. at S4781, S4783-S4784 (1992)); INTERNATIONAL LAW NORMS, *supra* note 87, at 436-

Among these, the Senate issued a declaration to the effect that the ICCPR, specifically Articles 1 through 27, was "not self-executing," and thus "did not itself create obligations enforceable in the federal courts."[108] Regardless of the constitutionality[109] and international legal validity[110] of these RUDs, the ICCPR unquestionably imposes an international legal obligation on the United States to comply with its provisions.[111] In other words, even if

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[108] Sosa v. Alvarez-Machain, 542 U.S. 692, 728, 735 (2004) ("[A]lthough the Covenant does bind the United States as a matter of international law, the United States ratified the Covenant on the express understanding that it was not self-executing and so did not itself create obligations enforceable in the federal courts.") (citations omitted). The First Circuit in Igartúa III, 417 F.3d 145, held that Puerto Rican voters do not have enforceable rights under Article 25 of the ICCPR because it is not self-executing. The First Circuit reaffirmed this holding in Igartúa IV, 626 F.3d 592, 605-06 (1st Cir. 2010), and also relied on the dictum in Sosa to declare the ICCPR not self-executing. Judge Howard, who dissented in Igartúa III along with Judge Torruella, questioned the Court's determination: "[S]eparation of powers considerations prevent a court from relying exclusively on the Senate's declaration to determine that a treaty is non-self-executing. The Supremacy Clause and Article III require a court to examine independently the intentions of the treatymakers to decide if a treaty, by its own force, creates individually enforceable rights." Igartúa III, 417 F.3d at 185-86 (Howard, J., dissenting). The Supreme Court in Medellín v. Texas confirmed Judge Howard's approach by stating that the self-executing nature of a treaty "is, of course, a matter for [the courts] to decide," and not for the Senate to decide unilaterally through the issuing of RUDs. 552 U.S. 491, 518 (2008). Despite this clear statement in *Medellín*, the First Circuit was not willing to go beyond the Senate's RUDs, and once again held that the ICCPR is not self-executing. Igartúa IV, 626 F.3d 592. Judge Torruella once again dissented and concluded that the totality of the circumstances indicate that the ICCPR creates enforceable obligations for the federal courts. *Id.* at 628-633 (Torruella, J., dissenting).

[109] Many scholars question the constitutionality of "the comparatively novel practice whereby the President and the Senate unilaterally declare certain manifestly *not* non-self-executing provisions (in the sense of Foster v. Nielson, 27 U.S. (2 Pet.) 253, 314 (1829)) to be non-self-executing." Lawson & Sloane, *supra* note 11 at 1186 n. 332 (citing Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT'L L. 341. 346-47 (1995); Carlos Manuel Vázquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT'L L. 695, 708 n. 61 (1995)).

[110] It is very likely that many of these RUDs are invalid as a matter of international law, mainly because of their incompatibility with the object and purpose of the ICCPR. INTERNATIONAL LAW NORMS, *supra* note 87, at 436-443; *see* Vienna Convention, *supra* note 85, art.19(c) (providing that "[a] State may . . . formulate a reservation [to a treaty] unless . . . [among other things,] it "is incompatible with the object and purpose of the treaty."); *see also* Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, 1951 I.C.J. 15, 24 (May 28); Human Rights Comm., General Comment No. 24, U.N. Doc. CCPR/C/21/Rev.l/Add.6 (Apr. 11, 1994).

[111] Sosa, 542 U.S. at 735 ("[T]he Covenant does bind the United States as a matter of international law. . . ."); Exec. Order No. 13,107, 63 Fed. Reg. 68,991 (Dec. 10, 1998) ("It shall be the policy and practice of the Government of the United States . . . fully to respect and implements its *obligations under international human rights treaties to which it is a*

claims under the ICCPR are not judicially enforceable in federal courts, the United States is still bound as a matter of international law to guarantee the full participation of its territorial citizens in federal electoral processes. In any case, the reference to the ICCPR's non-self-executing nature in the RUDs should be interpreted narrowly because the RUDs merely intended to foreclose a private right of action under the ICCPR absent legislative action.[112]

It is also worth noting that the United States did not issue any RUDs modifying its international legal obligations under Article 25.[113] This was not the case, for example, with other specific provisions of the Covenant.[114] As a result, the internationally binding nature of Article 25 remained unaltered after its ratification in 1992. Finally, Article 2 of the ICCPR requires that "each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant."[115] Because the Federal Government has not adopted any measures allowing territorial citizens to participate in federal electoral processes, it follows that the United States has failed to comply with its international legal obligations under the ICCPR.

Issue #2: Unreasonable Restrictions to the Right to Vote.

In 1996, the Human Rights Committee (the "Committee"), the treaty body charged with monitoring the implementation of the ICCPR, issued a general comment ("General Comment No. 25") clarifying the meaning of the rights in Article 25.[116] The Committee stated in Paragraph 4 of General Comment No. 25 that "[a]ny conditions which apply to the exercise of the rights protected by [A]rticle 25 should be based on objective and reasonable

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party, including the ICCPR . . . .") (emphasis added).

[112] U.S. Sen. Exec. Rep. 102-23, *supra* note 111; *see* Vázquez, *supra* note 109.

[113] "*[N]o reservations or other limitations to the specific obligations contained in Article 25 were made*, aside from the declaration of non-self-execution applicable to all substantive articles of the ICCPR." Igartúa III, 417 F.3d at 174 n. 42 (Torruella, J., dissenting) (emphasis added) (citing 138 Cong. Rec. S4781, S4783).

[114] The Senate, for example, made RUDs with respect to ICCPR provisions that could infringe on the First Amendment right to free speech, the applicability of capital punishment, and the right to treat juveniles as adults under certain circumstances; also equated the treaty's prohibition on "cruel, inhuman, or degrading treatment or punishment" with the constitutional prohibition on "cruel and unusual punishment." *Id.*

[115] ICCPR, *supra* note 13, art. 2(2).

[116] U.N. Office of the High Commissioner for Human Rights ("Human Rights Comm."), General Comment No. 25, U.N. Doc. CCPR/C/21/Rev.1/Add. 7 General Comment No. 25, 57th Sess. (July 12, 1996) [hereinafter General Comment No. 25].

criteria."[117] It follows that, in addition to the per se unreasonable restrictions in Article 2, any restriction limiting the Article 25 rights must satisfy a reasonableness test. The comment provides several examples of what may constitute a "reasonable" restriction on the right to vote and equal political participation, such as setting a minimum age limit, or denying these rights to persons with "established mental incapacity."[118]

These examples illustrate the Committee's narrow view regarding what constitutes an "objective and reasonable" restriction to the fundamental rights of Article 25. In light of these examples in General Comment No. 25 and the per se unreasonable restrictions in Article 2, the ICCPR seems to allow only those restrictions that reasonably relate to the effective and adequate functioning of the State's democratic institutions.[119] The Covenant expressly rejects any possible criterion that relies on discriminatory animus or arbitrary distinctions to justify any limitations upon a citizen's Article 25 rights.[120] This narrow reading is consistent with the fact that "Article 25 lies at the core of democratic government based on the consent of the people and in conformity with the principles of the Covenant."[121]

In addition to General Comment No. 25, the Committee addressed the question of reasonable restrictions in the context of residency requirements in *Gillot v. France*.[122] In this case, a group of French citizens residing in the French overseas territory of New Caledonia claimed that a ten-year residency requirement precluded them from voting in the 1998 and 2014 New Caledonia decolonization referenda.[123] The Committee held that when

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[117] *Id.* para. 4

[118] *Id.* paras. 4, 10.

