

10-1-2004

# Enfranchising a Discrete and Insular Minority: Extending Federal Voting Rights to American Citizens Living in United States Territories

Lisa M. Kömives

Follow this and additional works at: <http://repository.law.miami.edu/umialr>



Part of the [International Law Commons](#)

---

## Recommended Citation

Lisa M. Kömives, *Enfranchising a Discrete and Insular Minority: Extending Federal Voting Rights to American Citizens Living in United States Territories*, 36 U. Miami Inter-Am. L. Rev. 115 (2004)

Available at: <http://repository.law.miami.edu/umialr/vol36/iss1/6>

This Comment is brought to you for free and open access by Institutional Repository. It has been accepted for inclusion in University of Miami Inter-American Law Review by an authorized administrator of Institutional Repository. For more information, please contact [library@law.miami.edu](mailto:library@law.miami.edu).

# Enfranchising a Discrete and Insular Minority: Extending Federal Voting Rights to American Citizens Living in United States Territories

Lisa M. Kömives\*

I. INTRODUCTION: An Anachronistic Interpretation of the Constitution Restricts the Franchise of American Citizens Residing in United States Territories .....	117
A. The Supreme Court and the Territorial Clause: The Supreme Court Grants Congress Expansive Power over the American Territories .....	117
B. Congress and the Territorial Clause: Congress Can Characterize Fundamental Rights Differently for U.S. Citizens Living in the American Territories .....	118
C. The Lower Federal Judiciary and the Territorial Clause: The Current Positions of the Supreme Court and Congress Legally Require the Federal Judiciary to Deny the Citizens in the American Territories Equal Franchise Rights .....	120
II. The Status of Current Law: Territorial Residents Are Unjustly Deprived of Federal Franchise Rights .....	122
III. The Insular Cases: The Territorial Clause and the Legal Fiction of the Unincorporated Territory .....	124
A. Socio-Cultural Influences on the Restriction of Franchise: Manifest Destiny and Social Darwinism .....	124
B. The Changing 'Face' of Territorial Acquisition: The Challenge of a New Type of Territorial Resident .....	125

---

\* Juris Doctor Candidate, May 2005, University of Miami School of Law. This Comment is dedicated to all the disenfranchised American citizens in the United States territories, including my parents, whom I would like to thank for their unfailing love and support and all the sacrifices they have made on my behalf. I also would like to thank Robert Iseman for his invaluable suggestions and editorial support which greatly improved this Comment. Finally, I would like to thank my friends for being themselves, and sharing that with me, which greatly improves everything in my life.

C.	The Supreme Court and Congressional Power: The Legal Building Blocks of the United States Colonial Empire .....	128
1.	The Supreme Court's Creation: The Legal Construction of the Doctrine of Unincorporation .....	129
2.	Congress Controls Political Status: Congress's Shifting Conceptualization of the Political Status of the U. S. Territories .....	130
3.	Congress Control of Civil Rights: American Citizens Residing in the Territories Possess Different Fundamental Rights Than Those of Other Americans.....	131
IV.	Voting in National Elections has Become a Fundamental Right of American Citizenship .....	133
A.	Congress Expands Franchise .....	133
1.	Constitutional Amendments .....	133
2.	Legislation.....	133
B.	The Supreme Court: Contemporary Jurisprudence Defines Franchise as a Fundamental Right of Citizenship .....	134
C.	Given Contemporary Conceptions of Voting Rights the Antiquated Holdings of the Insular Cases Fail to Justify the Disenfranchisement of Territorial Residents.....	135
V.	CONCLUSION: The Judiciary Must Step in and Help Enfranchise a Discrete and Insular Minority That is Utterly Unprotected by the Political Process .....	136

The idea that this country may acquire territories anywhere upon the earth, by conquest or treaty, and hold them as mere colonies or provinces, – the people inhabiting them to enjoy only such rights as Congress chooses to accord to them, – is wholly inconsistent with the spirit and genius, as well as with the words, of the Constitution.<sup>1</sup>

# I. INTRODUCTION: AN ANACHRONISTIC INTERPRETATION OF THE CONSTITUTION RESTRICTS THE FRANCHISE OF AMERICAN CITIZENS RESIDING IN UNITED STATES TERRITORIES

The Constitution of the United States of America structures the government and endows United States citizens with certain inalienable rights, both express<sup>2</sup> and implied.<sup>3</sup> The Supreme Court's current interpretation of the Constitution with respect to the United States territories, however, contravenes that spirit of representative democracy which the Constitution itself embodies. In a line of decisions known as the Insular Cases,<sup>4</sup> interpreting the Constitution's Territorial Clause,<sup>5</sup> the judiciary effectively created a sub-class of American citizenship.

## A. *The Supreme Court and the Territorial Clause: The Supreme Court Grants Congress Expansive Power Over the American Territories*

The current Supreme Court's adherence to the anachronistic,

---

1. *Downes v. Bidwell*, 182 U.S. 244, 380 (1901) (Harlan J. dissenting).

2. Express rights are specifically granted in the Constitution (e.g., the Eighth Amendment guarantees the right not to be subjected to cruel and unusual punishment). U.S. CONST. amend. VIII, cl. 2.

3. The Supreme Court has also found implied rights in the Constitution based on the structure and foundation of our government (e.g., the fundamental right to privacy under substantive due process). See *Griswold v. Connecticut*, 381 U.S. 479 (1965). See also *Reynolds v. Sims*, 377 U.S. 533 (1963) (the fundamental right to vote under Equal Protection Clause of the Fourteenth Amendment). Interference from the federal government and Congress with rights of citizens, as deemed fundamental under the Equal Protection Clause, can also be contested through the Due Process Clause of the Fifth Amendment. See U.S. CONST. amend. V, cl. 4.; see also *Bolling v. Sharpe*, 347 U.S. 497 (1954).

4. A series of cases decided by the Supreme Court between 1901 and 1922 interpreting Congress's power under the Territorial Clause. See *Downes v. Bidwell*, 182 U.S. 244 (1901); see also *Dorr v. U.S.*, 195 U.S. 138 (1904); *Balzac v. Porto Rico*, 258 U.S. 298 (1922).

5. The Territorial Clause states, "The United States 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.

racist, and imperialist<sup>6</sup> rhetoric espoused in the century old Insular Cases enables Congress and the lower federal courts to deny United States citizens residing in American territories<sup>7</sup> the right to vote in national elections. Further, continued adherence to this outdated interpretation of the Territorial Clause is at odds with current constitutional jurisprudence on federal franchise. The Supreme Court currently deems franchise a fundamental right of American citizenship.<sup>8</sup>

Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.<sup>9</sup>

The effect of the Insular Cases, viewed in conjunction with modern Supreme Court jurisprudence concerning franchise, creates a legal conflict. The continued adherence to the Insular Cases, when voting is deemed a fundamental right, creates a tortured and unjust legal formulation: voting in federal elections is a crucial, fundamental right of American citizenship *except* when the citizen happens to live in a United States territory.

