

## COMMENTS

### BORN IN THE U.S.A., BUT NOT NATURAL BORN: HOW CONGRESSIONAL TERRITORIAL POLICY BARS NATIVE-BORN PUERTO RICANS FROM THE PRESIDENCY

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“No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.”<sup>1</sup>

One of the “best aspects of the American political tradition” is the notion that every American child—regardless of race, creed, gender, or social status—can grow up to become President.<sup>2</sup> On first glance, the language of Article II, Section 1, clause 5 of the United States Constitution enshrines this notion into the highest law of the land—the only permanent discriminatory bar to the American presidency is that candidates be “natural born” citizens.<sup>3</sup> Incorporation of the Twelfth Amendment places the same limitation on eligibility for the vice-presidency.<sup>4</sup>

But the meaning of this “natural born”<sup>5</sup> proviso long has been the subject of controversy because it is not defined anywhere in the Constitution.<sup>6</sup> The Supreme Court has ruled without doubt that United States citizens born to parents who are subject to United States juris-

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1 U.S. CONST. art. II, § 1, cl. 5.

2 See Randall Kennedy, *A Natural Aristocracy?*, 12 CONST. COMMENT. 175, 175–176 (1995) (arguing for the importance of the formal proposition that every native-born American child could conceivably grow up to become President).

3 U.S. CONST. art. II, § 1, cl. 5. The age and residency requirements can be viewed as temporary bars in that anyone who has reached the age of thirty-five and has resided in the United States for at least fourteen years becomes eligible for the presidency.

4 U.S. CONST. amend. XII (“But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.”).

5 U.S. CONST. art. II, § 1, cl. 5.

6 See *Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 167 (1874) (“The Constitution does not, in words, say who shall be natural-born citizens.”).

diction in one of the fifty states are unquestionably natural born citizens and therefore eligible for the presidency and vice-presidency.<sup>7</sup> But immigrants who become United States citizens through a naturalization process are not eligible for either office because the Supreme Court has ruled that these citizens clearly do not qualify as natural born under Article II.<sup>8</sup> Critics of the clause have described it as “opaque” for its ambiguity of language<sup>9</sup> and “an instance of rank superstition”<sup>10</sup> for its role in distinguishing between the rights of citizens based on their place of birth. Some have gone so far as to charge that the Natural Born Clause is “un-American.”<sup>11</sup> This latter charge is most often leveled by critics advocating that foreign-born citizens should also be eligible for the office of the presidency.<sup>12</sup>

The impact of the Natural Born Clause does not stop at foreign-born naturalized citizens, however. The language of Article II casts a shadow of doubt over the status of Native Americans who are members of tribes recognized by the United States government,<sup>13</sup> children

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7 See Sarah Helene Duggin & Mary Beth Collins, ‘Natural Born’ in the USA: *The Striking Unfairness and Dangerous Ambiguity of the Constitution’s Presidential Qualifications Clause and Why We Need to Fix It*, 85 B.U. L. REV. 53, 90–91 (2005). See also *Perkins v. Elg*, 307 U.S. 325, 328 (1939) (holding that a person born in New York City did not lose citizenship by virtue of moving to Sweden and becoming a Swedish citizen); *Morrison v. California*, 291 U.S. 82, 85 (1934) (holding that a person born abroad is a United States citizen if his or her father was a citizen and the father was at some time a resident of the United States); *United States v. Wong Kim Ark*, 169 U.S. 649, 702 (1898) (noting Congress’s authority to confer citizenship on children born abroad to United States citizens).

8 See *Schneider v. Rusk*, 377 U.S. 163, 165 (1964) (“[T]he rights of citizenship of the native born and of the naturalized person are of the same dignity and are coextensive. The only difference drawn by the Constitution is that only the ‘natural born’ citizen is eligible to be President.”); *Luria v. United States*, 231 U.S. 9, 22 (1913) (“[A] naturalized citizen stands on an equal footing with the native citizen in all respects, save that of eligibility to the Presidency.”).

9 See Duggin & Collins, *supra* note 7, at 55 (2005) (“While the language of this portion of Article II may appear clear on its face, few constitutional provisions are actually so opaque.”).

10 See Kennedy, *supra* note 2, at 176 (describing the natural born requirement as nothing but “idolatry of mere place of birth”).

11 Akhil Reed Amar, *Natural Born Killjoy*, LEGAL AFF., Apr./Mar. 2004, at 16. See also Kennedy, *supra* note 2, at 176 (arguing that the natural-born citizen requirement presumes that some citizens are “a bit more American” than other citizens); Robert Post, *What Is the Constitution’s Worst Provision?*, 12 CONST. COMMENT. 191, 193 (1995) (criticizing the validity of birthplace as a “proxy for allegiance”).

12 See Duggin & Collins, *supra* note 7, at 136–37 (reasoning that the natural born distinction is based on faulty presumptions); Kennedy, *supra* note 2, at 176 (arguing that all citizens should be eligible to seek the nation’s highest office).

13 See *Elk v. Wilkins*, 112 U.S. 94, 109 (1884) (holding that a member of an Indian tribe recognized by the United States was not a citizen of the United States pursuant to the Fourteenth Amendment because he was not born “subject to the jurisdiction” of the United

born to U.S. citizens living abroad,<sup>14</sup> and those born in U.S. embassies, on military bases, and in other areas within the jurisdiction of the United States.<sup>15</sup> From this last group emerges the interesting case of citizens born in United States territories, such as Puerto Rico. Such citizens clearly are not foreign born, but are these citizens natural born for purposes of Article II and, in turn, eligible to run for the presidency?

The answers to these questions have an obvious impact on the pool of potential presidential candidates in future elections, though the issue has arisen in the past. Barry Goldwater, the Republican senator and presidential candidate in the 1964 election, was born in the Arizona territory in 1909—three years prior to Arizona statehood.<sup>16</sup> His eligibility for the presidency, however, was never questioned at the time,<sup>17</sup> so the issue was neither raised nor resolved. Four years later, the eligibility of another Republican presidential candidate—George Romney, the Governor of Michigan—was challenged on the grounds that he was born to American missionaries in Chihuahua, Mexico.<sup>18</sup> Romney withdrew before the race was over, though, and the status of a citizen born of American citizens abroad also remained unresolved.<sup>19</sup> John McCain, United States Senator from Arizona and the Republican nominee in the 2008 presidential

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States). *But see* Act of June 2, 1924, Pub. L. No. 68-175, 43 Stat. 253 (codified as amended at 8 U.S.C. § 1401(b) (2006)) (conferring citizenship upon all Native Americans so long as they were born inside the territorial limits of the United States).

- 14 *See* *Weedin v. Chin Bow*, 274 U.S. 657, 670 (1927) (“[A]t common law the children of our citizens born abroad were always natural born citizens from the standpoint of this Government . . .”). *But see* *United States v. Wong Kim Ark*, 169 U.S. 649, 702–03 (1898) (“A person born out of the jurisdiction of the United States can only become a citizen by being naturalized, either by treaty, as in the case of the annexation of foreign territory; or by authority of Congress, exercised either by declaring certain classes of persons to be citizens, as in the enactments conferring citizenship upon foreign-born children of citizens, or by enabling foreigners individually to become citizens by proceedings in the judicial tribunals, as in the ordinary provisions of the naturalization acts.”).
- 15 *See* Duggin & Collins, *supra* note 7, at 102–03 (discussing the eligibility of children born in these areas of United States jurisdiction).
- 16 THEODORE H. WHITE, *THE MAKING OF THE PRESIDENT 1964*, at 211–12 (1965) (detailing Goldwater’s birth in the Arizona Territory in 1909).
- 17 *See* Charles Gordon, *Who Can Be President of the United States: The Unresolved Enigma*, 28 MD. L. REV. 1, 28 n.219 (1968) (noting the dismissal of a state court suit challenging Goldwater’s candidacy on the grounds that he was not a natural born citizen).
- 18 *See* Warren Weaver, *Romney’s Foes, or Friends, Expected to File Court Test of His Citizenship*, N.Y. TIMES, Nov. 1, 1967, at 28 (detailing the challenge to Governor George Romney’s bid for the Republican nomination in 1968).
- 19 Gordon, *supra* note 17, at 28.

election, was born in the Panama Canal Zone in 1936.<sup>20</sup> Scholars have argued that his presidential eligibility is protected first by the common law principle of *jus soli*—Latin for “right of the soil”<sup>21</sup>—because the Canal Zone was, at the time of his birth, a United States possession, and second by the principle of *jus sanguinis*—Latin for “right of blood”<sup>22</sup>—because his parents were both United States citizens at the time of his birth.<sup>23</sup> Residents of Puerto Rico—a United States territory with Commonwealth status<sup>24</sup>—are made citizens at birth by statute.<sup>25</sup> Are these citizens more akin to naturalized immigrants, Native Americans, Barry Goldwater, John McCain, or natural born citizens native to one of the states?

This Comment examines the Natural Born Citizen Clause in Article II of the United States Constitution as it relates to the narrow case of citizens native-born to United States territories, particularly Puerto Rico. Puerto Rico receives special attention for several reasons: the unique history by which it became a United States territory; the continued interest its citizens have in determining the political status of the island<sup>26</sup>; Congress’s inability—or unwillingness—to resolve that status; and the fact that of all the territories under U.S. jurisdiction, Puerto Rico is the most likely to be considered for statehood.<sup>27</sup> These factors collectively make the case of Puerto Rico one of particular sa-

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20 See JAMES W. JOHNSON, ARIZONA POLITICIANS: THE NOBLE AND THE NOTORIOUS 10 (2002) (stating that John McCain was born in the Panama Canal Zone).

21 See GERHARD VON GLAHN, LAW AMONG NATIONS: AN INTRODUCTION TO PUBLIC INTERNATIONAL LAW 148 (7th ed. 1996) (defining *jus soli* as the right or law of the soil).

22 BLACK’S LAW DICTIONARY 868 (7th ed. 1999) (defining *jus sanguinis* as “[t]he rule that a child’s citizenship is determined by the parent’s citizenship”).

23 See James C. Ho, *Unnatural Born Citizens and Acting Presidents*, 17 CONST. COMMENT. 575, 579 (2000) (arguing that although McCain was born in the Canal Zone, he is a natural born citizen under the common law).

24 See, e.g., *Trailer Marine Transp. Corp. v. Rivera Vazquez*, 977 F.2d 1, 7 (1st Cir. 1992) (holding that Puerto Rico—like the District of Columbia, the Virgin Islands, and Guam—is not a “state” within the meaning of the Constitution. Its status has altered over the period since it became a territory of the United States, culminating in an agreement in 1952, approved by the citizens of Puerto Rico, that Puerto Rico should have a unique “Commonwealth” status; but the unique status is not statehood within the meaning of the Constitution).

25 See Act of June 27, 1934, Pub. L. No. 73-477, 48 Stat. 1245 (extending United States citizenship to Puerto Ricans born on or after April 11, 1899).

26 See DICK THORNBURGH, PUERTO RICO’S FUTURE: A TIME TO DECIDE 6 (2007) (noting that plebiscites for Puerto Ricans to determine the status of the island have been held in 1967, 1993, and 1998).

27 See *id.* at 5–6 (noting that Puerto Rico is the largest, most populous, and most economically significant of all the remaining territories of the United States; four million people of Puerto Rican birth or descent live within the mainland United States; and Puerto Rico has a continued strategic importance to the United States’ presence in Latin America).

lience in resolving the constitutionality of native-born citizens in United States territories seeking the presidency and the practical implications of these results.

From the outset, it is worth noting that the current political and legal status of Puerto Rico and its citizens is one of continued controversy, subject to impassioned viewpoints.<sup>28</sup> For the purpose of fully analyzing the question of natural-born citizenship in relation to native-born Puerto Ricans, this Comment accepts the current status of and law governing the island and its citizens without opining on what is best for Puerto Rico.

Part I provides a historical and legal overview of the natural born citizen proviso of Article II. This section distinguishes the meaning of natural born citizens from that of “naturalized” citizens in order to fully extract the subtle but important difference between the two phrases.

