

# THE UNFINISHED BUSINESS OF AMERICAN DEMOCRACY

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## I. INTRODUCTION

Every year the United States is attacked at the United Nations because it promotes voting rights abroad but fails to extend voting rights to all U.S. citizens.<sup>1</sup> Approximately nine million U.S. citizens are denied the right to vote.<sup>2</sup> Most of these disenfranchised U.S. citizens are felons or reside in the U.S. territories.<sup>3</sup> Nearly four million of these U.S. citizens reside in Puerto Rico—a U.S. territory.<sup>4</sup> They are the “disenfranchised stepchildren within the great American family.”<sup>5</sup>

The federal government imposes the same burdens, including payment of federal payroll taxes for Social Security and Medicare as well as federal income tax on stateside or overseas earnings, on Puerto

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<sup>1</sup> Jamin Raskin, *A Right-to-Vote Amendment for the U.S. Constitution: Confronting America's Structural Democracy Deficit*, 3 ELECTION L.J. 559, 566 (2004). See generally *Special Committee on Decolonization Approves Text Calling on United States to Expedite Puerto Rican Self-Determination Process*, U.S. FED. NEWS, June 13, 2006, available at 2006 WLNR 10288060 (describing last year's attack).

<sup>2</sup> Jesse Jackson, Jr., *Securing the Right to Vote as a Citizenship Right*, COMMON DREAMS NEWSCENTER, Mar. 9, 2005, <http://www.commondreams.org/views05/0309-20.htm>. See also Raskin, *supra* note 1, at 559.

<sup>3</sup> Jackson, Jr., *supra* note 2.

<sup>4</sup> Raskin, *supra* note 1, at 565.

<sup>5</sup> Pedro Roselló, Former Governor of Puerto Rico, Remarks to the Open Forum: Self-Determination, Civil Rights and the Future of Puerto Rico (Oct. 23, 2001), <http://www.state.gov/s/p/of/proc/tr/11083.htm>.

Rico residents<sup>6</sup> as it does on U.S. citizens residing in the states.<sup>7</sup> In 2005 the U.S. Treasury collected four billion dollars from Puerto Rico.<sup>8</sup> Furthermore, Puerto Rico residents have participated in every major war involving the United States since World War I.<sup>9</sup> As of February 2006, forty-eight had died in the recent conflicts in Iraq and Afghanistan.<sup>10</sup> Still, Puerto Rico residents have never participated in federal elections.<sup>11</sup>

Puerto Rico residents do not have any voting representative in the federal government.<sup>12</sup> They are allowed to vote in presidential primaries but not in the general election.<sup>13</sup> If a U.S. citizen residing in a state moves to a foreign country, he or she may participate in presidential elections.<sup>14</sup> But if the same citizen moves to Puerto Rico, he or she loses all federal voting rights.<sup>15</sup> Thus, Puerto Rico residents are governed by people they have not elected to govern them.<sup>16</sup> Pedro Roselló, former Puerto Rico governor, described the island as “a political black hole, where the voting rights of U.S. citizens immediately disappear.”<sup>17</sup> All political factions in Puerto Rico agree that this undemocratic arrangement needs to end.<sup>18</sup>

For the last thirty years, courts have refused to recognize Puerto Rico residents’ right to vote in presidential elections. The best argument

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<sup>6</sup> The term “Puerto Rico residents” represents all U.S. citizens residing in Puerto Rico.

<sup>7</sup> Larry Craig, *Puerto Rico: Practicing What We Preach*, MIAMI HERALD (Fla.), June 26, 2006, at A25.

<sup>8</sup> U.S. Dep’t of the Treasury, Internal Revenue Serv., Internal Revenue Service Data Book 2005 Publication 55B 10 (2006), available at <http://www.irs.gov/pub/irs-soi/05databk.pdf>.

<sup>9</sup> Rick Bragg, *Puerto Ricans Seek Vote for President*, N.Y. TIMES, Oct. 8, 2000, at 1, available at 2000 WLNR 3283380.

<sup>10</sup> Bryan Bender, *As Its War Sacrifices Rise, Puerto Rico Debates U.S. Tie*, BOSTON GLOBE, Feb. 4, 2006, at A1.

<sup>11</sup> Bragg, *supra* note 9.

<sup>12</sup> Manuel Del Valle, *Puerto Rico before the United States Supreme Court*, 19 REV. JUR. U. INTER-AM. P.R. 13, 79 (1984); Nelson D. Hermilla, *Puerto Rico 1898-1998: The Institutionalization of Second Class Citizenship?*, 16 DICK. J. INT’L L. 275, 297 (1998); Lisa Napoli, *The Legal Recognition of the National Identity of a Colonized People: The Case of Puerto Rico*, 18 B.C. THIRD WORLD L.J. 159, 175-76 (1998) [hereinafter Napoli, *Colonized People*].

<sup>13</sup> Bragg, *supra* note 9; Hermilla, *supra* note 12, at 297.

<sup>14</sup> Uniformed and Overseas Citizens Absentee Voting Act [UOCAVA], 42 U.S.C. § 1973ff-1(3) (2000). See *Igartúa de la Rosa v. United States (Igartúa I)*, 32 F.3d 8, 10 (1st Cir. 1994) (interpreting UOCAVA), *aff’d*, 417 F.3d 145 (1st Cir. 2005) (en banc), *cert. denied*, 126 S. Ct. 1569 (2006) (mem.); *Romeu v. Cohen*, 265 F.3d 118, 124 (2d Cir. 2001) (interpreting UOCAVA).

<sup>15</sup> 42 U.S.C. §§ 1973ff-2(b)(1), 6(8). See *Igartúa I*, 32 F.3d at 10 (interpreting UOCAVA); *Romeu*, 265 F.3d at 124 (interpreting UOCAVA).

<sup>16</sup> Roselló, *supra* note 5.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*; Hermilla, *supra* note 12, at 284.

for extending this right to vote is one based on international human rights law.<sup>19</sup> However, courts and lawyers have failed to both appreciate and exploit the possibilities for judicial application of customary international law (CIL), or the general practice of states accepted as law,<sup>20</sup> because of unfamiliarity with international law and CIL's inherently vague nature. Examining the right to vote's status as CIL will help lawyers who argue that such a right exists and courts that examine their arguments. Evidence supporting the right to vote as CIL would help achieve universal suffrage nationally and abroad because national and international tribunals use a similar framework for demonstrating that a particular CIL norm exists.

This Article will argue that CIL supports recent efforts of Puerto Rico residents seeking the right to vote in presidential elections through the federal courts.<sup>21</sup> First, it will attempt to describe the current U.S.-Puerto Rico relationship. Second, it will explain CIL's role in U.S. law and present evidence suggesting that the right to vote has become CIL. Third, it will apply the right to vote as CIL to the problem of Puerto Rico residents' disenfranchisement in presidential elections. Finally, this Article will argue that CIL can be used to interpret the Constitution as favorable to their participation in presidential elections.

## II. THE U.S.-PUERTO RICO RELATIONSHIP AND THE QUEST FOR VOTING RIGHTS

An overview of the U.S.-Puerto Rico relationship is necessary to understand why Puerto Rico residents are seeking presidential voting rights. Since the beginning of the relationship, the United States has governed Puerto Rico without the consent of those residing on the

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<sup>19</sup> Natsu Taylor Saito, *The Plenary Power Doctrine: Subverting Human Rights in the Name of Sovereignty*, 51 CATH. U.L. REV. 1115, 1154 (2002).

<sup>20</sup> Statute of the International Court of Justice art. 38(1)(b), June. 26, 1945, 59 Stat. 1031, 33 U.N.T.S. 993. CIL and treaties are the two principal sources of international law. *Id.* art. 38. For further information about CIL, see *infra* Part III.

<sup>21</sup> The scope of this Article is limited to determining whether the right to vote has become CIL and, if it has, whether it could be incorporated into U.S. law. Jurisdictional, procedural, and remedial issues associated with CIL will not be addressed. See *generally, e.g.*, *White v. Paulsen*, 997 F. Supp. 1380, 1383 (E.D. Wash. 1998) (holding that CIL does not always create a private right of action); *United States v. Bush*, 794 F. Supp. 40, 42-43 (D.P.R. 1992) (holding that individuals did not have standing to bring a particular CIL claim against the U.S.); Natalie L. Bridgeman, *Human Rights Litigation under the ATCA as a Proxy for Environmental Claims*, 6 YALE HUM. RTS. & DEV. L.J. 1, 33-34 (2003) (discussing issues of CIL and subject matter jurisdiction).

island.<sup>22</sup> Despite granting Puerto Rico residents greater control over local affairs, the United States has never allowed them real access to the federal government.<sup>23</sup> Neither the courts nor the political branches have been willing to address this injustice.

The U.S.-Puerto Rico relationship has been characterized by the dominance and control the United States exerts over Puerto Rico.<sup>24</sup> When the United States invaded Puerto Rico on July 25, 1898, during the Spanish-American War,<sup>25</sup> Puerto Ricans lost their Spanish citizenship and voting representation in the Spanish Parliament.<sup>26</sup> After the war, Spain ceded Puerto Rico to the United States and agreed that Congress would determine Puerto Rico residents' civil rights and political status.<sup>27</sup> The United States has exercised suzerainty<sup>28</sup> over Puerto Rico ever since.<sup>29</sup>

While the relationship has changed over the last century, the United States continues to exercise dominance and control over Puerto Rico. For the first two years of U.S. control, Puerto Rico was under military rule.<sup>30</sup> The Foraker and Jones Acts gradually reduced the U.S. government's power over Puerto Rico's local affairs.<sup>31</sup> The Jones Act

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<sup>22</sup> Puerto Rico has never had voting representation in Congress or participated in presidential elections. Hermilla, *supra* note 12, at 297.

<sup>23</sup> While Puerto Rico has no voting representatives in Congress, the island elects to the House of Representatives a Resident Commissioner who lacks voting power. Del Valle, *supra* note 12, at 79.

<sup>24</sup> Napoli, *Colonized People*, *supra* note 12, at 175.

<sup>25</sup> Roselló, *supra* note 5.

<sup>26</sup> José D. Román, *Trying to Fit an Oval Shaped Island into a Squared Constitution: Arguments for Puerto Rican Statehood*, 29 FORDHAM URB. L.J. 1681, 1683-84 (2002); Saito, *supra* note 19, at 1155.

<sup>27</sup> Treaty of Paris, U.S.-Spain, arts. II, IX, Dec. 10, 1898, 30 Stat. 1754, 55, 59.

<sup>28</sup> Suzerainty is defined as "[t]he dominion of a nation that controls the foreign relations of another nation but allows it autonomy in its domestic affairs." BLACK'S LAW DICTIONARY 1488 (8th ed. 2004).

<sup>29</sup> KEITH BEA, POLITICAL STATUS OF PUERTO RICO at CRS-1 (2005), <http://www.prfaa.com/uploadedFiles/RL32933revB.pdf>.

<sup>30</sup> Ediberto Román, *Empire Forgotten: The United States' Colonization of Puerto Rico*, 42 VILL. L. REV. 1119, 1141 (1997).

<sup>31</sup> The Foraker Act created a civil government composed of presidentially-appointed officials and local legislators elected by Puerto Rico residents. 56 Cong. Ch. 191, §§ 7, 17, 18, 27, 31 Stat. 77 (1900). The Foraker Act also repealed several Puerto Rico laws, allowed federal law to pre-empt Puerto Rico law, and gave Congress the power to annul local laws. *Id.* §§ 8, 16, 31. The Jones Act changed the civil government created by the Foraker Act by allowing Puerto Rico residents to elect all local legislators. 64 Cong. Ch. 145, § 26, 39 Stat. 951 (1917). The amendments to the Jones Act allowed Puerto Rico residents to elect a governor. 80 Cong. Ch. 490, § 1, 61 Stat. 770 (1947).

also granted U.S. citizenship to Puerto Rico citizens.<sup>32</sup> In the early 1950s, Puerto Rico residents and Congress negotiated a new structural relationship called a commonwealth.<sup>33</sup> Puerto Rico, like a state, became an autonomous political entity sovereign over matters not ruled by the Constitution.<sup>34</sup> Nonetheless, the United States has retained great power over Puerto Rico because the courts have considered it an unincorporated territory since 1901.<sup>35</sup>

The judicial doctrine of the unincorporated territory has contributed to the dominance and control the United States exerts over Puerto Rico. As an unincorporated territory, only fundamental constitutional protections extend to Puerto Rico.<sup>36</sup> Additionally, Congress has the power to determine Puerto Rico's political status, to revoke its residents' U.S. citizenship, and to impose compulsory military

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<sup>32</sup> 64 Cong. Ch. 145 at § 5.

<sup>33</sup> Pub. L. No. 600, 64 Stat. 319 (1950) (codified as amended at 48 U.S.C.A. §§ 731(b)-(e) (West 2007)); Román, *supra* note 30, at 1152-56. A constitution for the Commonwealth of Puerto Rico was drafted and adopted by the Puerto Rican people in 1952. Pub. L. No. 447, 66 Stat. 327 (1952). The President approved the constitution and submitted it to Congress, which unilaterally modified the Puerto Rico constitution by removing and amending certain articles. *Id.* Congress approved the Puerto Rico constitution as modified. *Id.*

<sup>34</sup> *Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 9 (1982).

<sup>35</sup> *Downes v. Bidwell*, 182 U.S. 244, 287 (1901) (“[T]he island of Porto [sic] Rico is a territory appurtenant and belonging to the United States, but not a part of the United States . . .”); *Americana of Puerto Rico, Inc. v. Kaplus*, 368 F.2d 431, 436 (3d Cir. 1966) (finding that Puerto Rico is a territory); *Detres v. Lions Bldg. Corp.*, 234 F.2d 596, 600 (7th Cir. 1956) (holding that adoption of the 1952 Puerto Rico Constitution did not change Puerto Rico's territorial status); *United States v. Sanchez*, 992 F.2d 1143, 1151 (11th Cir. 1993) (“Puerto Rico is still constitutionally a territory, and not a separate sovereign.”); *Nestle Prods., Inc. v. United States*, 310 F. Supp. 792, 796 (Cust. Ct. 1970) (explaining that commonwealth status did not change the U.S.-Puerto Rico relationship); BEA, *supra* note 29, at CRS-4.