*B. Congress and the Territorial Clause: Congress Can Characterize Fundamental Rights Differently for U.S. Citizens Living in the American Territories*

The Court's interpretation of the Territorial Clause in the Insular Cases remains unmodified; Congress has full plenary power over the territories subject only to an outdated concept of

---

6. "The Insular Cases should be placed not only in the context of American expansionism [imperialism], but also within the sadly rich history of American racism . . . ." Sanford Levinson, *Why the Canon Should be Expanded to Include the Insular Cases and the Saga of American Expansionism*, 17 CONST. COMMENT 241, 257 (2000).

7. In this Comment, the author uses the term "territories" to refer to the five island communities governed by the United States, despite that only three of the five are actually designated territories. The political position of all these communities is the same in reference to the legal issues raised in this Comment, regardless of the territorial or commonwealth designation. For precision, these communities are the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, the Territory of the U.S. Virgin Islands, the Territory of Guam, and the Territory of American Samoa.

8. See *Reynolds v. Sims*, 377 U.S. 533 (1963); see also *Oregon v. Mitchell*, 400 U.S. 112 (1970).

9. *Reynolds*, 377 U.S. at 561-62.

fundamental rights. Over one hundred years ago, in *Downes v. Bidwell*,<sup>10</sup> Justice Brown set forth the rights that the Court would protect despite Congress expansive power under the Territorial Clause.<sup>11</sup> The 'fundamental' rights of territorial residents included:

[T]he rights to one's own religious opinion and to a public expression of them [sic], or, as sometimes said, to worship God according to the dictates of your own conscience; the right to personal liberty and individual property; to freedom of speech and the press; to free access to the courts of justice, to due process of law and to equal protection of the laws; to immunities from unreasonable searches and seizures, as well as cruel and unusual punishment; and to such other immunities as are indispensable to a free government.<sup>12</sup>

Justice Brown continued, however, by declaring that the right of "suffrage and . . . the particular methods of procedure pointed out in the Constitution, which are peculiar to Anglo-Saxon jurisprudence . . ." were excluded from the fundamental rights owing to the citizens in the American territories.<sup>13</sup> Thus the Supreme Court's construction of fundamental rights in the Insular Cases omitted franchise rights.<sup>14</sup> Therefore, because the Court did not deem these rights fundamental with respect to the territories, Congress was not obligated to, and has not, extended franchise.

---

10. *Downes v. Bidwell*, 182 U.S. 244, 282-3 (1901).

11. These rights were also discussed by the Court in *Downes* under the headings of 'natural' and 'personal' rights.

12. *Downes*, 182 U.S. at 282-3.

13. *Id.* Trial by jury was the main procedural right litigated in the Insular Cases, and the Supreme Court consistently held that territorial residents did not enjoy the right without Congress' express grant. See *Dorr v. U.S.*, 195 U.S. 138 (1904) (holding the right to trial by jury did not exist in the Philippines); see also *Balzac v. Porto Rico*, 258 U.S. 298 (1922) (holding the right to trial by jury did not exist in Puerto Rico). It is worth noting that the right to trial by jury has subsequently been granted to territorial residents.

14. This characterization occurred despite another Constitutional guarantee that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." U.S. CONST. amend XIV, § 1 cl. 1 (emphasis added).

C. *The Lower Federal Judiciary and the Territorial Clause: The Current Positions of the Supreme Court and Congress Legally Require the Federal Judiciary to Deny the Citizens in the American Territories Equal Franchise Rights*

Because the Supreme Court is the ultimate arbiter of the Constitution, the lower federal court decisions are controlled by the Supreme Court's interpretation of the Territorial Clause in the Insular Cases.<sup>15</sup> Thus, federal district courts can dismiss the disenfranchisement claims of territorial residents, because the Supreme Court has not held that the right to vote is fundamental for American citizens residing in the territories, nor has it been extended by Congress.

In fact, lower federal courts have denied the franchise to territorial residents,<sup>16</sup> anchoring their decisions in Article II, § 1, cl. 2 of the Constitution, which establishes the Electoral College<sup>17</sup> and gives states the right to appoint electors in Presidential elections.<sup>18</sup> Since these residents do not have a fundamental right to vote, according to the Supreme Court and Congress, it follows that they lack the right to name Presidential electors.<sup>19</sup> As such, where no right exists, there is no remedy.

The Supreme Court, however, ostensibly repudiated this resultant type of second-class citizenship when the doctrine of

---

15. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) (holding the Supreme Court is the ultimate arbiter of the Constitution, the Supreme law of the land, and as such, its precedent controls lower court decisions, and also holding that courts have the power of judicial review to determine the constitutionality of the actions of the other branches of government). To orient the Insular Cases in the history of constitutional jurisprudence, it is of note that these cases were decided by the same Supreme Court which crafted the doctrine of 'separate but equal' in *Plessey v. Ferguson*, 163 U.S. 537 (1896).

16. See *Igartua de la Rosa v. United States*, 32 F.3d 8 (1st Cir. 1994), *cert. denied* 514 U.S. 1049 (1995); see also *Guam v. United States*, 744 F.2d 699 (9th Cir. 1984).

17. The Electoral College section states, "Each state shall appoint, in such a manner as the Legislature thereof may direct, a number of electors . . ." U.S. Const. Art. II, § 1, cl. 2.

18. Note that the language does not say *only* states shall appoint electors. The District of Columbia is not a state and it has presidential electors.

19. In *Bush v. Gore*, 531 U.S. 98 (2000), the Supreme Court held that the Constitution does not guarantee each individual citizen the right to have their vote counted. Instead, the Court's holding rested on the assumption that each states' electors will represent the aggregate of the individual voters' interests. So, even if a citizen does not have the right to have his individual vote counted, the American citizens residing in United States territories would have the right to have appointed electors represent their interests in presidential elections if the right to vote was deemed fundamental by the Supreme Court.