Part II examines the territorial incorporation and naturalization powers exclusive to Congress and the manner in which Congress and the Courts have recognized the citizenship of persons whose status is not immediately apparent. This section demonstrates that Congress, through these powers, holds the authority to decide the political status of territories and, in turn, the citizenship status and presidential eligibility of the citizens of these territories.

Part III analyzes the legal and political status of Puerto Rico and citizens native-born to the U.S. territories. After comparing the Congressional treatment of Puerto Rico as a territory and the way in which Congress conferred citizenship to Puerto Ricans, this section concludes that native-born citizens of Puerto Rico—as well as those native-born of other United States territories—are ineligible for the presidency.

Finally, Part IV considers the implications of these conclusions, arguing that any other finding would exacerbate, rather than alleviate, the underlying problem—the unincorporated status of Puerto Rico.

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<sup>28</sup> See Johnny Smith, Note, *Commonwealth Status: A Good Deal for Puerto Rico?*, 10 HARV. LATINO L. REV. 263, 271 (2007) (describing how the three major political parties of Puerto Rico reflect the three major viewpoints on political status for the island—the Puerto Rican Independence Party favors independence, the New Progressive Party favors statehood, and the Popular Democratic Party supports some form of the current commonwealth status).

## I. DISTINGUISHING NATURAL BORN FROM NATURALIZED

A. *The Historical Origins of the Natural Born Citizen Proviso*

Several commentators have suggested<sup>29</sup> that the natural born citizen requirement for presidential eligibility originates from a July 25, 1787 letter sent by John Jay to George Washington, and possibly to other delegates at the Constitutional Convention, which stated:

Permit me to hint, whether it would be wise and seasonable to provide a strong check to the admission of Foreigners into the administration of our national Government; and to declare expressly that the Command in Chief of the American army shall not be given to nor devolve on, any but a natural born Citizen.<sup>30</sup>

Jay's letter was likely prompted by suspicion of ambitious foreigners who served in the Revolutionary cause, or a response to Convention discussions of a monarchy headed by a foreign ruler.<sup>31</sup> Regardless of his motives, his letter predated the appearance of the phrase "natural born citizen" in the Committee of Eleven report by six weeks,<sup>32</sup> and is therefore thought to be the source of the phrase in the Constitution.<sup>33</sup> Ultimately, the "natural born citizen" language was

<sup>29</sup> See Charles C. Thach, Jr., *The Creation of the Presidency, 1775–1789: A Study in Constitutional History*, in 40 JOHNS HOPKINS UNIVERSITY STUDIES IN HISTORICAL AND POLITICAL SCIENCE 415, 551 (1922) (providing a comprehensive discussion of the constitutional provisions relating to the Presidency). See also Gordon, *supra* note 17, at 5 & n.27 (supporting the Thach hypothesis that John Jay's letter to George Washington is the most likely source of the "natural born citizen" language in the Constitution).

<sup>30</sup> See Gordon, *supra* note 17, at 5 (emphasis omitted) (quoting U.S. DEP'T OF STATE, 4 DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES 237 (1905)).

<sup>31</sup> See Thach, *supra* note 29, at 551 ("[T]here can be little doubt that it was [von Steuben] . . . with his sympathies for the followers of Shay, and his evidently suspected dealings with Prince Henry of Prussia, whom Jay had in mind when he penned these words."); *id.* at 551 (suggesting distrust of Baron von Steuben, who had served in the Revolutionary forces but whom Jay distrusted); Cyril C. Means, Jr., *Is Presidency Barred to Americans Born Abroad?*, U.S. NEWS & WORLD REPORT, Dec. 23, 1955, at 28 (quoting *Pa. Journal*, Aug. 22, 1787) (stating that to quell popular fears that the Convention was considering foreigners for the presidency, the delegates released an official statement to the Philadelphia press stating: "We are informed that many letters have been written to the members of the Federal Convention . . . respecting the reports idly circulating that it is intended to establish a monarchical government, to send for [Prince Frederick Augustus], &c. &c.—to which it has been uniformly answered, 'though we cannot, affirmatively, tell you what we are doing, we can, negatively, tell you what we are not doing—we never once thought of a king.'").

<sup>32</sup> Jill A. Pryor, Note, *The Natural-Born Citizen Clause and Presidential Eligibility: An Approach for Resolving Two Hundred Years of Uncertainty*, 97 YALE L.J. 881, 888 (1988) ("The letter is generally assumed to be the source of the phrase in the Constitution.")

<sup>33</sup> See Gordon, *supra* note 17, at 4–5 (detailing the sequence of events leading up to the inclusion of the natural born proviso in the presidential eligibility clause of the Constitu-

introduced by the Committee of Eleven and adopted by the Convention without debate.<sup>34</sup>

At least one other commentator has noted that Jay's letter and the adoption of the natural born language might very well have been prompted by a document written by Alexander Hamilton on June 18, 1787—about a month prior to Jay's letter.<sup>35</sup> "Hamilton submitted a 'sketch of a plan of government which 'was meant only to give a more correct view of his ideas, and to suggest the amendments which he should probably propose . . . in . . . future discussion.'" Article IX, section 1 of that sketch provided [an early version of the presidential eligibility clause]: "No person shall be eligible to the office of President of the United States unless he be now a Citizen of one of the States, or hereafter be born a Citizen of the United States."<sup>37</sup> Similar to Article II, Section 1, clause 5 of the Constitution, Hamilton's sketch for presidential eligibility provides that those who were currently citizens of the United States at the time of the adoption of the Constitution would not be excluded from the presidency. But unlike the Constitution's requirement, Hamilton's sketch requires only that the President be born a citizen; there is no natural born requirement. Thus, according to Hamilton's sketch, the President need not be native born, but must be a citizen from birth.<sup>38</sup> That the Constitution bypassed such language in favor of Jay's suggests that the natural born language had a very specific meaning to the Framers,<sup>39</sup> just as did the other presidential requirements—that candidates be at least thirty-five years old and U.S. residents for fourteen years.<sup>40</sup>

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tion); Christina S. Lohman, *Presidential Eligibility: The Meaning of the Natural-Born Citizen Clause*, 36 GONZ. L. REV. 349, 352–53 (2001) (tracing the source of the Natural Born Citizen Clause back to John Jay's letter to George Washington).

34 See Gordon, *supra* note 17, at 4 (citing JONATHAN ELLIOT, 1 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787, at 289 (2d ed. 1891) [hereinafter ELLIOT'S DEBATES]); Lohman, *supra* note 33, at 352–53 (describing the Committee of Eleven's adoption of the language).

35 See Pryor, *supra* note 32, at 888–89 (concluding that the speculations of Jay's motives are buttressed by the earlier Hamilton document containing different language which would have had a different impact on presidential eligibility).

36 *Id.* at 889 (quoting 3 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 617 (rev. ed. 1937)).

37 *Id.* (quoting 3 FARRAND, *supra* note 36, at 629).

38 See Pryor, *supra* note 32, at 889 (analyzing the presidential requirements in Article IX, section 1 of Hamilton's submitted sketch).

39 See Lohman, *supra* note 33, at 353 (arguing that the natural born language meant something very specific to the Framers).

40 U.S. CONST. art. II, § 1, cl. 5.

### B. *The Meaning of “Natural Born”*

Traditional inquiries into the meaning of the natural born proviso search for the Framers’ original intent of the term “natural born” at the time of the adoption of the Constitution.<sup>41</sup> As other commentators have noted, there are several problems with the traditional approach.<sup>42</sup> The presidential qualification clause in Article II, section 1, clause 5 marks the only appearance of the phrase “natural born” in the Constitution,<sup>43</sup> and nowhere does the Constitution define the phrase.<sup>44</sup> Furthermore, no explanation of the meaning or intent of the natural born proviso appears anywhere in the recorded deliberations of the Constitutional Convention of 1787.<sup>45</sup>

In the absence of direct evidence from the Convention, the traditional approach looks next to the guidance of English common law,<sup>46</sup> in which the colonial legal system was grounded.<sup>47</sup> Although the Supreme Court has never directly addressed the natural born citizen clause, the Court has analyzed the evolution of the common law re-

41 See Pryor, *supra* note 32, at 882 (“Constitutional scholars have traditionally approached the uncertainty surrounding the meaning of the natural-born citizen clause by inquiring into the specific meaning of the term ‘natural born’ at the time of the Constitutional Convention.”).

42 See *id.* at 883 (“The traditional approach has not established the clause’s full and precise meaning, however, because it fails to adequately consider a critical analytical question that must inform our understanding of the constitutional text: What is the proper role for Congress in giving specific content to the natural-born citizen clause?”).

43 See U.S. CONST. amend. XII (incorporating this language into the Constitution by disqualifying for the Vice Presidency any person “constitutionally ineligible to the office of President”).

44 See *Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 167 (1874) (“The Constitution does not, in words, say who shall be natural-born citizens.”).

45 Gordon, *supra* note 17, at 3–4 (noting that the Convention wrote on a clean slate following the Articles of Confederation, which did not provide for a Chief Executive). See also 1 ELLIOT’S DEBATES 143, 280 (detailing the deliberations of the members of the Committee on Detail, the five-man committee—Rutledge, Randolph, Gorham, Ellsworth, and Wilson—to which the Convention referred various resolutions, including the establishment of a national executive); Pryor, *supra* note 32, at 885–86 (providing a summation of the relevant records of the Constitutional Convention).

46 See *Smith v. Alabama*, 124 U.S. 465, 478, (1888) (“There is, however, one clear exception to the statement that there is no national common law. The interpretation of the Constitution of the United States is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in the light of its history.”).

47 See Gordon, *supra* note 17, at 5 (exploring the British antecedents of the law of citizenship and presidential eligibility from monarchy to republic); Pryor, *supra* note 32, at 886–88 (detailing the guiding principles of nationality law in England). See also *United States v. Wong Kim Ark*, 169 U.S. 649, 654 (1898) (“In this, as in other respects, it must be interpreted in the light of the common law, the principles and history of which were familiarly known to the framers of the Constitution.”).

garding citizenship in America in the case of *United States v. Wong Kim Ark*:

The Constitution of the United States, as originally adopted, uses the words ‘citizen of the United States,’ and ‘natural-born citizen of the United States.’ . . .

The Constitution nowhere defines the meaning of these words, either by way of inclusion or of exclusion, except in so far as this is done by the affirmative declaration that ‘all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States.’ In this, as in other respects, it must be interpreted in the light of the common law, the principles and history of which were familiarly known to the framers of the Constitution. The language of the Constitution, as has been well said, could not be understood without reference to the common law.<sup>48</sup>

The basic tenet of *jus soli* long guided nationality law in England.<sup>49</sup> Under this principle, anyone born on British soil, with few exceptions, was a “natural-born British subject.”<sup>50</sup> British civil law, however, gradually adopted the principle of *jus sanguinis*, which granted natural born citizenship by descent or inheritance, not solely by birth-right.<sup>51</sup> This inherited English tradition became more complex when the American colonies passed their own naturalization laws prior to the adoption of the Declaration of Independence.<sup>52</sup> There was no uniform rule of naturalization prior to the Naturalization Act of 1790.<sup>53</sup> This has led some to the conclusion that, at the time of the Constitutional Convention in 1787, there was no discernable common understanding of the definition of “natural born citizen.”<sup>54</sup> This is too broad an overstatement, however, because what remains clear, whether the Framers’ understanding of “natural born citizen” followed solely the principle of *jus soli* or also incorporated *jus sanguinis* at the time of Convention, is that “natural born citizen” at least meant

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48 *Wong Kim Ark*, 169 U.S. at 654 (citations omitted).

49 *See* Gordon, *supra* note 17, at 6 (explaining how *jus soli* emerged out of feudal concepts of allegiance).

50 *See* Pryor, *supra* note 32, at 886 & n.24 (describing the meaning of *jus soli*).

51 *See id.* (describing the complications of tracing the adoption of English nationality law in the colonies because colonists inherited primarily, but not exclusively, English common law (*jus soli*) and not civil law (*jus sanguinis*)).

52 *See id.* at 887 & n.33 (describing the lack of uniformity among the naturalization laws of the various colonies).

