

## COMMENT

### Six Puerto Rican Congressmen Go to Washington

After 108 years as a colony<sup>1</sup> of the United States, Puerto Rico continues to search for a dignified solution to its status of political subordination. Although Puerto Ricans have been U.S. citizens since 1917,<sup>2</sup> they cannot vote in federal elections and have no say in the enactment, application, or administration of the federal laws and regulations that shape their lives. They are also denied the right to govern themselves without federal intrusion. A century of bitter internal debate, conspicuous federal neglect, and countless frustrated efforts at reform has failed to produce consensus on how to address this manifest lack of democracy. However, while the island's internal divisions reflect profound disagreements about politics, economics, and culture, Puerto Ricans from all political persuasions agree on the need to solve, at a minimum, the grossest democratic inequities of Puerto Rico's relationship with the United States. Unfortunately, the search for grand, permanent solutions to Puerto Rico's status may have dampened the search for pragmatic short-term alternatives.

While the debate over the political future of the island has sputtered in Puerto Rico and Washington, Congress is currently considering a bold proposal to address the undemocratic status of another disenfranchised territory. The District of Columbia House Voting Rights Act of 2007 (H.R. 1433)<sup>3</sup> attempts to end the congressional disenfranchisement of District of Columbia residents by treating the District as a state for purposes of

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1. I employ the word "colony" not in the "usual, vituperative sense" (for the U.S.-Puerto Rico relationship has been mutually beneficial), but rather to highlight its democratic failings. JOSÉ TRÍAS MONGE, *PUERTO RICO: THE TRIALS OF THE OLDEST COLONY IN THE WORLD* 194 (1997); *see id.* at 161-63.
  2. Organic Act of 1917, ch. 145, § 5, 39 Stat. 951, 953 (codified as amended at 8 U.S.C. § 1402 (2000)).
  3. H.R. 1433, 110th Cong. (2007). Because H.R. 1433 is materially similar to a previous bill introduced during the 109th Congress, *see* H.R. 5388, 109th Cong. (2006), this Comment cites to the hearings and debates that occurred during the 109th Congress.

representation in the House of Representatives.<sup>4</sup> The bill defies conventional constitutional doctrine by enfranchising District residents through an ordinary statute rather than through statehood, the traditional path to representation in the House. While the bill's constitutionality remains open to debate, its proposal, as well as the legal theories underlying it, has important—although largely overlooked—consequences for Puerto Rico.<sup>5</sup>

This Comment makes a three-pronged argument that employs the reasoning of H.R. 1433 to propose a novel way to address Puerto Rico's democratic deficit. First, the legal reasoning of H.R. 1433 applies fully to a bill granting similar congressional representation to Puerto Rico.<sup>6</sup> Second, a bill that enfranchises Puerto Ricans in elections for the House might pass constitutional muster even if H.R. 1433 does not, because it would avoid the latter's most conspicuous constitutional difficulties. Finally, recognition of Congress's power under the Territorial Clause to grant congressional representation to Puerto Rico provides an innovative and politically feasible option for addressing, at least temporarily, Puerto Rico's democratic deficit without limiting its options for self-determination.<sup>7</sup>

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4. H.R. 1433 § 3. As part of a political compromise, H.R. 1433 gives Utah an extra seat. See *id.* § 4. Whether a similar tradeoff would be necessary for Puerto Rico is beyond this Comment's scope.
  5. These consequences were flagged only briefly during the committee hearings for H.R. 5388 during the 109th Congress. *District of Columbia Fair and Equal House Voting Rights Act of 2006: Hearing on H.R. 5388 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 68 (2006) [hereinafter *Hearing on H.R. 5388*] (statement of Jonathan Turley, Professor, The George Washington University Law School); *id.* at 20 (statement of John C. Fortier, Research Fellow, American Enterprise Institute).
  6. Under such a bill, Puerto Rico might be granted up to six representatives—the number that it would be entitled to as a state. For an explanation of how congressional seats are apportioned, see U.S. Census Bureau, *Congressional Apportionment—How It's Calculated*, <http://www.census.gov/population/www/censusdata/apportionment/calculated.html> (last visited Mar. 7, 2007).
  7. Space constraints limit this Comment's ability to present a systematic defense of Congress's constitutional power to grant Puerto Rico congressional representation by statute. Although such a proposal shares with H.R. 1433 several important constitutional obstacles that merit detailed discussion, this Comment is limited to comparing H.R. 1433 to an analogous proposal for Puerto Rico. For an analysis arguing that H.R. 1433 might be unconstitutional, see KENNETH R. THOMAS, CONG. RESEARCH SERV., *THE CONSTITUTIONALITY OF AWARDING THE DELEGATE FOR THE DISTRICT OF COLUMBIA A VOTE IN THE HOUSE OF REPRESENTATIVES OR THE COMMITTEE OF THE WHOLE* (2007).