'separate but equal'<sup>20</sup> was eradicated in 1954.<sup>21</sup> Thus, it is unthinkable that territorial residents continue to be disenfranchised, an apparent vestige of the United States' era of colonial expansion.<sup>22</sup> Irrefutably, Congress would never act in a similar fashion to abridge the right to vote of non-territorial citizens.<sup>23</sup>

This Comment examines generally the injustice of the current voting status of territorial residents. Second, this Comment discusses the historical and socio-cultural background of the racist and imperialist rhetoric expressed in the Insular Cases. Third, the Comment analyzes the impact of the Insular decisions on Congress's ability to deny territorial residents fundamental rights of national citizenship. Fourth, in both rationale and effect, this Comment explores the 'Insular' jurisprudence as hopelessly outdated Constitutional law under the contemporary judicial and congressional trend of expanding voting power. This analysis demonstrates that the current policy of the United States regarding voter enfranchisement is in direct opposition to the existing interpretation of the Territorial Clause, set forth in the Insular Cases, whereby territorial residents are denied national electoral rights. Finally, in conclusion, this Comment will argue that, for want of political power, territorial residents constitute a discrete and insular minority subject to heightened judicial protection.<sup>24</sup>

---

20. See generally *Plessey v. Ferguson*, 163 U.S. 537 (1896).

21. See generally *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

22. 24 Ediberto Roman, *Empire Forgotten: The U.S.' Colonization of Puerto Rico*, 42 VILL. L. REV. 1119, 1119-21 (1997).

23. This is assuming the citizens were non-felons over the age of eighteen. See generally U.S. CONST. amend. XIV, § 2 & U.S. CONST. amend. XXVI, § 1; *Dunn v. Blumstein*, 405 U.S. 330 (1972) (explaining that the right to vote in national elections is considered a fundamental right in modern Supreme Court jurisprudence, and that as such, abridgement of that right triggers the Court's strict scrutiny standard, meaning any restriction will only be sanctioned if it is narrowly tailored to serve a compelling government interest).

24. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938). In *Carolene Products*, Justice Jackson, discussing when the judiciary should review government action more stringently, as opposed to the minimum rationality review approved of on the facts of that case, stated, "prejudice against discrete and insular minorities may be a special condition which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and . . . may call for a correspondingly more searching judicial inquiry." *Id.*



## II. THE STATUS OF CURRENT LAW: TERRITORIAL RESIDENTS ARE UNJUSTLY DEPRIVED OF FEDERAL FRANCHISE RIGHTS

Current law makes it impossible for the 4.3 million Americans<sup>25</sup> who reside in the territories and commonwealths of the United States to affect laws passed by the federal government through political representation, despite the fact that these residents are subject to all applicable federal laws.<sup>26</sup> Perhaps the most poignant example, because it involves potential death, is that these citizens must register with the Selective Service and subject themselves to United States military service.<sup>27</sup> Citizens residing in the American territories have served with distinction in every United States armed conflict since 1917, and are currently serving in the war against terror in Afghanistan and Iraq.<sup>28</sup> These citizens, however, can neither vote for the Commander-in-Chief of the military, the President, who controls United States combat, nor do they have voting representation in Congress, the official body which declares war.<sup>29</sup>

---

25. The 4.3 million total is based on United States Census estimates of the populations for the five U.S. territories and commonwealths in mid 2004. U.S. Census Bureau, International Data Base Access, Display Mode-Total Mid Year Population at <http://www.census.gov/ipc/www/idbprint.html> (last visited September 7, 2004). *Id.* at 338.

26. "The U.S. citizens residing in Puerto Rico to this day continue to have no real say in the choice of those who, from afar, really govern them, nor as to the enactment, application and administration of the myriad of federal laws and regulations that control almost every aspect of their daily affairs." *Igartua de la Rosa v. United States*, 229 F.3d 80, 88 (1st Cir. 2000) (Torruella, J., concurring).

27. *United States v. Valentine*, 288 F. Supp. 957, 979 (D.P.R. 1968) (holding that the Selective Service Act is applicable to U.S. citizens who reside in the territories). For example, over 43,000 Puerto Ricans served in the Korean War. Almost 40,000 were volunteers and close to 3,540 lost their lives. This was the second highest rate of death per capita of any jurisdiction in the United States. See *Igartua de la Rosa*, 229 F.3d at 89 n.19.

28. Amber Cottle noted how the military service of the residents of the District of Columbia played a large part in the passage of the Twenty-Third Amendment giving them the right to vote for president. "The House Committee on the Judiciary, reporting on the proposed amendment, examined the relationship between the U.S. and the District of Columbia in deciding whether it should pass such an amendment . . . Furthermore, the committee noted that District of Columbia residents fought and died in every U.S. war since the District was founded. Thus the committee concluded that it was a 'constitutional anomaly' to impose 'all the obligations of citizenship without the most fundamental of its privileges.'" (internal citations omitted). Amber M. Cottle, Comment, *Silent Citizens: U.S. Territorial Residents and the Right to Vote in Presidential Elections*, U. CHI. LEGAL F. 315, 325-26 (1995).

29. See generally U.S. CONST. art. I, § 8, cl. 11 & art. II, § 2, cl. 1.

Territorial citizens only have non-voting members in the House of Representatives. Since each representative has no vote s/he cannot effectively

This disenfranchisement not only applies to American citizens born and residing in the American territories, but also to American citizens who reside in one of the fifty states and move to a United States territory. In the latter case, the new territorial resident is stripped of the right to vote in Presidential or Congressional elections.<sup>30</sup> This second-class form of citizenship is based solely on the arbitrary criterion of locale,<sup>31</sup> for even American citizens residing abroad have the right to vote in federal elections under the Uniformed and Overseas Citizens Absentee Voting Act.<sup>32</sup> Although the American territories are part of the physical geography of the United States, the citizens residing therein are unconstitutionally disenfranchised.<sup>33</sup>

---

represent the territories' people. "They [the territorial residents] can only vote for congressional representatives who have no substantive power. The representatives are merely weak advocates for the needs of their people rather than functioning legislators for the nation. In the final analysis, they cannot block or promote legislation effectively because they cannot form meaningful coalitions and they have no vote to trade." *Id.* at 338.

30. See *Igartua de la Rosa v. United States*, 32 F.3d 8, 9 (1st Cir. 1994), *cert. denied* 514 U.S. 1049 (1995) (holding the plaintiffs' [citizens who previously resided in the fifty states and moved to Puerto Rico] contention that the Uniformed and Overseas Citizens Absentee Voting Act [which allowed citizens who moved abroad to vote by absentee ballot] violated their rights to equal protection under the law was invalid because the plaintiffs still had the right to vote in federal elections for a *non-voting representative* in Congress) (emphasis added). *Cf.* Cottle, *supra* note 27.

31. "Thus *Balzac* solidified the truly amazing concept that the bundle of rights of citizenship grows and diminishes as the citizen travels from one location to another within the physical geography of the U.S. of America!" *Ballentine v. United States*, No. 1999-130, 2001 U.S. Dist. LEXIS 16856, at 22 (D.V.I. Oct. 15, 2001) (supplemental briefing ordered) (discussing the effect of the Supreme Court's conclusion in *Balzac v. Porto Rico*, 258 U.S. 298, 309 (1922), further Judge Moore incredulously stated that as the law exists it appears that, "it is the locality that is determinative of the application of the Constitution . . . and not the [citizenship] status of the people who live in it.").