53 *Id.* at 887. Prior to Congress’s first exercise of the naturalization power (the Naturalization Act of 1790), there were no uniform rules of naturalization.

54 *See, e.g., id.* at 887–88 & n.35 (maintaining that while there is no evidence that there was an agreed-upon meaning of “natural born citizen” at the time of the Constitutional Convention, nothing in the British or early American traditions suggests that there were different meanings for the terms “naturalized,” “natural-born,” and “citizen at birth”).

*jus soli*—any native born citizen was a natural born citizen of the United States, with the traditional exceptions of children of diplomats (whose allegiance remained to their respective countries).<sup>55</sup> It is also clear what “natural born citizen” did not mean: a naturalized citizen. As Chancellor James Kent wrote in his Commentaries, the concern is one of allegiance:

Natives are all persons born within the jurisdiction and allegiance of the United States. This is the rule of the common law, without any regard or reference to the political condition or allegiance of their parents, with the exception of the children of ambassadors, who are, in theory, born within the allegiance of the foreign power they represent.<sup>56</sup>

The Supreme Court has expressed a similar sentiment: “To create allegiance by birth, the party must be born, not only within the territory, but within the ligeance of the government.”<sup>57</sup>

If “natural born” incorporates the principle of *jus sanguinis*, someone like Senator John McCain is clearly a natural born citizen, because regardless of whether or not his birthplace counts as part of the United States and grants him natural born status through *jus soli*, he clearly inherits his natural born status by virtue of both of his parents having been natural born citizens. The same would not hold true for the vast majority of native-born Puerto Ricans, because their natural born status necessarily turns on whether or not birth in Puerto Rico grants them the right through *jus soli*. This is so because if Puerto Rico does not grant these citizens natural born status via right of the soil, the only alternative is through right of inheritance. But, assuming their parents are native-born Puerto Ricans (and not citizens born on the mainland United States), their parents would not be natural born citizens by virtue of birthplace any more than are their children. Thus, whether or not the Framers understood “natural born” as incorporating *jus soli* solely or in conjunction with *jus sanguinis* does not clear the ambiguity regarding the presidential eligibility of native-born Puerto Ricans.

### C. *The Meaning of Naturalized and Naturalized at Birth*

The Fourteenth Amendment states, in relevant part: “All persons born or naturalized in the United States, and subject to the jurisdic-

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55 See generally *United States v. Wong Kim Ark*, 169 U.S. 649, 662 (1898) (discussing the meaning of natural born citizenship in light of the common law).

56 *Id.* at 664 (quoting 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 38–39 (6th ed. 1848)).

57 *Id.* (quoting 2 KENT, *supra* note 56, at 42).

tion thereof, are citizens of the United States and of the State wherein they reside.”<sup>58</sup> The Supreme Court has interpreted this clause to mean that there are only two means of acquiring citizenship: birth and naturalization.<sup>59</sup> The Immigration and Nationality Act of 1952 defined “naturalization” as “the conferring of nationality of a state upon a person after birth, by any means whatsoever.”<sup>60</sup> Thus, naturalized citizens are neither native born nor natural-born. The Court has made clear that, under the Constitution, “a naturalized citizen stands on an equal footing with the native citizen in all respects, save that of eligibility to the Presidency.”<sup>61</sup>

What remains less clear is how to interpret the status of a statutory citizen naturalized at birth—that is, a person who is made a citizen at birth by statute, not by virtue of the Constitution. The case of native-born Puerto Ricans presents this very scenario of “statutory” United States citizens.<sup>62</sup> Answering this question requires an examination of the territorial incorporation and naturalization powers exclusive to Congress and the manner in which Congress has recognized the citizenship of Puerto Ricans.

## II. CONGRESSIONAL POWER OVER TERRITORIES AND CITIZENSHIP

### A. *Congressional Power of Territorial Incorporation*

“The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . . .”<sup>63</sup>

Through the Territorial Clause, the Constitution grants Congress the exclusive power to regulate all territories of the United States.<sup>64</sup> The Continental Congress adopted the Northwest Ordinance of

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58 U.S. CONST. amend. XIV, § 1.

59 *See Schneider v. Rusk*, 377 U.S. 163, 165 (1964) (describing two paths to citizenship: the native born path and the naturalized citizen path); *Wong Kim Ark*, 169 U.S. at 702 (“The Fourteenth Amendment of the Constitution, in the declaration 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,’ contemplates two sources of citizenship, and two only: birth and naturalization.”).

60 Immigration and Nationality Act of 1952, 8 U.S.C. § 1101(a)(23) (1964). A similar definition appeared in the Nationality Act of 1940, § 101(c), ch. 876, 54 Stat. 1137.

61 *Luria v. United States*, 231 U.S. 9, 22 (1913).

62 *See THORNBURGH*, *supra* note 26, at 2 (describing differences between U.S. nationals and “statutory” U.S. citizens).

63 U.S. CONST. art. IV, § 3, cl. 2.

64 *See id.*

1787<sup>65</sup> as the territorial policy of the United States.<sup>66</sup> Through this policy, Congress placed on the path of incorporation territories acquired by the westward expansion of the United States.<sup>67</sup> The Northwest Ordinance assumed territorial status was temporary.<sup>68</sup> The end goal of the territorial incorporation process was statehood, and between 1796 and 1959, Congress admitted thirty-two incorporated territories into the Union as states.<sup>69</sup>

*B. Congressional Power of Naturalization and Judicial Interpretation*

“The Congress shall have Power . . . [t]o establish an uniform Rule of Naturalization . . . .”<sup>70</sup>

Through the Naturalization Clause, the Constitution grants Congress the exclusive power to establish a uniform rule of naturalization.<sup>71</sup> Pursuant to this power, Congress has passed several statutes concerning immigration and naturalization, culminating in the Immigration and Naturalization Act of 1952.<sup>72</sup> This Act describes the procedures for immigrating to the United States and becoming a naturalized United States citizen.<sup>73</sup> But the Act does not settle many of the ambiguities created by the Constitution’s “natural born” language. The following provides a brief overview of the manner in which Congress and the Courts have recognized the citizenship of persons whose status and presidential eligibility is not immediately apparent.

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65 Act of Aug. 7, 1789, ch. 8, 1 Stat. 50.

66 See THORNBURGH, *supra* note 26, at 9, 45.

67 *Id.*

68 In reference to the original territory “north-west of the river Ohio” governed by the statute, the Northwest Ordinance pronounced that organization of the area as a territory was “for the purposes of temporary government.” See Act of Aug. 7, 1789, ch. 8, 1 Stat. 50, 51 n.(a).

69 See THORNBURGH, *supra* note 26, at 9 & n.1 at 32. Thornburgh list the territories admitted to statehood under the territorial incorporation policy set down by the Northwest Ordinance as: Tennessee (1796), Ohio (1803), Louisiana (1812), Indiana (1816), Mississippi (1817), Illinois (1818), Alabama (1819), Missouri (1821), Arkansas (1836), Michigan (1837), Florida (1845), Iowa (1846), Wisconsin (1848), California (1850), Minnesota (1858), Oregon (1859), Kansas (1861), Nevada (1864), Nebraska (1867), Colorado (1876), North Dakota (1889), South Dakota (1889), Montana (1889), Washington (1889), Idaho (1890), Wyoming (1890), Utah (1896), Oklahoma (1907), New Mexico (1912), Arizona (1912), Alaska (1959), and Hawaii (1959).

70 U.S. CONST. art. I, § 8, cl. 4.

71 *Id.*

72 Immigration and Naturalization Act of 1952, Pub. L. No. 414, 66 Stat. 163 (codified as amended at 8 U.S.C. §§ 1101–1503 (2006)).

73 *Id.*

1. *Persons Born in United States Territories Prior to Statehood*

Senator Barry Goldwater, born in the Arizona territory in 1909, presents the only instance of a presidential candidate born in a United States territory prior to statehood.<sup>74</sup> His candidacy was never challenged, and his defeat by President Lyndon B. Johnson prevented any claims of a constitutional crisis from arising. John Nance Garner, presidential candidate in the Democratic primary of 1932 and Vice President for the first two terms of President Franklin Delano Roosevelt's tenure in office, was born in Texas several months prior to its re-admittance into the Union in 1868 after the Civil War.<sup>75</sup> However, there is no record of any legal challenge to his qualifications for office on natural born grounds.<sup>76</sup> Garner stepped down as Vice President in January, 1941, ending any further constitutional questions.<sup>77</sup>

But Goldwater and Garner raise the issue of the presidential eligibility of persons born in territories that later become states. The only possibility of a modern-day Goldwater scenario would be if a citizen born in Alaska before January 3, 1959, or born in Hawaii before August 21, 1959—i.e., prior to those states' admittance into the Union—ran for the presidency.<sup>78</sup> From the time of its purchase by the United States from Russia in 1867, Alaska was considered an incorporated territory.<sup>79</sup> Congress declared Hawaii an incorporated territory after April 30, 1900.<sup>80</sup> An incorporated territory is one which has been incorporated into the body politic of the United States, usually by Con-

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74 See WHITE, *supra* note 16, at 211–12 (noting Goldwater's birth in the Territory of Arizona in 1909).

75 See Duggin & Collins, *supra* note 7, at 91 n.199 (raising the issue of Garner's presidential eligibility).

76 *Id.*

77 Because the Twelfth Amendment disqualifies for the Vice-Presidency any person "constitutionally ineligible to the office of President," the same constitutional issue over whether or not Garner was a natural born citizen was raised by virtue of Garner's election to the Vice Presidency. U.S. CONST. amend. XII.

78 These are the official dates of statehood for Alaska and Hawaii. See Act of Mar. 18, 1959, Pub. L. No. 86-3, 73 Stat. 4; Act of July 7, 1958, Pub. L. No. 85-508, 72 Stat. 339; Proclamation No. 3309, 24 Fed. Reg. 6868 (Aug. 25, 1959) (admitting Hawaii into the Union); Proclamation No. 3269, 24 Fed. Reg. 81 (Jan. 6, 1959) (admitting Alaska into the Union).

79 See *Rasmussen v. United States*, 197 U.S. 516, 525 (1905) (holding that Alaska was an incorporated territory).

80 See Act of Apr. 30, 1900, ch. 339, 31 Stat. 141 (declaring Hawaii an incorporated territory after this date, and all of its citizens at the time of its acquisition by the United States on August 12, 1898, to be United States citizens).

gressional action.<sup>81</sup> Because incorporation is a necessary and important step in the path to statehood,<sup>82</sup> Congress has been careful to extend incorporation only to those territories “destined for statehood.”<sup>83</sup> Because of incorporation’s designation as a stepping stone for statehood, the Constitution applies in full force to incorporated territories, such as Alaska and Hawaii prior to statehood.<sup>84</sup> Therefore, commentators have argued that it is likely that persons born in these territories that are destined for statehood subsequent to being designated as incorporated territories qualify as natural born citizens under Article II, as well as birthright citizens within the meaning of the Fourteenth Amendment.<sup>85</sup> Thus, whether a territory is “in the United States” within the meaning of the Fourteenth Amendment likely turns on Congressional intent with respect to that territory’s future statehood.<sup>86</sup> This group includes Goldwater, Garner, and the aforementioned citizens of Alaska and Hawaii. Still, in the absence of an explicit ruling by the Supreme Court, the eligibility of such persons for the office of the presidency remains uncertain.

## 2. *Persons Born to Americans Abroad*

Most of the debate surrounding the natural born proviso has focused on whether foreign-born children of citizen parents fall under the meaning of “natural born.” This rekindles the discussion of whether the governing principle of “natural born” is *jus soli* or *jus sanguinis*. If the former meaning applies, then foreign-born children of natural-born citizen parents do not qualify as natural-born; if the latter applies, then they do. Congress’s first exercise of its naturaliza-

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81 See *Rasmussen*, 197 U.S. at 521 (holding that territory is usually incorporated by congressional action, and in the case of acquiring a territory by treaty, the treaty is also important); *Dorr v. United States*, 195 U.S. 138, 149 (1904) (holding that the Constitution did not require the right to trial by jury in the Philippines while it was a United States territory); *Downes v. Bidwell*, 182 U.S. 244, 287 (1901) (holding that “Porto [sic] Rico is a territory appurtenant and belonging to the United States, but not a part of the United States within the revenue clauses of the Constitution . . .”).