## I. APPLYING THE LEGAL REASONING OF H.R. 1433

The most daunting legal hurdle for the sponsors of H.R. 1433 is the text of the Constitution, which stipulates that “[t]he House of Representatives shall be composed of Members chosen . . . by the People of the *several States*.”<sup>8</sup> The bill’s detractors claim that the Constitution expressly limits representation in the House to states of the Union.<sup>9</sup> Because the District is not a “State” within the meaning of the Constitution,<sup>10</sup> it arguably should be denied representation in the House absent a grant of statehood or a constitutional amendment.

To counter the textual analysis of detractors, advocates of H.R. 1433 have advanced arguments based on constitutional text and structure as well as judicial precedent. The bill’s sponsors argue that the expansive language of the Seat of Government Clause, which grants Congress the power “[t]o exercise exclusive Legislation in all Cases whatsoever, over such District . . . as may . . . become the Seat of the Government of the United States,”<sup>11</sup> confers upon Congress the power to enact any legislation that it deems conducive to the District’s general welfare.<sup>12</sup> Furthermore, the bill’s supporters assert that because courts had consistently upheld Congress’s power to treat the District as a state under several constitutional and statutory provisions,<sup>13</sup> H.R. 1433 should receive similar deference. The bill’s sponsors also minimize differences between the District and the states, arguing that the District is “akin to a state in virtually all important respects.”<sup>14</sup>

These arguments provide similar constitutional support for granting Puerto Rico representation in the House. First, the Territorial Clause, under which Congress legislates for Puerto Rico,<sup>15</sup> is as expansive as the Seat of Government Clause. An exegesis of both provisions reveals clear parallels in language and in the breadth of congressional power recognized. While the Seat of Government Clause refers to the power “[t]o exercise exclusive Legislation in all Cases whatsoever,”<sup>16</sup> the Territorial Clause grants Congress the “Power

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

9. See, e.g., *Hearing on H.R. 5388, supra* note 5, at 17-18 (statement of John C. Fortier).

10. See, e.g., *Hepburn v. Ellzey*, 6 U.S. (2 Cranch) 445 (1805).

11. U.S. CONST. art. I, § 8, cl. 17.

12. H.R. REP. NO. 109-593, pt. 1, at 3 (2006).

13. *Id.* at 8 (citing *Nat’l Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582 (1949) (holding that Congress could extend diversity jurisdiction to District residents)).

14. *Id.* at 12.

15. See, e.g., *Davila-Perez v. Lockheed Martin Corp.*, 202 F.3d 464, 468 (1st Cir. 2000).

16. U.S. CONST. art. I, § 8, cl. 17.

to dispose of and make all needful Rules and Regulations respecting the Territory . . . belonging to the United States.”<sup>17</sup> Commentators have highlighted this constitutional parallel, arguing that “[s]tructurally, [the Territorial Clause] endowed Congress with the same plenary power that . . . Congress itself enjoyed under Article I when enacting ‘exclusive Legislation in all Cases’ for the national capital city.”<sup>18</sup>

Furthermore, courts have described Congress’s power under the Territorial Clause in expansive terms,<sup>19</sup> have recognized the need for congressional flexibility in legislating for the territories,<sup>20</sup> and have intimated that Congress bears ultimate responsibility for addressing Puerto Rico’s historic disenfranchisement.<sup>21</sup> Courts have also deferred to congressional actions pursuant to the Territorial Clause even in circumstances in which constitutional limitations might otherwise be insurmountable.<sup>22</sup> Without judicial challenge, Congress has extended to territorial residents rights otherwise not guaranteed to them by the Constitution.<sup>23</sup> Congress’s power under the Territorial Clause is therefore expansive,<sup>24</sup> arguably limited only by the need to respect the “fundamental rights” of territorial inhabitants.<sup>25</sup>

17. *Id.* art. IV, § 3, cl. 2.

18. AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 264 (2005).

19. *See, e.g.,* *Downes v. Bidwell*, 182 U.S. 244, 285 (1901) (“[T]he Territorial Clause . . . is absolute in its terms, and suggestive of no limitations upon the power of Congress in dealing with them.”). Significantly, *Scott v. Sandford (Dred Scott)*, 60 U.S. (19 How.) 393, 432 (1856), the only Supreme Court case to hold unconstitutional a law passed by Congress pursuant to the Territorial Clause, is no longer good law with respect to the breadth of Congress’s power, *see* *Dorr v. United States*, 195 U.S. 138, 140 (1904) (overruling *Dred Scott*).

20. *See, e.g.,* *Downes*, 182 U.S. at 285; *see also* T. ALEXANDER ALEINIKOFF, *SEMBLANCES OF SOVEREIGNTY: THE CONSTITUTION, THE STATE, AND AMERICAN CITIZENSHIP* 90 (2002).

21. *See* *Igartúa-de la Rosa v. United States*, 417 F.3d 145, 148, 153 (1st Cir. 2005) (suggesting that the road to federal enfranchisement “runs through Congress”).

22. *See, e.g.,* *Dorr*, 195 U.S. at 149 (holding that the Constitution did not require Congress to extend to the Philippines the right to jury trial).

23. *See, e.g.,* *Elective Governor Act of 1947* § 7, 48 U.S.C. § 737 (2000) (extending to Puerto Rico, by statute, the rights and privileges secured by the Constitution).

24. In fact, a court recently suggested that Congress may have power under the Territorial Clause to cure Puerto Rico’s disenfranchisement. *See* *Romeu v. Cohen*, 265 F.3d 118, 130 & n.7 (2d Cir. 2001). The court asserted that “statehood or a constitutional amendment may not be necessary prerequisites to permitting U.S. citizens residing in Puerto Rico to vote for the office of President.” *Id.* at 128.

25. *Balzac v. Porto Rico*, 258 U.S. 298, 306 (1922). Congress might also be restrained from exercising power relinquished pursuant to a “compact,” *see, e.g.,* ALEINIKOFF, *supra* note 20, at 87-93, or from repealing “vested rights” in political status, *see, e.g., id.* at 133, 134 & n.96. It remains an open question, however, whether there are clear limits to Congress’s power to

## II. ON FIRMER CONSTITUTIONAL GROUND

Although considerable overlap would exist between H.R. 1433 and an analogous bill for Puerto Rico, the latter would avoid some of H.R. 1433's most conspicuous constitutional difficulties.

### A. *Original Intent*

While the Constitution explicitly mandated the creation of the District,<sup>26</sup> it conspicuously failed to provide it with representation. This omission was intentional. The Founders denied self-government to the District in order to protect the federal government from undue external influence.<sup>27</sup> And proposals to extend voting rights to the District were rejected during the Constitution's ratification.<sup>28</sup>

By contrast, the Constitution does not present similar roadblocks to extending congressional representation to Puerto Rico. Unlike the District, Puerto Rico was not part of the United States until it was ceded by Spain following the Spanish-American War.<sup>29</sup> Puerto Rico's status as an "unincorporated territory," and its consequent democratic disempowerment, was not a response to an explicit constitutional command, but rather to a twentieth-century distinction created by the *Insular Cases*<sup>30</sup> that allowed the United States to hold territories as colonies *ad perpetuam* without the promise

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govern Puerto Rico pursuant to the Territorial Clause. Compare, e.g., *Davila-Perez v. Lockheed Martin Corp.*, 202 F.3d 464, 468 (1st Cir. 2000) ("Puerto Rico . . . is still subject to the plenary powers of Congress under the territorial clause . . . ."), with *Cordova & Simonpietri Ins. Agency Inc. v. Chase Manhattan Bank N.A.*, 649 F.2d 36, 41 (1st Cir. 1981) (Breyer, J.) ("Puerto Rico's status changed from that of a mere territory to the unique status of Commonwealth. And the federal government's relations with Puerto Rico changed from being bounded merely by the territorial clause . . . to being bounded by the United States and Puerto Rico Constitutions, Public Law 600, [and] the Puerto Rican Federal Relations Act . . .").