32. 42 U.S.C. § 1973ff (2004). The Uniformed and Overseas Citizens Absentee Voting Act allows American citizens who move abroad to vote by absentee ballot in their previous state of residence.

33. For example, a passport is not needed to enter or exit American territories from the United States. The American territories are also considered part of America for legal purposes given the applicability of other federal laws. So, it is effectively only in the realm of federal politics that the territories are not considered part of the United States.

III. THE INSULAR CASES: THE TERRITORIAL CLAUSE  
AND THE LEGAL FICTION OF THE  
UNINCORPORATED TERRITORY

A. *Socio-Cultural Influences on the Restriction of  
Franchise: Manifest Destiny and Social Darwinism*

The era of American imperialism, which culminated in the acquisition of the United States' island territories, grew out of the historical concepts of Manifest Destiny and Social Darwinism.<sup>34</sup> The ethos of Manifest Destiny, extant at this point in American history, stemmed from a sense of entitlement, or the notion of an inherent right of the American people to expand. This notion of privilege was reified by the previous century's territorial expansion westward and throughout North America.<sup>35</sup> The concepts of "right, duty and mission" were emblematic of the Anglo-Saxon Manifest Destiny ideology and its desire to civilize the world.<sup>36</sup>

Social Darwinism also proved an instrumental intellectual force for the legitimization of the United States' colonial endeavors.<sup>37</sup> Charles Darwin's "survival of the fittest" concept was transposed from the world of nature to the world of the social and political, thereby fomenting the underlying ideology that only the fittest nations will survive in the global struggle for power.<sup>38</sup> In *The Descent of Man*, Darwin himself said of American citizens: "there is apparently much truth in the belief that the wonderful progress of the United States, as well as the character of the people, [is] the result of natural selection."<sup>39</sup> The Social Darwinists in America framed the United States' colonial endeavors as necessary against the background of other imperial powers, describing these colonial maneuvers as a preventive measure to avoid falling behind other nations and exposing the country to the risk of political extinction.<sup>40</sup>

The United States acquired its various island territories for three distinct and non-mutually exclusive reasons: military

---

34. Efren Rivera Ramos, *The Legal Construction of American Colonialism: The Insular Cases (1901-1922)*, 65 REV. JUR. U.P.R. 225, 285 (1996).

35. *Id.*

36. *Id.* at 287.

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.* at 287. There was an intense competition for expansion in the world at the time. A "new imperialism" was also influencing Britain, France, Germany, Russia, and Japan to expand. *Id.* at 314.

security, an expanded market for the products of American industry, and a desire for national aggrandizement deriving from the nation's status as an imperial power.<sup>41</sup> Each of these reasons for acquiring territory offered favorable benefits to the United States, and although robust debate ensued regarding the desirability of colonization<sup>42</sup> and the constitutionality of such an action,<sup>43</sup> the United States eschewed principles of representative democracy, instead creating several colonial regimes which exist today.<sup>44</sup>

*B. The Changing 'Face' of Territorial Acquisition:  
The Challenge of a New Type of Territorial  
Resident*

Shortly after the United States acquired Puerto Rico and the Philippines in the wake of the Spanish-American War,<sup>45</sup> questions arose regarding the legal status of these new territories and their residents. Unlike prior Anglo-Saxon expansion westward, these islands were settled by both non-Americans and non-whites.<sup>46</sup> This reality posed a new legal problem for the United States, for despite the benefits of territorial acquisition, new questions arose about controlling the territories and their non-Anglo-Saxon populations.<sup>47</sup>

Prior to the United States' acquisition of island territories fol-

41. "In any event, military considerations can be considered the main determinant in the decision to acquire specific territories and, eventually, in the [systematic] establishment of direct colonial control, as opposed to informal, or indirect, economic or political hegemony." *Id.* at 313 & 316.

42. "The acquisition of overseas territories as a result of the Spanish-American War and other events opened up an intense debate regarding the future of the new possessions. The polemic took place in Congress, academic journals, the press, and other public forums." *Id.* at 237.

43. Strains of the both the imperialist and anti-imperialist movements, and legal scholars, were among those who joined the debate over the constitutionality of the American colonial enterprise. *Id.* at 238-9.

44. The Supreme Court gave the following description of representative democracy in *Gray v. Sanders*, 372 U.S. 368, 381 (1963), stating, "The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing - one person, one vote."

45. Treaty of Paris, Dec. 10, 1898, U.S.-Spain, T.S. no. 343.

46. Ediberto Roman and Theron Simmons, *Membership Denied: Subordination and Subrogation Under U.S. Expansionism*, 39 SAN DIEGO L. REV. 437, 446 (2002).

47. Roman and Simmons recognized this racial and cultural tension as giving rise to the doctrine of the unincorporated territory. "Interestingly, this approach [the doctrine of the unincorporated territory] which sought to limit the applicability of the Constitution to the territories, arose after this country acquired distant lands that were densely populated by people of color who spoke different languages . . . ." *Id.* at 458.

lowing the Spanish American War, United States territorial expansion was geared toward eventual statehood and incorporating each territory's residents as full-fledged American citizens. The Northwest Ordinance of 1787<sup>48</sup> was passed by Congress to address the political and social needs of the Northwest Territory, and became the archetype for this early expansion: eventual statehood and full incorporation into the body politic of the United States.<sup>49</sup> For example, Article III of the Treaty of 1803, which made Louisiana part of the United States stated, "the inhabitants of the ceded territory shall be incorporated in the Union . . . and admitted as soon as possible . . . to the enjoyment of all rights, advantages and immunities of the citizens of the United States . . . ."<sup>50</sup> The treaties used in the annexation of Florida, New Mexico, Utah, and California each had similar provisions.<sup>51</sup>

But, the new colonial territories presented a unique dilemma. Writing for the majority in *Downes v. Bidwell*,<sup>52</sup> a leading Insular Case,<sup>53</sup> Justice Brown succinctly summed up the Supreme Court's concerns:

It is obvious that in 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, which may require action on the part of Congress that would be quitted unnecessary in the annexation of contiguous territory inhabited only by people of the same race, or by scattered bodies of native Indians.<sup>54</sup>

If the Supreme Court held that the Constitution followed the flag and applied its inherent powers, the United States would be forced to grant the territorial peoples full constitutional rights. That interpretation would have provided the "alien races, differing from [Americans] in religion, customs, laws, methods of taxation and modes of thought . . . [the] rights which peculiarly belong to the citizens of the United States."<sup>55</sup> According to Justice White

---

48. *Id.* at 451.