[119] "The delegates included this phrase, ['without reasonable restrictions,'] to allow denial of suffrage to minors, convicts, the mentally ill, and those not meeting residency requirements, and to permit the existence of certain limitations on the right to hold public office, such as a requirement of professional training." Fox, *supra* note 79 at 554.

[120] "It is of particular importance to ensure that persons do not suffer discrimination in the exercise of their rights under article 25, subparagraph (c), on any of the grounds set out in article 2, paragraph 1." General Comment No. 25, *supra* note 116, para 23.

[121] *Id.* para 1.

[122] Human Rights Committee, Gillot v. France (Commc'n. No. 932/2000). Article 2 of the ICCPR's First Optional Protocol allows those individuals under the jurisdiction of a state that has ratified the Protocol to "submit a written communication to the Committee for consideration," if "any of their rights enumerated in the Covenant have been violated" and they "have exhausted all available domestic remedies." Because the United States has not ratified any of the ICCPR Protocols, the disenfranchised U.S. citizens of Puerto Rico are precluded from submitting their grievances and claims to the Human Rights Committee. 1966 Optional Protocol to the 1966 International Covenant on Civil and Political Rights, art. 2, Dec. 16, 1966, 999 U.N.T.S. 171.

[123] Human Rights Committee, Gillot v. France (Commc'n. No. 932/2000).

deciding whether the "criteria in dispute" is of "discriminatory or non-discriminatory character," it is important to evaluate the restrictions "on a case-by-case basis, having regard in particular to the purpose of such restrictions and the principle of proportionality."[124] To put it differently, when deciding whether a limitation constitutes an "unreasonable restriction" for purposes of Article 25 of the ICCPR, the proper standard is to determine "whether the requirements have the purpose or effect of restricting in a disproportionate manner, given the nature and purpose of the [election] in question, the participation of the 'concerned' population . . . ."[125]

In light of this standard, the Committee held that the ten-year residency requirement was an "objective and proportional restriction" of the claimants' right to vote because: (1) "[I]t would not be unreasonable to limit participation in local referendums to persons 'concerned' by the future of New Caledonia who have proven, sufficiently strong ties to that territory;" and (2) their right was "strictly limited *ratione loci* to local ballots on self-determination and therefore ha[d] no consequences for participation in general elections, whether legislative, presidential, European or municipal, or other referendums."[126]

This analysis demonstrates that the denial of the right to vote to those U.S. citizens who live in Puerto Rico does not constitute a reasonable restriction of said right under Article 25. Even though the U.S. citizens of Puerto Rico may vote and participate in local elections, like the rest of the citizens in the fifty states, their participation is significantly limited at the federal level. Their rights to vote and to equal political participation at the federal level consists exclusively of electing the Resident Commissioner, a delegate who sits and votes in individual committees but cannot cast a vote in the Committee of the Whole in the House of Representatives.[127] It follows that the "concerned population" of 3.7 million U.S. citizens is unable to vote for the President of the United States, who not only has the constitutional authority to sign bills into laws that are fully applicable in Puerto Rico, but also exercises authority as Commander-in-Chief over thousands of Puerto Ricans in the Armed Forces.

In light of the Committee's interpretation of Article 25 in General Comment No. 25 and its decision in *Gillot*, a distinction based on the place of residence or the kind of citizenship – statutory versus constitutional – for purposes of the right to vote and equal political participation is neither reasonable nor objective. First, the U.S. Constitution's grant of exclusive

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[124] *Id.* para. 13.2.

[125] *Id.* para. 14.2.

[126] *Id.* paras. 13.16-13.17.

[127] Cottle, *supra* note 5.

authority to elect the President to state electors is irrelevant for purposes of Article 25 compliance because international law is only concerned with the substantive compliance of its norms.[128] Likewise, use of a citizen's place of residence as a voting restriction is inappropriate because Puerto Rico's relationship with the United States closely resembles that of a state with the federal government.[129] Therefore, denying the right to vote based on residency in Puerto Rico is no less rational than denying the vote to residents of any one U.S. state because all citizens' relationships with the federal government are nearly identical.

Moreover, to the extent that territorial citizens enjoy statutory citizenship, as opposed to the constitutional citizenship of the residents in the fifty states,[130] this distinction would be in direct tension with the text of Article 25, which extends the rights to vote and to equal political participation to *all citizens* of a State, regardless of whether their citizenship derives from a statute or from the Constitution.[131] Furthermore, a distinction akin to the doctrine of territorial incorporation of the *Insular Cases* would be even more problematic under the ICCPR for obvious reasons. The judicially created distinction between incorporated and unincorporated territories was predicated on the unfounded and discriminatory belief that the inhabitants of the new territories lacked a capacity for self-government[132] and that if

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[128] "Whatever form of constitution or government is in force, the Covenant requires States to adopt such legislative and other measures as may be necessary to ensure that citizens have an effective opportunity to enjoy the rights it protects." General Comment No. 25, *supra* note 116, para. 1.

[129] It is worth noting that all federal laws, criminal and civil in nature, apply to Puerto Rico as they apply to the fifty states, unless otherwise provided. 48 U.S.C. § 734 (2006). Other similarities include: (1) common system of government and laws; (2) Article III courts; (3) participation in the Armed Forces. *See* Consejo de Salud de Playa de Ponce v. Rullán, 586 F. Supp. 2d 22, 33-43 (D.P.R. 2008) (noting that Puerto Rico should not be considered an unincorporated state any longer in light of the island's evolving arrangement with the United States and how it resembles a state of the Union).

[130] Since the Jones Act granted Puerto Ricans their U.S. citizenship, their citizenship is more likely to be grounded in this federal statute and not in the U.S. Constitution. Jones Act, Pub. L. No. 64-368, ch. 145, 39 Stat. 951 (1917). Nonetheless, if Puerto Rico has achieved the status of an "incorporated territory" under the *Insular Cases* doctrine, it follows that Puerto Ricans are U.S. citizens by virtue of Section 1 of the Fourteenth Amendment. Lawson & Sloane, *supra* note 11, at 1193 n. 281 [citing U.S. CONST. amend. XIV, § 1 ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States . . . ."); Lisa María Pérez, Note, Citizenship Denied: *The Insular Cases* and the Fourteenth Amendment, 94 VA. L. REV. 1029 (2008)].

[131] ICCPR, *supra* note 13, art. 25.