26. See U.S. CONST. art. I, § 8, cl. 17.
27. See THE FEDERALIST NO. 43, at 272 (James Madison) (Clinton Rossiter ed., 1961) (claiming that without exclusive congressional power over the District, "the public authority might be insulted and its proceedings interrupted with impunity," and that the "dependence of the members of the general government on the State comprehending the seat of the government for protection" would be "dishonorable").
28. See 5 THE PAPERS OF ALEXANDER HAMILTON 189 (Harold C. Syrett & Jacob E. Cooke eds., 1962) (detailing an amendment proposed by Alexander Hamilton during the New York Ratifying Convention to grant House representation to the District).
29. Treaty of Paris, U.S.-Spain, art. II, Dec. 10, 1898, 30 Stat. 1754, 1755.
30. See, e.g., *Dorr v. United States*, 195 U.S. 138 (1904); *Downes v. Bidwell*, 182 U.S. 244 (1901).

of eventual statehood and consequent enfranchisement.<sup>31</sup> The Constitution imposes few explicit restrictions on Congress's power to shape its relationship with Puerto Rico;<sup>32</sup> the *Insular Cases* themselves suggested that Congress possessed ample flexibility to structure its territorial relationships.<sup>33</sup> Absent a clear constitutional intent to deny Congress the power to treat Puerto Rico as a state for purposes of representation in the House, the broad language of the Territorial Clause seems at least to provide a clearer source of power to enfranchise nonstate citizens than does the Seat of Government Clause.

In addition, while the Founders acted purposefully in denying federal enfranchisement to the District, they possessed no comparable qualms about extending the same benefits to the territories. In fact, full enfranchisement seems to have been the ultimate goal of territorial expansion for more than a century after the Founding. The Northwest Ordinance of 1787 not only guaranteed the existing territories eventual enfranchisement through admission into the Union, but further stipulated that once a territory had "sixty thousand free Inhabitants," it would "be admitted by its Delegates into the Congress of the United States on equal footing with the original States."<sup>34</sup> All U.S. territories acquired between 1787 and the Spanish-American War also achieved congressional representation through statehood.

The evidence therefore suggests that territorial disenfranchisement was meant to be temporary; territories would be held as states-in-waiting. Only the territorial incorporation doctrine devised by the *Insular Cases* permitted a sharp deviation from prior practice. But holding colonies like Puerto Rico without the possibility of eventual enfranchisement still runs against the very principles upon which the nation was founded and the Constitution enacted. As Judge Juan R. Torruella has asserted, "*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."<sup>35</sup> In the end, extending representation in the House to Puerto Rico would be more consistent with original intent, the Founding spirit, and the principles of territorial expansion.

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31. For a detailed analysis and criticism of the *Insular Cases*, see JUAN R. TORRUELLA, *THE SUPREME COURT AND PUERTO RICO: THE DOCTRINE OF SEPARATE AND UNEQUAL* (1985).

32. While the Territorial Clause arguably limits Congress's power over the Territories to "needful" legislation, U.S. CONST. art. IV, § 3, cl. 2, this limitation has never been given a clear construction.

33. See, e.g., ALEINIKOFF, *supra* note 20, at 90.

34. An Ordinance for the Government of the Territory of the United States Northwest of the River Ohio arts. 4-5, 1 Stat. 51, 52-53 n.a (1787).

35. *Igartua de la Rosa v. United States*, 229 F.3d 80, 89 (1st Cir. 2000).