49. *Id.* at 452. "The eventual statehood and full incorporation archetype envisioned that territories would become states after a period of tutelage, when enough free males would have settled in the territory." *Id.*

50. Rubin Francis Weston, *Racism in U.S. Imperialism: The Influence of Racial Assumptions on American Foreign Policy, 1895-1946* 188-89 (1972).

51. *Id.* at 189.

52. 182 U.S. 244 (1901).

53. See generally, Levinson, *supra* note 6.

54. *Downes*, 182 U.S. at 282.

55. *Id.* at 287 & at 324 (White, J., concurring).

in *Downes*, granting full constitutional rights to the territorial inhabitants could overthrow "the whole structure of government."<sup>56</sup>

The jingoism and xenophobia that gave rise to the perceived socio-cultural need for this doctrine were plainly stated by Justice Brown writing for the plurality in *Downes*:

We are also of the opinion that the power to acquire territories by treaty implies not only the power to govern such territory, but to prescribe upon what terms the United States will receive its inhabitants, and what their status shall be in what Chief Justice Marshall termed the 'American Empire.' There seems to be no middle ground between this position and the doctrine that if these inhabitants do not become, immediately upon annexation, citizens of the United States, their children thereafter born, *whether savages or civilized, are such, and entitled to all the rights, privileges and immunities of citizens.* If such be their status, the consequences will be extremely serious.<sup>57</sup>

Further, he plainly stated the legal conundrum concerning territorial expansion and voting rights, "Indeed it would be doubtful if Congress would ever assent to the annexation of territory upon the conditions that its inhabitants, however foreign they may be to our habits, traditions and modes of life shall become at once citizens of the United States."<sup>58</sup> Therefore, to prevent these perceived horrors, the earlier model of territorial expansion proposing full incorporation and eventual statehood was abandoned.<sup>59</sup> Congress subsequently utilized this judicial interpretation of the Territorial Clause to enact legislation which effectively maximized the benefits and minimized the risks of colonial expansion.

This newly formulated presumption that Congress, and not the Constitution, served as the arbiter of territorial residents' rights stemmed from racist and culturally imperialist assumptions about the people residing in the new territories.<sup>60</sup> These suppositions were the result of a rather shameful socio-cultural moment in the history of the United States which weighed against

56. *Id.* at 313.

57. *Id.* at 279 (emphasis added).

58. *Id.* at 279-80.

59. Roman and Simmons, *supra* note 46 at 452-53.

60. "The obvious racism of the Court's expressions cannot be separated from others reflecting an adherence by some members of the Court to the tenets of the ideologies of Manifest Destiny and Social Darwinism, which were part of the ideological framework of the dominant circles in the U.S. at the time." Ramos, *supra* note 34, at 290.

a judicial determination that the Constitution applied to the territories by its own force. In short, the theories are now vastly outdated at best, and morally reprehensible at worst.<sup>61</sup> Therefore, the Insular Cases do not form a current and justifiable basis for continuing to deprive American citizens of their fundamental rights. The enduring use of these cases to form the basis of that denial when they are so out of step with current intellectual, cultural, ideological, and even juridical paradigms is, as such, morally reprehensible.<sup>62</sup>

*C. The Supreme Court and Congressional Power: The  
Legal Building Blocks of the United States  
Colonial Empire*

The legal questions answered by the Supreme Court in the Insular Cases fall roughly into two groups: First, those cases concerned with the political relationship of the territories to the United States and ask, "What is the legal status of these territories?"<sup>63</sup> and second, the cases that are concerned with civil rights of the inhabitants and ask, "Do the rights guaranteed by the United States Constitution extend to the people in the newly

---

61. The author is personally offended, as an American and a resident of the Territory of the U.S. Virgin Islands, by the fact that this racist, imperialistic, colonial rationale is still being used in 2005 to explain why American citizens are deprived of fundamental Constitutional rights.

62. It is worth noting that most territorial residents have become citizens since Justice Brown first opined on the extreme seriousness of the consequences of that status. Further under the current citizenship status even Justice Brown's analysis would concede that because these territorial residents are citizens they should have the rights deemed fundamental for citizens, which currently includes the right to vote. Yet still, the 'savage' and 'alien races' residing in the American territories, fighting in the U.S. military, traveling under U.S. passports, speaking American English, using the American dollar, taking mandatory high school classes on American civics and government, using the United States Postal Service, reading American newspapers and magazines, consuming all varieties of American products, do not have all the rights, privileges and immunities of citizens.

In his own way, Justice Brown was more progressive than current members of the judiciary and Congress. As egregious as his sentiments were regarding the territorial inhabitants, Brown at least acknowledged that if territorial peoples became American citizens they would be "entitled to the rights, privileges and immunities of citizens." *Downes*, 182 U.S. at 279. This position is not clearly embraced by members of Congress, state legislatures, and the judiciary who, by their inaction, demonstrate a belief that second-class citizenship has a justifiable place in America today.

63. See, e.g., *DeLima v. Bidwell*, 182 U.S. 1 (1901); see also *Goetze v. United States* 182 U.S. 221 (1901); *Dooley v. United States*, 182 U.S. 222 (1901).

acquired territories?"<sup>64</sup> Perhaps, and most importantly, the over-arching question with respect to both political status and civil rights presented in the Insular Cases is: "How much power does Congress have over the territories to determine the extent of the rights?"<sup>65</sup>

# 1. The Supreme Court's Creation: The Legal Construction of the Doctrine of Unincorporation

The judicially created doctrine of unincorporation<sup>66</sup> grew out of the Supreme Court's analysis of the Territorial Clause of the Constitution. The clause states: "The United States 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."<sup>67</sup> The Court reasoned the Territorial Clause gave Congress virtually unlimited power to govern the territories, because it states that Congress has the power to, "make all needful rules and regulations."<sup>68</sup>

However, the majority of the Court extended this reasoning further, holding that the remaining protections of the Constitution did not necessarily apply to the making of those needful rules and regulations.<sup>69</sup> The Court's jurisprudence established that Congress wielded this power over territorial inhabitants' civil rights by its ability to designate a territory as incorporated, or unincorporated. To deem a territory incorporated would extend the full measure of constitutional rights. To designate a territory unincorporated, would allow Congress to curtail the extent of its rights. Thereby, Congress was given the power to decide which parts of the Constitution were applicable, subject only to the Court's designation of certain rights as fundamental.<sup>70</sup>

---

64. See, e.g., *Downes v. Bidwell*, 182 U.S. 244 (1901); see also *Dorr v. United States*, 195 U.S. 138, (1904); *Balzac v. Porto Rico*, 258 U.S. 298 (1922).