The idea of the unincorporated territory was developed in *Downes*, *Balzac*, and the other Insular Cases. *Downes*, 182 U.S. 244; *Balzac v. Porto Rico [sic]*, 258 U.S. 298 (1922); Román, *supra* note 30, at 1144-45 n.104; Roselló, *supra* note 5. Under the Insular Cases, U.S. territories are divided into incorporated and unincorporated territories. Roselló, *supra* note 5. Incorporated territories are those where statehood should be granted after a transitional period and the Constitution is in full effect. *Id.* By contrast, unincorporated territories are to be ruled under Congress's plenary power. *Id.* Congress decides the fate of the territory and the extent to which constitutional protections are extended to the unincorporated territory's citizens. *Id.*

<sup>36</sup> *Balzac*, 258 U.S. at 312-13; *Rodriguez*, 457 U.S. at 7. The rights, privileges, and immunities of the United States have to be respected to the same extent as if Puerto Rico were a state. 80 Cong. Ch. 490 at § 7. Puerto Rico residents are entitled to be protected from deprivations of life, liberty, and property without due process of law. *Downes*, 182 U.S. at 283. Puerto Rico is subject to the constitutional guarantees of due process and equal protection. *Rodriguez*, 457 U.S. at 7. The First and Fourth Amendments, the Supremacy Clause, the Commerce Clause, and the Territorial Clause also apply in Puerto Rico. Del Valle, *supra* note 12, at 77.

service on Puerto Rico residents.<sup>37</sup> Another consequence of Puerto Rico's status as an unincorporated territory is that Puerto Rico residents can only enjoy full civil and political rights by moving to a state.<sup>38</sup> The unincorporated territory doctrine permits the federal government to exercise greater control over Puerto Rico residents than over U.S. citizens residing in the states, without allowing Puerto Rico residents to participate in federal decision-making.<sup>39</sup>

The political branches have been unwilling to change the U.S.-Puerto Rico relationship from one of dominance and control into one based on the consent of the governed. President Ford submitted the Puerto Rico Statehood Act of 1977 to Congress on January 19, 1977.<sup>40</sup> Congress ignored it.<sup>41</sup> In 2004, Delegate to Congress Donna M. Christensen<sup>42</sup> introduced proposals for a constitutional amendment regarding presidential voting rights for all U.S. territorial residents.<sup>43</sup> Congress has ignored these proposals as well. Thus, efforts to secure presidential voting rights through political means have been futile.

The judiciary has also been unwilling to change the relationship into one based on consent as evidenced by the unsuccessful judicial challenges to Puerto Rico residents' disenfranchisement. *Sanchez v. United States*<sup>44</sup> held that presidential disenfranchisement did not raise a substantial constitutional question.<sup>45</sup> The court explained that the Constitution provides for indirectly selecting Electoral College members through the states and Washington, D.C.<sup>46</sup> The court further explained

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<sup>37</sup> *Ruiz Alicea v. United States*, 180 F.2d 870, 872 (1st Cir. 1950) (holding that Congress has the power to impose compulsory military service on Puerto Rico residents); BEA, *supra* note 29, at CRS-3; Lisa Napoli, *The Puerto Rican Independentistas: Combatants in the Fight for Self-Determination and the Right to Prisoner of War Status*, 4 CARDOZO J. INT'L. & COMP. L. 131, 139 (1996) [hereinafter Napoli, *Independentistas*]; Saito, *supra* note 19, at 1156. Congress also controls, among other things, tax provisions, civil rights, trade and commerce, public finance, administration of federal public lands, application of federal law over navigable waters, congressional representation, the judicial process, urban development, and slum clearance. BEA, *supra* note 29, at CRS-3.

<sup>38</sup> *Balzac*, 258 U.S. at 308.

<sup>39</sup> Puerto Rico residents elect a non-voting member of the House of Representatives but do not participate in presidential elections. Puerto Rico Fed. Affairs Admin., Puerto Rico Fact Sheet, <http://www.prfaa.com/eng/PRFactSheet.asp> (last visited Feb. 10, 2006).

<sup>40</sup> JOHN A. BOYD, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 1977 57 (1978).

<sup>41</sup> BEA, *supra* note 29, at CRS-25.

<sup>42</sup> Ms. Christensen is a Democrat and a Representative from the Virgin Islands (another U.S. territory), <http://www.house.gov/christian-christensen/> (last visited Feb. 25, 2007).

<sup>43</sup> H.R.J. Res. 101, 108th Congress (2004); H.R.J. Res. 1, 109th Congress (2005).

<sup>44</sup> 376 F. Supp. 239 (D.P.R. 1974).

<sup>45</sup> *Id.* at 242.

<sup>46</sup> *Id.* at 241.

that the right to vote is not an essential right of citizenship, even though citizenship is a prerequisite to voting.<sup>47</sup> It concluded that Puerto Rico residents could not enjoy the right to vote in presidential elections until Puerto Rico becomes a state or the Constitution is amended.<sup>48</sup> In 1994, the United States Court of Appeals for the First Circuit followed a similar approach in *Igartúa v. United States (Igartúa I)*.<sup>49</sup> The court held that Puerto Rico was not entitled to choose presidential electors under Article II of the U.S. Constitution because it was not a state.<sup>50</sup> The court further stated that only a constitutional amendment or statehood could enfranchise Puerto Rico residents.<sup>51</sup> Thus, Puerto Rico residents have no constitutional right to participate in presidential elections.<sup>52</sup>

In contrast to these holdings, in 2000 the United States District Court for the District of Puerto Rico held that Puerto Rico residents have the right to vote in presidential elections in *Igartúa v. United States (Igartúa II)*.<sup>53</sup> The court explained that the right to vote was a national right guaranteed by the principle of freedom of association and protected by the due process and equal protection clauses.<sup>54</sup> As such, Article II should not be read as a roadblock for Puerto Rico residents to vote in

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<sup>47</sup> *Id.* See also *Minor v. Happersett*, 88 U.S. 162, 178 (1875) (holding that women, as U.S. citizens, did not have the right to vote because “the Constitution of the United States does not confer the right of suffrage upon any one. . .”).

<sup>48</sup> *Sanchez*, 376 F. Supp. at 242.

<sup>49</sup> 32 F.3d 8, 10 (1st Cir. 1994), *aff’d*, 417 F.3d 145 (1st Cir. 2005) (en banc), *cert. denied*, 126 S. Ct. 1569 (2006) (mem.).

<sup>50</sup> *Id.* at 9-10. The court explained that only U.S. citizens residing in states can vote for the president. *Id.* at 9. The court further explained that the relevant provisions of the International Covenant on Civil and Political Rights [ICCPR], *opened for signature* December 19, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368 [hereinafter ICCPR], were not self-executing and could not override constitutional limits. *Id.* at 10 n.1.

<sup>51</sup> *Id.* at 9-10.

<sup>52</sup> *Id.*

<sup>53</sup> 113 F. Supp. 2d 228, 242 (D.P.R. 2000). The court considered the matter again despite previous cases because it viewed the question as one of first impression: whether Puerto Rico residents should be allowed to select delegates to the Electoral College. *Igartúa v. United States*, 107 F. Supp. 2d 140, 145 (D.P.R. 2000). After this decision, the Puerto Rican government prepared for the 2000 presidential election by printing ballots listing the names and pictures of Al Gore and George W. Bush. Eduardo Guzmán, *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, 144 (2001).

<sup>54</sup> *Igartúa II*, 113 F. Supp. 2d at 232. The court reasoned that the right to vote in presidential elections would exist even if Article II was deleted from the Constitution because Article II does not grant any rights to citizens residing in the United States. *Id.* The court further explained that residency in a state is not dispositive of the right to vote in presidential elections because a citizen’s right to vote in presidential elections does not depend on residency, but on citizenship. *Id.* See also Uniformed and Overseas Citizens Absentee Voting Act §§ 1973ff-1 to 1973ff-6 (allowing U.S. citizens residing in foreign countries to vote in federal elections).

presidential elections but rather as the method by which voting is carried out in the states.<sup>55</sup> The court concluded that not recognizing Puerto Rico residents' right to vote in presidential elections would render void the principles of freedom entrenched in the Constitution.<sup>56</sup>

The First Circuit reversed the district court's decision in *Igartúa II*.<sup>57</sup> Echoing *Sanchez*, the court stated that the Constitution does not grant Puerto Rico residents a right to participate in presidential elections.<sup>58</sup> Puerto Rico had not become a state, the Constitution had not been amended, and there had been no intervening controlling or compelling authority since *Igartúa I*.<sup>59</sup> In a concurring opinion, Judge Torruella stated that Puerto Rico residents were caught in an "untenable Catch-22" because their disenfranchisement ensured that they would never be able to resort to the political processes to rectify the denial of their civil rights in those very political processes.<sup>60</sup> Judge Torruella went on to explain that the inequality to which Puerto Rico residents were subjected was an injury to all Americans.<sup>61</sup> He concluded by serving notice upon the political branches to take appropriate steps to correct this "outrageous disregard for the rights of a substantial segment of its citizenry" or corrective judicial action would be warranted.<sup>62</sup>

In 2005 the First Circuit held, for the third time, that Puerto Rico residents do not have a constitutional right to vote in presidential elections in *Igartúa v. United States (Igartúa III)*.<sup>63</sup> *Igartúa III* was the first case where a court was split on the issue. The majority explained, once again, that Puerto Rico residents are not entitled to vote for

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<sup>55</sup> *Igartúa II*, 113 F. Supp. 2d at 233. The court stated that the nature of the place is irrelevant to determine if an individual can vote, and it is being subject to a government's laws that vest a citizen with a stake in voting for that government. *Id.* at 234. The court noted that the Supreme Court has acknowledged that certain rights not spelled out in the Constitution must be recognized to make the Constitution whole. *Id.* at 235.

<sup>56</sup> *Id.*

<sup>57</sup> *Igartúa v. United States (Igartúa II)*, 229 F.3d 80 (1st Cir. 2000). Subsequently, the Puerto Rico Supreme Court issued a writ of mandamus ordering the Government of Puerto Rico to stop preparing for the presidential election. *Báez Galib v. Comisión Estatal de Elecciones*, 152 D.P.R. 359, 361-62 (2000).

<sup>58</sup> *Igartúa II*, 229 F.3d at 83.

<sup>59</sup> *Id.* at 83-84.

<sup>60</sup> *Id.* at 89 (Torruella, J., concurring).

<sup>61</sup> *Id.* at 90 (Torruella, J., concurring).

<sup>62</sup> *Id.*

<sup>63</sup> 417 F.3d 145, 146-47 (1st Cir. 2005) (en banc), *cert. denied*, 126 S. Ct. 1569 (2006) (mem.). This time *Igartúa* claimed that the right to vote as a U.S. citizen had been established by *Bush v. Gore*, 531 U.S. 98 (2000), as well as other precedential cases and developments in international law. *Id.* at 169-71.



presidential electors because Puerto Rico is not a state.<sup>64</sup> The court concluded that extending the right to vote in presidential elections to Puerto Rico residents was a political question to be resolved through political means.<sup>65</sup>

In this latest request before the courts, Puerto Rico residents invoked the right to vote in presidential elections under CIL, but *Igartúa III* held that the failure to grant this right did not violate U.S. international obligations.<sup>66</sup> No treaty claim would permit a court to order that the Electoral College be changed, and no serious argument existed that CIL required a particular representative government.<sup>67</sup> If an international norm of democratic government existed, it was so general that it should not be incorporated into U.S. law.<sup>68</sup> In his dissent, Judge Torruella argued that the international norm at issue was not democratic governance generally but the “right to vote in equality with all other citizens of one’s nation.”<sup>69</sup> He recognized that such a right had become CIL.<sup>70</sup>

While the U.S.-Puerto Rico relationship continues to be based on dominance and control, the court’s willingness to consider arguments based on CIL is promising. This willingness demonstrates the possibility of recognizing Puerto Rico residents’ right to vote in presidential elections because, as the following sections will show, the courts recognize CIL as U.S. law and the right to vote has indeed become CIL.

### III. CIL AS U.S. LAW

CIL constitutes the clear and unambiguous rules nations universally accept out of a sense of legal obligation and mutual concern.<sup>71</sup> CIL contains two elements: (1) the general practice of nations

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<sup>64</sup> *Id.* at 147. The court also noted that the method of choosing electors could not be unconstitutional because it is what the Constitution itself requires. *Id.* at 148.

<sup>65</sup> *Id.* at 151. But in a strong dissent, Judge Torruella argued that the majority opinion left the four million disenfranchised Puerto Rico residents to claim their rights through a nonexistent political forum. *Id.* at 159 (Torruella, J., dissenting).

<sup>66</sup> *Id.* at 147 (majority opinion).

<sup>67</sup> *Id.* at 148, 151.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 179 (Torruella, J., dissenting).

<sup>70</sup> *Id.* at 177 (Torruella, J., dissenting).

<sup>71</sup> *Id.* at 175 (Torruella, J., dissenting); Flores v. S. Peru Copper Corp., 414 F.3d 233, 248 (2d Cir. 2003); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987); ANTONIO CASSESE, INTERNATIONAL LAW 119 (2001); JORDAN J. PAUST,

and (2) *opinio juris*.<sup>72</sup> The general practice of nations should be extensive and virtually uniform, but it does not have to be universal.<sup>73</sup> This general practice of nations must reflect a general sense of legal obligation, or *opinio juris*.<sup>74</sup> CIL must address wrongs of mutual, and not merely several, concern to nations to be recognized in U.S. courts.<sup>75</sup> It is binding on all nations except for persistent objectors—those nations that dissented from the principle during its development.<sup>76</sup>

CIL has been U.S. law for two centuries,<sup>77</sup> and federal courts can recognize federal common law claims for CIL violations under certain circumstances.<sup>78</sup> However, CIL will not be given effect if it is inconsistent with the Constitution.<sup>79</sup> A federal statute, treaty, or other international agreement will supersede earlier CIL if specifically enacted

INTERNATIONAL LAW AS LAW OF THE UNITED STATES 3 (2d ed. 2003); MALCOLM N. SHAW, INTERNATIONAL LAW 70 (5th ed. 2003).

<sup>72</sup> Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 97-98 (June 27); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102; CASSESE, *supra* note 68, at 119; PAUST, *supra* note 68, at 3; SHAW, *supra* note 68, at 70.