[132] With respect to the constitutional right to a jury, the Supreme Court expressed the following in its decision in Balzac v. Porto Rico:

> The jury system needs citizens trained to the exercise of the responsibilities of

Congress opted for the "annexation of outlying and distant possessions grave questions will arise from differences of race, habits, laws and customs of the people, and from differences of soil, climate, and production . . . ."[133] The racist undertones of the *Insular Cases* seems to evoke the per se unreasonable distinctions listed in Article 2 and stands in stark contrast with the examples of reasonable restrictions described in General Comment No. 5.[134]

Furthermore, in the 2006 "Concluding Observations" to the United States Second and Third Periodic Reports concerning the ICCPR, the Committee expressed its concern that the "residents of the District of Columbia do not enjoy full representation in Congress, *a restriction which does not seem to be compatible with article 25 of the Covenant*," and recommended that the United States "ensure the right of [D.C. residents] to take part in the conduct of public affairs, directly or through freely chosen representatives, in particular with regard to the House of Representatives."[135] While the Committee did not make any references to Puerto Rico, the fact that Puerto Ricans have even less participation at the federal level than the residents of the District of Columbia (who can at least vote in presidential elections) bolsters the claim that Article 25 of the ICCPR requires at the very minimum that the U.S. citizens of Puerto Rico participate in presidential elections. Finally, given the nature and importance of U.S. presidential elections, the political exclusion of nearly 3.7 million citizens "have the purpose or effect of restricting in a disproportionate manner . . . the participation of the 'concerned' population . . . ."[136] Unlike the claimants in

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> jurors . . . The jury system postulates a conscious duty of participation in the machinery of justice which it is hard for people not to brought up in fundamentally popular government at once to acquire . . . Congress has thought that *a people like the Filipinos or the Porto Ricans*, trained to a complete judicial system which knows no juries, *living in compact and ancient communities, with definitely formed customs and political conceptions*, should be permitted themselves to determine how far they wish to adopt this institution of Anglo-Saxon origin and when.

258 U.S. 298, 310-311 (1922) (emphasis added).

[133] Downes v. Bidwell, 182 U.S. 244, 282 (1901).

[134] *See* Consejo de Salud Playa de Ponce v. Rullan, 586 F. Supp. 2d 22, 28 n. 9 (D.P.R. 2008) (citing 33 Cong. Rec. 2015, 3616 (1900)) (including statements in both the House and Senate Floors describing both Filipinos and Puerto Ricans as "mongrels . . . with breath of pestilence and touch of leprosy . . . [and] with their idolatry, polygamous creeds and harem habits"); *see also* Torruella, *supra* note 39, at 300, 307 (describing the racism and Filipinophobia of the times); TORRUELLA, *supra* note 39, at 3.

[135] Concluding Observations of the Human Rights Committee on the United States of America, U.N. Doc. CCPR/C/USA/CO/3/Rev.1, at 11 para. 36 (2006) (emphasis added), *available at* http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G06/459/61/PDF/G0645961.pdf?OpenElement.

[136] Human Rights Committee, Gillot v. France (Commc'n. No. 932/2000), para. 14.2.

Gillot, Puerto Ricans are politically excluded from *all* electoral processes at the federal level. In conclusion, the restrictions in place, even if viewed in light of the totality of Puerto Rico's circumstances, are unreasonable.

B. Customary International Law

In addition to the ICCPR, the "general and consistent practice of states followed by them from a sense of legal obligation" seems to indicate that the rights to vote and to equal political participation has risen to the level of customary international law.[137] Custom is formed "as divergent practices of various states converge and achieve a level of uniformity, consistency, and regularity that in turn generates a sense of legal obligation, often referred to as *opinio juris*."[138] Because custom is neither fixed nor immutable, customary international law must be interpreted in light of its historical evolution and its current state among the community of nations.[139]

The rights to vote and to equal political participation have become a binding rule of customary international law due to the widespread state practice of upholding this right, and due to the fact that states enforce participatory rights as a matter of law. These fundamental human rights originate from the gradual transition among the community of nations from a "traditional [notion of] 'absolutist' sovereignty" to an "emerging notion of 'popular' sovereignty."[140] Professor Gregory H. Fox ascribes two factors that contributed to the "late emergence of participatory rights in international law."[141] First, national elections were not commonplace until the mid-nineteenth century, and many states were still experiencing "national debates over the nature, power, and extent of representative institutions."[142] Second, since efficiency originally guided the notion of state recognition, "the [negative] treatment of unelected, [and presumably illegal], governments by the international community" emerged much later in international law.[143] Consequently, it was not until elections became more commonplace and state recognition became grounded on the liberal notions of political legitimacy, as opposed to efficiency, that participatory

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[137] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (2004).

[138] INTERNATIONAL LAW NORMS, *supra* note 87, at 77.

[139] Filartiga v. Peña-Irala, 630 F.2d 876, 881 (2d Cir. 1980); The Paquete Habana, 175 U.S. 677 (1900).

[140] Fox, *supra* note 79, at 544.

[141] *Id.* at 546.

[142] *Id.* ("An international requirement of free and fair elections could not reasonably be expected to arise until elections in individual states became the norm.").

[143] *Id.* at 546-47.

rights became widespread enough to support the creation of an international legal obligation.

These two factors have certainly influenced the historical evolution of the fundamental rights to vote and to equal political participation. With respect to the first factor, the number of electoral democracies in the international community has dramatically increased over the last half-century.[144] Nearly 60% of all states today hold some form of democratic elections.[145] Furthermore, the end of the Cold War and the collapse of the Soviet bloc marked a dramatic increase in the total number of electoral democracies.[146] More recently, the U.S. military incursions into Iraq and Afghanistan, along with the political uprisings across the Middle East and North Africa, reflect a steady transition towards popular sovereignty and democratization.[147] The popular and democratic revolutions in states such as Egypt, Tunisia, Libya, Syria, and Yemen, collectively referred as the "Arab Spring," are widely considered as "the most significant challenge to authoritarian rule since the collapse of Soviet communism."[148]

With respect to the second factor, most states and international organizations treat authoritarian regimes, such as Kim Jong-un's regime in North Korea, Raúl Castro in Cuba, and Bashar al-Assad in Syria, as pariahs. As a result, modern judgments on the domestic legitimacy of a government hinge upon the government's recognition and protection of these fundamental participatory rights.[149] Finally, another important example of the "internationalization" of these rights is the widespread practice of electoral monitoring and assistance under the United Nations system, as

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[144] In 1950, only 22 out of a total of 154 states were considered electoral democracies. Freedom House, *Democracy's Century: A Survey of Global Political Change in the 20th Century* 2 (1999). In 2011, however, 117 out of 195 states were electoral democracies. Freedom House, *Freedom in the World 2012: The Arab Uprisings and their Global Repercussions* 29 (2012) [hereinafter Freedom House 2012], *available at* http://www.freedomhouse.org/sites/default/files/inline_images/FIW%202012%20Booklet—Final.pdf. In other words, while only fourteen percent of states were democracies in 1950, more than sixty percent of modern states could be classified as electoral democracies under the Freedom House standards. *Id.*

[145] *Id.*

[146] *See id.*

[147] T.S. Krishna Murthy, *The Relevance of Voting Rights in Modern Democracies*, 2 WAKE FOREST J.L. & POL'Y 337, 349-50 (2012); Angela Walker, *Foreword: From Riots to Rights*, 10 NW. U. J. INT'L HUM. RTS. 191 (2012).