65. See, e.g., *Downes v. Bidwell*, 182 U.S. 244 (1901).

66. This doctrine was first articulated by Justice White in his concurrence in *Downes v. Bidwell*, 182 U.S. 244, 272-3 (1901) (White, J. concurring). The doctrine of the 'unincorporated' territory was adopted by the majority of the court in *Dorr v. United States*, 195 U.S. 138 (1904). Note that the words unincorporated territory do not appear anywhere in the Constitution; this concept is a legal fiction created by the Supreme Court.

67. U.S. CONST. art. IV, § 3, cl. 2.

68. *Id.*

69. See generally, *Downes v. Bidwell*, 182 U.S. 244, 272-3 (1901) (White, J. concurring).

70. See *supra* Section I(B) (listing the rights deemed fundamental for territorial residents in the Insular Cases).



## 2. Congress Controls Political Status: Congress's Shifting Conceptualization of the Political Status of the U. S. Territories

The first Insular Case, *DeLima v. Bidwell*,<sup>71</sup> established the islands' new status under federal tariff laws. The territories' new classifications were important because a change in status from a foreign country to membership in the United States would result in differential treatment under federal customs taxes and the duties on imported goods. In *DeLima* the Court held that after Puerto Rico was ceded by Spain,<sup>72</sup> it was no longer a foreign country, but instead a domestic territory of the United States.<sup>73</sup> Therefore, the tax which was levied on imports from Puerto Rico was invalid; because Puerto Rico was classified as a domestic territory and, under federal law, taxes are prohibited on exports from one part of the United States to another.<sup>74</sup>

*Downes v. Bidwell*,<sup>75</sup> arguably the most well-known and important of the Insular Cases, also involved customs duties collected on imports from Puerto Rico. There was, however, a crucial difference between the cases, because the *Downes* opinion was rendered following Congress's enactment of the Foraker Act.<sup>76</sup> Since a similar tax was invalidated by the Supreme Court in *DeLima*, and because Puerto Rico had been deemed a domestic territory, the constitutionality of the tax levying portion of the Foraker Act became the focal point of *Downes*. The basic question was whether Congress had the constitutional authority to levy a tax on imports from Puerto Rico. The Supreme Court answered in the affirmative, holding that Congress did have valid authority to tax.

Why, in seeming opposition to the holding in *DeLima*, was the tax found to be constitutional? *DeLima* held Puerto Rico was a domestic territory under the application of the Uniformity Clause, which states: "The Congress shall have the power to lay and collect taxes, duties, imposts and excises, to pay the debts and pro-

---

71. *DeLima v. Bidwell*, 182 U.S. 1 (1901) (determining Puerto Rico's status under the tariff laws).

72. Treaty of Paris, Dec. 10, 1898, U.S.-Spain, art. II, T.S. No. 343 ("Spain cedes the island of Porto Rico [sic] and other islands now under Spanish sovereignty in the West Indies.").

73. See *DeLima*, 182 U.S. at 199-200.

74. See U.S. CONST. art. I, § 8, cl. 1 (Uniformity Clause).

75. *Downes*, 182 U.S. 244 (1901).

76. Foraker Act, 48 U.S.C. §§ 733, 736, 738-40, 744 (1994) (original version at ch. 191, 31 Stat. 77 (1900)).

vide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States."<sup>77</sup> The Court held the Uniformity Clause was not a bar to the import tax on goods imported from Puerto Rico in *Downes* because Puerto Rico was, "a territory appurtenant and belonging to the states, but not a part of the United States within the meaning of the revenue clauses of the Constitution."<sup>78</sup> Therefore, Congress could levy taxes on imports from Puerto Rico even though it was not a foreign country under federal tariff laws.

Taken together, *DeLima* and *Downes* represent the notion that pursuant to plenary power under the Territorial Clause, Congress could define the area as it pleased and keep Puerto Rico unincorporated. Puerto Rico could be a domestic territory while simultaneously "not part of the United States within the meaning of the revenue clauses of the Constitution" if Congress so chose.<sup>79</sup> Thus, the legal construction of the unincorporated territory enabled Congress to categorize its unincorporated island acquisitions in different ways and provided Congress a functional means to achieve its desired ends.<sup>80</sup>

### 3. Congressional Control of Civil Rights: American Citizens Residing in the Territories Possess Different Fundamental Rights Than Those of Other Americans

In the Insular Cases, the Supreme Court held that certain fundamental rights applied to territorial citizens without a special grant by Congress, including: the freedom of religion, freedom of speech and the press, access to courts, right to liberty of person, due process of the law, equal protection of the law, freedom from unreasonable searches and seizures, and freedom from cruel and unusual punishment. Congress has no power to abridge these rights.<sup>81</sup> But the right of franchise and certain judicial procedural protections were not available save for Congress's discretion.<sup>82</sup>

---

77. U.S. CONST. art. I, § 8, cl. 1.

78. *Downes*, 182 U.S. at 287.

79. *Id.*

80. One example is taxing imports from Puerto Rico to a state, even though the Uniformity Clause would ban this tax on goods imported from another state in the Union. See U.S. CONST. art. I, § 8, cl. 1.

81. *Downes*, 182 U.S. at 282-3.

82. *Id.* See *supra* Section III(A) (explaining the racist and imperialist vision which required franchise to be at Congress' discretion due to a fear of savage and alien people overthrowing the very structure of government if they were enfranchised).

Thus, Congress was granted the power to restrict or extend citizens' rights if the citizens resided in a United States Territory. If Congress did extend the full panoply of rights to territorial citizens, the Supreme Court indicated that such action would constitute incorporation.<sup>83</sup> Since Congress held that power, it became constitutionally permissible to deny territorial residents these rights by leaving the territory unincorporated.

In *Dorr v. United States*, the majority of the Court adopted the doctrine of unincorporation. In holding the right to jury trial did not extend to Filipinos, the Court stated:

[T]he power to govern territory, implied in the right to acquire it, and given to Congress in the Constitution in Article IV, § 3, to whatever other limitations it may be subject, the extent which must be decided as questions arise, does not require that body [Congress] to enact for ceded territory, not made part of the United States by Congressional action [incorporation], a system of laws which shall include the right of trial by jury, and that the Constitution does not, without legislation and of its own force, carry such right to territory so situated.<sup>84</sup>

The Territorial Clause was interpreted to grant an extensive amount of power to Congress, including a grant of almost full plenary power over the territories and their people. This expansive delegation was achieved through the legal fiction of the unincorporated territory, thereby enabling Congress to constitutionally deny citizens rights deemed non-fundamental by the Court.<sup>85</sup> Thus, the Court achieved its desired result - the denial of franchise to territorial residents by interpreting the Territorial Clause as a Congressional carte blanche to keep a territory unincorporated. This broad interpretation of Congress's power under the Territorial Clause produced the existing legal framework providing for a form of second-class of territorial citizenship. As such, territorial citizens face an overwhelming obstacle because they have no power to vote and influence Congressional legislation.