<sup>73</sup> *Igartúa III*, 417 F.3d at 175 (Torruella, J., dissenting); *Flores*, 414 F.3d at 248; *Mil. and Paramilitary Activities*, 1986 I.C.J. at 98; *Asylum (Colom. v. Peru)*, 1950 I.C.J. 266, 294 (Nov. 20) (Alvarez, J., dissenting); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102, cmt. b; CASSESE, *supra* note 71, at 119-20; PAUST, *supra* note 71, at 4; SHAW, *supra* note 71, at 72-74.

<sup>74</sup> *Flores*, 414 F.3d at 248; RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102, cmt. c; CASSESE, *supra* note 71, at 119; SHAW, *supra* note 71, at 80. While the general practice of nations and *opinio juris* are usually listed as separate elements of CIL, they are interrelated. Courts have assumed the existence of *opinio juris* based on evidence of the general practice of nations. IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 7 (5th ed. 1998). For example, “treaties . . . constitute both state practice and evidence of *opinio juris*.” *Kane v. Winn*, 319 F. Supp. 2d 162, 197 (D. Mass. 2004).

<sup>75</sup> *Igartúa III*, 417 F.3d at 175 (Torruella, J., dissenting); *Flores*, 414 F.3d at 249; *Filártiga v. Peña-Irala*, 630 F.2d 876, 888 (2d Cir. 1980); *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161, 167 (5th Cir. 1999). Matters of mutual concern involve the dealings of nations “inter se” capable of impairing international peace and security while matters of several concerns involve separate and independent national interests. *Flores*, 414 F.3d at 249.

<sup>76</sup> RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102, cmt. b, d; CASSESE, *supra* note 71, at 117, 119, 123; PAUST, *supra* note 71, at 4; Napoli, *Independentistas*, *supra* note 37, at 161; Phillip R. Trimble, *A Revisionist View of Customary International Law*, 33 UCLA L. REV. 665, 680 (1985).

<sup>77</sup> *Sosa v. Álvarez-Machain*, 542 U.S. 692, 729-30 (2004); *Filártiga*, 630 F.2d at 886; JOHN F. MURPHY, THE UNITED STATES AND THE RULE OF LAW IN INTERNATIONAL AFFAIRS 96 (2004); PAUST, *supra* note 71, at 3, 7-11.

<sup>78</sup> *Sosa*, 542 U.S. at 729-31; *Filártiga*, 630 F.2d at 887; *Kadic v. Karadžić*, 70 F.3d 232, 246 (2d Cir. 1995); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111, cmt. d; MURPHY, *supra* note 77, at 97; PAUST, *supra* note 71, at 227; Richard B. Lillich, *Invoking International Human Rights Law in Domestic Courts*, 54 U. CIN. L. REV. 367, 393 (1985).

<sup>79</sup> RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 115(3); PAUST, *supra* note 71, at 16.

for that purpose or if the two are irreconcilable.<sup>80</sup> However, beyond the domestic sphere, the United States will continue to be bound by superseded CIL, as well as by CIL inconsistent with the Constitution, and subject to the consequences for its violation.<sup>81</sup>

The Supreme Court first addressed CIL in detail in the famous case of *The Paquete Habana*.<sup>82</sup> In that case, the Supreme Court held the following:

[I]nternational law is part of our law, and must be ascertained and determined by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations.<sup>83</sup>

In 2004 the Supreme Court followed *The Paquete Habana* in *Sosa v. Álvarez-Machain*.<sup>84</sup> *Sosa* provided certain guidelines specifying when CIL could be directly incorporated into U.S. law. First, the norm must be accepted by the civilized world and defined as clearly as the norms recognized when the Constitution was drafted.<sup>85</sup> This first guideline involves an element of judgment about the practical consequences of making that norm available to litigants as a cause of action in federal courts.<sup>86</sup> Second, liability must attach to the perpetrator being sued.<sup>87</sup> Third, all domestic remedies must have been exhausted.<sup>88</sup> Fourth, the court must have given case-specific deference to the political

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<sup>80</sup> RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 115(1)(a); Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 842 (1997); Michelle M. Kundmueller, Note, *The Application of Customary International Law in U.S. Courts: Custom, Convention, or Pseudo-Legislation?*, 28 J. LEGIS. 359, 371 (2002); Lillich, *supra* note 78, at 369.

<sup>81</sup> RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 115(1)(b). While Congress has the constitutional power to supersede a treaty or CIL as domestic law, this power does not extend beyond the domestic sphere. *Id.* at § 115 cmt. b. Under international law, nations may not invoke domestic law to excuse breaches of international legal obligations. *Id.* However, this does not mean that the Supreme Court must act to prevent Congress from violating international law.

<sup>82</sup> 175 U.S. 677 (1900).

<sup>83</sup> *Id.* at 700.

<sup>84</sup> 542 U.S. 692 (2004).

<sup>85</sup> *Id.* at 732. In interpreting this guideline, federal courts have explained that boundless and indeterminate principles are not clearly defined. *Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 254-55 (2d Cir. 2003). The absence of any limitations on the rights asserted shows a lack of a clear definition. *Id.* at 255.

<sup>86</sup> *Sosa*, 542 U.S. at 732-33.

<sup>87</sup> *Id.* at 733 n.20.

<sup>88</sup> *Id.* at 733.

branches.<sup>89</sup> Finally, there must be no treaty, legislation, case law, or executive act on the issue.<sup>90</sup> While *The Paquete Habana* and *Sosa* support the conclusion that CIL can be directly incorporated into U.S. law, little CIL has actually been incorporated directly.

CIL has been most instrumental in interpreting the Constitution, federal statutes, and treaties.<sup>91</sup> The Constitution was meant to be interpreted in conformity with CIL.<sup>92</sup> Federal statutes should also be interpreted to comply with CIL whenever possible.<sup>93</sup> Two recent Supreme Court decisions support this idea. In *Lawrence v. Texas*,<sup>94</sup> the Supreme Court ruled a Texas statute criminalizing homosexual behavior unconstitutional based on the due process clause of the Fourteenth Amendment.<sup>95</sup> The Court looked at British statutes, European Court of Human Rights decisions, and Mary Robinson's<sup>96</sup> amicus curiae brief to explain that its conclusion was compatible with current CIL.<sup>97</sup>

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<sup>89</sup> *Id.* at 733 n.21. Commentators have noted that CIL is primarily applied by the political branches, not the judiciary. Curtis A. Bradley, Breard, *Our Dualist Constitution, and the Internationalist Conception*, 51 STAN. L. REV. 529, 543 (1999); Trimble, *supra* note 76, at 670. These commentators argue courts should follow the directions of the political branches regarding questions of CIL. Bradley & Goldsmith, *supra* note 80, at 861; Trimble, *supra* note 76, at 715. They argue that courts lack an institutional capacity to participate fully in the development of CIL because the accepted mandate of the judiciary does not run to assessments of foreign policy and the judiciary cannot readily make judgments about changed international circumstances. Bradley & Goldsmith, *supra* note 80, at 861; Trimble, *supra* note 76, at 709. These commentators conclude that courts could independently apply CIL, but only when the question has not been addressed by the political branches and there is no danger of complicating the nation's foreign policy. Trimble, *supra* note 76, at 715. *Contra* Bradley & Goldsmith, *supra* note 80, at 870 ("[I]n the absence of federal political branch authorization, CIL is not a source of federal law.").

<sup>90</sup> *Sosa*, 542 U.S. at 734.

<sup>91</sup> PAUST, *supra* note 71, at 13; Lillich, *supra* note 78, at 408, 411.

<sup>92</sup> Francisco Forrest Martin, *Our Constitution as Federal Treaty: A New Theory of the United States Constitutional Construction Based on an Originalist Understanding for Addressing a New World*, 31 HASTINGS CONST. L.Q. 269, 319 (2004). See *Ex parte Bushnell*, 9 Ohio St. 77, 189 (1859) ("The constitution of the United States was framed, and the union perfected, subordinate to, and without violating the fundamental law of nations . . ."); Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and its Progeny*, 100 HARV. L. REV. 853, 877 (1987) ("The framers of the Constitution respected the law of nations, and it is plausible that they expected the political branches as well as the courts to give effect to that law.").

<sup>93</sup> *Murray v. Schooner Charming Betsy*, 6 U.S. 64, 118 (1804); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 114; Kundmueller, *supra* note 80, at 368.

<sup>94</sup> 539 U.S. 558 (2003).

<sup>95</sup> *Id.* at 578-79.

<sup>96</sup> Former President of Ireland and UN High Commissioner for Human Rights.

<sup>97</sup> *Lawrence*, 539 U.S. at 572-73, 576-77.

More important was *Roper v. Simmons*,<sup>98</sup> holding death sentences for crimes committed by juveniles in violation of the Eighth and Fourteenth Amendments.<sup>99</sup> The *Roper* Court looked at the UN Convention on the Rights of the Child (which the United States had not ratified), amicus curiae briefs from the European Union and the Human Rights Committee of the Bar of England and Wales, the International Covenant on Civil and Political Rights (ICCPR), the American Convention on Human Rights, the African Charter on the Rights and Welfare of the Child, British statutes, and other nations' positions on the issue.<sup>100</sup> The Court based its ruling partly on "[t]he opinion of the world community" and stated that "[i]t does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom."<sup>101</sup>

However, when addressing CIL affecting U.S. foreign relations, courts have invoked the separation of powers doctrine and have avoided resolving conflicts on several grounds.<sup>102</sup> The notion of CIL as federal common law is premised on the idea that the political branches, not the courts, are authorized to make decisions about foreign relations.<sup>103</sup> Thus, judicial interpretations of CIL will not bind the political branches.<sup>104</sup> Nevertheless, because the judiciary is empowered and entrusted to identify, clarify, and apply CIL in cases properly before the court,<sup>105</sup> courts do not violate the separation of powers principle when using CIL to interpret federal law.<sup>106</sup>

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<sup>98</sup> 543 U.S. 551 (2005).

<sup>99</sup> *Id.* at 578.

<sup>100</sup> *Id.* at 576-78.

<sup>101</sup> *Id.* at 578.

<sup>102</sup> MURPHY, *supra* note 77, at 109.

<sup>103</sup> Bradley & Goldsmith, *supra* note 80, at 861.

<sup>104</sup> *Id.* "There is no doubt that an act of Congress prevails as a matter of [U.S.] law if it is in conflict with a [CIL] norm that developed prior to the time the statute was enacted." MURPHY, *supra* note 77, at 97. Thus, a judicial declaration of a norm as CIL is like a statutory ruling in that Congress can change the courts' interpretation through legislation.

<sup>105</sup> *The Paquete Habana*, 175 U.S. 677, 700 (1900); Kundmueller, *supra* note 80, at 367.

<sup>106</sup> Kundmueller, *supra* note 80, at 367. When recognizing a norm as CIL, courts are merely acknowledging a norm that has already been created by the political branches through their action or inaction in the face of a developing norm of CIL. However, courts engage in law-making when deciding whether to incorporate CIL into U.S. law. LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 136 (2d ed. 1996). Thus, a different separation of powers issue dealing with the courts' law-making ability remains to be addressed. However, this problem is beyond the scope of this Article.

Now that it has been established that CIL can become U.S. law, it must be determined whether the right to vote has become CIL before deciding whether CIL supports efforts to obtain the right to vote in presidential elections through the federal courts.

#### IV. THE RIGHT TO VOTE AS CIL

U.S. courts have recognized several norms of CIL, including the prohibitions on genocide and torture,<sup>107</sup> after looking at the current state of international law to determine their existence.<sup>108</sup> The customs and usages of nations should reflect the existence of CIL<sup>109</sup> as evidenced by international agreements, UN resolutions, national laws, executive statements, diplomatic statements, judicial decisions, historical accounts, and scholarly works.<sup>110</sup>

Although the amount of evidence necessary to establish the existence of CIL is not clear and varies depending on the scope of the norm in dispute,<sup>111</sup> *Kadic v. Karadžić*<sup>112</sup> exemplifies how U.S. courts have determined the existence of CIL. In *Kadic*, Bosnian victims of Serb atrocities sued the Serbian president under the Alien Tort Claims Act, claiming the Serbian president's responsibility for genocide, war crimes, and torture violated CIL.<sup>113</sup> The court first looked at international

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<sup>107</sup> *E.g.*, *The Paquete Habana*, 175 U.S. at 677 (recognizing that coast fishermen are exempt from seizure and capture during war under CIL); *Kadic v. Karadžić*, 70 F.3d 232 (2d Cir. 1995) (holding that prohibitions of genocide, war crimes, and torture were CIL); *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980) (recognizing the prohibition of torture as CIL).

<sup>108</sup> *E.g.*, *Sosa v. Álvarez-Machain*, 542 U.S. 692, 733 (2004); *Kadic*, 70 F.3d at 238; *Filártiga*, 630 F.2d at 880; *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161, 165 (5th Cir. 1999).

<sup>109</sup> *E.g.*, *Sosa*, 542 U.S. at 734; *The Paquete Habana*, 175 U.S. at 700; *Kadic*, 70 F.3d at 238; *Filártiga*, 630 F.2d at 880; *Beanal*, 197 F.3d at 165.

<sup>110</sup> *E.g.*, *The Paquete Habana*, 175 U.S. at 687-713; *Kadic*, 70 F.3d at 241-43; *Filártiga*, 630 F.2d at 879-84; RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 701, cmt. 2 (1987). Some courts have suggested that scholarly works only provide secondary evidence of CIL and should be considered less authoritative than the other types of evidence. *Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 251 (2d Cir. 2003); *United States v. Yousef*, 327 F.3d 56, 102-03 (2d Cir. 2003).

<sup>111</sup> For example, a combination of international and maritime treatises, judicial decisions, and general practice of nations was sufficient to support the existence of the prohibition on piracy as CIL. *United States v. Smith*, 18 U.S. 153, 161-62 (1820). However, a combination of international agreements, national constitutions, international judicial decisions, and federal judicial decisions might not be enough to support a norm of CIL as broad as arbitrary detention. *Sosa*, 542 U.S. at 736.

<sup>112</sup> 70 F.3d 232 (2d Cir. 1995).