[148] Freedom House 2012, *supra* note 144, at 1.

[149] *See* Fox, *supra* note 79, 607 ("[I]nternational notions of legitimacy are no longer oblivious to the origin of governments, but have come to approximate quite closely those domestic conceptions embodied in theories of popular sovereignty. In Professor Reisman's words, '[i]nternational law still protects sovereignty, but – not surprisingly – it is the people's sovereignty rather than the sovereign's sovereignty.'") (citations omitted).

well as other international bodies and non-governmental organizations.[150] This practice emerged from the need to systematize "democratic standards" and develop "mechanisms to ascertain the preferences of peoples emerging from colonialism."[151] Today, electoral monitoring displays the widespread recognition of the fundamental right to vote and to equal political participation, as well as the notion that the protection of these liberties is no longer a matter "essentially within the domestic jurisdiction" of a state, but, rather, one of international concern under international human rights law.[152]

The legal status of the rights to vote and to equal political participation as custom does not depend on whether state practice reflects uniform consensus over a certain type of democratic system. As Judge Juan R. Torruella stated in his dissenting opinion in *Igartúa De La Rosa v. United States* (*Igartúa III*), "While the system of democratic government may differ from country to country, the fundamental right of citizens to participate, directly or indirectly, in the process of electing their leaders is at the heart of *all* democratic governments."[153] Neither does the formation of a rule of customary law require absolute and perfect compliance with the right in question.[154] It follows that the fact that there are some regimes that do not hold free and fair elections and that fail to ensure the political inclusion and participation of all of its citizens does not deprive this fundamental right from its legal status as custom.[155]

With respect to *opinio juris*, the existence of numerous international and

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[150] *Id.* at 572.

[151] *Id.*

[152] *See supra* text accompanying notes 76-77.

[153] Igartúa III, 417 F.3d 145, 176 (1st Cir. 2005) (Torruella, J., dissenting) (citing Crawford, *supra* note 80) (emphasis added). The Court in Igartúa III, however, disagreed with Judge Torruella's analysis, and instead relied on a general and broad characterization of the right to vote and to equal political participation to conclude that because states have different conceptions of democratic rule, it cannot be argued that this right is part of customary international law. Igartúa III, 417 F.3d at 151 ("If there exists an international norm of democratic government, it is at a level of generality so high as to be unsuitable for importation into domestic law.").

[154] INTERNATIONAL LAW NORMS, *supra* note 87, at 78:

> The jurisprudence of the International Court of Justice shows that contrary practice which, at first sight, appears to undermine the uniformity of the practice concerned, does not prevent the formation of a rule of customary international law as long as this contrary practice is condemned *by other States* or denied by the government itself. *Through such condemnation or denial, the rule in question is actually confirmed* . . . .;

see also RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102, cmt. b (2004).

[155] *See id.*; *see also* Filartiga v. Peña-Irala, 630 F.2d 876, 884 n. 15 (2d Cir. 1980) (explaining that occasional breaches to a categorical prohibition on torture did not preclude this prohibition from rising to the level of customary international law).

regional legal instruments and enforcement mechanisms constitute powerful evidence of the binding character of the rights to vote and to equal participation that heavily influences the aforementioned state practice.[156] The UDHR and subsequent regional instruments express this norm, and, while their language is not identical, they convey with similar emphasis their commitment to protect and guarantee this basic right.[157] More importantly, an absolute majority of all states, 167, have ratified the ICCPR and are legally bound by its Article 25 and Article 2 provisions.[158] From this perspective, it is plausible to argue that Article 25's recognition of the rights to vote and to equal political participation of all citizens codifies customary international law. It is also worth noting that the states' filing of periodic reports to the Human Rights Committee further confirms the fact that states "follow the practice out of a sense of legal obligation."[159] A similar rationale applies to other enforcement mechanisms, such as electoral monitoring and assistance, which also serve as an important source of law.[160]

Given states' general and consistent practice with regard to the aforementioned legal obligations, it is certainly plausible to conclude that the rights to vote and to equal participation are clear and unambiguous norms that have ripened to the level of customary international law. Thus, Puerto Rico's disenfranchisement from the federal electoral and political

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[156] RESTATEMENT § 102(3) ("International agreements . . . may lead to the creation of customary international law when such agreements *are intended for adherence by states generally and are in fact widely accepted*.") (emphasis added).

[157] In addition to the UDHR and the IADC, several legal instruments protect the right to vote and to equal political participation. Here are some examples: African [Banjul] Charter on Human and Peoples' Rights, June 26, 1981, art. 13(1), O.A.U. Doc. CAB/LEG/67/3/Rev. 5, *reprinted in* 9 I.L.M. 58, 61 (1981) ("Every citizen shall have the right to freely participate in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law."); Organization of American States, American Convention on Human Rights, Nov. 22, 1969, art. 23(1)(b), O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 ("[Every citizen shall enjoy the right] to vote and to be elected in genuine periodic elections, which shall be by universal and equal suffrage and by secret ballot that guarantees the free expression of the will of the voters."); Protocol (No. 1) to the Convention for the Protection of Human Rights and Fundamental Freedoms ("European Protocol"), Mar. 20, 1952, art. 3, 213 U.N.T.S. 262, 264 ("The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.").

[158] U.N. Multilateral Treaties Deposited with the Secretary General, ch. IV, section 4, *available at* http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en.

[159] RESTATEMENT § 102(2); *see also* INTERNATIONAL LAW NORMS, *supra* note 87, at 79.

[160] Fox, *supra* note 79, at 570-95 (describing the importance of international and regional election monitoring for purposes of state practice and as a source of law).

processes is in direct tension with the overwhelming acceptance of this fundamental right and its prevalence in international human rights law. It follows that customary international law and the ICCPR treaty obligations impose on the United States an international legal obligation to ensure the political inclusion and participation of the U.S. citizens of Puerto Rico at the federal level, and at the very minimum, the ability to participate in presidential elections. This next section undertakes the inevitable and inescapable task of evaluating formal and legally feasible mechanisms that guarantee substantive compliance with this international legal obligation.

IV. THE PRO-RATA PROPOSAL: A POLITICAL SOLUTION TO PUERTO RICO'S DISENFRANCHISEMENT

Scholars agree that statehood or a constitutional amendment akin to the Twenty-Third Amendment would directly address the concerns raised in the previous section. There are other legally feasible alternatives, however, that ensure substantive compliance with international human rights law. Ensuring substantive compliance with international law does not require a specific type of formal mechanism under U.S. municipal law, but, rather, requires only that territorial citizens be able to participate in presidential elections.[161] While an option outside of statehood or a constitutional amendment will not grant a constitutionally guaranteed vote for the President or a vote for the election of a delegation to the Electoral College to territorial citizens, it is still possible to ensure substantive compliance with international human rights law through statutory alternatives that would grant territorial citizens the right to vote for the President.[162]

This fourth part of this Note will first evaluate the legal feasibility of Judge Pierre Leval's Pro-Rata Proposal in his separate opinion in *Romeu v. Cohen*,[163] and then consider whether this political solution effectively satisfies the United States' international legal obligation to enfranchise territorial citizens. To the extent that the Proposal is both feasible and effective, Judge Leval's Proposal has forced Congress to reconsider its role in bringing equality to those long-forgotten citizens residing in the territories who have been excluded from participating in the U.S. presidential elections for over a century.