### B. Structural Concerns

The structural characteristics of the District raise important problems that are absent in the case of Puerto Rico. The District clearly does not possess the most basic attributes of a state<sup>36</sup>: it has no governor and no local legislature analogous to a state legislature, it is not governed by a written constitution, and it is not sovereign over matters not governed by the U.S. Constitution.<sup>37</sup> By contrast, Puerto Rico's internal government structure is exactly like that of a state. It is organized under a written constitution established by the consent of the governed,<sup>38</sup> and, "like a state, [it] is an autonomous political entity, 'sovereign over matters not ruled by the [Federal] Constitution.'"<sup>39</sup> The Supreme Court has further underscored that "the purpose of Congress" in approving the present Commonwealth relationship "was to accord to Puerto Rico the degree of autonomy and independence normally associated with States of the Union."<sup>40</sup>

These differences have important implications. Unlike the District, Puerto Rico is analogous to a state in virtually every significant aspect except for its lack of voting power.<sup>41</sup> Extending House representation to Puerto Rico is therefore more consistent with the text of the Constitution.<sup>42</sup> In fact, courts have treated Puerto Rico as a state under constitutional and statutory provisions that apply exclusively to states and that hinge on the existence of a separate sovereign entity. For example, courts treat Puerto Rico like a state

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36. See *Texas v. White*, 74 U.S. (7 Wall.) 700, 721 (1868) ("A state, in the ordinary sense of the Constitution, is a political community of free citizens, occupying a territory of defined boundaries, and organized under a government sanctioned and limited by a written constitution, and established by the consent of the governed.").
37. Congress in fact frequently intrudes into District affairs, see Note, *Democracy or Distrust? Restoring Home Rule for the District of Columbia in the Post-Control Board Era*, 111 HARV. L. REV. 2045, 2046-51 (1998), and courts usually do not treat the District as a sovereign, see *infra* notes 45-46 and accompanying text.
38. See P.R. CONST.; Act of July 3, 1950, ch. 446, § 2, 64 Stat. 319, 319.
39. *Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 8 (1982).
40. *Examining Bd. v. Flores de Otero*, 426 U.S. 572, 594 (1982).
41. Although Congress's power to intrude upon Puerto Rico's "sovereign" sphere remains an open question, see *supra* note 25, Congress retains, at a minimum, residual powers under the Territorial Clause over matters in which Puerto Rico is not sovereign. Puerto Rico's powers of internal self-government, however, do not conflict with Congress's power to extend House representation to Puerto Rico. Even if Congress can legally transgress Puerto Rico's sovereign sphere, the custom and practice of the U.S. government has been to treat Puerto Rico as possessing the most important sovereign and structural characteristics of a state.
42. See U.S. CONST. art. I, § 2, cl. 1.

under both the Double Jeopardy Clause<sup>43</sup> and the Civil Rights Act of 1871,<sup>44</sup> while simultaneously denying such treatment to the District.<sup>45</sup> In contrast to the District, Puerto Rico is also entitled to sovereign immunity.<sup>46</sup>

Furthermore, the fifty states currently enjoying representation in the House possess clearly defined structural and sovereign attributes, suggesting that further extension of membership in the House would be appropriate only to entities possessing similar characteristics. Nearly all territories that have followed the traditional path to representation in the House (i.e., statehood) possessed, prior to federal enfranchisement, structural characteristics analogous to a state—namely, a governor and a local legislature.<sup>47</sup>

In fact, granting congressional representation to entities not structurally analogous to a state would create constitutional anomalies. For example, the Constitution stipulates that voters in elections for the House “shall have the qualifications requisite for electors of the most numerous branch of the *State legislatures*.”<sup>48</sup> The District possesses no state legislature, only a city council; its “state legislature” is Congress. Moreover, giving representation in the House to the District could result in bizarre conflicts of interests. For instance, by electing representatives to the House, District citizens would be electing representatives to what is in practice both its local and national legislature. District representatives in Congress could introduce bills to overturn decisions made by the city council or to dissolve the local government. The District’s structural characteristics thus create constitutional and policy problems absent in the case of Puerto Rico.

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43. U.S. CONST. amend. V.

44. 42 U.S.C. § 1983 (2000).