<sup>113</sup> *Kadic*, 70 F.3d at 237.

agreements to define the actions alleged.<sup>114</sup> Next, the court established the prohibition's universality by referring to several international agreements and UN resolutions.<sup>115</sup> The court then established the practice of nations towards the actions alleged by referencing executive statements, judicial decisions, and relevant legislation.<sup>116</sup> The court also looked at international legal scholars' affidavits stating that international law prohibited the actions alleged.<sup>117</sup> The court concluded that enough evidence existed to establish that prohibitions on genocide, war crimes, and torture had become CIL.<sup>118</sup>

A strong argument could be made that the right to vote has become CIL under the *Kadic* framework. The following sections will show how domestic law, diplomatic statements, international agreements, judicial decisions, UN resolutions, and scholarly opinion reflect sufficient general practice of nations and *opinio juris* to demonstrate that the right to vote has become CIL.

#### A. THE GENERAL PRACTICE OF NATIONS CONFIRMS THE RIGHT TO VOTE AS CIL

The general practice of nations includes diplomatic acts and instructions, public measures and other governmental acts, official policy statements, treaties and conventions, national history, judicial opinions, and the general practice of international organizations.<sup>119</sup> CIL can be created by a few nations if they are "intimately connected with the issue

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<sup>114</sup> *Kadic*, 70 F.3d at 241, 243; *accord Filártiga*, 630 F.2d at 882-83 (analyzing treaties to define the prohibition on torture).

<sup>115</sup> *Kadic*, 70 F.3d at 241, 242-43; *accord The Paquete Habana*, 175 U.S. at 687-91, 698-99 (citing several treaties to support the exemption of coast fishing vessels from capture as prize of war); *Filártiga*, 630 F.2d at 883-84 (examining treaties to support the prohibition on torture).

<sup>116</sup> *Kadic*, 70 F.3d at 242, 243; *accord The Paquete Habana*, 175 U.S. at 687-90, 693, 695, 709, 712 (citing royal orders, executive statements, national laws, and judicial decisions to support the exemption of coast fishing vessels from capture as prize of war); *Filártiga*, 630 F.2d at 884 (mentioning national law, diplomatic statements, and judicial decisions to support the prohibition on torture).

<sup>117</sup> *Kadic*, 70 F.3d at 243; *accord The Paquete Habana*, 175 U.S. at 695-96, 701-08 (citing several treaties to support the exemption of coast fishing vessels from capture as prizes of war); *Filártiga*, 630 F.2d at 879 (citing the affidavits of international legal scholars to support the prohibition on torture).

<sup>118</sup> *Kadic*, 70 F.3d at 242-43.

<sup>119</sup> RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102, cmts. b, i (1987); SHAW, *supra* note 71, at 78-79; JAMES H. WOLFE, MODERN INTERNATIONAL LAW: AN INTRODUCTION TO THE LAW OF NATIONS 21 (2002); Bradley & Goldsmith, *supra* note 80, at 839; M. Erin Kelly, *Customary International Law in United States Courts*, 32 VILL. L. REV. 1089, 1122 (1987).

at hand.”<sup>120</sup> Additionally, the practice of nations in a region may create “regional” customary law for those states.<sup>121</sup>

The general practice of nations shows the right to vote has become CIL. In 1900 no nation had universal suffrage<sup>122</sup> for all its citizens.<sup>123</sup> Since 1986, the number of nations with universal suffrage increased from 69 to 119.<sup>124</sup> By 2004, 62 percent of nations had universal suffrage for all citizens.<sup>125</sup> Moreover, the Central Intelligence Agency lists only 12 out of 234 nations as not having universal suffrage as of August 2006.<sup>126</sup>

The general practice of nations with dependent territories shows that the right to vote has become an extensive and virtually uniform custom within this group of nations. Australia, Norway, China, France, Denmark, the Netherlands, New Zealand, the United Kingdom, and the United States are the only nations that still have dependent territories.<sup>127</sup> Seven of these nations allow their citizens to participate in national elections.<sup>128</sup> However, American and British citizens residing

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<sup>120</sup> SHAW, *supra* note 71, at 75 (“for example maritime nations and sea law”). As another example, most CIL in the field of space law was developed by the two nations that first ventured into space, the United States and the U.S.S.R. Colin B. Picker, *A View From 40,000 Feet: International Law and the Invisible Hand of Technology*, 23 CARDOZO L. REV. 149, 176 (2001).

<sup>121</sup> *Asylum (Colom. v. Peru)*, 1950 I.C.J. 266, 276 (Nov. 20); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102, cmt. e (1987); CASSESE, *supra* note 71, at 119; SHAW, *supra* note 71, at 87.

<sup>122</sup> Under international law, “universal suffrage” means that every citizen meeting reasonable qualifications is entitled to vote. Scott Davidson, *Civil and Political Rights Protections*, in THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS 283 (David Harris & Stephen Livingstone eds., 1998).

<sup>123</sup> FREEDOM HOUSE, DEMOCRACY’S CENTURY: A SURVEY OF GLOBAL POLITICAL CHANGE IN THE 20TH CENTURY 2 (1999).

<sup>124</sup> Adrian Karatnycky, *Civic Power and Electoral Politics*, in FREEDOM IN THE WORLD 2005, 10 (2005), available at <http://www.freedomhouse.org/template.cfm?page=130&year=2005> (last visited Feb. 19, 2007).

<sup>125</sup> *Id.*

<sup>126</sup> United States Central Intelligence Agency [CIA], The World Factbook: Suffrage, <https://www.cia.gov/cia/publications/factbook/fields/2123.html> (last visited Aug. 3, 2006) (including data from dependent territories).

<sup>127</sup> *Id.*

<sup>128</sup> Australian citizens living in the territories of Christmas, Cocos, and Norfolk Islands participate in national elections. Austl. Gov’t Dep’t Transp. & Reg’l Servs., Norfolk Island: Voting and Elections, [http://www.dotars.gov.au/territories/norfolk\\_island/governance/voting.aspx](http://www.dotars.gov.au/territories/norfolk_island/governance/voting.aspx) (last visited Aug. 3, 2006); Warren Snowdon MP, About Lingari, <http://www.warrensnowdon.com/lingari.htm> (last visited Aug. 3, 2006). Norwegian citizens living in the territory of Svalbard enjoy national voting rights. E-mail from Gran Beate, Christin, Information Officer at the Royal Norwegian Consulate General of New York, to Ezequiel Lugo (Aug. 30, 2005, 8:11 a.m. EDT) (on file with author). The Chinese territories of Hong Kong and Macau participate in national elections. U.S. Dep’t State, China 2004 Country Report on Human Rights Practices,



respectively in American and British territories do not participate in national elections despite the U.S. and U.K. governments' ability to make laws for their territories without authority from the territorial governments.<sup>129</sup>

The general practice of nations with electoral democracies shows that the right to vote has become CIL within this group of nations. Among the 120 nations with electoral democracies, only 11 do not grant their citizens a constitutional right to vote.<sup>130</sup> The countries that do not grant the right are all former British colonies.<sup>131</sup>

## B. U.S. PRACTICE SUPPORTS THE RIGHT TO VOTE AS CIL

The practice of the states of the Union supports each U.S. citizen's right to vote in presidential elections. The U.S. Constitution requires that the president be elected indirectly through each state's appointment of electors.<sup>132</sup> Each state legislature determines the method for selecting presidential electors.<sup>133</sup> The states have uniformly delegated their power to appoint presidential electors to U.S. citizens residing within each state.<sup>134</sup>

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<http://www.state.gov/g/drl/rls/hrrpt/2004/41640.htm> (last visited Aug. 3, 2006). French citizens living in the French overseas territories participate in presidential elections. E-mail from Press Service Representative, French Embassy of Washington, D.C., to Ezequiel Lugo (July 29, 2005, 11:58 a.m. EDT) (on file with author). The Danish territories of Faroe Islands and Greenland participate in national parliamentary elections. Kingdom of Den., Greenland & the Faroe Islands, [http://denmark.dk/portal/page?\\_pageid=374,520328&\\_dad=portal&\\_schema=PORTAL](http://denmark.dk/portal/page?_pageid=374,520328&_dad=portal&_schema=PORTAL) (last visited Aug. 3, 2006). The elected governments of Aruba and the Netherlands Antilles appoint ministers to the Dutch governing body, the State Ministerial Council. Dutch Ministry of the Interior & Kingdom Relations, Aruba and the Netherlands Antilles, [http://www.ministerdegraaf.nl/uk/aruba\\_and\\_the/introduction](http://www.ministerdegraaf.nl/uk/aruba_and_the/introduction) (last visited Aug. 3, 2006). New Zealand's territories do not participate in national elections, however New Zealand cannot make laws for the territories unless authorized by the territorial governments. CIA, *supra* note 123; Cook Islands Gov't, Voyage to Statehood, <http://www.cook-islands.gov.ck/history.php> (last visited Aug. 3, 2006); Modern House of Tokelau, Government, <http://www.tokelau.org.nz/Government/Government.htm> (last visited Aug. 3, 2006); Niue Gov't, The Island, <http://www.niuegov.com/system%20of%20government.htm> (last visited Aug. 3, 2006).

<sup>129</sup> CIA, *supra* note 126; U.K. Foreign & Commonwealth Office, *FAQs: The British Overseas Territories Act*, <http://www.fco.gov.uk/> (follow "International Priorities" hyperlink; then follow "UK Overseas Territories" hyperlink; then follow "FAQs: The British Overseas Territories Act" hyperlink) (last visited Feb. 19, 2007). However, the U.S. cannot be considered a persistent objector to the right to vote as explained *infra* notes 272-73 and accompanying text.

<sup>130</sup> FAIR VOTE, THE RIGHT TO VOTE AROUND THE WORLD, <http://www.fairvote.org/righttovote/rtvinternational.pdf> (last visited Aug. 3, 2006).

<sup>131</sup> *Id.*

<sup>132</sup> U.S. CONST. art. II, § 1.

<sup>133</sup> *Bush v. Gore*, 531 U.S. 98, 104 (2000).

<sup>134</sup> *Romeu v. Cohen*, 265 F.3d 118, 123 (2d Cir. 2001).

Throughout its history, the United States has supported the expansion of the right to vote.<sup>135</sup> Since the Bill of Rights, many constitutional amendments have expanded suffrage.<sup>136</sup> The Fifteenth Amendment, ratified in 1870, prohibits the denial or abridgment of “[t]he right of citizens of the United States to vote” based on racial discrimination by the federal or state governments.<sup>137</sup> The Nineteenth Amendment, prohibiting the denial or abridgment of “[t]he right of citizens of the United States to vote” based on sexual discrimination by the federal or state governments, was ratified in 1920.<sup>138</sup> The Twenty-Third Amendment has allowed Washington, D.C. to appoint presidential electors since 1961.<sup>139</sup> In 1964 the Twenty-Fourth Amendment was ratified to prohibit denials or abridgments of “[t]he right of citizens of the United States to vote” in federal elections caused by failure to pay taxes.<sup>140</sup> The Twenty-Sixth Amendment, ratified in 1971, prohibits the denial or abridgment of “[t]he right of citizens of the United States, who are eighteen years of age or older, to vote” based on age restrictions imposed by the federal or state governments.<sup>141</sup>

Congressional legislation has similarly extended the right to vote. Title I of the Civil Rights Act of 1964 prohibits racially motivated voting-rights denials or abridgements.<sup>142</sup> Later-enacted statutes expand the protection of voting rights to include, among others, linguistic minorities, absentee voters, and the uneducated.<sup>143</sup> More recently, Congress has protected the right to vote for U.S. citizens living in foreign countries.<sup>144</sup>

U.S. presidents have made many statements describing the importance of the right to vote. President Reagan proclaimed that voting was a concept unwelcome by dictators who subordinate voting to other goals defined by those who “claim to know what is best for the individual and for peoples subject to their control.”<sup>145</sup> President George

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<sup>135</sup> *Reynolds v. Sims*, 377 U.S. 533, 555 (1964).

<sup>136</sup> Raskin, *supra* note 1, at 573.

<sup>137</sup> U.S. CONST. amend. XV, § 1.

<sup>138</sup> *Id.* amend. XIX, § 1.

<sup>139</sup> *Id.* amend. XXIII, § 1.

<sup>140</sup> *Id.* amend. XXIV, § 1.

<sup>141</sup> *Id.* amend. XXVI, § 1.

<sup>142</sup> 42 U.S.C. § 1971 (2000).

<sup>143</sup> *Id.* §§ 1973aa to 1973aa-1a.

<sup>144</sup> *Id.* §§ 1973ff-1 to 1973ff-6.

<sup>145</sup> Exec. Procl. 5921, 53 Fed. Reg. 49969 (Dec. 8, 1988). President Reagan was criticizing Communist regimes for not welcoming the fundamental goals of free elections and due process

H.W. Bush proposed creating the UN Electoral Commission and the UN Special Coordinator for Electoral Assistance to protect voting rights worldwide.<sup>146</sup> President Bush also stated that the ICCPR “codifies the essential freedoms people must enjoy in a democratic society, such as the right to vote.”<sup>147</sup> President Clinton later said that “[i]t shall be the policy and practice of the U.S. . . . fully to respect and implement its obligations under the . . . ICCPR.”<sup>148</sup> More recently, the right to vote has been described as “one of the most cherished rights and fundamental responsibilities of citizenship”<sup>149</sup> and as “[our] most important right.”<sup>150</sup>

Additionally, American diplomatic statements show that the United States supports voting rights worldwide. The U.S. Department of State explains that the United States wants all citizens around the world to enjoy voting rights and “seeks to identify and denounce regimes that deny their citizens the right to choose their leaders in elections that are free, fair, and transparent.”<sup>151</sup> The United States strongly supports expanding voting rights to women worldwide until all women have an equal right to vote.<sup>152</sup> Former Secretary of State Colin Powell warned that “democracies do not remain democracies for long if elected leaders use undemocratic methods.”<sup>153</sup>

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in a proclamation commemorating the signing of the Universal Declaration of Human Rights and the ratification of the Bill of Rights. *Id.* President Reagan also pointed out that there is an “inescapable connection between freedom, human rights, and government by the consent of the governed.” *Id.*

<sup>146</sup> GEORGE H.W. BUSH, A NEW PARTNERSHIP OF NATIONS (1990), *reprinted in* AMERICAN FOREIGN POLICY CURRENT DOCUMENTS 1990, 20 (Sherrill Brown Wells ed., 1991). In 1992, the UN established the Electoral Assistance Division to coordinate UN activities related to elections. U.N. ELECTORAL ASSISTANCE DIV., MISSION AND MANDATE, [http://www.un.org/depts/dpa/french/electoral\\_assistance/ea\\_content/ea\\_mandate.htm](http://www.un.org/depts/dpa/french/electoral_assistance/ea_content/ea_mandate.htm) (last visited Aug. 3, 2006).