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[161] This means that international law does not require a constitutional amendment or the annexation of Puerto Rico as a state, if there are other ways in which Puerto Ricans are able to participate in presidential elections. *See* Lawson & Sloane, *supra* note 11, at 1127 (explaining that international law is only concerned with the substantive compliance of its legal obligations).

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

[163] *Id.* at 127-30.

A. Romeu v. Cohen: Background of the Pro-Rata Proposal

In 2001, the U.S. Court of Appeals for the Second Circuit held that a U.S. citizen residing in Puerto Rico, who had previously resided and voted in New York, lacked a constitutional or statutory right to participate in the U.S. presidential elections.[164] The disenfranchised citizen, Xavier Romeu, first asserted that the Uniformed and Overseas Citizens Absentee Voting Act ("UOCAVA")[165] and the New York Election Law ("NYEL")[166] violated the equal protection clause of the Fourteenth and Fifth Amendments of the Constitution because it extended the right to vote for the state's presidential electors to former residents of the state residing outside of the United States, but not to those former residents of the state residing in a U.S. territory.[167] Romeu also claimed that the UOCAVA and the NYEL violated his constitutional rights to vote and travel, as well as his rights under the Privileges and Immunities Clause of Article IV and the Due Process Clause in the Fifth and Fourteenth Amendments.[168] Judge Leval, writing for the court, explained that while Romeu "suffer[ed] a grave injustice," the statutes did not violate any of his constitutional rights because "the deprivation of which he complain[ed] is created by the Constitution."[169]

In addition to the court's opinion, Judge Leval and Chief Judge John Walker wrote separate opinions addressing the problem of extending the presidential vote to territorial citizens.[170] Judge Leval notes that "[s]tate legislatures do not have unfettered authority over the appointment of electors" because Congress has the power to enforce constitutional provisions that restrict the ways in which a state may exercise its power to appoint electors.[171] In fact, Congress has enacted voting rights legislation on several occasions pursuant to its constitutional authority to regulate the states' appointment of electors.[172] More importantly, as Judge Leval points

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[164] Romeu, 265 F.3d 118.

[165] 42 U.S.C. §§ 1973ff-1 & 1973ff-6 (2006).

[166] N.Y. Elec. Law § 11-200(1) (McKinney 1998).

[167] Romeu, 265 F.3d at 120, 124.

[168] *Id.* at 120.

[169] *Id.* at 122.

[170] *Id.* at 127-130 (Leval, J., writing separately); *id.* at 131-136 (Walker, C.J., concurring).

[171] *Id.* at 128 (Leval, J., writing separately) (citing U.S. CONST. amends. 14, 15, 19, & 26).

[172] Some examples of voting rights legislation preempting state law are: (1) banning literacy tests; (2) "strictly limit[ing] States' power to deny voting rights to U.S. citizens on the basis of their inability to read English when those citizens are educated in U.S. schools in which the predominant language is not English;" (3) requiring States to provide bilingual voting materials; (4) banning state residency requirements; (5) requiring uniform absentee

out, Congress has also "required States to provide absentee ballot eligibility to former citizens of a State who leave the State and establish residence in another State within thirty days of a president election, and has barred the States from establishing durational residency requirements for eligibility to vote in a Presidential election."[173] The UOCAVA extends the requirement of mandatory absentee ballot eligibility to those former residents of states who are now domiciled overseas.[174] The result of this law is that states must accept voters who do not reside in their state.

Judge Leval argues that the legal implications of federal statutes, such as the UOCAVA, suggest that Congress could do the same with respect to the territories. His Pro-Rata Proposal provides that:

> Congress might permit every voting citizen residing in a territory to vote for the office of President by requiring every State that chooses its electors by popular vote (which all States do) to include in that State's popular vote the State's pro rata share of the votes cast by U.S. citizens in the territories.[175]

The proposal consists of taking the number of votes cast by the territorial citizens for each presidential candidate and allocating them according to each "State's proportion of the total U.S. population" or to each "State's proportion of the total electoral votes."[176] In order for this proposal to be legally feasible under U.S. municipal law, Congress would have to rely on one of its constitutionally enumerated powers to enact legislation containing the Pro-Rata Proposal. Even if feasible, the proposal is only effective to the extent that it satisfies the United States' legal obligations under the ICCPR and customary international law.

B. Legal Feasibility (Constitutionality) of the Pro-Rata Proposal

In a separate concurring opinion, Chief Judge Walker disagreed with Judge Leval's observations that it is possible for territorial citizens to participate in presidential elections absent statehood or a constitutional amendment.[177] In other words, Judge Walker believes that since either statehood or a constitutional amendment is a prerequisite to permitting U.S. citizens residing in Puerto Rico to vote for the President, a federal statute or treaty cannot enfranchise territorial citizens.[178] He concludes that Congress

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ballot eligibility. *Id.* at 128-129 (Leval, J., writing separately).

[173] *Id*. (citing 42 U.S.C. §§1973aa-1(e) & 1973aa-1(c) (2006)).

[174] 42 U.S.C. § 1973ff-1.

[175] Romeu, 265 F.3d at 130.

[176] *Id.* n. 7.

[177] *Id.* at 131, 136 (Walker, C.J., concurring).

[178] *Id.*

has no constitutional authority to compel the states to accept the votes of territorial citizens.[179]

Judge Walker anticipates four plausible constitutionally enumerated powers that could support the enactment of Judge Leval's Pro-Rata Proposal: (1) the Commerce Clause; (2) § 5 of the Fourteenth Amendment; (3) § 2 of the Fifteenth Amendment; and (4) the Spending Clause.[180] Throughout his opinion, Judge Walker explains why these constitutionally enumerated powers could not justify the proposal's enactment. He considers the Proposal to be unconstitutional because it commandeers states to "govern according to Congress' intentions,"[181] and because it neither "prohibit[s] conduct that itself violates [any constitutional] substantive guarantees" nor "remed[ies] . . . violations of these guarantees by 'prohibiting a somewhat broader swath of conduct' that is otherwise unconstitutional . . . ."[182] More importantly, Justice Walker believes that this Proposal will result in states sharing with the territories their absolute authority to select electors, thus altering the federal-state balance struck by the Constitution.[183]

While Judge Walker could be right in concluding that these four constitutional powers do not justify the enactment of Judge Leval's Pro-Rata Proposal,[184] his overall conclusions regarding the Proposal's constitutionality seem problematic in light of Supreme Court jurisprudence upholding certain types of voting rights legislation and the role of treaties in the constitutional scheme. The fact that only residents of the state may participate in the selection of electors does not necessarily follow from Article II's grant of authority to the states.[185] It is not entirely obvious, as

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[179] *Id.* at 132.