82 See *Balzac v. Porto Rico*, 258 U.S. 298, 311 (1922) (“Incorporation has always been a step, and an important one, leading to statehood.”).

83 *Smith v. Gov’t of the Virgin Islands*, 375 F.2d 714, 718 (3d Cir. 1967).

84 See T. Alexander Aleinikoff, *Puerto Rico and the Constitution: Conundrums and Prospects*, 11 CONST. COMMENT. 15, 26 (1995) (“For those territories ‘incorporated’ into the United States by congressional and executive branch action and deemed to be on the road to statehood (such as Alaska), the Constitution applied in full.”).

85 See Duggin & Collins, *supra* note 7, at 92 (arguing for the inclusion of these groups under the meaning of natural born citizens as well as under the Fourteenth Amendment).

86 *Id.* at 92 & n.206 (noting Congress’s plenary power over territories under Section 3 of Article IV of the Constitution).

tion powers—the Naturalization Act of 1790—followed the principle of *jus sanguinis*, providing that “the children of citizens of the United States, that may be born beyond sea . . . shall be considered as natural born citizens . . . .”<sup>87</sup> Congress repealed the 1790 Act, however, in 1795 and replaced it with legislation providing substantially the same provisions with one significant change—it stated that foreign-born children of citizen parents “shall be considered as citizens of the United States.”<sup>88</sup> Thus, the new legislation omitted the characterization of such children as “natural born.” While there is no evidence explaining why the 1795 legislators omitted the natural born language, the language has not since reappeared in any legislation concerning citizenship.<sup>89</sup> More recent legislation refers only to citizenship at birth and by naturalization,<sup>90</sup> much like the Court’s interpretation of the two means to citizenship.<sup>91</sup> The Cabinet Committee—comprised of the Secretary of State, the Attorney General, and the Secretary of Labor<sup>92</sup>—whose five-year study was responsible for the Nationality Act of 1940 noted that the question of whether the Constitution’s language of “natural born citizens” includes foreign-born children of citizens was “still a subject of debate.”<sup>93</sup> But this Committee recognized the possibility that the Framers may have had a broader definition of “naturalization” in mind, which would have included the acquisition of citizenship at birth by foreign-born children of citizens.<sup>94</sup> Congress has since passed several statutes govern-

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87 Act of Mar. 26, 1790, ch. 3, § 1, 1 Stat. 103, 104.

88 Act of Jan. 29, 1795, ch. 20, § 3, 1 Stat. 414, 415.

89 See Gordon, *supra* note 17, at 11 (noting that after removing the language from the Naturalization Act of 1795, Congress has never reinserted the natural born language into its naturalization laws).

90 See Immigration and Nationality Acts, *supra* note 60. See also Gordon, *supra* note 17, at 11 (asserting that modern designations of citizenship refer only to citizenship by birth and by naturalization).

91 See cases cited *supra* note 59 and accompanying text.

92 See Gordon, *supra* note 17, at 15 (quoting UNITED STATES COMMITTEE TO REVIEW THE NATIONALITY LAWS, NATIONALITY LAWS OF THE UNITED STATES: MESSAGE FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING A REPORT PROPOSING A REVISION AND CODIFICATION OF THE NATIONALITY LAWS OF THE UNITED STATES vii (Comm. Print 1939) [hereinafter NATIONALITY LAWS OF THE UNITED STATES]) (describing the evolution of citizenship and presidential eligibility in recent legislation, including the 1940 United States Code).

93 *Id.*

94 *Id.* at 15 (quoting NATIONALITY LAWS OF THE UNITED STATES, *supra* note 92, at 3) (noting that while the Committee acknowledged this possibility of a broader meaning of “naturalization,” it also recognized the “now universally” accepted meaning that naturalization encompassed citizenship after birth).

ing citizenship by birth abroad.<sup>95</sup> As a general rule, the citizenship of foreign-born persons who claim derivative United States citizenship through certain familial relationships is governed by the statute in effect at the time of the person's birth.<sup>96</sup> Statutes conferring such citizenship are construed prospectively only in application.<sup>97</sup>

### 3. African American Freedmen

The status of African Americans has been a source of controversy since this nation's founding.<sup>98</sup> At the time of the Constitution's adoption, African Americans were citizens of several states.<sup>99</sup> But in the *Dred Scott* case, the Supreme Court held that African Americans—even those born free—were not citizens of the United States.<sup>100</sup> The ruling of this case was short-lived, however, and was overruled by the Fourteenth Amendment. Section 1 of this Amendment confirmed the principle of birthright citizenship and guaranteed the application of this principle to groups that had been previously excluded by Congress and the Courts, especially the descendants of slaves.<sup>101</sup> In this way, the Fourteenth Amendment reaffirmed the principle of *jus soli*:

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95 See DANIEL LEVY, U.S. CITIZENSHIP AND NATURALIZATION HANDBOOK § 4:17 (Charles Roth ed. 2007) (listing in detail several statutes governing citizenship by birth abroad); see also The Immigration and Nationality Act of 1952, 8 U.S.C. § 1401(c)–(g) (2006) (granting derivative citizenship to all foreign-born children of an American parent, providing United States citizenship for children under five found in the United States with unknown parentage, and incorporating predecessor statutes).

96 See *Solis-Espinoza v. Gonzales*, 401 F.3d 1090 (9th Cir. 2005) (granting citizenship based on citizenship statute applicable when petitioner was born in 1967); *Alvarez-Garcia v. Ashcroft*, 293 F.3d 1155 (9th Cir. 2002) (stating that the applicable citizenship law for petitioner born in 1952 was 8 U.S.C. § 601(g) (1940)); *Scales v. INS*, 232 F.3d 1159 (9th Cir. 2000) (applying the citizenship statute of 1977 for petitioner born in that year).

97 See, e.g., *Wolf v. Brownell*, 253 F.2d 141 (9th Cir. 1957); *Palomo v. Mitchell*, 361 F. Supp. 455 (S.D. Tex. 1972), *aff'd*, 474 F.2d 1345 (5th Cir. 1973).

98 See PETER H. SCHUCK & ROGERS M. SMITH, *CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY* 66 (1985) (noting that the status of African Americans had been a subject of debate in the United States since at least the 1820s).

99 See *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 572–75 (1856) (Curtis, J., dissenting) (“At the time of the ratification of the Articles of Confederation, all free native-born inhabitants of the States of New Hampshire, Massachusetts, New York, New Jersey, and North Carolina, though descended from African slaves, were not only citizens of those States, but such of them as had the other necessary qualifications possessed the franchise of electors, on equal terms with other citizens.”).

100 *Id.* at 454 (holding that *Dred Scott* was not a citizen under the meaning of the term as used in the Constitution).

101 See Pryor, *supra* note 32, at 881 n.2 (describing the application of *jus soli* to descendants of slaves through the Fourteenth Amendment).

The Fourteenth Amendment affirms the ancient and fundamental rule of citizenship by birth within the territory, in the allegiance and under the protection of the country, including all children here born of resident aliens, with the exceptions or qualifications (as old as the rule itself) of children of foreign sovereigns or their ministers . . . or of enemies within and during a hostile occupation of part of our territory . . . . The Amendment, in clear words and in manifest intent, includes the children born, within the territory of the United States, of all other persons, of whatever race or color, domiciled within the United States.<sup>102</sup>

#### 4. *Native Americans*

Before 1924, Native Americans could attain citizenship only by naturalization, treaty, or statute.<sup>103</sup> The Supreme Court held that tribal Native Americans were not citizens within the meaning of the Fourteenth Amendment because they were perceived “as owing immediate political allegiance to their ancestral tribes,”<sup>104</sup> and therefore “were not part of the people of the United States.”<sup>105</sup> But a Congressional statute passed in 1924 made all Native Americans born in the United States citizens.<sup>106</sup> This statute has been extended to include Eskimos, Aleutians, and members of any other “aboriginal tribe.”<sup>107</sup> Through this statute, Native Americans are treated as are any other citizens for jurisdictional purposes.<sup>108</sup> The Supreme Court held that

<sup>102</sup> United States v. Wong Kim Ark, 169 U.S. 649, 693 (1898).

<sup>103</sup> See *Elk v. Wilkins*, 112 U.S. 94, 109 (1884) (holding that a Native American who had not been naturalized was not entitled to register to vote in Nebraska because Native Americans do not acquire citizenship at birth even though they are born in the United States); see also *United States v. Nice*, 241 U.S. 591, 601 (1916) (holding that Congress alone had the power to dissolve tribal relations); *Boyd v. Nebraska*, 143 U.S. 135, 162 (1892) (holding that Native Americans in the state of Nebraska became United States citizens by statute); *Felix v. Patrick*, 145 U.S. 317, 330 (1892) (holding that, through a treaty, a Native American resident of Minnesota became a citizen of the United States).

<sup>104</sup> Jonathan C. Drimmer, *The Nephews of Uncle Sam: The History, Evolution, and Application of Birthright Citizenship in the United States*, 9 GEO. IMMIGR. L.J. 667, 699 (1995) (explaining why the Fourteenth Amendment had not previously applied to Native Americans).

<sup>105</sup> See *Elk*, 112 U.S. at 99.

<sup>106</sup> See The Indian Citizenship Act of June 2, 1924, Pub. L. No. 175, ch. 233, 43 Stat. 253 (1924) (“That all non-citizen Indians born within the territorial limits of the United States be, and they are hereby, declared to be citizens of the United States: *Provided*, That the granting of such citizenship shall not in any manner impair or otherwise affect the right of any Indian to tribal or other property.”).

<sup>107</sup> See 8 U.S.C. § 1401(b) (2006) (granting citizenship to “a person born in the United States to a member of an Indian, Eskimo, Aleutian, or other aboriginal tribe”).

<sup>108</sup> See *Squire v. Capoman*, 351 U.S. 1, 6 (1956) (“Indians are citizens and . . . in ordinary affairs of life, [are] not governed by treaties or remedial legislation . . . .”); see also *Poitra v. Demarias*, 502 F.2d 23 (8th Cir. 1974), *cert. denied*, 421 U.S. 934 (1975) (ruling that Native Americans are citizens for diversity jurisdiction purposes); *Ex parte Green*, 123 F.2d

Native Americans who remain on tribal reservations are citizens of the state in which the reservation is located.<sup>109</sup> Similarly, the Court ruled that a Native American who has left the reservation is a citizen of the state in which he or she is domiciled.<sup>110</sup> It remains subject to debate, however, whether the 1924 statute extending citizenship to Native Americans confers “natural born” status to them, because the Supreme Court has never overruled its prior ruling that Native Americans are not citizens under the Fourteenth Amendment, and “the United States citizenship of many Native Americans purportedly arises from collective naturalization by statute rather than the Constitution.”<sup>111</sup>

##### 5. *Persons Born in the District of Columbia*

The issue of presidential eligibility for citizens born in the District of Columbia revolves around the question of whether the District would be defined as “in the United States.”<sup>112</sup> Congress, with a Constitutional grant of authority,<sup>113</sup> has never designated the District of Columbia as a state.<sup>114</sup> The District also has never been defined as an unincorporated territory of the United States, and the Constitution therefore applies in full force to the District.<sup>115</sup> Nevertheless, the Supreme Court has held that “[w]hether the District of Columbia constitutes a ‘State or Territory’ within the meaning of any particular . . . constitutional provision depends upon the character and aim

862, 864 (2d Cir. 1941), *cert. denied*, 316 U.S. 668 (holding that Native Americans are citizens for purposes of Selective Service Act).

109 *See* *Schantz v. White Lightning*, 502 F.2d 67 (8th Cir. 1974) (holding that where an action arose out of an accident on an Indian reservation, federal jurisdiction could not be based on diversity of citizenship when defendant Native Americans were members of tribes located in North Dakota and plaintiff was resident of North Dakota residing outside the reservation).