45. *Compare* United States v. Lopez Andino, 831 F.2d 1164 (1st Cir. 1987) (holding that the United States and Puerto Rico are dual sovereigns for double jeopardy purposes), *with* United States v. Weathers, 186 F.3d 948, 951 n.3 (D.C. Cir. 1999) (holding the contrary with respect to the District); *compare* Nogueras v. Univ. of P.R., 890 F. Supp. 60 (D.P.R. 1995) (dismissing a claim because Puerto Rico, like a state, is not a “person” under 42 U.S.C. § 1983), *with* Dorman v. District of Columbia, 888 F.2d 159, 162 (D.C. Cir. 1989) (finding that the District is a “person” under § 1983 because it is a “municipality”).

46. *Compare* Ortiz-Feliciano v. Toledo-Davila, 175 F.3d 37, 40 (1st Cir. 1999) (holding that Puerto Rico is entitled to sovereign immunity), *with* Best v. District of Columbia, 743 F. Supp. 44, 47 (D.D.C. 1990) (holding the contrary with respect to the District).

47. *See generally* 1-2 GRUPO DE INVESTIGADORES PUERTORRIQUEÑOS, INC., BREAKTHROUGH FROM COLONIALISM: AN INTERDISCIPLINARY STUDY OF STATEHOOD (1984).

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

### C. *The Twenty-Third Amendment*

The Twenty-Third Amendment might also pose significant obstacles to H.R. 1433 that remain inapplicable to an analogous bill for Puerto Rico. In particular, the fact that enfranchising District residents in presidential elections required a constitutional amendment suggests that changes to the District's enfranchisement in federal elections must be made through Article V. However, the Amendment's preclusive effect appears limited to the District, as it does not mention the territories.<sup>49</sup> And while an amendment was arguably necessary to override the Constitution's intentional denial of the District's right to vote in federal elections, there seems to be no analogous constitutional intent to disenfranchise territories *ad perpetuam* that would require an amendment in the case of Puerto Rico.<sup>50</sup>

The effect of the Twenty-Third Amendment on District statehood might also create obstacles to its statutory enfranchisement. In particular, some scholars have suggested that because the Constitution provides for both the creation of the District and for its enfranchisement in presidential elections, District statehood might require a constitutional amendment to repeal the Twenty-Third Amendment and perhaps the Seat of Government Clause.<sup>51</sup> By contrast, statehood for Puerto Rico could be achieved through simple legislation.<sup>52</sup> The different procedural steps necessary to achieve statehood for the District and Puerto Rico may have important implications. Because Congress clearly possesses the power to grant Puerto Rico full enfranchisement through statehood by simple legislation, a proposal to grant representation to Puerto Rico in the House through statute would be procedurally indistinguishable from granting full statehood to Puerto Rico. By contrast, H.R. 1433 would in fact sidestep an otherwise necessary constitutional requirement—namely, the affirmative approval of three-fourths of the states.<sup>53</sup> Congress might thus be precluded from granting to the District through statute what it would otherwise have had to achieve through constitutional amendment.

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49. See *id.* amend. XXIII.

50. See *supra* Section II.A.

51. See, e.g., Adam H. Kurland, *Partisan Rhetoric, Constitutional Reality, and Political Responsibility: The Troubling Constitutional Consequences of Achieving D.C. Statehood by Simple Legislation*, 60 GEO. WASH. L. REV. 475, 477-80 (1992).

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

53. *Id.* art. V.

### III. NORMATIVE CONSIDERATIONS

Extending statutory representation in the House to Puerto Rico presents an innovative proposal to address Puerto Rico's democratic deficit. While the proposal would not cure completely the island's lack of democratic empowerment,<sup>54</sup> it would grant Puerto Ricans the power to participate in the election of those who govern them and in the formulation of the laws that control their destiny.

The proposal might also break the current political stalemate. It could receive support from both commonwealth and statehood advocates, the two major political forces on the island, because it achieves a long-sought-after goal of statehood supporters—federal enfranchisement—within the autonomic framework of commonwealth status. While such a proposal would fall short of a comprehensive status solution, it could serve as a short- to medium-term alternative to alleviate the most glaring democratic injustice in the relationship between Puerto Rico and the United States. More importantly, enfranchisement through statute does not foreclose future decolonization avenues. In contrast to a grant of statehood or a constitutional amendment, such a statute would be repealable by another federal statute, permitting Congress and Puerto Ricans to readdress the issue at a later time.