<sup>147</sup> Letter from George Bush, Pres., to Claiborne Pell, Chairman, Sen. For. Rels. Comm. (Aug. 8, 1991), *in* 31 I.L.M. 645, 660 (1992).

<sup>148</sup> Exec. Order No. 13,107, 63 Fed. Reg. 68,991 (Dec. 10, 1998).

<sup>149</sup> Proclamation No. 7916, 70 Fed. Reg. 46,401 (Aug. 5, 2005).

<sup>150</sup> Proclamation No. 6924, 61 Fed. Reg. 51,767 (Oct. 2, 1996).

<sup>151</sup> U.S. Dep’t of State, Democracy, <http://www.state.gov/g/drl/democ/> (last visited Aug. 3, 2006); John F. Maisto, U.S. Permanent Rep. to the O.A.S., Remarks on the Situation in Ecuador (Apr. 22, 2005), <http://www.state.gov/p/wha/rls/rm/2005/q2/45074.htm>.

<sup>152</sup> U.S. Dep’t of State, Promoting Human Rights and Fundamental Freedoms (Sept. 22, 2003), <http://www.state.gov/p/io/fs/2003/24186.htm>; Madeleine Albright, Sec’y State, *Advancing the Status of Women in the 21st Century, Remarks Upon Induction Into the National Women’s Hall of Fame* (July 11, 1998), *in* DISPATCH MAGAZINE, Aug. 1998, at 10, *available at* <http://www.state.gov/www/publications/dispatch/August1998.pdf>.

<sup>153</sup> OFFICE OF LEGAL ADVISOR, U.S. DEP’T OF STATE, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 2002, 385-87 (Sally J. Cummins & David P. Stewart eds., 2003) (referencing Colin L. Powell, Sec’y State, Remarks at Special Session of the G.A. of O.A.S. (Apr. 18, 2002)), *available at* [www.state.gov/secretary/former/powell/remarks/2002/9537.htm](http://www.state.gov/secretary/former/powell/remarks/2002/9537.htm).

In addition, the Supreme Court has recognized the right to vote as a fundamental right. *Bush v. Gore* held that no federal constitutional right to vote for presidential electors exists but that this right may nevertheless become fundamental once states extend it to the people.<sup>154</sup> In *Reynolds v. Sims*, the Court explained that the Constitution protects all qualified citizens' right to vote in federal and state elections.<sup>155</sup> The right to vote cannot be denied outright because it is essential in a democratic society.<sup>156</sup> The Court previously explained that sovereignty remains with the people even though sovereign powers were delegated to the government.<sup>157</sup> Thus, any infringement on the right to vote must be carefully and meticulously scrutinized.<sup>158</sup> "To the extent that a citizen's right to vote is debased, he is that much less a citizen."<sup>159</sup>

In sum, U.S. practice supports the right to vote as CIL.<sup>160</sup> Furthermore, it demonstrates that recognizing the right to vote as CIL would not be contrary to current U.S. law or policy.

### C. INTERNATIONAL AGREEMENTS SUPPORT THE RIGHT TO VOTE AS CIL

An international agreement will constitute sufficient proof of CIL only if an overwhelming majority of nations have ratified the treaty.<sup>161</sup> The greater the number of nations and the greater the influence of those nations internationally, the greater the treaty's evidentiary value.<sup>162</sup> The International Covenant on Civil and Political Rights (ICCPR), the Universal Declaration of Human Rights (UDHR), the American Declaration of the Rights and Duties of Man, the American

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<sup>154</sup> 531 U.S. 98, 104 (2000).

<sup>155</sup> 377 U.S. 533, 554 (1964).

<sup>156</sup> *Id.* at 555. The *Reynolds* Court explained that the right to vote is "preservative of other basic civil and political rights." *Id.* at 562.

<sup>157</sup> *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). *Yick Wo* also stated that restrictions on the right to vote were always open to judicial inquiry because this right was "preservative of all rights." *Id.* at 370-71.

<sup>158</sup> *Reynolds*, 377 U.S. at 562.

<sup>159</sup> *Id.* at 567.

<sup>160</sup> If U.S. practice was contrary to the right to vote as CIL, the right to vote as CIL would not bind it. See *Asylum (Colom. v. Peru)*, 1950 I.C.J. 266, 294 (Nov. 20) (finding that diplomatic asylum as CIL could not be invoked against Peru because it had repudiated the norm by refusing to ratify relevant treaties).

<sup>161</sup> See *Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 256 (2d Cir. 2003).

<sup>162</sup> *Id.* See *Asylum*, 1950 I.C.J. at 277 (describing the Montevideo Convention of 1933 as weak evidence of diplomatic asylum as CIL because it had been ratified by a limited number of nations).

Convention on Human Rights, and the Inter-American Democratic Charter are all evidence of the emergence of CIL with an independent and binding juridical status.<sup>163</sup>

The Universal Declaration of Human Rights (UDHR) states that “[t]he will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.”<sup>164</sup> The UN General Assembly adopted the UDHR by unanimous vote with eight nations abstaining.<sup>165</sup> Among the nations voting to adopt the UDHR were the United States, Canada, China, France, and the United Kingdom.<sup>166</sup> In 1993, 171 countries reaffirmed their commitment to the UDHR,<sup>167</sup> which has become binding CIL, either in whole or in part.<sup>168</sup>

Article 25 of the ICCPR states as follows: “[e]very citizen shall have the right and opportunity, without . . . distinctions . . . and without unreasonable restrictions . . . to vote at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors.”<sup>169</sup> One-hundred and fifty-two nations, including the United States, Canada, France, Germany, Italy, Japan, Russia, the United Kingdom, and China, have ratified the ICCPR.<sup>170</sup> Six nations entered reservations<sup>171</sup> to Article 25,<sup>172</sup> but the United States merely entered a declaration that Article 25 would not be self-executing.<sup>173</sup>

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<sup>163</sup> *Igartúa v. United States (Igartúa III)*, 417 F.3d 149, 176 (1st Cir. 2005) (Torruella, J., dissenting); *Filártiga v. Peña-Irala*, 630 F.2d 876, 883 (2d Cir. 1980).

<sup>164</sup> G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 12, 1948).

<sup>165</sup> Office of High Comm’r for Human Rights, *Universal Declaration of Human Rights*, <http://www.unhchr.ch/udhr/miscinfo/carta.htm> (last visited Aug. 3, 2006). The abstaining nations were Byelorussian SSR, Czechoslovakia, Poland, Saudi Arabia, Ukrainian SSR, South Africa, the USSR, and Yugoslavia. *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> See *Filártiga*, 630 F.2d at 876.

<sup>169</sup> ICCPR, *supra* note 50.

<sup>170</sup> OFFICE OF U.N. HIGH COMM’R FOR HUMAN RIGHTS, STATUS OF RATIFICATIONS OF THE PRINCIPAL INTERNATIONAL HUMAN RIGHTS TREATIES 12 (2004), <http://www.unhchr.ch/pdf/report.pdf>.

<sup>171</sup> A reservation is a unilateral statement by a nation to modify or to exclude the legal effect of particular treaty provisions in their application to that nation that formally limits the scope of the nation’s acceptance of the treaty. Vienna Convention on the Law of Treaties art. 2(1)(d), *adopted on May 22, 1969*, 1155 U.N.T.S. 331.

<sup>172</sup> U.N. Treaty Collection, *Declarations and Reservations*, <http://www.unhchr.ch/html/menu3/b/treaty4.asp.htm> (last visited Aug. 3, 2006). The reservations were: Kuwait (women, the military, and the police excluded from elections), Mexico (religious ministers excluded from

The Convention on the Political Rights of Women (CPRW) and the Inter-American Convention on the Granting of Political Rights to Women (IACGPRW) require nations to grant the right to vote to women on equal terms as it is granted to men.<sup>174</sup> One-hundred and thirty-two nations, including the United States, Canada, France, Germany, Italy, Japan, Russia, and the United Kingdom, have ratified the CPRW.<sup>175</sup> Twenty-four nations, including the United States and Canada, have ratified the IACGPRW.<sup>176</sup> Only three nations entered reservations to these international agreements.<sup>177</sup>

The American Declaration of the Rights and Duties of Man (ADRDM) states that “[e]very person having legal capacity is entitled . . . to take part in popular elections, which shall be by secret ballot, and shall be honest, periodic and free.”<sup>178</sup> The ADRDM was adopted at the Ninth International Conference of American States at Bogotá, Colombia, in 1948, which included the United States.<sup>179</sup> Even though originally adopted as a nonbinding agreement, the ADRDM is a source of international obligations for members of the Organization of American States (OAS), including the United States.<sup>180</sup>

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elections), Monaco (foreign nationals excluded from elections), Switzerland (some elections not conducted through secret ballots), the Netherlands (art. 25(c) not accepted as to the Netherlands Antilles), and the United Kingdom (no elected legislature for Hong Kong or equal suffrage in Fiji). *Id.* Finland and Sweden objected to Kuwait’s reservation. *Id.*

<sup>173</sup> *Id.* A treaty is self-executing, or directly enforceable by individuals, when it establishes specific rights and duties in individuals without implementation or amplification by additional legislative acts. Russell G. Donaldson, Annotation, *United Nations Resolutions as Judicially Enforceable in United States Domestic Courts*, 42 A.L.R. Fed. 577, 577 (1979). Non-self-executing treaties constitute international obligations but do not become domestic law, creating a private cause of action, unless an act of Congress shows how the treaty obligations are to be carried out. *Foster v. Neilson*, 27 U.S. 253, 259 (1829); *Igartúa v. United States (Igartúa III)*, 417 F.3d 149, 150 (1st Cir. 2005).

<sup>174</sup> Convention on the Political Rights of Women [CPRW] art. 1, Mar. 31, 1953, 27 U.S.T. 1909; Inter-American Convention on Granting of Political Rights to Women [IACGPRW] art. 1, May 2, 1948, 27 U.S.T. 3301.

<sup>175</sup> U.S. DEP’T OF STATE, TREATIES IN FORCE 539-40 (2006), <http://www.state.gov/documents/organization/66288.pdf>.

<sup>176</sup> *Id.*

<sup>177</sup> Ecuador expressed a reservation to Article 1 of the CPRW. CPRW, *supra* note 174, at 1909. Guatemala and Honduras entered reservations to Article 1 of the IACGPRW. Organization of American States, A-44: *Convencion Interamericana Sobre Concesion de los Derechos Politicos a la Mujer*, <http://www.oas.org/juridico/spanish/firmas/a-44.html> (last visited Aug. 3, 2006).

<sup>178</sup> American Declaration of the Rights and Duties of Man [ADRDM], O.A.S. Res. XXX, art. XX (May 2, 1948), reprinted in 43 AM. J. INT’L L. SUPP. 133 (1949).

<sup>179</sup> Inter-Am. Comm. Human Rights, Introduction, <http://www.cidh.oas.org/Basicos/basic1.htm> (last visited Aug. 3, 2006).

<sup>180</sup> *Id.*

Nonbinding international agreements signed by the United States also support the right to vote as CIL. These nonbinding agreements include the American Convention on Human Rights (ACHR),<sup>181</sup> the Warsaw Declaration,<sup>182</sup> and the Inter-American Democratic Charter (IADC).<sup>183</sup> Additionally, other international agreements to which the United States is not a party also support the right to vote's existence as CIL.<sup>184</sup>

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<sup>181</sup> Organization of American States [OAS], American Convention on Human Rights, art. 23(a)(b), Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 143 (*entered into force* July 18, 1978) (stating that every citizen shall enjoy the right "to vote . . . in genuine periodic elections, which shall be by universal and equal suffrage and by secret ballot that guarantees the free expression of the will of the voters"); *see also* Organization of American States [OAS], Office of International Law, B-32: *American Convention on Human Rights "Pact of San Jose, Costa Rica,"* <http://www.oas.org/juridico/english/Sigs/b-32.html> (last visited Aug. 3, 2006) (the ACHR has been ratified by 25 nations, not including the United States).

<sup>182</sup> Final Warsaw Declaration: Toward a Community of Democracies, Community of Democracies Ministerial Meeting, 39 I.L.M. 1306 (2000), *available at* <http://www.state.gov/g/drl/rls/26811.htm> (last visited Feb. 25, 2007). The Warsaw Declaration included a provision where signatories agreed to respect and uphold that "[t]he will of the people shall be the basis of the authority of government, as expressed by exercise of the right and civic duties of citizens to choose their representatives through regular, free and fair elections with universal and equal suffrage." *Id.* The Warsaw Declaration was signed by 106 nations including the United States, Canada, Germany, Japan, Russia, and the United Kingdom. *Id.* at 1306.

<sup>183</sup> Inter-American Democratic Charter, 40 I.L.M. 1289 (2001) (stating "the holding of periodic, free, and fair elections based on secret balloting and universal suffrage as an expression of the sovereignty of the people" is an essential element of representative democracy). The IADC was signed by thirty-four nations, including the United States and Canada. OAS, Strengthening the Democratic Commitment, [http://www.oas.org/charter/docs/why\\_charter.htm](http://www.oas.org/charter/docs/why_charter.htm) (last visited Aug. 3, 2006); *see also* World Policy Inst., Inter-American Democratic Charter: Who Has Signed, <http://www.worldpolicy.org/globalrights/treaties/maps-oas.html> (last visited Aug. 3, 2006).