110 *Id.*

111 *See* Duggin & Collins, *supra* note 7, at 102 (citing CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE § 92.03(3)(e) (2004)) (asserting that the natural born proviso “casts a shadow over the eligibility of at least some Native Americans to serve as President . . .”).

112 U.S. CONST. amend. XIV, § 1. *See also* Duggin & Collins, *supra* note 7, at 89–90 (noting that, at a minimum, citizens born “in the United States” are considered natural born citizens under the principle of birthright citizenship).

113 U.S. CONST. art. I, § 8, cl. 17.

114 While several attempts at statehood have been advanced, *e.g.*, S. 898, 103d Cong. (1993); H.R. 51, 103d Cong. (1993), Congress has never admitted the District of Columbia as a state.

115 *See* Duggin & Collins, *supra* note 7, at 97 (describing the status of the District of Columbia and the presidential eligibility of citizens born in the District).

of the specific provision involved.”<sup>116</sup> The Court has determined that the District of Columbia is not a state for purposes of the Fourteenth Amendment’s Equal Protection Clause,<sup>117</sup> Congressional representation,<sup>118</sup> or diversity jurisdiction pursuant to Article III.<sup>119</sup> But residents of the District of Columbia are protected by the Due Process clause of the Fifth Amendment.<sup>120</sup> The Supreme Court has never directly decided whether a citizen born in the District of Columbia is a natural born citizen, prompting some commentators to view the status of such citizens and their eligibility for the presidency as uncertain.<sup>121</sup> Such a conclusion, however, seems to contradict the Supreme Court’s recognition of the District’s status. As early as 1820, Chief Justice John Marshall stated: “The district of Columbia . . . is not less within the United States, than Maryland or Pennsylvania . . . .”<sup>122</sup> Therefore, it appears that citizens born in the District are as entitled to natural born status as those born in Maryland, Pennsylvania, or any other state in the Union.

6. *Persons Born in United States Embassies, Military Bases, and Other Areas of Special Jurisdiction*

The Supreme Court has ruled that the territory subject to United States jurisdiction “includes the land areas under its dominion and control, the ports, harbors, bays and other enclosed arms of the sea along its coast and a marginal belt of the sea extending from the coast line outward a marine league, or three geographic miles.”<sup>123</sup> Congress has since extended the territorial waters to twelve nautical

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116 *District of Columbia v. Carter*, 409 U.S. 418, 420 (1973) (holding that the District of Columbia was not a “State or Territory” within the meaning of 42 U.S.C. § 1983).

117 *Id.* at 424.

118 *Adams v. Clinton*, 90 F. Supp. 2d 35, 50 (D.D.C. 2000) (“We conclude from our analysis of the text that the Constitution does not contemplate that the District may serve as a state for purposes of the apportionment of congressional representatives.”).

119 *Nat’l Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 588 (1949) (holding that the District of Columbia was neither contemplated as a state nor admitted as a new state).

120 *See Bolling v. Sharpe*, 347 U.S. 497 (1954) (holding racial segregation in the District of Columbia’s public schools unconstitutional based on the Due Process Clause of the Fifth Amendment rather than the Equal Protection Clause of the Fourteenth Amendment, which was applied in *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954)).

121 *See Duggin & Collins*, *supra* note 7, at 98 (asserting that “a modicum of uncertainty remains” over the presidential eligibility of citizens born in the District of Columbia).

122 *Loughborough v. Blake*, 18 U.S. (5 Wheat.) 317, 319, 325 (1920) (“Congress possesses, under the constitution, the power to lay and collect direct taxes within the District of Columbia . . .”).

123 *Cunard S.S. Co. v. Mellon*, 262 U.S. 100, 122 (1923).

miles from the baselines of the United States.<sup>124</sup> Because territorial waters are considered an extension of the land, “whether a birth occurs along the coast of Virginia or that of Puerto Rico could be significant in determining whether a citizen is natural born.”<sup>125</sup>

While it is generally assumed that anyone born in a United States embassy, consulate, or other installation (such as a military base) is a United States citizen at birth, such birth does not result in citizenship unless there is also another basis for citizenship.<sup>126</sup> Similarly, while United States civilian and military vessels in international and foreign waters or airspace are subject to United States jurisdiction for several purposes, birth aboard these vessels does not in itself guarantee citizenship.<sup>127</sup> While at least two commentators have argued in favor of interpreting the status of children born of military personnel living abroad on active duty assignment as falling under the “natural born” umbrella, even this status remains ambiguous.<sup>128</sup>

### III. NATIVE BORN PUERTO RICANS AND PRESIDENTIAL ELIGIBILITY

Congress has defined “United States” in a geographical sense to mean “the continental United States, Alaska, Hawaii, Puerto Rico, Guam, and the Virgin Islands of the United States.”<sup>129</sup> However, these entities are not all accorded the same legal status. Under the Territory Clause of the Constitution, Congress has the power to regulate territories “belonging to the United States.”<sup>130</sup> It is also “well established that Congress possesses plenary power to legislate for territories acquired by purchase, conquest, treaty, or war.”<sup>131</sup> The Court has

124 See Proclamation No. 5928, 54 Fed. Reg. 777 (Dec. 27, 1988).

125 Duggin & Collins, *supra* note 7, at 102 & n.263 (arguing that because the legal principle of *jus soli* is based on actual physical presence, children born to aliens in international zones are arguably natural born United States citizens).

126 See GORDON ET AL., *supra* note 111, at § 93.02(2)(d).

127 See *Lam Mow v. Nagle*, 24 F.2d 316 (9th Cir. 1928) (holding that a person born to alien parents while aboard an American ship in foreign waters did not acquire United States citizenship at birth); see also Duggin & Collins, *supra* note 7, at 103 (citing *Lam Mow*).

128 See Lohman, *supra* note 33, at 366 (“Thus, under both the common law and *Wong Kim Ark*, it appears that, at the very least, all foreign-born children of United States citizens, foreign-born as a direct result of parental government employment, are ‘within the allegiance’ of the United States at birth. For example, this should encompass all children of United States military personnel, whether or not in enemy occupation of a foreign land.”); cf. Duggin & Collins, *supra* note 7, at 103 (endorsing Lohman’s interpretation, but acknowledging that the presidential eligibility of such children is ambiguous).

129 Immigration and Nationality Act, 8 U.S.C. § 1101(a)(38) (2006).

130 U.S. CONST. art. IV, § 3, cl. 2.

131 Aleinikoff, *supra* note 84, at 17; see also *Dorr v. United States*, 195 U.S. 138, 140 (1904) (finding “Congress possessing and exercising the absolute and undisputed power of gov-

interpreted this power as granting Congress the ability to determine what parts of the Constitution, apart from these fundamental rights, will apply to each unincorporated territory.<sup>132</sup> The inhabitants of unincorporated territories are not United States citizens until Congress chooses to grant United States citizenship to them, and only Congress has the power to determine upon what terms the United States will receive these inhabitants and what their status will be.<sup>133</sup>

A. *Why Puerto Rico Merits Special Attention Among Unincorporated Territories*

There are several reasons why Puerto Rico ought to be considered a unique case among the unincorporated territories.<sup>134</sup> With a population of more than 3.8 million people,<sup>135</sup> Puerto Rico is by far the

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erning and legislating” for territories (quoting *Seré v. Pitot*, 10 U.S. (6 Cranch) 332, 337 (1810)).

132 See *Rasmussen v. United States*, 197 U.S. 516, 528 (1905) (holding that the Sixth Amendment applied to Alaska, an incorporated territory); *Dorr*, 195 U.S. at 149 (holding that the Sixth Amendment did not apply to the Philippines, an unincorporated territory); *Hawaii v. Mankichi*, 190 U.S. 197, 215–18 (1903) (holding that the Fifth and Sixth Amendments did not apply to Hawaii until it had been formally incorporated); *Downes v. Bidwell*, 182 U.S. 244, 342 (1901) (White, J., concurring) (arguing that the uniformity clause of the Constitution was not applicable to Congress in legislating for Puerto Rico).

133 See *Rabang v. Boyd*, 353 U.S. 427, 429 (1957) (noting that “. . . [t]he civil rights and political status of the native inhabitants . . . shall be determined by the Congress” (quoting Treaty of Peace, *supra* note 143, art. IX, Dec. 10, 1898, 30 Stat. 1754)).

134 There are five remaining organized, unincorporated territories, all islands: American Samoa, Guam, Puerto Rico, the Northern Mariana Islands, and the U.S. Virgin Islands. See THORNBURGH, *supra* note 26, at 11 (discussing U.S. policy toward unincorporated territories). Of these, Congress has designated American Samoa as an “outlying possession[] of the United States.” 8 U.S.C. § 1101(a)(29) (2006). The citizens of these possessions are not born United States citizens, but acquire noncitizen nationality at birth and may become citizens through an expedited naturalization process. See Duggin & Collins, *supra* note 7, at 96 n.229 (“Residence as a national in American Samoa satisfies the permanent residency requirement for naturalization, and American Samoans can freely enter the United States and become naturalized after three months.”). There are also eleven small island territories, largely uninhabited, and unorganized: Bajo Nuevo, Navassa Island, and Serranilla Bank in the Caribbean Sea; and Baker Island, Howland Island, Jarvis Island, Johnston Atoll, Kingman Reef, Midway Atoll, Palmyra Atoll, and Wake Atoll in the Pacific Ocean. THORNBURGH, *supra* note 26, at 11, 32 n.10. All of these are also unincorporated territories, except for Palmyra Atoll. In addition to being the only existing incorporated territory, the Pacific island of Palmyra Atoll is also an unorganized territory with no indigenous population. See U.S. Department of the Interior, Office of Insular Affairs, Definitions of Insular Area Political Organizations, [http://www.doi.gov/oia/Islandpages/political\\_types.htm](http://www.doi.gov/oia/Islandpages/political_types.htm) (last visited Jan. 15, 2009) (defining “incorporated territory” and “unorganized territory”).

135 U.S. Census Bureau, Census 2000 Data for Puerto Rico, <http://www.census.gov/census2000/states/pr.html> (last visited Jan. 15, 2009).

largest unincorporated territory of the United States—larger than the populations of American Samoa, Guam, the Northern Mariana Islands, and the U.S. Virgin Islands combined.<sup>136</sup> Puerto Rico's population also rivals that of many states; if Puerto Rico ever achieved statehood, it would be the twenty-fifth most populous state in the Union and would send about half a dozen representatives to the House in addition to two senators.<sup>137</sup> There are also more than 3.4 million persons of Puerto Rican descent living in the continental United States, comprising about 1.2% of the nation's population.<sup>138</sup> This reflects not only the close social, political, and cultural ties between both the United States proper and the island, but also the fact that the issue's salience reaches a constituency beyond Puerto Rico itself.

The ties between Puerto Rico and the United States are further evidenced by the two countries' financial and strategic ties. Federal aid is critical to the health of the Puerto Rican economy. The current federal subsidy of the Puerto Rican commonwealth is estimated at \$16 billion annually and growing.<sup>139</sup> In return, Puerto Rico provides the United States with an important military and strategic foothold in the Caribbean.<sup>140</sup> Puerto Ricans served in the U.S. military in all of American's wars in the twentieth and twenty-first centuries,<sup>141</sup> and Puerto Rico ranks alongside the top five states in the Union in per capita military service.<sup>142</sup>

Puerto Rico's historical relationship with the United States presents a unique case unlike that of any other state already admitted into the Union or any other territory not yet admitted. Over a century ago, the United States Congress agreed to determine the "civil

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136 The combined population of American Samoa (population 57,291), Guam (population 154,805), the Northern Mariana Islands (population 69,221), and the U.S. Virgin Islands (population 108,612) is 389,929. See U.S. Census Bureau, Census 2000 Results for the Island Areas, <http://www.census.gov/population/www/cen2000/islandareas/index.html> (last visited Jan. 15, 2009).

137 Aleinikoff, *supra* note 84, at 15.

138 U.S. Summary: 2000, Census 2000 Profile 2 (2002), <http://www.census.gov/prod/2002pubs/c2kprof00-us.pdf>.

139 THORNBURGH, *supra* note 26, at 6, 7 n.4 (citing other estimates that place the subsidy as high as \$22 billion annually).