While a proposal to extend statutory enfranchisement to Puerto Rico might be challenged as inconsistent with Puerto Rico's status as an unincorporated territory,<sup>55</sup> this claim does not present a significant barrier. The doctrine of territorial incorporation is traditionally described as differentiating territories in which the Constitution applies in full from those in which only the Constitution's fundamental provisions apply.<sup>56</sup> If anything, this doctrine grants Congress *more* legislative power because Congress may deny to territorial inhabitants rights otherwise not "fundamental."<sup>57</sup> Unincorporation has not limited Congress's ability to treat Puerto Rico like a state under other constitutional and statutory provisions. Furthermore, granting Puerto Rico

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54. The problem could be addressed in other ways, such as through statehood, independence, or a form of enhanced Commonwealth relationship in which federal laws applied to Puerto Ricans with their consent. This Comment only attempts to broaden the options available.

55. See, e.g., *Downes v. Bidwell*, 182 U.S. 244, 341-42 (1901) (White, J., concurring) (asserting that Puerto Rico "was foreign to the United States in a domestic sense, because the island had not been incorporated . . . but was merely appurtenant thereto as a possession").

56. See, e.g., ALEINIKOFF, *supra* note 20, at 21-22. But see Christina Duffy Burnett, *Untied States: American Expansion and Territorial Deannexation*, 72 U. CHI. L. REV. 797, 802 (2005) (challenging the standard account of the *Insular Cases*, and suggesting that the doctrine of territorial incorporation "amounted to a constitutional doctrine of territorial deannexation").

57. *Downes*, 182 U.S. at 291.

statutory representation in the House will not transform the island into an incorporated territory because the Supreme Court has held that incorporation will not be presumed absent unambiguous congressional language.<sup>58</sup>

In addition, while Puerto Rico's exemption from federal income taxation<sup>59</sup> could raise political resistance to the proposal, the island's tax treatment does not create constitutional difficulties or raise insuperable normative concerns. First, there is no constitutional requirement making enfranchisement contingent on taxation. In any event, Puerto Ricans currently do pay federal taxes: they are subject to federal payroll taxes,<sup>60</sup> and they are not exempt from federal income taxes on U.S. and foreign-source income.<sup>61</sup> Furthermore, the Supreme Court has repeatedly emphasized the fundamental nature of the right to vote and its importance as the link between a citizen and her government.<sup>62</sup> The Twenty-Fourth Amendment, which abolished the poll tax, expresses a general disfavor of conditioning the franchise on the payment of taxes. Puerto Ricans are also as deserving of the right to vote as state citizens: Puerto Ricans, like their stateside counterparts, possess U.S. citizenship, contribute to the U.S. Treasury, and serve in the U.S. military. In the end, the extension of federal taxation to Puerto Rico presents a policy decision for Congress.<sup>63</sup>

Ultimately, recognition of Congress's power under the Territorial Clause to create innovative and flexible alternatives within the U.S. constitutional framework presents new opportunities for the resolution of Puerto Rico's status dilemma. Such recognition would broaden the available status options, permitting the United States and Puerto Rico to craft solutions not only consistent with democratic principles, but also adaptive to their particular needs and idiosyncrasies. It would allow the present Commonwealth relationship to achieve a greater degree of democratic legitimacy without sacrificing the economic, social, and cultural benefits of autonomy.

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58. *See Balzac v. Porto Rico*, 258 U.S. 298, 306 (1922). The Supreme Court has in fact refused to infer incorporation from the grant of U.S. citizenship to Puerto Ricans. *See id.* at 307-08.

59. I.R.C. § 933(1) (2000) (exempting Puerto Rico residents from taxes on Puerto Rico-derived income).

60. *See id.* § 3121(e).

61. All income derived from outside Puerto Rico remains taxable. *See id.* §§ 61(a), 933(1).

62. *See, e.g., Reynolds v. Sims*, 377 U.S. 533, 555 (1964).

63. Studies suggest that extending federal income taxation to Puerto Rico would be fiscally and economically unwise. *See, e.g., U.S. GEN. ACCOUNTING OFFICE, TAX POLICY: ANALYSIS OF CERTAIN POTENTIAL EFFECTS OF EXTENDING FEDERAL INCOME TAXATION TO PUERTO RICO* (1996).