<sup>184</sup> *See, e.g.,* Inter-Parliamentary Union, Declaration on Criteria for Free and Fair Elections arts. 1-2, Mar. 26, 1994, <http://www.ipu.org/cnl-e/154-free.htm> (last visited Aug. 3, 2006) (recognizing all adult citizens' right to vote in "genuine, free and fair elections held at regular intervals on the basis of universal, equal and secret suffrage"); Inter-Parliamentary Union, Universal Declaration on Democracy ¶¶ 12, 22, Sept. 16, 1997, <http://www.ipu.org/cnl-e/161-dem.htm> (last visited Aug. 3, 2006) (requiring that all people participate in free and fair elections held at regular intervals on the basis of universal, equal, and secret suffrage); Convention for the Protection of Human Rights and Fundamental Freedoms, Council of Eur., Protocol art. 3, Mar. 3, 1952, Eur. T.S. No. 009 (obligating countries "to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people"); Treaty Establishing the European Community art. 19, Mar. 25, 1957, 2002 O.J. (C 325) 33 (granting every citizen the right to vote in national and supranational elections); Treaty Establishing a Constitution for Europe arts. I-9, II-99, Oct. 29, 2004, 2004 O.J. (C310) 1 (recognizing all citizens' right to vote in national and supranational elections); Banjul Charter on Human and People's Rights, Org. of African Unity [OAU], art. 13(1), June 27, 1981, 21 I.L.M. 58 (requiring that all citizens have the right to participate in government); Arab Charter on Human Rights, League of Arab States, art. 24(c), May 2004, 12 INT'L H.R. REP. 893 (granting every citizen the right to "choose his representatives in free and impartial elections, on the basis of equality among all citizens and guaranteeing the free expression of his will").

In sum, the number of international agreements signed by a majority of nations confirming states' commitment to respecting voting rights demonstrates that the right to vote has become CIL.

#### D. JUDICIAL INTERPRETATIONS OF INTERNATIONAL AGREEMENTS EXPLAIN THE RIGHT TO VOTE AS CIL

International tribunals have established the right to vote's boundaries when interpreting international agreements protecting it. These tribunals have explained that the right to vote may be subject to reasonable limitations.<sup>185</sup> Nations may limit voting rights if (1) the limitations do not restrict the right to vote such that its essence is impaired and it is deprived of its effectiveness, (2) the limitations are imposed to pursue a legitimate purpose, and (3) the means used are not disproportionate.<sup>186</sup>

In *Statehood Solidarity Committee v. United States*, the Inter-American Commission on Human Rights held that the United States violated the ADRDM by denying District of Columbia residents the right to vote in congressional elections.<sup>187</sup> The commission reasoned that electing a non-voting representative and participating in presidential elections was not equivalent to the nature of participation anticipated by the ADRDM because D.C. residents do not have a meaningful opportunity to influence governmental decisions affecting them.<sup>188</sup> The commission recommended that the United States adopt legislative or other measures to guarantee D.C. residents the effective right to participate, directly or indirectly, in their national legislature.<sup>189</sup>

In *Statehood Solidarity Committee*, the Inter-American Commission on Human Rights applied the reasonableness test for limitations on the right to vote. The restriction imposed on D.C. residents deprived the right to vote of its essence and effectiveness

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<sup>185</sup> See, e.g., *Aziz v. Cyprus*, 41 Eur. Ct. H.R. 11, ¶ 25 (2005); *Matthews v. United Kingdom*, 28 Eur. H.R. Rep. 361, ¶ 64 (1999); *Altesor v. Uruguay*, Commc'n No. R2/10/1977, 70 I.L.R. 248, ¶¶ 14-16 (U.N.H.R. Comm. 1985); *Weinberger v. Uruguay*, Commc'n No. 28/1978, ¶¶ 15-17 (U.N.H.R. Comm. 1984); *Pietraroia v. Uruguay*, 62 I.L.R. 246, 254-55 (U.N.H.R. Comm. 1981).

<sup>186</sup> *Aziz*, 41 Eur. Ct. H.R. 11, ¶ 25; *Matthews*, 28 Eur. H.R. Rep. 361, ¶ 64.

<sup>187</sup> Case No. 11.204, Inter-Am. C.H.R. 98/03 (2003). D.C. residents have been unable to vote in congressional elections since 1801. *Id.* at 508. They currently elect a non-voting member to the House of Representatives. *Id.* at 509.

<sup>188</sup> *Id.* at 514-15.

<sup>189</sup> *Id.* at 519. The United States has not officially responded to this case. Jonathon H. Foglia, *Voter Disenfranchisement and International Law: The Peculiar Case of the District of Columbia* 8 (2004), <http://www.dcvote.org/pdfs/papers/jfoglia-intlaw.pdf>.



because Congress exercises authority over D.C. without being accountable.<sup>190</sup> The commission also noted that the purpose of avoiding disproportionate influence of D.C. residents over governmental affairs was no longer legitimate.<sup>191</sup> Thus, the restriction was unreasonable because it failed the first two prongs of the reasonableness test.

Similarly, in *Matthews v. United Kingdom* the European Court of Human Rights held that the United Kingdom had violated the European Convention on Human Rights<sup>192</sup> by denying a British citizen residing in Gibraltar the right to vote in European Parliament elections.<sup>193</sup> Matthews sued after not being allowed to register in the 1994 European Parliament elections.<sup>194</sup> The court found that Matthews was denied any opportunity to express her opinion in the choice of members of the European Parliament because she was a British citizen residing in Gibraltar.<sup>195</sup> No difference between European legislation and national legislation existed because European Parliament legislation affected Gibraltar in the same way as national legislation.<sup>196</sup> Thus, the court concluded that the United Kingdom should be required to secure the right to vote in European Parliament elections to the same extent as the right to vote in national elections.<sup>197</sup>

In *Matthews v. United Kingdom*, the European Court of Human Rights applied the reasonableness test for limitations on the right to vote.<sup>198</sup> The court found that the restriction imposed on Gibraltar residents deprived the right to vote of its essence and effectiveness

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<sup>190</sup> Case No. 11.204, Inter-Am. C.H.R. 98/03.

<sup>191</sup> *Id.*

<sup>192</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, Council of Eur., Protocol art. 3, Mar. 3, 1952, Eur. T.S. No. 009.

<sup>193</sup> *Matthews v. United Kingdom*, 28 Eur. H.R. Rep. 361, ¶ 65 (1999). Gibraltar is a British dependent territory under the authority of the British Parliament where European Parliament legislation applies. *Id.* ¶¶ 8, 10.

<sup>194</sup> *Id.* ¶¶ 7, 20.

<sup>195</sup> *Id.* ¶ 64.

<sup>196</sup> *Id.* ¶ 34.

<sup>197</sup> *Id.* ¶ 35. After *Matthews v. United Kingdom*, the United Kingdom granted British citizens residing in Gibraltar the right to vote in European Parliament elections. European Parliament (Representation) Act, 2003, c. 7, §§ 9, 15. The European Court of Justice recently dismissed a claim by Spain that the European Parliament (Representation) Act was illegal under European Community law reasoning that the United Kingdom's human rights obligations extended to those "territor[ies] for whose international relations [the United Kingdom] is responsible," such as Gibraltar. Case C-145/04, *Spain v. United Kingdom*, 2006 E.C.J. ¶ 96, available at <http://curia.europa.eu/en/content/juris/index.htm> (follow "Cases Lodged before the Court of Justice since 1989" hyperlink; scroll down to "C-145/04" hyperlink; then follow "C-145/04 Judgment" hyperlink) (last visited Feb. 19, 2007).

<sup>198</sup> *Matthews*, 28 Eur. H.R. Rep. 361, ¶ 63.

because the European Parliament was enacting legislation affecting Gibraltar without the consent of Gibraltar's residents.<sup>199</sup> Thus, the restriction was unreasonable because it failed the first prong of the reasonableness test.

These two cases show that international tribunal decisions have established a test to determine whether a particular abridgment or denial of the right to vote is reasonable. If the abridgment or denial is unreasonable under the test described above, the citizen's nation is violating international law.

#### E. UN RESOLUTIONS ESTABLISH OPINIO JURIS AND CONFIRM THE RIGHT TO VOTE AS CIL

*Opinio juris* is one of the two essential elements of CIL.<sup>200</sup> It is a sense of legal obligation that makes nations behave in accordance with a particular norm.<sup>201</sup> The general practice of nations and *opinio juris* are interrelated. Courts have assumed its existence based on evidence of the general practice of nations, including treaties and judicial decisions.<sup>202</sup> Courts have also inferred the existence of *opinio juris* from UN resolutions.<sup>203</sup>

UN General Assembly resolutions, by themselves, do not demonstrate *opinio juris* or give rise to CIL<sup>204</sup> because the General Assembly only issues non-binding recommendations.<sup>205</sup> However, General Assembly resolutions have been influential on the development of CIL and have some legal value.<sup>206</sup> The legal value of General Assembly resolutions differs according to the type of resolution and the

<sup>199</sup> *Id.* ¶ 65.

<sup>200</sup> Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 97-98 (June 27); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 (1987); CASSESE, *supra* note 71, at 119; PAUST, *supra* note 71, at 3; SHAW, *supra* note 71, at 70.

<sup>201</sup> See Flores v. S. Peru Copper Corp., 414 F.3d 233, 248 (2d Cir. 2003); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 cmt. c (1987); CASSESE, *supra* note 71, at 119, 123; SHAW, *supra* note 71, at 80.

<sup>202</sup> See BROWNIE, *supra* note 74, at 7; Maria Frankowska, *The Vienna Convention on the Law of Treaties Before United States Courts*, 28 VA. J. INT'L L. 281, 383 (1988); Katharine Shirey, *The Duty to Compensate Victims of Torture under Customary International Law*, 14 INT'L LEGAL PERSP. 30, 33 (2004). E.g., Kane v. Winn, 319 F. Supp. 2d 162, 197 (D. Mass. 2004) ("[T]reaties . . . constitute both state practice and evidence of *opinio juris*.").

<sup>203</sup> See *Military and Paramilitary Activities*, 1986 I.C.J. at 100; *Texaco Overseas Petroleum Co. v. Libya*, 17 I.L.M. 1, 30 (Int'l Arb. Trib. 1978).

<sup>204</sup> See Flores, 414 F.3d at 261.

<sup>205</sup> See U.N. Charter art. 10; *Texaco*, 17 I.L.M. at 28.

<sup>206</sup> See *Texaco*, 17 I.L.M. at 28, 29.

conditions attached to it.<sup>207</sup> The resolutions' legal value can be determined by looking at the circumstances of their adoption and analyzing their principles.<sup>208</sup>

Resolutions supported by a diverse majority of nations carry more legal value than resolutions supported by a more uniform majority of nations.<sup>209</sup> Resolutions stating the existence of a right to which most nations have agreed express *opinio juris*,<sup>210</sup> as well as confirm and specify the right's scope, but do not create CIL.<sup>211</sup> In contrast, resolutions introducing new principles rejected by certain groups of nations are no more than suggestions for making law.<sup>212</sup>

Two UN General Assembly resolutions recognizing the right to vote carry great legal value because they were supported by a diverse majority of nations. First, Resolution 55/96 called upon nations to promote and consolidate democracy by "guaranteeing the right to vote freely . . . in a free and fair process at regular intervals, by universal and equal suffrage, conducted by secret ballot and with full respect for the right to freedom of association."<sup>213</sup> Resolution 55/96 was adopted by a vote of 157-0-16.<sup>214</sup> Support for this resolution came from all developed nations, most developing nations, and nations from every continent.<sup>215</sup>

Second, Resolution 59/201 declared that "the right to vote . . . at genuine . . . periodic free elections by universal and equal suffrage and by secret ballot guaranteeing the free expression of the will of the people" is an essential element of democracy.<sup>216</sup> This resolution also reaffirmed support for strengthening and promoting democracy.<sup>217</sup>

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<sup>207</sup> See *id.* at 29.

<sup>208</sup> See *id.* at 30.

<sup>209</sup> See *id.* at 30. For example, the International Arbitral Tribunal found Resolution 1803 (supported by a majority of nations from all different groups) to have greater legal value than Resolutions 3171, 3201, and 3281 (which were not supported by any developed countries heavily involved in international trade). *Id.*

<sup>210</sup> See *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 100 (June 27); *Texaco*, 17 I.L.M. at 30.

<sup>211</sup> See *Texaco*, 17 I.L.M. at 30.

<sup>212</sup> See *id.*

<sup>213</sup> G.A. Res. 55/96, ¶ 1(d)(ii), U.N. Doc. A/Res/55/96 (Feb. 28, 2001).

<sup>214</sup> G.A. Res. 55/96, 16, U.N. GAOR, 55th Sess., U.N. Doc. A/55/PV.81 (Dec. 4, 2000). The sixteen nations abstaining were Bahrain, Bhutan, Brunei, China, Cuba, Congo, Honduras, Laos, Libya, Maldives, Myanmar, Oman, Qatar, Saudi Arabia, Swaziland, and Vietnam. *Id.* However, Honduras intended to vote in favor. *Id.*

<sup>215</sup> *Id.*

<sup>216</sup> G.A. Res. 59/201, ¶ 1, U.N. Doc. A/Res/59/201 (Mar. 23, 2005).

<sup>217</sup> *Id.* ¶ 5.

Resolution 59/201 was adopted by a vote of 172-0-15.<sup>218</sup> Support for the resolution came from all developed nations, an overwhelming majority of developing nations, and nations from every continent.<sup>219</sup> In addition to demonstrating widespread international support for the right to vote as CIL, the two resolutions confirm and specify its scope as well as express *opinio juris*.

These UN General Assembly resolutions state the existence of a right to which most nations have agreed. Resolution 59/201 stated the existence of the right to vote, which had already been agreed to in Resolution 55/96. Previous General Assembly resolutions had also declared that every citizen has the right to participate in government through periodic elections by equal and universal suffrage.<sup>220</sup> Furthermore, previous resolutions had condemned denials or abridgements of the right to vote.<sup>221</sup> Thus, Resolution 59/201 carries great legal value, confirms and specifies the scope of the right to vote, and expresses the *opinio juris* necessary to establish the right to vote as CIL.