140 *Id.* at 6 (noting that Puerto Rico was once home to the largest U.S. military base in the world at Roosevelt Roads, which could be reactivated in the future if needed).

141 See George H. W. Bush, *Foreword to THORNBURGH*, *supra* note 26, at viii ("In particular, Puerto Ricans have fought bravely in all of America's wars in the twentieth and twenty-first centuries.").

142 THORNBURGH, *supra* note 26, at 6.

rights and political status” of Puerto Rican residents.<sup>143</sup> Yet today, their rights and status are as ambiguous as ever. Ninety years after Congress conferred U.S. citizenship to the residents of Puerto Rico, the island remains the only large and populous U.S. territory that has never been placed on the path to either statehood or independence.<sup>144</sup>

Finally, Puerto Rico has generated the bulk of litigation concerning the status of territories and the rights of their citizens, due in large part to the salience of the issue of Puerto Rico’s status among its citizens.<sup>145</sup> Therefore, while Puerto Rico serves as a good lens through which to analyze the legal status and presidential eligibility of citizens of other territories, it presents an original and fascinating case study in its own right.

### *B. Acquisition from Spain*

Territorial policy substantially deviated from the Northwest Ordinance policy of incorporation after the Spanish-American War, when the United States acquired sovereignty or control over Cuba, Guam, the Philippines, and Puerto Rico under the Treaty of Paris, signed with Spain on December 10, 1898.<sup>146</sup>

Under this treaty, Spanish subjects born and residing in Puerto Rico had the choice to either remain subjects of the Spanish crown or be granted U.S. nationality.<sup>147</sup> All other Spanish nationals residing in

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<sup>143</sup> See Treaty of Peace, U.S.–Spain, art. IX, Dec. 10, 1898, 30 Stat. 1754 (“The civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by the Congress.”).

<sup>144</sup> See THORNBURGH, *supra* note 26, at 5 (noting that Alaska and Hawaii were the last large territories admitted into the Union as states).

<sup>145</sup> See Smith, *supra* note 28, at 271 (noting the high voter turnout—over 70%—in the last two referenda over Puerto Rico’s status).

<sup>146</sup> THORNBURGH, *supra* note 26, at 10 (stating that federal territorial policies and practices deviated in earnest following the Spanish-American War); see also Treaty of Peace, *supra* note 143, art. I–III (stating that Spain relinquished “claim of sovereignty over and title to Cuba,” and “cedes to the United States” Puerto Rico, Guam, and the Philippines).

<sup>147</sup> See Treaty of Peace, *supra* note 143, art. IX (“Spanish subjects, natives of the Peninsula, residing in the territory over which Spain by the present treaty relinquishes or cedes her sovereignty . . . may preserve their allegiance to the Crown of Spain by making, before a court of record, within a year from the date of the exchange of ratifications of this treaty, a declaration of their decision to preserve such allegiance; in default of which declaration they shall be held to have renounced it and to have adopted the nationality of the territory in which they may reside.”).

Puerto Rico automatically became United States nationals at the time of the treaty's ratification.<sup>148</sup>

Article IX of the treaty, consistent with the Territorial Clause,<sup>149</sup> stated that the "civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by the Congress."<sup>150</sup> But unlike the federal treatment of the territories acquired by westward expansion, including Alaska and Hawaii, congressional action that followed did not make these territories part of the United States.<sup>151</sup> As a result, the Citizenship Clause of the Constitution did not apply to the inhabitants of Puerto Rico or any of these territories at the time of their acquisition by the United States.<sup>152</sup> Prior to the Treaty of Paris, "[e]very treaty by which territory was ceded to the United States . . . contained some provision whereby either all or some of the inhabitants of the ceded territory could, either immediately or ultimately, be admitted to United States citizenship."<sup>153</sup> This marked the first time in American history that, "in a treaty acquiring territory for the United States, there was no promise of citizenship . . . [nor any] promise, actual or implied, of statehood. The United States thereby acquired not 'territories' but possessions or 'dependencies' and became, in that sense, an 'imperial' power."<sup>154</sup>

### C. Congressional Policy Towards Puerto Rico and Judicial Interpretation

Following the Treaty of Paris, congressional action towards Puerto Rico has been marked by the passage of a series of "organic" laws, similar to those passed for other "organized" territories, aimed at enabling the residents of the island to establish local rule consistent with and subject to federal law.<sup>155</sup> Congress passed the first of these organic laws, the Foraker Act, in 1900 in order to establish a tempo-

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148 *See id.* *See also* LEVY, *supra* note 95, § 2:16 n.4 (citing an Immigration and Naturalization Services interpretation of the treaty as not allowing these other subjects to retain Spanish nationality).

149 U.S. CONST. art. IV, § 3, cl. 2.

150 Treaty of Peace, *supra* note 143, art. IX.

151 *See* *Balzac v. Porto Rico*, 258 U.S. 298, 304–05 (1922) (noting that *Downes v. Bidwell* had made settled law the fact "that neither the Philippines nor Porto Rico was territory which had been incorporated in the Union or become a part of the United States, as distinguished from merely belonging to it").

152 LEVY, *supra* note 95, at § 2:16.

153 LUELLA GETIYS, *THE LAW OF CITIZENSHIP IN THE UNITED STATES* 144–45 (1934).

154 JULIUS W. PRATT, *AMERICA'S COLONIAL EXPERIMENT: HOW THE UNITED STATES GAINED, GOVERNED, AND IN PART GAVE AWAY A COLONIAL EMPIRE* 68 (1950).

155 *See* THORNBURGH, *supra* note 26, at 11 (describing the nature of the organic laws).

rary civil government of the island.<sup>156</sup> The Foraker Act established the office of Puerto Rico's resident commissioner, a non-voting member of the U.S. House of Representatives with a four-year term.<sup>157</sup> Under this Act, Congress retained the power to annul any laws enacted by this legislature.<sup>158</sup> Congress also granted Puerto Rican citizenship to all former Spanish subjects residing in Puerto Rico since the treaty's ratification.<sup>159</sup>

A year after passing the Foraker Act, the Supreme Court issued the first in a series of decisions known as the *Insular Cases*.<sup>160</sup> In these cases, the Supreme Court held that Congress had the power to create unincorporated territories.<sup>161</sup> The Court distinguished these from incorporated territories by holding that the latter are intended for statehood from the time of acquisition and have the entire Constitution applied to them in full force.<sup>162</sup> Unincorporated territories, on the other hand, were not incorporated in the tradition of the Northwest Ordinance and not intended for statehood, and in these territo-

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<sup>156</sup> Foraker Act, ch. 191, 31 Stat. 77 (1900) (repealed 1917).

<sup>157</sup> *See id.* § 39 (describing the position of the resident commissioner of Puerto Rico). *See also* 48 U.S.C. § 891 (2006) (setting the term of the resident commissioner to four years).

<sup>158</sup> Foraker Act, *supra* note 156, § 31.

<sup>159</sup> *Id.* § 7. *See also* LEVY, *supra* note 95, § 2:16 n.5 (noting that under this Act, Congress extended United States citizenship to former Spanish subjects only).

<sup>160</sup> *See* Smith, *supra* note 28, at 268 n.72 (providing the full list of Insular Cases, which include: *De Lima v. Bidwell*, 182 U.S. 1 (1901); *Dooley v. United States*, 183 U.S. 151 (1901); *Goetze v. United States*, 182 U.S. 221 (1901); *Armstrong v. United States*, 182 U.S. 243 (1901); *Downes v. Bidwell*, 182 U.S. 244 (1901); *Huus v. New York & Porto Rico S.S. Co.*, 182 U.S. 392 (1901); *The Diamond Rings*, 183 U.S. 176 (1901); *Hawaii v. Mankichi*, 190 U.S. 197 (1903); *Gonzales v. Williams*, 192 U.S. 1 (1904); *Kepner v. United States*, 195 U.S. 100 (1904); *Dorr v. United States*, 195 U.S. 138 (1904); *Rasmussen v. United States*, 197 U.S. 516 (1905); *Trono v. United States*, 199 U.S. 521 (1905); *Dowdell v. United States*, 221 U.S. 325 (1911); *Ocampo v. United States*, 234 U.S. 91 (1914); and *Balzac v. Porto Rico*, 258 U.S. 298 (1922)); *but see* Duggin & Collins, *supra* note 7, at 93 n.212 (noting that some scholars limit the series to the original 1901 cases, while others extend the canon to include between twenty-three and twenty-eight Supreme Court decisions through 1922, ending with *Balzac v. Porto Rico*, 258 U.S. 298 (1922)); *see also* José A. Cabranes, *Citizenship and the American Empire*, 127 U. PA. L. REV. 391, 419 n.97 (1979) (limiting the canon of Insular Cases to the first four of its kind in 1901).

<sup>161</sup> *See* *Dorr*, 195 U.S. at 149 ("We conclude that the power to govern territory, implied in the right to acquire it, and given to Congress in the Constitution in Article IV, § 3 . . . does not require that body to enact for ceded territory, not made a part of the United States by Congressional action, 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>162</sup> *See* *Rasmussen*, 197 U.S. at 528 (holding that the Constitution applied in full force to Alaska, an incorporated territory).

ries only fundamental rights apply by their own force.<sup>163</sup> In *Downes v. Bidwell*, the Supreme Court held that Puerto Rico was “a territory appurtenant and belonging to . . . but not a part of the United States within [certain provisions] of the Constitution.”<sup>164</sup> This departure from the territorial policy of the Northwest Ordinance was justified, in part, because the territories acquired from Spain were “inhabited by alien races, differing from us in religion, customs, laws, methods of taxation and modes of thought” and therefore “the administration of government and justice, according to Anglo-Saxon principles, may for a time be impossible.”<sup>165</sup>

In *Gonzales v. Williams*, the Supreme Court ruled that native-born Puerto Ricans who came to the mainland United States were neither aliens nor immigrants.<sup>166</sup> Instead, the Court carved out a new status for these residents “who live in the peace of the dominion of the United States”<sup>167</sup> and left the future of their “civil rights and political status”<sup>168</sup> to the discretion of Congress.<sup>169</sup>

Congress increased local authority over the administration of civil government and, more importantly, conferred statutory citizenship to all citizens in Puerto Rico through the Jones Act of 1917.<sup>170</sup> One of the primary motivations for extending citizenship to Puerto Ricans under the Jones Act was to proclaim “‘the future of Puerto Rico to be something other than national independence,’ while denying that citizenship entailed an immediate eventual offer of statehood.”<sup>171</sup> Thus, in granting citizenship to Puerto Ricans, Congress did not intend to expand their rights, nor did it demonstrate congressional in-

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163 See *Examining Bd. of Eng'rs, Architects and Surveyors v. Flores de Otero*, 426 U.S. 572, 599 n.30 (1976) (noting that the unincorporated territories “included those Territories not possessing that anticipation of statehood. As to them, only ‘fundamental’ constitutional rights were guaranteed to the inhabitants”).

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

165 *Id.*

166 *Gonzales*, 192 U.S. at 13.

167 *Id.*

168 *Id.* at 9 (citing Treaty of Peace, *supra* note 143, art. IX).

169 See THORNBURGH, *supra* note 26, at 49 (stating that through the *Gonzales* decision, the Supreme Court invented a new class of persons).

