

An Outdated Interpretation of the Constitution Restricts the Franchise of American Citizens Residing in United States Territories

Would you like to be able to vote for President? Do you know why we territorial residents, although U.S. citizens, cannot vote in federal elections despite the fact that we are subject to federal law? As you are likely aware, the current state of the law makes it impossible for the approximately 4.5 million Americans who reside in the territories of the United States to vote for President despite the fact that territorial residents serve in the military and die for their country. Moreover, this second-class form of citizenship is based solely on the arbitrary criterion of residence in a territory, since even American citizens residing abroad have the right to vote in federal elections under the Uniformed and Overseas Citizens Absentee Voting Act.

As today is Organic Act Day—and it is through the Organic Act that Congress established the rights of the American citizens residing in the United States Virgin Islands which, notably, do not include the right to vote for President—I invite you to learn why Congress gets to decide if we can vote for President.

Congress's power with respect to U.S. territories is defined by the "Territorial Clause" of the Constitution which states that, "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. . ." When the United States acquired its first territories—Puerto Rico and the Philippines—in the wake of the Spanish-American War, questions arose about the rights to which territorial residents were entitled. Thus, beginning in the late 1800s, the U.S. Supreme Court decided a series of cases—collectively referred to as the "Insular Cases"—where the Court decided which rights were "fundamental" and, therefore, applied by the force of the Constitution such as: freedom of religion, freedom of speech and freedom of the press.

However, with respect to voting rights, these new colonial territories presented a dilemma. In *Downes v. Bidwell* (1901), a leading Insular Case, the Supreme Court stated its concerns:

It is obvious that in the annexation of outlying and distant possessions [territories] grave questions will arise from differences of race, habits, laws and customs of the people, and from differences of soil, climate and production, which may require action on the part of Congress that would be [] unnecessary in the annexation of contiguous territory inhabited only by people of the same race, or by scattered bodies of native Indians.

If the U.S. Supreme Court decided that the Constitution followed the flag, the United States would be forced to grant the territorial peoples full constitutional rights. As stated in *Downes*, that interpretation would provide to "alien races, differing from [Americans] in religion, customs, laws, methods of taxation and modes of thought . . . [the] rights which peculiarly belong to the citizens of the United States." Accordingly, granting full constitutional rights to the territorial inhabitants could overthrow "the whole structure of government."

With these "concerns" in mind, the U.S. Supreme Court decided that the right to vote was

not “fundamental,” so pursuant to the Territorial Clause, Congress could withhold the right to vote in federal elections. In *Downes* the Court explained its decision as follows:

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

Thus, through the decisions made by the U.S. Supreme Court in the plainly racist and imperialist Insular Cases, Congress was given *carte blanche* to decide which territories would have federal voting rights. Importantly, the U.S. Supreme Court's current adherence to the Insular Cases—regardless of the anachronistic and contemptible justifications for those decisions—enables Congress and the lower federal courts to continue to deny United States citizens residing in U.S. Virgin Islands and our sister territories the right to vote in presidential elections.

Further, continued adherence to this outdated interpretation of the Territorial Clause is completely at odds with the U.S. Supreme Court’s more recent decisions on federal voting rights which state that voting rights are a fundamental right of American citizenship. For example, in *Reynolds v. Sims* (1963), the U.S. Supreme Court stated:

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

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

Notably, since 1870, Congress itself has, by Constitutional Amendment, extended the franchise to virtually every citizen over 18 in the United States. The 15th Amendment enfranchised former slaves, the 19th Amendment enfranchised women, the 23rd, residents of the District of Columbia, and the 26th, citizens who were over eighteen. Further expanding the ability of Americans to directly participate in the political process, Congress passed the 17th Amendment, which provides for direct election of United States Senators, as well as the 24th Amendment which says the right to vote cannot be abridged by a failure to pay a poll tax or any other tax. These Congressional actions evidence a legislative trend recognizing the expansion of

voting rights and a broadly inclusive political process.

In 1885, in the case of *Murphy v. Ramsey*, the Supreme Court stated:

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

At the time this case was decided, the right to vote was limited to men over 21. Subsequent constitutional amendments, legislative acts, and judicial decisions vastly expanded voting rights. The reasoning of the Insular Cases, however, harkens back to an era of limited franchise, embracing a concept that is discordant with contemporary ideology. The absurdity of applying the Insular Cases antiquated interpretations in a contemporary setting is underscored by subsequent Constitutional amendments and by the Supreme Court's current articulation of the fundamental nature of federal voting rights.

Where does this leave us this Organic Act Day? Is there a way that we, as American citizens residing in U.S. territories, could get the right to vote for President? The most direct way for territorial residents to get voting rights would be for Congress to pass a Constitutional amendment granting territories the power to appoint electors as if they were states. The residents of the District of Columbia were given the right to vote for president in this way by the 23rd Amendment to the Constitution. However, territorial citizens face an overwhelming obstacle in this regard because we do not have a voting representative in Congress, or any other way to influence Congress to pass such an amendment. Therefore, due to our lack of political power in Congress, in order to have a Constitutional amendment proposed and passed, the territorial residents would likely need judicial intervention.

The requisite judicial intervention would have to come from the U.S. Supreme Court and could occur if the Court agreed to hear a case where American citizens residing in the territories were challenging the constitutionality of their disenfranchisement. In deciding such a case, the U.S. Supreme Court could and should move away from the narrow definition of fundamental rights espoused in the Insular Cases and expand the definition of the "fundamental" rights of citizens residing in the U.S. territories to be equal with the definition of the "fundamental" rights of other American citizens. As a result, Congress would no longer have the discretionary power—initially granted by the Supreme Court in the Insular Cases—to restrict the rights of territorial residents to vote in federal elections. Accordingly, if voting were deemed a fundamental right of American citizens living in the U.S. territories, Congress would be forced to enact legislation—likely including a constitutional amendment—which would allow us to cast votes in presidential elections and have our votes counted. In short, the powers granted by the U.S. Supreme Court under the Constitution can also be modified or removed by the Supreme Court under the Constitution. Therefore, if the Supreme Court expanded the definition of the term "fundamental" as set forth in the Insular Cases to be coextensive with the definition of "fundamental" rights of American citizens not residing in the territories, there would no longer be a legal mechanism for territorial disenfranchisement.

On this, Organic Act Day, it is important that we both understand why and how Congress was given the power to restrict our right to vote for President particularly given the egregious and outdated rationale underpinning this power. I would ask you to reflect on the irony that our men and women are sent to war to bring democracy to other parts of the world when they cannot even vote for their own President and Commander in Chief. I would also ask you to take just a moment on this day and reflect on what steps you could take to help yourself and others better understand—and potentially change—the current situation.

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