[180] *Id.*

[181] *Id.* (citing New York v. United States, 505 U.S. 144, 162 (1992)).

[182] *Id.* at 133 (citing Bd. of Trustees of the Univ. of Ala. v. Garrett, 531 U.S. 356 (2001)).

[183] *Id*. at 135.

[184] *See* Lawson & Sloane, *supra* note 11 at 1190 ("From an originalist perspective, however, there is much to commend Judge Walker's objections. Judge Walker examines all plausible – and, in Professor Lawson's judgment, several implausible – sources of enumerated congressional authority to implement Judge Leval's proposal and finds all of them wanting.").

[185] *See e.g.*, Oregon v. Mitchell, 400 U.S. 112 (1970) (holding that Congress may require States to provide uniform absentee ballot eligibility); Igartúa IV, 626 F.3d 592, 608 (1st Cir. 2010) (Lipez, J., concurring) (recognizing the possibility of enfranchising territorial citizens through federal legislation or self-executing treaty); Igartúa III, 417 F.3d 145, 159 (1st Cir. 2005) (Torruella, J., dissenting) (rejecting the idea that only statehood or a constitutional amendment could enfranchise the U.S. citizens of Puerto Rico); *see also* Cottle, *supra* note 5, at 331-338 (suggesting changes to the UOCAVA to include those former State residents that now live in the territories).

Judge Walker suggests, that the Article II grant of authority to the states to select their electors necessarily prohibits extending the right to vote to citizens residing in the territories. As the following subsection indicates, the fact that only state residents may participate in presidential elections because of Article II is a *non sequitur*.

1. Extending the Presidential Vote to Territorial Citizens

The first question to consider is whether the Constitution permits the enfranchisement of territorial citizens through a federal statute or treaty.[186] While the Constitution does not grant the federal franchise to territorial citizens, it does not restrict Congress from extending it to them pursuant to its constitutional powers.[187] Several sources confirm this view. In 1970, eight Justices of the Supreme Court upheld § 202 of the Voting Rights Amendments of 1970 in *Oregon v. Mitchell*.[188] In upholding this Section, the Court acknowledged the constitutionality of Congress's authority to ban state durational residency requirements imposed on newly relocated citizens and to require states to provide uniform absentee ballot eligibility for citizens moving to a new state.[189] While the Justices did not agree on the constitutional source of authority allowing Congress to do this,[190] the holding's implication is that the Constitution permits Congress to compel the fifty states to accept the votes of those residing outside of the state.

In light of this necessary implication, "if the Constitution authorizes the UOCAVA and other Congressional limitations . . . on the power of the States to determine who may vote in its presidential elections, [there is] no reason in the Constitution why Congress might not" enact a federal statute containing the Pro-Rata Proposal.[191] Judge Walker's only response to this analysis is that *Mitchell* was wrongly decided and that the UOCAVA's requirement that the states accept the votes of "non-resident U.S. citizens

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[186] *Compare* Igartúa IV, 626 F.3d 592, *and* Romeu, 265 F.3d at 131 (Walker, C.J., concurring), *with* Igartúa IV, 626 F.3d at 616 (Torruella, J., dissenting), *and* Romeu, 265 F.3d at 128 (Leval, J., writing separately).

[187] *See* cases cited, *supra* note 185; *see also* José R. Coleman Tió, Comment, *Six Puerto Rican Congressmen Go to Washington*, 116 YALE L. J. 1389, 1394 (2007).

[188] 400 U.S. 112 (1970); *see* 42 U.S.C. §§ 1973-1973bb-1 (2006).

[189] Mitchell, 400 U.S. 112.

[190] The eight Justices in Mitchell identified the following powers to uphold the 1970 Amendments to the Voting Rights Act: (1) Congress's "inherent 'broad authority to create and maintain a national government;'" (2) Congress's power under Section Five of the Fourteenth Amendment to enforce "the right to vote for national officers;" (3) Section Five power "to enforce the right to unhindered interstate travel;" and (4) power under the "Necessary and Proper Clause of Article IV to 'protect and facilitate' the right to interstate travel." Romeu, 265 F.3d at 129 n. 6 (Leval, J., writing separately).

[191] *Id.* at 129-130.

living overseas . . . appears constitutionally infirm."[192] Ignoring Supreme Court precedent, however, is simply not an option if one is going to claim that the Pro-Rata Proposal is not a legally feasible mechanism to enfranchise territorial citizens and cure the lack of compliance with international human rights law.

First Circuit Judges Juan Torruella and Kermit Lipez discuss in *Igartúa v. United States* (*Igartúa IV*)[193] the "view that the Constitution does not necessarily forbid extensions of the rights it delineates . . . ."[194] For example, in 1949, the Supreme Court held in *National Mutual Insurance Co. v. Tidewater Transfer Co.* that Congress could extend Article III diversity jurisdiction to the District of Columbia, even though the text of the constitutional provision refers only to "States."[195] The fact that the District of Columbia is not a state "does not . . . determine that Congress lacks power under other provisions of the Constitution to enact . . . legislation" to extend Article III diversity jurisdiction to the District.[196] Extending the Court's rationale in *Tidewater* to Puerto Rico's disenfranchisement indicates that a political solution, such as the Pro-Rata Proposal, is legally feasible.[197]

Finally, Judge Walker's federalism critique of the Pro-Rata Proposal – essentially that the proposal distorts the constitutional plan – relies on a somewhat problematic, originalist interpretation of the Framers' intent.[198] Judge Walker relies on the fact that because the Framers excluded the territories from being represented in the new federal government at a time when the Continental Congress in New York controlled the Northwest Territories, it follows that "the exclusion of territorial lands generally from

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[192] *Id.* at 134 n. 7 (Walker, C.J., concurring); Lawson & Sloane, *supra* note 11, at 1190-91 ("As does Judge Walker, Professor Lawson gravely doubts the constitutionality of the UOCAVA . . . [F]rom an originalist standpoint, Oregon v. Mitchell was wrongly decided . . . .").

[193] 626 F.3d 592 (1st Cir. 2010). Even though Igartúa IV only involved claims regarding a right to vote in congressional elections, as opposed to a right to vote in presidential elections, the analysis is essentially the same. The question of whether Congress can enfranchise territorial citizens without amending the Constitution is at the heart of these cases.

[194] *Id.* at 608 (Lipez, J., concurring); *see also id*. at 616-617 (Torruella, J., dissenting).

[195] 337 U.S. 582, 603-04 (1949).

[196] *Id*. at 588.

[197] 626 F.3d at 608 (Lipez, J., concurring) ("By analogy, . . . references 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.") (citation omitted).