170 Jones Act, Act of March 2, 1917, Ch. 145, 39 Stat. 951. The Jones Act is also known as the Organic Act of 1917.

171 Eduardo Guzmán, Note, *Igartúa de la Rosa v. United States: The Right of the United States Citizens of Puerto Rico to Vote for the President and the Need to Re-evaluate America's Territorial Policy*, 4 U. PA. J. CONST. L. 141, 154 (2001) (citing JOSÉ A. CABRANES, *CITIZENSHIP AND THE AMERICAN EMPIRE* 6 (1979)).

tent to incorporate the territory into the United States.<sup>172</sup> Puerto Ricans born on the island after the passage of the Act, however, did not become United States citizens at birth as a result of the Jones Act.<sup>173</sup> Congress did not extend citizenship at birth to all persons born in Puerto Rico until 1934.<sup>174</sup> Because members of Congress did not believe that residents of Puerto Rico were capable of self-government, the increases in self-government granted by the Jones Act were counterbalanced by other restrictions.<sup>175</sup> Like the Foraker Act before it, the Jones Act “carefully avoided” any language concerning Puerto Rico’s relationship to the United States.<sup>176</sup>

Five years later, in *Balzac v. Porto Rico*, the Supreme Court ruled that the extension of citizenship to Puerto Ricans neither incorporated the territory into the United States nor granted its citizens more rights than were conferred in the Foraker and Jones Acts.<sup>177</sup> The Court concluded that the unincorporated status of Puerto Rico handed down by the *Insular Cases* was clear by 1917, and the Court found no congressional action in the Jones Act that would change that fact.<sup>178</sup> The Court stated that “[i]ncorporation has always been a step, and an important one, leading to statehood” and, therefore, “it is reasonable to assume that when such a step is taken it will be begun and taken by Congress deliberately and with a clear declaration of purpose, and not left a matter of mere inference or construction.”<sup>179</sup> In this way, the Court held that the status and rights of Puerto Ricans—and other U.S. citizens of incorporated territories—had to be explicitly determined by Congress through its territorial powers and

172 *Id.* at 153–54 (discussing congressional intent in granting citizenship to residents of Puerto Rico).

173 *See* Conrad v. Dulles, 155 F. Supp. 542, 543 (D.P.R. 1957) (noting that the Jones Act did not confer citizenship status at birth to a native-born Puerto Rican born after the Jones Act in 1901 and before 1934).

174 *See* Act of June 27, 1934, ch. 845, 48 Stat. 1245 (extending United States citizenship to Puerto Ricans born after April 11, 1899).

175 *See* HENRY WELLS, THE MODERNIZATION OF PUERTO RICO: A POLITICAL STUDY OF CHANGING VALUES AND INSTITUTIONS 85 (1969) (“Such increased authority as it did bestow, it counter-balanced in part with new controls.”).

176 *Id.*

177 *See* 258 U.S. 298, 306 (1922) (“The act is entitled ‘An Act To provide a civil government for Porto Rico, and for other purposes.’ It does not indicate by its title that it has a purpose to incorporate the Island into the Union. It does not contain any clause which declares such purpose or effect. While this is not conclusive, it strongly tends to show that Congress did not have such an intention.”).

178 *See id.* at 304–13 (concluding that Congress did not, through the Jones Act, incorporate Puerto Rico or set it on the path towards incorporation); THORNBURGH, *supra* note 26, at 51 (explaining the Court’s interpretation of the Jones Act in *Balzac*).

179 *Balzac*, 258 U.S. at 311.

were not defined by direct application of the Constitution.<sup>180</sup> The only limit on this power was that Congressional territorial policy should not violate “certain fundamental personal rights declared in the Constitution.”<sup>181</sup>

This case has been the subject of criticism,<sup>182</sup> in large part because it is difficult to reconcile with the Court’s previous holding in *Rasmussen v. United States*.<sup>183</sup> There, the Court inferred intent to incorporate Alaska based on Congressional conferral of citizenship to Alaskan residents.<sup>184</sup> Yet in *Balzac*, the Court came to the exact opposite conclusion after Congress had conferred citizenship to the residents of Puerto Rico—requiring that there be a “declaration of purpose” by Congress in order to find intent to incorporate the territory.<sup>185</sup> Nevertheless, this insistence that Congress explicitly declare its purpose to incorporate Puerto Rico—and the fact that it has yet to do so after a century of United States control of Puerto Rico—has controlled the status of native-born Puerto Ricans ever since.

In 1950, Congress continued its legislation to promote increased home rule for Puerto Rico by passing Public Law 600.<sup>186</sup> This law allowed residents of Puerto Rico to adopt a local constitution, subject to Congressional approval, for internal civil affairs, thus creating a process for joint approval.<sup>187</sup> Pursuant to Public Law 600, Puerto Rico held a referendum on whether to organize a government centered on commonwealth status as well as a constitutional convention, which would then be subjected to Congressional approval.<sup>188</sup> Under this proposed commonwealth, however, the legal and political relationship between Puerto Rico and the United States was to remain largely unchanged from that which had existed since 1917.<sup>189</sup> This is because

180 See THORNBURGH, *supra* note 26, at 52 (interpreting the implications of the Court’s decision in *Balzac*).

181 *Id.* (citing *Balzac*, 258 U.S. at 312–13).

182 *See id.* (“The conspicuous deficiencies in this controlling jurisprudence cannot be sustained upon serious scrutiny, yet the destiny of the U.S. citizens of Puerto Rico has been determined for eight decades based on the flawed logic and mind-bending cognitive dissonance of this misconceived ruling.”).

183 197 U.S. 516 (1905).

184 *See id.* at 522 (“This declaration . . . is the equivalent . . . of the formula employed from the beginning to express the purpose to incorporate acquired territory into the United States, especially in the absence of other provisions showing an intention to the contrary.”).

185 *Balzac*, 258 U.S. at 311.

186 Act of July 3, 1950, Pub. L. No. 600, ch. 446, 64 Stat. 319.

187 *Id.*

188 *See id.*

189 WELLS, *supra* note 175, at 233.

Public Law 600 provided for a partial repeal of the Jones Act, with the rest of the 1917 act to stay in effect under a new statute, the Puerto Rican Federal Relations Act.<sup>190</sup> The remaining provisions of the Jones Act that were to be incorporated into the new statute pertained to Puerto Rico's relationship with the United States.<sup>191</sup> Thus, the Puerto Rican Federal Relations Act, as the amended Jones Act would be known, was to keep in effect the relationship between Puerto Rico and the United States established by the Jones Act and interpreted by the Court in *Balzac*.

Nevertheless, on June 4, 1951, 76.5% of Puerto Ricans approved Public Law 600 and voted in favor of "permanent association" with the United States in the form of commonwealth status.<sup>192</sup> After accepting Congressional amendments to the draft of the proposed constitution of Puerto Rico,<sup>193</sup> the Puerto Rican constitutional convention amended its Constitution in accordance with the congressional mandate, and the constitution formally took effect on July 25, 1952, establishing commonwealth status for Puerto Rico.<sup>194</sup> That same year, the citizenship status of Puerto Ricans was bolstered by the Immigration and Nationality Act of 1952, which made every person born in Puerto Rico a statutory citizen of the United States at birth.<sup>195</sup>

Though some have suggested that establishing commonwealth status in Puerto Rico ended Congress's plenary power under the Territory Clause,<sup>196</sup> both the Supreme Court and the Executive Branch have rejected this view.<sup>197</sup> Thus, since the establishment of common-

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190 See WELLS, *supra* note 175, at 232 (detailing the fourth and fifth sections of Public Law 600, which partially repealed the Jones Act).

191 *Id.*

192 Smith, *supra* note 28, at 269.

193 See THORNBURGH, *supra* note 26, at 16 (stating that Congress approved the local constitution draft, subject to certain amendments, on July 3, 1952); Aleinikoff, *supra* note 84, at 18 & nn.13, 14 (noting Congress's rejection of "positive rights" in the Puerto Rican constitution and the addition of an education proviso).

194 Aleinikoff, *supra* note 84, at 19 (describing the final stages of adoption for the Puerto Rican Constitution and the beginning of commonwealth status for the island).

195 See Immigration and Nationality Act of 1952, Ch. 477, 66 Stat. 163 (codified as amended at 8 U.S.C. § 1402 (2006)) ("All persons born in Puerto Rico on or after January 13, 1941, and subject to the jurisdiction of the United States, are citizens of the United States at birth.").

196 See Aleinikoff, *supra* note 84, at 19 ("Under this reasoning, Congress lost general power to regulate the internal affairs of Puerto Rico or to amend the 'compact' without Puerto Rican consent—much as Congress has no power to legislate for the now-independent Philippines or territories that have become states.").

197 See *Harris v. Rosario*, 446 U.S. 651, 651–52 (1980) (per curiam) (citing *Califano v. Torres*, 435 U.S. 1 (1978)) ("Congress, which is empowered under the Territory Clause of the Constitution, to 'make all needful Rules and Regulations respecting the Terri-

wealth status more than half a century ago—and arguably, since the Jones Act of 1917—nothing has changed with regard to the status of Puerto Rico’s relationship to the United States,<sup>198</sup> or the citizenship status of native-born Puerto Ricans.

#### D. Presidential Ineligibility of Native-Born Puerto Ricans

In order to qualify as natural born citizens, native-born Puerto Ricans would have to establish a right through the principle of *jus soli*.<sup>199</sup> Having examined the Congressional treatment of Puerto Rico and its citizens through Congress’s territorial incorporation and naturalization powers, and the Supreme Court’s interpretation of that legislation, this Comment concludes that native-born Puerto Ricans do not, by virtue of their birthplace,<sup>200</sup> qualify as natural born citizens and are therefore ineligible for the office of the presidency under Article II of the Constitution.

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tory . . . belonging to the United States,’ may treat Puerto Rico differently from States so long as there is a rational basis for its actions.”); *Political Status of Puerto Rico, 1991: Hearings on S. 244 Before the Senate Comm. on Energy and Natural Resources*, 102d Cong., 1st Sess. 193–94 (1991) (statement of Hon. Richard Thornburgh, Attorney General) (“We also have concerns with some of the provisions that define the commonwealth option. For example, Section 402(a) would declare that Puerto Rico ‘enjoys sovereignty, like a state, to the extent provided by the Tenth Amendment,’ and that ‘[t]his relationship is permanent unless revoked by mutual consent.’ These declarations are totally inconsistent with the Constitution.”).

198 Since the referendum of 1951 endorsing commonwealth status, three other referenda have been held on the status of Puerto Rico. On July 23, 1967, a second referendum offered three options to Puerto Ricans: 60.5% voted for commonwealth status, 38.9% voted for statehood, and 0.6% voted for independence. Smith, *supra* note 28, at 270. Two referenda were introduced in the 1990s. On November 14, 1993, 48.6% of Puerto Ricans voted for commonwealth status, 46.3% voted for statehood, and 4.4% voted for independence. *Id.* Finally, on December 13, 1998, a fourth option was introduced—the “Associated Republic,” a status meaning something “less autonomous than independence but more than commonwealth status.” *Id.* at 271. But because the ballot described commonwealth status as “the colonial option,” commonwealth proponents protested by encouraging voters to choose none of the options. *Id.* As a result, 50.3% of voters chose “none of the above,” 46.5% chose statehood, 2.5% chose independence, and 0.1% chose commonwealth status. *Id.* While none of these votes were binding on Congress, the last two votes in the 1990s drew voter turnout of 73.5% and 71.3%, respectively. *Id.* This demonstrates the level of interest Puerto Ricans have in the question of their island’s political status.

199 See Part I.B., *supra* (discussing why the only claim to natural born status for native-born Puerto Ricans is through the principle of *jus soli*).

200 If persons born in Puerto Rico have an alternative claim to natural born status—such as right by *jus sanguinis*—then they may be eligible for the presidency, but birthplace alone does not make these citizens eligible.

First, persons born in Puerto Rico cannot claim natural born citizenship through the common law principle of *jus soli* because Puerto Rico, as an unincorporated territory, was not made part of the United States in the fullest sense.<sup>201</sup> Nothing in the congressional acts governing Puerto Rico—not even establishing commonwealth rule—has so fundamentally changed its status as to negate the fact that it still has not yet been fully incorporated by the United States.<sup>202</sup> This unincorporated status of Puerto Rico is crucial to understanding that the territory does not qualify as United States soil for purposes of determining natural born citizenship through *jus soli* because this status signaled “an implied denial of the rights of the inhabitants to American citizenship until Congress by further action shall signify its assent thereto.”<sup>203</sup> The Supreme Court has upheld the disparate treatment of Puerto Ricans from citizens of the states, ruling that under the Territory Clause Congress “may treat Puerto Rico differently from States so long as there is a rational basis for its actions.”<sup>204</sup> What makes this disparate treatment permissible is not simply that there is a rational justification for the different treatment—there may be rational reasons to treat citizens of different states differently, but that is impermissible. Rather, what makes the disparate treatment of Puerto Rico and its residents permissible is residence in a territory—“the status of place.”<sup>205</sup> It is for this same reason—a difference in status of place—that residents of Puerto Rico do not have the right to vote in presidential elections.<sup>206</sup> The courts have held that in the Electoral College system, the right to vote for presidential electors applies only to the states and the District of Columbia.<sup>207</sup> Since

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201 See *Balzac v. Porto Rico*, 258 U.S. 298, 312–13 (1922) (holding that the right to trial by jury was not “fundamental”); *Downes v. Bidwell*, 182 U.S. 244, 291, 294 (White, Shiras, and McKenna, JJ., concurring) (1901) (holding that fundamental rights apply in unincorporated territories).