#### F. SCHOLARLY OPINION SUPPORTS THE RIGHT TO VOTE AS CIL

The works of scholars “peculiarly well acquainted with the subjects of which they treat” evidence the customs and usages of nations.<sup>222</sup> However, they are merely secondary evidence of the established practice of nations.<sup>223</sup>

As early as 1992, scholars were recognizing the emergence of the right to vote as CIL. Thomas M. Franck, Murry and Ida Becker Professor of Law Emeritus at New York University School of Law, was

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<sup>218</sup> G.A. Res. 59/201, 23-24, U.N. GAOR, 59th Sess., U.N. Doc. A/59/PV.74 (Dec. 20, 2004). The fifteen nations abstaining were Belarus, Bhutan, China, Cuba, North Korea, Laos, Libya, Myanmar, Saudi Arabia, Syria, Turkmenistan, United Arab Emirates, Venezuela, Vietnam, and Zimbabwe. *Id.*

<sup>219</sup> *Id.*

<sup>220</sup> G.A. Res. 46/137, ¶ 3, U.N. Doc. A/Res/46/137 (Dec. 17, 1991); G.A. Res. 44/146, ¶ 2, U.N. Doc. A/Res/44/146 (Dec. 15, 1989); G.A. Res. 43/157, ¶ 2, U.N. Doc. A/Res/43/157 (Dec. 8, 1988).

<sup>221</sup> G.A. Res. 46/137, *supra* note 220, ¶ 6; G.A. Res. 44/146, *supra* note 220, ¶ 6; G.A. Res. 43/157, *supra* note 220, ¶ 4.

<sup>222</sup> *Sosa v. Álvarez-Machain*, 542 U.S. 692, 734 (2004); *The Paquete Habana*, 175 U.S. 677, 700 (1900). *See also* Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 101 (June 27) (explaining that the United States quoted the views of scholars that the prohibition on the use of force is CIL).

<sup>223</sup> *See Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 251 (2d Cir. 2003); *United States v. Yousef*, 327 F.3d 56, 102-03 (2d Cir. 2003).

the first to make this argument.<sup>224</sup> He stated that “one can convincingly argue that states which deny their citizens the right to free and open elections are violating a rule that is fast becoming an integral part of the elaborately woven human rights fabric.”<sup>225</sup> Today, scholars agree that the right to vote has become widely accepted as CIL.<sup>226</sup>

In summary, the current state of international law shows a substantial amount of evidence supporting the right to vote as CIL. The customs and usages of nations reflect the right to vote’s status as CIL. International agreements, UN resolutions, national laws, executive statements, diplomatic statements, judicial decisions, historical accounts, and scholarly opinion further support the right to vote as CIL. Thus, U.S. courts should recognize the right to vote as CIL.

## V. THE RIGHT TO VOTE AS CIL UNDER U.S. LAW

After establishing that CIL can become U.S. law and that the right to vote is CIL, U.S. courts should recognize Puerto Rico residents’ arguments based on CIL in their quest for presidential voting rights through the judiciary. But before enfranchising Puerto Rico residents, U.S. courts must first determine that the right to vote can be incorporated into U.S. law.

U.S. courts can recognize the right to vote as CIL in two distinct ways. First, they can engage in direct incorporation, or the recognition of CIL as an independent source of law directly providing a cause of

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<sup>224</sup> See Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT’L L. 46 (1992). Professor Franck, one of the most distinguished international law scholars in America, has served as a judge *ad hoc* before the International Court of Justice and has been cited favorably by several international and national tribunals. See, e.g., *Sovereignty over Pulau Ligitan and Pulau Sipadan* (Indon. v. Malay.), 2002 I.C.J. 625 (Dec. 12) (Franck served as judge *ad hoc*); *East Timor* (Port. v. Austl.), 1995 I.C.J. 90, 191 (June 30) (Weeramantry, J., dissenting) (citing Franck); *Filártiga v. Pena-Irala*, 630 F.2d 876, 879 (2d Cir. 1980) (citing Franck as a distinguished international legal scholar).

<sup>225</sup> Franck, *supra* note 224, at 79.

<sup>226</sup> See *Igartúa v. United States* (*Igartúa III*), 417 F.3d 149, 179 (1st Cir. 2005) (Torruella, J., dissenting); CASSESE, *supra* note 71, at 371; Raskin, *supra* note 1, at 560; Jan Wouters et al., *Democracy and International Law*, 34 NETH. Y.B. INT’L L. 139, 195 (2004). Antonio Cassese is a distinguished international scholar who has served as a judge in the International Criminal Tribunal for the Former Yugoslavia and has been cited by international tribunals. See, e.g., *Prosecutor v. Tadić*, Case No. IT-94-I-A, Appeal against Conviction (July 15, 1999) (decided by a panel including Cassese); *Urrutía v. Guatemala*, 2003 Inter-Am. Ct. H.R. (ser. C) No. 103, at 67 (Nov. 27, 2003) (Cançado Trindade, J., concurring) (citing CASSESE, *supra* note 71).

action.<sup>227</sup> CIL can be directly incorporated only when it meets the *Sosa* requirements.<sup>228</sup> Second, U.S. courts can engage in indirect incorporation, or the recognition of CIL as an interpretative tool placing federal and state law in compliance with international law.<sup>229</sup> Indirect incorporation can take place despite CIL failing to meet the *Sosa* requirements.<sup>230</sup>

### A. DIRECT INCORPORATION

Courts determine whether CIL can be directly incorporated into U.S. law by examining the *Sosa* guidelines. *Sosa* explained that CIL will be directly incorporated into U.S. law if (1) the norm is clearly defined and accepted by the civilized world, (2) liability attaches to the perpetrator being sued, (3) domestic remedies have been exhausted, (4) the courts have given case-specific deference to the political branches, and (5) there is no domestic or treaty law on the issue.<sup>231</sup> In addition, the norm must concern a matter of mutual concern to nations.<sup>232</sup> Matters of mutual concern involve the dealings of nations with one another capable of impairing international peace and security.<sup>233</sup>

The right to vote concerns a matter of mutual concern for several reasons. One reason is that democratic nations rarely go to war with one another.<sup>234</sup> Another is that forcible repudiations of the people's democratically expressed will are not accepted by the international community.<sup>235</sup> The United States and the UN have justified several military interventions on the basis that democratically elected

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<sup>227</sup> For additional information on the direct incorporation of CIL into U.S. law, see *supra* notes 77-90 and accompanying text.

<sup>228</sup> *Infra* Part V.A.

<sup>229</sup> For additional information on the indirect incorporation of CIL into U.S. law, see *supra* notes 91-101 and accompanying text.

<sup>230</sup> *Infra* Part V.B.

<sup>231</sup> For additional information on the *Sosa* requirements, see *supra* notes 85-90 and accompanying text.

<sup>232</sup> *Igartúa v. United States (Igartúa III)*, 417 F.3d 145, 175-76 (1st Cir. 2005) (Torruella, J., dissenting); *Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 249 (2d Cir. 2003); *Filártiga v. Peña-Irala*, 630 F.2d 876, 888 (2d Cir. 1980); *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161, 167 (5th Cir. 1999).

<sup>233</sup> *Flores*, 414 F.3d at 249. For example, matters of mutual concern include official torture and genocide, which can affect international peace and security. *Id.*

<sup>234</sup> James Crawford, *Democracy and International Law*, 64 BRIT. Y.B. INT'L L. 113, 113 (1994); Franck, *supra* note 224, at 88; FREEDOM HOUSE, *supra* note 123, at 2.

<sup>235</sup> Steven Wheatley, *Democracy in International Law: A European Perspective*, 51 INT'L & COMP. L.Q. 225, 233 (2002).

governments have been ousted.<sup>236</sup> Furthermore, the United States and several international organizations are involved in monitoring and assisting elections worldwide.<sup>237</sup>

Directly incorporating CIL into U.S. law also requires that the *Sosa* guidelines are satisfied.<sup>238</sup> *Sosa* requires that the norm be (1) accepted by the civilized world and (2) as clearly defined as norms recognized when the Constitution was drafted.<sup>239</sup> Federal courts have explained that to be clearly defined, the norm must not be boundless or indeterminate and must not lack limitations.<sup>240</sup> When considering this guideline, courts must address the practical consequences of making that norm available to litigants as a cause of action in federal courts.<sup>241</sup>

As previously shown, the civilized world clearly accepts the right to vote as CIL. More than 80 percent of the world's nations have ratified the ICCPR, which arguably contains the right to vote's clearest description.<sup>242</sup> Similarly, most nations have supported UN resolutions advocating the right to vote,<sup>243</sup> and a vast majority of electoral democracies have incorporated the right to vote into their constitutions.<sup>244</sup> International organizations protect the right to vote in general and regional agreements as well as through judicial actions enforcing the right.<sup>245</sup> Only two nations, the United States and the United Kingdom, deny citizens living in dependent territories the right to vote in national elections.<sup>246</sup> Even Saudi Arabia, a nation that persistently objected to the right to vote, has been slowly reforming its government to extend voting rights to its citizens.<sup>247</sup> As Professor Jamin Raskin observed, "our

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<sup>236</sup> For example, the U.S. military intervened in Grenada and Panama to reinstate the democratically elected governments ousted by left-wing revolutionaries. Crawford, *supra* note 234, at 126; Wouters, *supra* note 226, at 167-73.

<sup>237</sup> CTR. FOR HUMAN RIGHTS, HUMAN RIGHTS AND ELECTIONS: A HANDBOOK ON THE LEGAL, TECHNICAL AND HUMAN RIGHTS ASPECTS OF ELECTIONS 2, U.N. Doc. HR/P/PT/2, U.N. Sales No. 94.XIV.5 (1994), available at <http://www.ohchr.org/english/about/publications/docs/hrelections.pdf>; Crawford, *supra* note 234, at 123-24; Franck, *supra* note 224, at 69-75.

<sup>238</sup> For additional information on the incorporation of CIL into U.S. law, see *supra* notes 77-101 and accompanying text.

<sup>239</sup> *Sosa v. Álvarez-Machain*, 542 U.S. 692, 729-30 (2004).

<sup>240</sup> *Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 254-55 (2d Cir. 2003).

<sup>241</sup> *Sosa*, 542 U.S. at 732-33.

<sup>242</sup> OFFICE OF U.N. HIGH COMM'R FOR HUMAN RIGHTS, *supra* note 170, at 12.

<sup>243</sup> See *supra* Part IV.E.

<sup>244</sup> See *supra* Part IV.A.

<sup>245</sup> See *supra* Parts IV.C, D.

<sup>246</sup> See *supra* Part IV.A.

<sup>247</sup> Royal Embassy of Saudi Arabia, Washington, D.C., *Reform*, <http://www.saudiembassy.net/Issues/Reform/IssuesRef.asp> (last visited Feb. 10, 2006).

political Constitution seems frail and incomplete when held up to modern universal suffrage principles visible in most of the world.”<sup>248</sup>

The right to vote is as clearly defined as norms recognized when the Constitution was drafted.<sup>249</sup> The right to vote refers to the expression of the people’s will in periodic and genuine elections, by universal and equal suffrage, held by secret vote.<sup>250</sup> This definition is reflected in international agreements and UN resolutions signed, ratified, or supported by the United States<sup>251</sup> as well as in international agreements to which the United States is not a party.<sup>252</sup> The right to vote is more definite than the “right of the citizens of the United States to vote” found in the constitutional amendments previously described.<sup>253</sup> This “right of the citizens of the United States to vote” is boundless and indeterminate because it does not give any description as to how the vote will be cast. In contrast, international instruments state that the vote must be secret, universal, equal, and periodic.<sup>254</sup>

The right to vote as CIL also includes certain limitations. First, it applies only to citizens.<sup>255</sup> Second, the right to vote may be limited by

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<sup>248</sup> Raskin, *supra* note 1, at 572.

<sup>249</sup> The right to vote is not equivalent to a right to democracy. CTR. FOR HUMAN RIGHTS, *supra* note 237, at 1. The right to vote is merely one element of the broader, emerging right to democracy. *Id.*; Crawford, *supra* note 234, at 113-14. “It would be unfortunate to confuse the end with the means and to forget that democracy implies far more than the mere act of periodically casting a vote.” CTR. FOR HUMAN RIGHTS, *supra* note 237, at 1 (citing UN Secretary-General Perez de Cuellar).

<sup>250</sup> “Genuine elections” means that no one party has an advantage over another and voters participate without coercion or pressure. Davidson, *supra* note 122, at 283-84; Karl Josef Partsch, *Freedom of Conscience and Expression, and Political Freedoms*, in THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT OF CIVIL AND POLITICAL RIGHTS 209, 239-40 (Louis Henkin ed., 1981). “Universal suffrage” means that everyone meeting reasonable qualifications should be entitled to vote. *Id.* “Secret vote” means that the casting of the ballot is conducted in secret. *Id.* “Equal elections” means that each vote must be given the same weight. *Id.* at 240.

<sup>251</sup> See *supra* Parts IV.C, E.

<sup>252</sup> See *supra* Part IV.C.

<sup>253</sup> See *supra* Part IV.B.

<sup>254</sup> E.g., ICCPR, *supra* note 50, art. 25(b); (“[e]very citizen shall have the right . . . [t]o vote . . . at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot . . .”); Universal Declaration of Human Rights [UDHR] art. 21(3), G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 10, 1948), available at <http://www.unhchr.ch/udhr/lang/eng.htm> (“The will of the people . . . shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.”).

<sup>255</sup> Only nationals are entitled to vote in any national elections within their country. CTR. FOR HUMAN RIGHTS, *supra* note 237, at 21.



objective and reasonable criteria.<sup>256</sup> As interpreted by international tribunals, a limitation on the right to vote is reasonable if (1) the limitations do not restrict the right to vote such that its essence is impaired and it is deprived of its effectiveness, (2) the limitations are imposed to pursue a legitimate purpose, and (3) the means used are not disproportionate.<sup>257</sup> Reasonable limitations are usually restricted to minimum age, nationality, and mental capacity.<sup>258</sup> Under some circumstances, limitations due to criminal punishment and separation of powers (e.g., military, public officials, etc.) are reasonable.<sup>259</sup> Denials or abridgments of the right to vote on the grounds of race, language, social origin, religion, or other status are prohibited.<sup>260</sup>

Furthermore, the practical consequences of making the right to vote available to litigants in federal courts should not prevent its recognition as CIL. One potential consequence would be increased litigation. Federal litigation from state residents, however, should not increase because U.S. law already incorporates most of the voting rights protections by CIL in the context of the right to vote for U.S. citizens residing in the states.<sup>261</sup> Potential litigation should come mostly from U.S. citizens residing in other territories and from convicted felons. Both groups are currently engaged in this type of litigation anyway.<sup>262</sup> So, a dramatic increase in overall domestic litigation resulting from recognizing the right to vote as CIL would be unlikely.<sup>263</sup>

As the second *Sosa* guideline requires, the scope of liability for violating the right to vote extends to the United States. The right to vote

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<sup>256</sup> OFFICE OF HIGH COMM'R FOR HUMAN RIGHTS, GENERAL COMMENT NO. 25: THE RIGHT TO PARTICIPATE IN PUBLIC AFFAIRS, VOTING RIGHTS AND THE RIGHT OF EQUAL ACCESS TO PUBLIC SERVICE: ART. 25 ¶ 4 (DEC. 7, 1996), available at <http://www.unhchr.ch/> (click "Search" tab; search for "General Comment 25"; select first document) (last visited Feb. 19, 2007).