[198] *See* Romeu, 265 F.3d 118, 135 (Walker, C.J., concurring), ("The Constitution having assigned the authority to select electors to the states exclusively, neither the Congress nor the officials of the states may, consistent with the Supremacy Clause, alter that scheme.") (citation omitted).

the electoral college was not simply a historical oversight, but rather a *conscious product of the constitutional design*."[199]

Even assuming for purposes of this argument that originalism is the best theory of constitutional interpretation and construction, the problem with Judge Walker's historical argument is that it presumes that the Framers deliberately intended a scenario of political inequality where only *some* U.S. citizens could participate in the federal government.[200] Historical evidence suggests quite the opposite. For example, the Northwest Ordinance of 1787 guaranteed the inhabitants of the territories eventual enfranchisement and admission into the Union.[201] Moreover, because every U.S. territory acquired up until the Spanish-American War was eventually admitted into the Union, "[t]he evidence therefore suggests that territorial disenfranchisement was *meant to be temporary*; territories would be held as states-in waiting."[202] It was, rather, the *Insular Cases* that "permitted a sharp deviation from prior practice."[203] In conclusion, denying enfranchisement to the territories is "wholly inconsistent *with the spirit and genius,* as well as with the *words*, of the Constitution."[204]

2. Legal Justifications for the Pro-Rata Proposal

Since the enumeration of a right in the Constitution does not necessarily proscribe its extension via federal statute or treaty, Congress may act pursuant to its constitutional authority to extend the right. The constitutionality of the UOCAVA and the statutes banning state durational residency requirements suggest that Congress possesses the constitutional authority to enact legislation containing the Pro-Rata Proposal.[205] Even though the Court's split in *Mitchell* does not offer clear guidance as to the

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[199] *Id.* at 134 n. 6 (emphasis added); *see also* Igartúa IV, 626 F.3d 592, 596-97.

[200] Because 1898 marked the first time in U.S. history that the Federal Government "acquired territory without *ipso facto* granting its inhabitants citizenship," a manner inconsistent with the country's "founding history," it cannot be that the Framers intended *citizens* to be excluded from participating in federal elections. Igartúa III, 417 F.3d 145, 161 (1st Cir. 2005) (Torruella, J., dissenting) (emphasis added).

[201] Denis P. Duffey, Note, *The Northwest Ordinance as a Constitutional Document*, 95 COLUM. L. REV. 929, 965 (1995).

[202] Coleman Tió, *supra* note 187, at 1394 (emphasis added).

[203] *Id.*; *see* Lawson & Sloane, supra note 11, at 1146 ("[T]o the best of our knowledge and research, *no current scholar, from any methodological perspective*, defends *The Insular Cases*. . . .") (emphasis added). For further criticism of the *Insular Cases*, *see* TORRUELLA, *supra* note 39; Neuman, *supra* note 39, at 193-194.

[204] Downes v. Bidwell, 182 U.S. 244, 380 (1901) (Harlan J., dissenting) (emphasis added); *see also* Igartúa II, 229 F.3d 80, 89 (1st Cir. 2000) ("Indefinite colonial rule by the United States is not something that was contemplated by the Founding Fathers nor authorized per secula seculorum by the Constitution.").

[205] Romeu v. Cohen, 265 F.3d 118, 130. (Leval, J., writing separately).

constitutional basis for the statute that it upheld, it is still important to identify plausible constitutionally enumerated powers that justify the Proposal's enactment.

Congress's authority to enact the proposal "may well reside in Article IV, Section 3, which gives Congress the power to make 'all needful Rules and Regulations respecting the Territor[ies].'"[206] Congress's powers under Article IV, Section 3, the Territorial Clause, are quite broad and entitled to substantial deference.[207] While the Pro-Rata Proposal, like other voting rights statutes, revolves around the idea of states accepting voters who are not residents of the state, this source of constitutional authority is clearer and more predictable than whatever power Congress relied on to enact the UOCAVA or the durational residency requirements in *Mitchell*.

Interestingly, Judge Walker suggests that in the event that the UOCAVA is unconstitutional, Congress may still enact a similar provision for members of the U.S. armed forces as a "necessary and proper" exercise of Congress's constitutional authority to provide for an army and navy under Article I, Section 8.[208] The idea is that Congress can act pursuant to one of its enumerated constitutional powers to address any issues concerning the disenfranchisement of U.S. citizens. If anything, Judge Walker's own statement strengthens the claim that the Pro-Rata Proposal may well be an exercise of Congress's broad authority under the Territorial Clause. Judge Walker's statement undermines his own anti-commandeering criticism[209] of the Pro-Rata Proposal because allowing those provisions of the UOCAVA that govern military voting necessarily results in federal compulsion of the states to accept voters that reside outside of their jurisdiction.[210]

The Constitution's Treaty Clause, in conjunction with the Supremacy Clause, provides another source of power under which Congress can enact

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[206] *Id.* at 130 n. 9 (quoting U.S. CONST. art. IV, § 3, cl. 2).

[207] Quiban v. Veterans Administration, 928 F.2d 1154, 1160 (D.C. Cir. 1991) ("To require the government . . . to meet the most exacting standard of review . . . would be *inconsistent with Congress's 'large powers'* to 'make all needful Rules and Regulations respecting the Territory . . . belonging to the United States.'") (citations omitted) (emphasis added).

[208] "It is possible, however, that those provisions of UOCAVA governing military voting . . . may well be a 'necessary and proper' exercise of Congress's authority to provide for an army and navy . . . by ensuring that military personnel are not disenfranchised . . . ." Romeu, 265 F.3d at 135 n. 7 (Walker, C.J., concurring) (internal citations omitted).

[209] The anti-commandeering principle is best described in the Supreme Court's decision regarding the scope of Congress's powers under the Commerce Clause in New York v. United States: "While Congress has substantial powers to govern the Nation directly, including in areas of intimate concern to the States, the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions." 505 U.S. 144, 162 (1992) (citation omitted).

[210] 42 U.S.C. § 1973ff-1(1) & (2) (2006).

the Proposal. Since the ICCPR is a treaty made under the Treaty Clause of Article II,[211] the Supremacy Clause imposes an obligation on the states to comply with the substantive provisions of the ICCPR. To the extent that the ICCPR is a self-executing treaty, it provides individuals a right of action in federal courts to enforce its provisions.[212] A treaty, however, becomes "supreme Law of the Land" under the Supremacy Clause regardless of its non-self-executing nature.[213] It follows that, regardless of its non-self-executing nature, the ICCPR governs state law with respect to allowing all citizens to participate in U.S. presidential elections. Consequently, Congress may enact legislation as a "necessary and proper" exercise to vindicate the Supremacy Clause and implement the relevant substantive provisions of the ICCPR.[214]

Judge Walker's anti-commandeering criticism is even less forceful in light of the U.S. international legal obligations under the ICCPR. The criticism is less forceful because these international legal obligations render federal compulsion unnecessary.[215] Because the Supremacy Clause of the Constitution makes treaties "the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding," it follows that "State laws directing the manner of appointing presidential electors . . . must therefore be adjusted to comply with the ICCPR."[216] It

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[211] "[The President] shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the Senators present concur." U.S. CONST. art. II, § 2, cl. 2.