202 See Aleinikoff, *supra* note 84, at 19.

203 *Downes*, 182 U.S. at 280.

204 *Harris v. Rosario*, 446 U.S. 651, 651–52 (1980).

205 See Aleinikoff, *supra* note 84, at 24 (arguing that *Harris* exposes the deeper issue of status of place as determining the disparate treatment of Puerto Rico from states).

206 Nelson D. Hermilla, *Puerto Rico 1898–1998: The Institutionalization of Second Class Citizenship?*, 16 DICK. J. INT’L L. 275, 297 (1998); Ezequiel Lugo, *The Unfinished Business of American Democracy*, 24 WIS. INT’L L.J. 871, 872 (2007). Since 1980, however, Puerto Ricans have participated in presidential primaries. See Hermilla, *supra*, at 284 n.29.

207 See *Igartúa de la Rosa v. United States*, 229 F.3d 80, 83–84 (1st Cir. 2000) (ruling that the right to vote for presidential electors through the Electoral College was reserved for the states and the District of Columbia, and that Puerto Rico is not a state within the meaning of the U.S. Constitution).

Puerto Rico is not a state under the Constitution,<sup>208</sup> and has not been granted electors via a constitutional amendment as in the case of the District of Columbia,<sup>209</sup> it is not entitled to presidential electors and citizens of Puerto Rico therefore have no constitutional right to vote in presidential elections.<sup>210</sup> Oddly enough, although United States citizens retain their voting rights in presidential elections when they move to foreign countries,<sup>211</sup> they lose that same right to vote if they move to Puerto Rico.<sup>212</sup> Thus, Puerto Rico does not have what states do—formal congressional representation, votes in the Electoral College, and, most importantly, the status that entails full rights for its residents.

If birth in Puerto Rico, as a United States territory, granted a person natural born citizenship, it would not have taken a federal statute to extend citizenship to residents of and persons born in Puerto Rico. Furthermore, if Congress, through its powers under the Territorial Clause,<sup>213</sup> decided to revoke the extension of citizenship to Puerto Ricans, then surely persons thereafter born on the island would have no *jus soli* claims—even though the territory still belonged to the United States, because only natural born citizens are eligible for the presidency. This illustrates that, even with the extension of statutory citizenship, birthplace in Puerto Rico does not provide natural born citi-

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208 See *Igartúa de la Rosa v. United States*, 417 F.3d 145, 147 (1st Cir. 2005) (en banc), *cert. denied*, 547 U.S. 1035 (2006) (mem.) (citing *Trailer Marine Transp. Corp. v. Rivera Vazquez*, 977 F.2d 1, 7 (1st Cir. 1992)) (stating that Puerto Rico is not a state within the meaning of the Constitution).

209 See U.S. CONST. amend. XXIII, § 1 (“The District constituting the seat of Government of the United States shall appoint in such 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, but in no event more than the least populous State . . .”).

210 *Igartúa*, 417 F.3d at 147 (“As Puerto Rico has no electors, its citizens do not participate in the presidential voting, although they may do so if they take up residence in one of the 50 states . . .”).

211 See Uniformed and Overseas Citizens Absentee Voting Act (“UOCAVA”), 42 U.S.C. § 1973ff-1(3) (2006). See also *Igartúa de la Rosa v. United States (Igartúa I)*, 32 F.3d 8, 10 (1st Cir. 1994) (interpreting UOCAVA to protect the voting rights of citizens who temporarily reside overseas), *aff’d*, 417 F.3d 145 (1st Cir. 2005) (en banc), *cert. denied*, 547 U.S. 1035 (2006).

212 See 42 U.S.C. §§ 1973ff-2(b)(1), 1973ff-6(8). See also *Igartúa I*, 32 F.3d at 10 (asserting that UOCAVA did not guarantee that a citizen moving to Puerto Rico will be eligible to vote in a presidential election); *Romeu v. Cohen*, 265 F.3d 118, 124 (2d Cir. 2001) (holding that UOCAVA did not violate the Equal Protection clause by providing presidential voting rights to former residents of a state currently residing outside the United States, but not to former residents of a state currently residing in Puerto Rico).

213 U.S. CONST. art. IV, § 3, cl. 2.

zenship—and presidential eligibility—through *jus soli* because of Puerto Rico’s unincorporated status.

Second, the citizenship enjoyed by native-born Puerto Ricans, which is statutorily protected, does not have the same meaning as or consequence of natural-born citizenship, which is constitutionally protected.<sup>214</sup> Natural-born citizens enjoy the full protection and rights of the Constitution. Natural-born citizenship also entails a legal and political permanence—once a right to natural born citizenship is established under the Constitution, it cannot be stripped away.

The same permanence and scope of rights and benefits afforded to natural born citizens are not shared by Puerto Rican citizens. In a variety of circumstances, Congress continues to treat Puerto Rico and its residents, native-born and otherwise, differently than it treats states and their residents.<sup>215</sup> Through its territorial powers,<sup>216</sup> Congress can, in its discretion, choose to apply or refrain from applying the Constitution, federal treaty, or federal statutes to Puerto Rico. Extending citizenship to residents of Puerto Rico, however, did not also extend the full protections and rights of the Constitution to those residents.<sup>217</sup> Federal courts will uphold the application of those laws while they remain in effect.<sup>218</sup> But because no Congress can restrict the power of any future Congress to amend or nullify a statute,<sup>219</sup> any such statute—including the extension of citizenship—cannot be guaranteed as territorial policy in the future. “What Congress has granted . . . it may always take away.”<sup>220</sup> It follows that equating statutory citizenship with natural born citizenship could quite plausibly lead to the Natural Born Citizen Clause having one meaning today and quite another tomorrow, all at the whim of Congress. This would violate the bright-line meaning the Framers intended the natural

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214 THORNBURGH, *supra* note 26, at 55 (noting, in light of constitutionally protected citizenship versus statutory citizenship, the differences between congressionally granted statutory rights and constitutional rights).

215 *See, e.g.*, Aleinikoff, *supra* note 84, at 21 & n.19 (describing several ways in which Congress treats Puerto Rico differently from states for purposes of federal benefits).

216 U.S. CONST. art. IV, § 3, cl. 2.

217 *Balzac v. Porto Rico*, 258 U.S. 298, 312–13 (1922) (explaining that some of the grants of power and limitations in the Constitution are not always and everywhere applicable).

218 THORNBURGH, *supra* note 26, at 55 (“[F]ederal courts will uphold statutes creating local government structures in the territories as long as the statutes creating those structures remain in effect and unaltered by federal law.”).

219 *Id.* at 55, 60 n.44.

220 Aleinikoff, *supra* note 84, at 17.

born clause to have.<sup>221</sup> Therefore, the temporary nature of the statutory citizenship that native-born Puerto Ricans enjoy lacks both the scope and permanence of the legal and political rights of natural born citizenship.<sup>222</sup>

Thus, this Comment concludes that native-born Puerto Ricans have no right to natural born status through *jus soli* for two related reasons: neither the status of the unincorporated territory in which they are born nor the legal or political status they are granted as statutory citizens has the scope or permanence of Constitutional rights and privileges associated with natural born citizenship.

#### IV. CONCLUSION

While the question of who qualifies for presidential eligibility under the natural born proviso of Article II, Section 1, clause 5 presents a fascinating issue on a theoretical level, the case of native-born Puerto Ricans illustrates that the issue has a real-life impact as well. There appear to be two ways to make these persons eligible for the office of the presidency. First, Congress could pass a constitutional amendment that clarifies the definition of “natural born citizen” to include persons born in Puerto Rico.<sup>223</sup> Second, Congress could fully incorporate Puerto Rico into the Union, designating the territory as destined for statehood and its citizens natural born by virtue of being born within the United States in the fullest sense. This Comment now considers the implications of presidential ineligibility for citizens of Puerto Rico and other United States territories.

Without question, “eligibility for [the] office alone promotes democratic values separate and apart from actual service in office.”<sup>224</sup> It is therefore understandable that preclusion from the office of the presidency for certain persons who at their birth are citizens of this country leads to discontent and sentiments of second-class citizenship.<sup>225</sup> But those sentiments are likely to exist regardless of whether

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221 See Pryor, *supra* note 32, at 895 (suggesting that the Framers intended for “natural born” to be a bright-line rule, much like the age and residency requirements of presidential eligibility).

222 THORNBURGH, *supra* note 26, at 55.

223 It is beyond the scope of this Comment to suggest what would be the best wording for such a proposed constitutional amendment.

224 Ho, *supra* note 23, at 576.

225 See, e.g., Cabranes, *supra* note 160, at 492 (concluding that Congress extended second class citizenship to Puerto Ricans and created an anomalous situation that has lasted ever since); Guzman, *supra* note 171, at 182 (claiming that the current policy towards Puerto Rico and its residents “creates second class citizens”); Hermilla, *supra* note 206, at 278

or not native-born Puerto Ricans are deemed eligible to run for the presidency by virtue of the many other ways in which citizenship in Puerto Rico has a different legal and political meaning than citizenship in any one of the fifty states in the Union.<sup>226</sup>

Thus, to the extent that the current political and legal status of the island is the root of the problem,<sup>227</sup> and to the extent that citizens of Puerto Rico are dissatisfied with that status,<sup>228</sup> making native-born citizens of Puerto Rico eligible to run for the presidency will not fix the problem. In fact, it will likely exacerbate it. With each small political gain citizens of the island receive, the less dissatisfied with the current status of the island and the less motivated they will be to mobilize and vote for change at the polls—whether that change be statehood or independence. Therefore, if one views Puerto Rico's status as an unincorporated territory with commonwealth status as an obstacle to full citizenship, extending eligibility to the office of the presidency distracts from rather than solves the underlying problem. To the extent that citizens of Puerto Rico do not want a change in the current status of their island, however, they must accept the fact that under this framework the office of the presidency is out of their reach.

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("No matter what position the individual ultimately takes in his or her conclusion of what Puerto Rico is or should be, the longstanding and current legacy of Puerto Rico's connection to the United States is clearly that island inhabitants are second class citizens that do not have a voting representative in the United States and cannot vote for the President."); Pedro A. Malavet, *Puerto Rico: Cultural Nation, American Colony*, 6 MICH. J. RACE & L. 1, 30 (2001) (arguing that the *Bazac* decision created second class citizenship for Puerto Ricans); Ediberto Román, *Empire Forgotten: The United States's Colonization of Puerto Rico*, 42 VILL. L. REV. 1119, 1148 (1997) (arguing that, through the Jones Act, Congress extended second class citizenship to Puerto Ricans).

<sup>226</sup> See discussion *supra* Part III.D.

<sup>227</sup> For a comprehensive listing of those in favor and those opposed to commonwealth status, see José A. Cabranes, *Puerto Rico: Colonialism As Constitutional Doctrine*, 100 HARV. L. REV. 450, 460–61 n.55 (1986) (reviewing JUAN R. TORRUELLA, *THE SUPREME COURT AND PUERTO RICO: THE DOCTRINE OF SEPARATE AND UNEQUAL* (1985)).

<sup>228</sup> Consider the results of the last two referenda on the status of Puerto Rico. In 1993, a combined 50.7% (46.3% for statehood and 4.4% for independence) voted for change; in 1994, a combined 49% (46.5% for statehood and 2.5% for independence) voted for change, although this referendum was protested by a large segment of the electorate. See *supra* note 198.