---

83. *Rasmussen v. U.S.*, 197 U.S. 516 (1905) (holding Congress had the power to declare Alaska an incorporated territory).

84. *Dorr*, 195 U.S. at 149 (1904).

85. Notice that if the Court had declared the right to vote fundamental, Congress would be required to afford that right to territorial residents as well, notwithstanding the Territorial Clause.

#### IV. VOTING IN NATIONAL ELECTIONS HAS BECOME A FUNDAMENTAL RIGHT OF AMERICAN CITIZENSHIP

##### A. *Congress Expands the Franchise*

##### 1. Constitutional Amendments

Since 1870, Congress has, by Constitutional Amendment, extended the franchise to virtually every citizen over eighteen in the United States. Four of the sixteen amendments passed since the Bill of Rights extended franchise to groups previously denied participation in the political process. The Fifteenth Amendment enfranchised former slaves,<sup>86</sup> the Nineteenth Amendment enfranchised women,<sup>87</sup> the Twenty-Third, residents of the District of Columbia,<sup>88</sup> and the Twenty-Sixth, citizens who were over eighteen.<sup>89</sup> These grants evidenced a legislative trend recognizing a broadly inclusive political process.

Further expanding the ability of Americans to directly participate in the political process, Congress passed the Seventeenth Amendment, which provides for direct election of United States Senators, as well as the Twenty-Fourth Amendment which says the right to vote cannot be abridged by a failure to pay a poll tax or any other tax.<sup>90</sup> These affirmative Congressional actions provide a constitutional manifestation that the right to vote is fundamental for citizens of the United States of America.

##### 2. Legislation

To actualize the constitutional amendments, Congress has legislated affirmatively to allow citizens to freely exercise their voting rights. For example, Congress demonstrated its commitment to achieve full participation in the political process by passing the Voting Rights Act of 1965 and the Voting Rights Act Amendments of 1970 ("Amendments").<sup>91</sup> The 1970 Amendments attempted to lower the minimum age of voters in state and federal elections from 21 to 18.<sup>92</sup> In addition, the Amendments barred the

---

86. U.S. CONST. amend. XV.

87. U.S. CONST. amend. XIX.

88. U.S. CONST. amend. XXIII.

89. U.S. CONST. amend. XVII.

90. U.S. CONST. amend. XXVI & amend. XXIV, §1.

91. Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 314 (1970) (amending The Voting Rights Act of 1965, 42 U.S.C. 1973 (1965)).

92. See *Oregon v. Mitchell*, 400 U.S. 112, 117 (1970). In addition, the Twenty-Sixth Amendment, giving citizens over the age of eighteen the right vote, was passed in 1971. U.S. CONST. amend. XXVI.

use of literacy tests and similar voting eligibility requirements for a period of five years in any state or federal election where such tests were not already proscribed by the Voting Rights Act of 1965.<sup>93</sup> It was also forbidden for states to impose durational residency requirements barring new state residents from voting in federal elections, and the Amendments provided uniform rules for absentee balloting in those elections as well. The Supreme Court found constitutional support for Congress's broadly inclusive efforts and upheld the majority of the Voting Rights Act Amendments of 1970, only invalidating the requirement that to vote in local elections voters had to be 18 years of age.<sup>94</sup>

*B. The Supreme Court: Contemporary Jurisprudence Defines Franchise as a Fundamental Right of Citizenship*

One of the most eloquent descriptions of the right of franchise, its fundamental nature, and its jurisprudential history is articulated by the Supreme Court in *Reynolds v. Sims*.<sup>95</sup> There, the Court stated that the Constitution undeniably protects the right of all qualified citizens to vote in both state and federal elections.<sup>96</sup> As the Court noted in *Reynolds*, it has been recognized repeatedly that all qualified voters have a constitutionally protected right to vote.<sup>97</sup> Racially based gerrymandering has been held unconstitutional because it denies some citizens the right to vote.<sup>98</sup> The Court further stated:

And history has seen a continuing expansion of the scope of the right to suffrage in this country. The right to vote freely for the candidate of one's choice is the essence of a democratic society, and any restrictions on that right strike at the heart of representative government.<sup>99</sup>

The *Reynolds* opinion concludes its discussion on the fundamental nature of voting rights by arguing that the right to suffrage is a *fundamental matter in a free and democratic society*, preservative of other basic civil and political rights, and that any infringement

---

93. *Mitchell*, 400 U.S. 112, 117-18 (1970).

94. *Id.* at 117-119.

95. 377 U.S. 533 (1964).

96. The Court made this indelibly clear by citing a consistent line of its decisions on the issue. *Id.* at 555.

97. *See id.* at 554 (citing *Ex Parte Yarbrough*, 110 U.S. 651 (1884)).

98. *Id.* at 555. (citing *Gomillion v. Lightfoot*, 364 U.S. 339 (1968)).

99. *Id.* *See also id.* at 555 n.28.

on the right thereof must be meticulously scrutinized.<sup>100</sup>

*C. Given Contemporary Conceptions of Voting Rights, the Antiquated Holdings of the Insular Cases Fail to Justify the Disenfranchisement of Territorial Residents*

In 1885, the Supreme Court stated:

The personal and civil rights of the inhabitants of the territories are secured to them, as to other citizens, by the principles of constitutional liberty which restrain all the agencies of government, state and national; *their political rights are franchises which they hold as privileges* in the legislative discretion of the Congress of the United States.<sup>101</sup>

At the time this case was decided, the right to vote was limited to men over twenty-one. Subsequent constitutional amendments,<sup>102</sup> legislative acts,<sup>103</sup> and judicial decisions<sup>104</sup> expounded that limited suffrage right. The reasoning of the Insular Cases, however, harkens back to an era of limited franchise, embracing a concept that is discordant with contemporary ideology, and functioning as the legal justification for the disenfranchisement of American citizens. The absurdity of applying these antiquated Territorial Clause interpretations in a contemporary setting is underscored by Constitutional amendments and by the Supreme Court granting virtually every other American citizen over eighteen the

---

100. *Id.* at 562. (emphasis added) (citing *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), and enunciating that over a century ago, the *Yick Wo* Court referred to the "political franchise of voting" as "a fundamental political right, because preservative of all rights.")

It is also worth noting that *Yick Wo* was decided before the Insular Cases were heard by the Supreme Court. At the time of those decisions, the Court did consider voting a fundamental right (at least for male citizens of the United States). However, it was not among the fundamental rights guaranteed to territorial residents, male or otherwise, thus giving further support to the deliberate racial, cultural, and colonial exclusion of territorial citizens from the political process.