[212] A self-executing treaty is "'equivalent to an act of the legislature.'" Medellín v. Texas, 552 U.S. 491, 505 (2008) (citation omitted). The Court in Medellín also confirmed that the self-executing nature of a treaty "is, of course, a matter for [the courts] to decide," and not for the Senate to decide unilaterally through the issuing of RUDs. *Id.* at 519 (citation omitted). In this respect, "[n]either the 2005 majority [in Igartúa III, 417 F.3d at 150] nor the Supreme Court['s dictum] in Sosa [v. Alvarez-Machain, 542 U.S. at 728] performed such an examination of the ICCPR, which necessarily makes them unreliable precedent on its status." Igartúa IV, 626 F.3d 592, 611 (1st Cir. 2010) (Lipez, J., concurring); *see also* Igartúa III, 417 F.3d at 190 (Howard, J., dissenting) ("[A Senate] 'declaration is not part of a treaty in the sense of modifying the legal obligations created by it. A declaration is merely an expression of an interpretation or of a policy or position.'") (quoting Stefan A. Riesenfeld & Frederick M. Abbott, *Foreword: Symposium on Parliamentary Participation in the Making and Operation of Treaties*, 67 CHI.-KENT L. REV. 293, 296 (1991)).

[213] *See* Vázquez, *supra* note 109.

[214] *See* Igartúa IV, 626 F.3d at 608 (Lipez, J., concurring) ("If the Constitution does not prohibit extending the right to vote to citizens who reside outside 'the several States,' an enforceable treaty could provide the governing domestic law on that issue.") (citation omitted); *see also* INTERNATIONAL LAW NORMS, *supra* note 87, at 250-55 (describing the limits to the U.S. Government's power under Article II to make international agreements).

[215] Lawson & Sloane, *supra* note 11 at 1189.

[216] *Id.* (quoting U.S. CONST. art. VI, cl. 2) [citing Louis Henkin, *Provisional Measures, U.S. Treaty Obligations, and the States*, 92 AM. J. INT'L L. 679, 683 (1998) ("It apparently

follows that international law would direct state rules in this area regardless of federal compulsion.

Judge Walker points out that Congress cannot implement the Pro-Rata Proposal pursuant to its authority under the Treaty Clause because this power "cannot be used to alter the structural relationships enshrined in the Constitution, something the . . . Proposal would plainly do."[217] This, however, presumes that the Constitution prohibits Congress from extending any right it enumerates, which, as the previous subsection demonstrates, is a problematic claim in itself.[218] In conclusion, Congress may enact the Pro-Rata Proposal pursuant to its broad powers under the Territorial Clause or as a "necessary and proper" exercise to vindicate the Supremacy Clause and implement the ICCPR provisions. Since the Proposal is similar to other constitutional statutes requiring states to accept voters that do not reside in their jurisdiction, it is plausible to conclude that Judge Leval's Pro-Rata Proposal is a legally feasible political solution to the disenfranchisement problem.

C. The Proposal's Effectiveness: Ensuring Substantive Compliance with International Law

The Pro-Rata Proposal is a formal mechanism that ensures in part substantive compliance with international human rights law. The Proposal, unlike the UOCAVA, would "necessarily be limited to the presidential election."[219] The right to vote and to equal political participation in international human rights law, however, would seem to require territorial citizens to participate in those electoral processes already available to citizens residing in the fifty states.[220] Because the President and Vice-President are privileged constitutional players under U.S. municipal law, the Proposal constitutes a crucial step towards ensuring substantive compliance with these international legal obligations. Similar solutions may exist with respect to the election of House Representatives and Senators.[221]

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needs reminding, even after two hundred years, that treaties of the United States are supreme law of the land, and are binding on the states by express provision in the U.S. Constitution.")].

[217] Romeu v. Cohen, 265 F.3d 118, 136 n. 8 (Walker, C.J., concurring) (citing Reid v. Covert, 354 U.S. 1, 16-17 (1956) (plurality opinion)) (other citations omitted); *but see* the Supreme Court's decision in Missouri v. Holland, which to the extent that it still good law, held that Congress may act beyond its Article I powers to enforce a treaty obligation. 252 U.S. 416 (1920).

[218] *See supra* text accompanying notes 186-204.

[219] Romeu, 265 F.3d at 130 n. 8 (Leval, J., writing separately). The UOCAVA applies to the election of all federal offices. 42 U.S.C. § 1973ff-1.

[220] *See supra* Part III.

[221] Professors Sloane and Lawson propose a legally *feasible* and *formal* mechanism that

In conclusion, Congress could play an important role in enfranchising the U.S. citizens residing in the territories and cure the United States' lack of compliance with its legal obligations under international human rights law. As a result, even though Judge Leval's legally feasible Pro-Rata Proposal is only partly effective with respect to ensuring substantive compliance with international law, this proposal may be coupled with other similar creative solutions to ensure full compliance.

V. CONCLUSION

The disenfranchisement of the U.S. citizens of Puerto Rico is certainly a matter of concern under both U.S. municipal law and international human rights law. These citizens have long been neglected and "are not being afforded a meaningful voice in national governance."[222] This disenfranchisement cannot be further ignored in "a State committed to the rule of law."[223] As Gerald Neuman stated, "[T]he citizens of the states have a stake in how the territories are governed, not only because they are morally responsible for how power is exercised in their name, but also because rights in the territories are ultimately linked to the rights in the states."[224]

Since the ICCPR and customary international law enshrine and protect the right to vote and to equal political participation as a matter of international human rights law, the United States must satisfy its international legal obligations by granting all of its citizens the opportunity to vote for federal offices and to participate in the design and administration of the federal government. Even though territorial citizens have consistently challenged their inequitable political situation for decades, federal courts

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could guarantee *substantive* compliance with Article 25 of the ICCPR with respect to congressional elections:

> Congress could authorize, for example, the local election of a number of persons in the various territories equal to the number of representatives in Congress to which they would be entitled if they were states. It could then allow those elected officials to participate, in a substantive but formally nonbinding fashion, in congressional deliberations and votes. And Congress could then cast and count its formal votes in a fashion that conforms to the outcomes that would have resulted if the votes of the territorial representatives had official weight. Congress could even inscribe these procedures in House and Senate rules, though such rules could be repealed by a majority at any time and therefore would not add value to the mix.

Lawson & Sloane, *supra* note 11, at 1192.

[222] Romeu, 265 F.3d at 136 (Walker, C.J., concurring) (citing T. Alexander Aleinikoff, *Puerto Rico and the Constitution: Conundrums and Prospects*, 11 CONST. COMMENT. 15, 43 (1994)).

[223] Lawson & Sloane, *supra* note 11, at 1125.

[224] Neuman, *supra* note 39, at 200.

continue to shut down their plight for political inclusion and participation by holding that only statehood or a constitutional amendment will grant them the right to vote.[225] It is true that statehood or a constitutional amendment will cure U.S. non-compliance with international human rights law. These, however, are not the only formal mechanisms that guarantee substantive compliance with international law. Because territorial citizens are a "silent minority, [whose] silence is *not by choice but by political exclusion*,"[226] it seems appropriate to conclude that the solution might lie in the political process. As a result, Congress and the Executive must carefully evaluate all available options. The Pro-Rata Proposal is just one of perhaps other legally feasible and effective solutions to the disenfranchisement of territorial citizens. The time has come for Congress to reconsider its role in bringing equality to America's long-forgotten citizens.

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[225] Cottle, *supra* note 5, at 315.

[226] *Id.* at 338 (emphasis added).