101. *Murphy v. Ramsey*, 114 U.S. 15, 44-45 (1885) (emphasis added).

102. See U.S. CONST. amend. XV (enfranchising former slaves); U.S. CONST. amend. XIX (creating the women's right to vote); U.S. CONST. amend. XXIII (enfranchising the residents of the District of Columbia); U.S. CONST. amend. XXIV (abolishing poll taxes as a requisite to voting); U.S. CONST. amend. XVI (enfranchising citizens over the age of eighteen).

103. Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 314 (1970) (amending The Voting Rights Act of 1965, 42 U.S.C. 1973 (1965)).

104. See *Reynolds v. Sims*, 377 U.S. 533, (1964); see also *Oregon v. Mitchell*, 400 U.S. 112 (1970); *Dunn v. Blumstein*, 405 U.S. 330 (1972).

fundamental right to vote in federal elections. If this contemporary understanding of fundamental voting rights is to be consistently applied, the rights granted to territorial residents through the Insular Cases must be expanded to include voting as well.

V. CONCLUSION: THE JUDICIARY MUST STEP IN AND  
HELP ENFRANCHISE A DISCRETE AND INSULAR  
MINORITY THAT IS UTTERLY UNPROTECTED  
BY THE POLITICAL PROCESS

The most direct way to achieve voting rights for territorial residents would be to pass a Constitutional amendment granting territories the power to appoint electors as if they were states. The residents of the District of Columbia were enfranchised in this way by the Twenty Third Amendment.<sup>105</sup> But, in order to have a Constitutional amendment proposed and passed, the territorial residents need judicial support.<sup>106</sup>

Article V of the United States Constitution sets for that an amendment to the Constitution must be proposed in one of two ways: by two-thirds of both the United States House of Representatives and the United States Senate or by a constitutional convention called by two-thirds of the state legislatures.<sup>107</sup> The proposed amendment must then be approved by either three-fourths of the state legislatures or conventions in three-fourths of the states. Under these parameters, territorial residents become the quintessential discrete and insular minority; they have no political power in Congress.<sup>108</sup>

The judiciary should exercise its authority to ameliorate this colonial regime and enfranchise this discrete and insular minority

---

105. U.S. CONST. amend. XXIII, § 1. "The District constituting the seat of government of the U.S. shall appoint in such a manner as the Congress may direct: A number of electors of President and Vice President equal to the whole number of Senators and Representatives in Congress to which the District would be entitled if it were a state . . . they shall be in addition to those appointed by the States, but they shall be considered, for the purposes of the election of President and Vice President, to be electors appointed by a state . . ."

106. U.S. CONST. art. V.

107. *Id.*

108. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938) (discussing when the judiciary should review government action more stringently, as opposed to the minimum rationality review approved of on the facts of that case, Justice Jackson stated, "prejudice against discrete and insular minorities may be a special condition which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and . . . may call for a correspondingly more searching judicial inquiry").

who cannot protect itself politically. One solution would be for the Supreme Court to grant certiorari in a case where American territorial citizens seek to challenge the constitutionality of their disenfranchisement.<sup>109</sup> The Court should broaden the definition of fundamental rights espoused in the Insular Cases to make it coextensive with contemporary jurisprudence on fundamental rights of other national citizens, such as the right to vote in national elections and to travel and settle interstate.<sup>110</sup> Then, the right to vote in national elections would become a fundamental right for American citizens residing in the United States territories. As a result, the Supreme Court would effectively be endorsing a reinterpretation of Article II, Section 2<sup>111</sup> of the Constitution, because territorial residents must be allowed electors if their right to vote is determined to be fundamental.<sup>112</sup>

This result is substantiated by the Court's decision in *Bush v. Gore*.<sup>113</sup> In that case, the Court held that the Constitution does not necessarily guarantee each individual citizen the right to have their vote counted, since electors represent the aggregate of the individual voters' interests. Therefore, if the American citizens residing in United States territories have the fundamental right to vote, they have the correlative right to have electors who represent their interests in presidential elections.

Similarly, if the Supreme Court holds the right to vote in national elections fundamental for territorial residents, the right will be protected by the Equal Protection Clause of the Fourteenth Amendment.<sup>114</sup> Although the Equal Protection Clause protects citizens against impermissible infringement of their fundamental

---

109. *Ballentine v. United States*, Civ. No. 1999-130, 2001 U.S. Dist. LEXIS 16856 (V.I. Oct. 15, 2001) (supplemental briefing ordered).

110. *Reynolds*, 377 U.S. at 561 ("Undoubtedly the right of suffrage is a fundamental matter in a free and democratic society . . ."); *See Shapiro v. Thompson*, 394 U.S. 618 (1969) (holding that a one-year waiting period for welfare benefits for welfare recipients moving to a new state impermissibly impinged on those recipients fundamental right to travel); *See also Califano v. Torres*, 435 U.S. 1, 4 n.6 (1978) ("For the purposes of this opinion we may also assume that there is virtually unqualified constitutional right to travel between Puerto Rico and any of the 50 states of the Union.").

111. "Each state shall appoint, in such a manner as the Legislature thereof may direct, a number of electors . . ." U.S. CONST. Art. II, § 1, cl. 2.

112. American citizens do not have to be residents of states to vote for President and Vice President. The residents of the District of Columbia are an example, they have the right to appoint electors and thus vote in presidential elections. U.S. CONST. amend XXIII, § 1.

113. *Bush v. Gore*, 531 U.S. 98 (2000).

114. U.S. CONST. amend. XIV, § 1 cl. 4.



rights by the States, it also guarantees strict scrutiny against similar actions by the federal government.<sup>115</sup> As a result, Congress would no longer have the discretionary power, which was initially granted by the Supreme Court in the Insular Cases, to extend or restrict the rights of territorial residents to vote in federal elections. In short, the powers granted by the Supreme Court under the Constitution can also be modified or removed by the Supreme Court under the Constitution. Therefore, if the Supreme Court reconceptualized the term 'fundamental' in the Insular Cases to be consonant with the concept of fundamental rights for American citizens not residing in the territories, there would no longer be a legal mechanism for territorial disenfranchisement.

---

115. Equal protection of the laws is enforced against the federal government through the Due Process Clause of the Fifth Amendment. U.S. CONST. amend. V, cl. 4.; See *Bolling v. Sharpe*, 347 U.S. 497 (1954) (holding that just as the Constitution does not allow the states to maintain racially segregated public schools under the Equal Protection Clause of the Fourteenth Amendment, Congressionally maintained racial segregation in the District of Columbia was also unconstitutional under the Due Process Clause of the Fifth Amendment).