<sup>257</sup> See *supra* Part IV.D.

<sup>258</sup> OFFICE HIGH COMM'R HUMAN RIGHTS, *supra* note 256.

<sup>259</sup> *Id.*; Alex Conte, *Democratic and Civil Rights*, in DEFINING CIVIL AND POLITICAL RIGHTS: THE JURISPRUDENCE OF THE UNITED NATIONS HUMAN RIGHTS COMMITTEE 43, 69 (2004).

<sup>260</sup> Conte, *supra* note 259, at 69.

<sup>261</sup> See *supra* Part IV.B.

<sup>262</sup> *E.g.*, *Igartúa v. United States (Igartúa III)*, 417 F.3d 145 (1st Cir. 2005) (involving Puerto Rico residents); *Attorney Gen. of Guam v. United States*, 738 F.2d 1017 (9th Cir. 1984) (dealing with Guam residents); *Johnson v. Bush*, 405 F.3d 1214 (11th Cir. 2005) (concerning Florida felons); *Ballentine v. United States*, 2001 WL 1242571, 2001 U.S. Dist. LEXIS 16856 (D.V.I. Oct. 15, 2001) (unpublished) (addressing Virgin Islands residents).

<sup>263</sup> Another practical consequence would be strengthening the right to vote as CIL. Recognizing the right to vote as CIL would be extremely influential in promoting the right to vote internationally. Moreover, it would be consistent with federal foreign and domestic policy. See *supra* Part IV.B.

imposes a positive duty upon the state to guarantee its enjoyment.<sup>264</sup> The United States has already been held liable under international law for voting rights violations.<sup>265</sup> Furthermore, under the UN Charter, the United States undertook an obligation to protect human rights,<sup>266</sup> and the right to vote is a fundamental human right.<sup>267</sup> Thus, the United States is also liable under the UN Charter for the denial of Puerto Rico residents' right to vote.

The United States cannot claim to be a persistent objector to the right to vote as CIL as an excuse for its denial of Puerto Rico residents' right to vote. As discussed above, CIL does not apply to persistent objectors, or those nations that dissented from the principle during its development.<sup>268</sup> The right to vote was first enunciated in the UDHR, which was created in 1948,<sup>269</sup> but scholarly opinion did not reflect the emergence of the right to vote as CIL until the 1990s.<sup>270</sup> Since 1948 the United States has ratified several constitutional amendments and treaties and has enacted legislation extending the right to vote to presidential elections.<sup>271</sup> The United States also ratified the ICCPR without placing a reservation on Article 25 stating it would deny voting rights to Puerto Rico residents.<sup>272</sup> By extending the scope of the right to vote in presidential elections domestically and by not placing a reservation when ratifying the ICCPR, the United States accepted the emerging norm.<sup>273</sup>

The third guideline requires that all domestic remedies be exhausted. Puerto Rico residents have been litigating the denial of their right to vote in presidential elections for thirty years.<sup>274</sup> Arguments based on domestic and international law have been rejected, and the Supreme

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<sup>264</sup> Conte, *supra* note 259, at 71.

<sup>265</sup> See *supra* Part IV.D.

<sup>266</sup> U.N. Charter art. 1, para.1.

<sup>267</sup> See *supra* Part IV.

<sup>268</sup> RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102, cmt. b, d (1987); CASSESE, *supra* note 71, at 117, 119, 123; PAUST, *supra* note 71, at 3; Kelly, *supra* note 119, at 1123; Napoli, *Independentistas*, *supra* note 37, at 161 n.9; Trimble, *supra* note 76, at 680.

<sup>269</sup> See *supra* Part IV.C.

<sup>270</sup> See *supra* Part IV.F.

<sup>271</sup> See *supra* Parts IV.B-C.

<sup>272</sup> U.N. Treaty Collection, *supra* note 172.

<sup>273</sup> In contrast, the United States is considered a persistent objector to the right to vote in congressional elections because the original constitutional provision granting the right to vote in congressional elections to state citizens has not been modified to extend this right to other U.S. citizens. Martin, *supra* note 92, at 325-26.

<sup>274</sup> See *supra* Part II.

Court refuses to address the issue.<sup>275</sup> As a result, all remedies under domestic law have been exhausted as required by *Sosa* and international law.<sup>276</sup>

The fourth guideline requires that courts give case-specific deference to the political branches. The concurrence in *Igartúa II* formally served notice on the political branches to take appropriate steps to correct Puerto Rico residents' disenfranchisement.<sup>277</sup> No statehood proposals have been initiated in Congress,<sup>278</sup> and Congress has ignored attempts to amend the Constitution.<sup>279</sup> Puerto Rico should not be forced to eternally wait for its political rights.<sup>280</sup> Thus, the courts have given case-specific deference to the political branches, but the political branches have failed to act.

Although Puerto Ricans' right to vote comports with four of the *Sosa* guidelines, the fifth guideline disallows its direct incorporation into U.S. law. The final guideline requires the absence of a treaty, legislation, case law, or an executive act on the issue.<sup>281</sup> This guideline is problematic because controlling case law supports the denial of Puerto

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<sup>275</sup> See *Igartúa v. United States (Igartúa III)*, 417 F.3d 145, 148 (1st Cir. 2005); *Igartúa v. United States (Igartúa I)*, 32 F.3d 8, 10 (1st Cir. 1994); *United States v. Sanchez*, 992 F.2d 1143, 1152-1153 (11th Cir. 1993).

<sup>276</sup> See Kelly, *supra* note 119, at 1103 (describing the Exhaustion of Domestic Remedies Rule).

<sup>277</sup> *Igartúa v. United States (Igartúa II)*, 229 F.3d 80, 90 (1st Cir. 2000) (Torruella, J., concurring).

<sup>278</sup> Although there is a plan for a federally sponsored self-determination process that might allow Puerto Rico to become a state or an independent nation, no legislation has been enacted. See Puerto Rico Democracy Act of 2006, H.R. 4867, 109th Cong., 2d Sess. (2006), available at <http://www.prfaa.com/uploadedfiles/HR4867.pdf> (responding to a presidential report of Puerto Rico's status); see also Carol J. Williams, *Puerto Rico Checks Its Options-Again: White House Asks Whether Territory Wants Statehood or Independence*, ST. PAUL PIONEER PRESS, Mar. 5, 2006, at 11A (describing presidential report on Puerto Rico's status and popular response to it).

<sup>279</sup> H.R.J. Res. 101, 108th Cong. (2004); H.R.J. Res. 1, 109th Cong. (1998).

<sup>280</sup> Raskin, *supra* note 1, at 566.

<sup>281</sup> Lower courts have added constitutional provisions to this list, but do not list any authority supporting the proposition. *Tag v. Rogers*, 267 F.2d 664, 666 (D.C. Cir. 1959). See also *In re Dillon*, 7 F. Cas. 710, 711, No. 3,914 (N.D. Cal. 1854) (arguing that the Constitution is paramount to any conflicting CIL). Nevertheless, the RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES section 115(3) (1987) states that CIL "will not be given effect as law in the United States if it is inconsistent with the United States Constitution." But even if constitutional provisions were included in this list, nothing in the Constitution explicitly denies the right to vote to any U.S. citizens. The judiciary's interpretation of the Constitution, not the Constitution itself, has been responsible for the denial of voting rights for some U.S. citizens. See, e.g., *Minor v. Happersett*, 88 U.S. 162, 178 (1874) (denying women the right to vote because "the Constitution of the United States does not confer the right of suffrage upon any one"); *Attorney Gen. of Guam v. United States*, 738 F.2d 1017, 1019 (9th Cir. 1984) (denying Guam residents the right to vote because Article II only confers voting rights to the states).

Rico residents' right to vote in presidential elections.<sup>282</sup> Thus, the right to vote as a norm of CIL cannot be directly incorporated into U.S. law.

## B. INDIRECT INCORPORATION

Nevertheless, the Supreme Court has the authority to indirectly incorporate CIL by interpreting the Constitution to protect the right to vote regardless of whether it could be directly incorporated. Chief Justice Marshall explained that "[i]t is emphatically the province and duty of the judicial department to say what the law is,"<sup>283</sup> and he did not limit this judicial power to domestic law.<sup>284</sup> In fact, the founders believed the Constitution must be construed in conformity with CIL,<sup>285</sup> which American courts have done for centuries.<sup>286</sup>

Dean Harold H. Koh<sup>287</sup> noted that the Supreme Court used CIL to interpret constitutional provisions under three situations: (1) when American law parallels the laws of other nations, (2) when international law roughly comparable to American constitutional law is applied in roughly comparable circumstances, and (3) when a constitutional concept deals with a community standard.<sup>288</sup> For instance, in two recent cases previously mentioned involving constitutional concepts concerning community standards, the Court indirectly incorporated CIL that could not be directly incorporated under the *Sosa* test.

In *Roper v. Simmons*, Christopher Simmons claimed that his murder conviction for events taking place when he was seventeen years old constituted "cruel and unusual" punishment.<sup>289</sup> Generally, the Supreme Court refers to evolving standards of decency, including those expressed "by other nations that share our Anglo-American heritage and by the leading members of the Western European community," to decide whether a particular punishment is "cruel and unusual."<sup>290</sup> The Court indirectly incorporated the international prohibition on the death penalty

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<sup>282</sup> See *supra* Part II.

<sup>283</sup> *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

<sup>284</sup> Harold Hongju Koh, *International Law as Part of Our Law*, 98 AM. J. INT'L L. 43, 44 (2004).

<sup>285</sup> See sources cited *supra* note 92.

<sup>286</sup> Koh, *supra* note 284, at 45.

<sup>287</sup> Current Dean of Yale Law School and Gerard C. and Bernice Latrobe Smith Professor of International Law, and former Assistant United States Secretary of State for Democracy, Human Rights and Labor.

<sup>288</sup> Koh, *supra* note 284, at 45-46.

<sup>289</sup> *Roper v. Simmons*, 543 U.S. 551, 559-60 (2005).

<sup>290</sup> *Id.* at 560-61.

as criminal punishment for juveniles in its interpretation of the Seventh and Fourteenth Amendments<sup>291</sup> despite judicial precedent supporting the juvenile death penalty in *Stanford v. Kentucky*.<sup>292</sup>

In *Lawrence v. Texas*, the Court protected the right to engage in private homosexual behavior from criminalization under the due process clause.<sup>293</sup> The Court acknowledged that the international protection of the right to engage in private homosexual behavior was in direct opposition to its previous decision in the *Bowers v. Hardwick*<sup>294</sup> case.<sup>295</sup> Both the prohibition on the juvenile death penalty and the protection of private homosexual behavior from criminalization would have failed the fifth prong of the *Sosa* test. Nevertheless, the Court indirectly incorporated both norms of CIL into U.S. law.<sup>296</sup> In line with these cases, the Court should also interpret the Constitution to protect voting rights by indirectly incorporating the right to vote as CIL.

However, there is no unifying theory explaining when and why international law is relevant to determine whether the scope of domestic constitutional rights should be expanded.<sup>297</sup> Professor Michael D. Ramsey<sup>298</sup> has suggested that international materials, even when not necessarily reflecting CIL, can be used to interpret the Constitution when (1) a clearly defined theory is stated in advance and applied consistently; (2) international materials might restrict as well as enhance rights; (3) the practice of nations is correctly described; and (4) selected opinions of UN personnel, world leaders, and international judges are not used as the only evidence of worldwide consensus.<sup>299</sup>

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<sup>291</sup> *Id.* at 578.

<sup>292</sup> 492 U.S. 361 (1989), *overruled by* *Roper v. Simmons*, 543 U.S. 551 (2005).

<sup>293</sup> *Lawrence v. Texas*, 539 U.S. 558, 578-79 (2003).

<sup>294</sup> 478 U.S. 186 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>295</sup> *Lawrence*, 539 U.S. at 576-77.

<sup>296</sup> As previously mentioned, a different separation of powers issue dealing with the courts' law-making ability remains to be addressed when the Court indirectly incorporates CIL. However, this problem is beyond the scope of this Article.

<sup>297</sup> Michael D. Ramsey, *International Materials and Domestic Rights: Reflections on Atkins and Lawrence*, 98 AM. J. INT'L L. 69, 69, 71-72 (2004).

<sup>298</sup> Professor of Law, University of San Diego Law School.

<sup>299</sup> Ramsey, *supra* note 297, at 72-80. Prof. Ramsey's approach to determining the relevance of international materials in constitutional interpretation developed in response to Dean Koh's argument that courts should indirectly incorporate CIL because CIL has always been considered by courts when interpreting U.S. laws. See Lori Fisler Damrosch & Bernard H. Oxman, *Agora: The United States Constitution and International Law—Editors' Introduction*, 98 AM. J. INT'L L. 42, 42-43 (2004). Ramsey argues that whether or not international materials demonstrate CIL, they can be used to interpret the Constitution under certain strict conditions. See Damrosch &

The use of the right to vote as CIL to support recent efforts by Puerto Rico residents seeking the right to vote in presidential elections through the federal courts satisfies all of these requirements. First, the international materials discussed above were used to determine whether the right to vote has become a norm of CIL. The underlying theory under examination was whether enough national practice and *opinio juris* support the existence of the right to vote as CIL. The materials were examined according to methodology developed by U.S. courts' prior judicial practice when determining the existence of CIL. As such, the materials may be used to interpret the Constitution because a clearly defined theory was stated in advance and applied consistently. Second, international tribunals have established that the right to vote is not absolute and may be limited by objective and reasonable restrictions.<sup>300</sup> Third, since the end of the Cold War, a trend towards universal suffrage has emerged.<sup>301</sup> And, currently, the general practice of a vast majority of nations supports the existence of the right to vote as CIL.<sup>302</sup> Fourth, no easy proxies were used to demonstrate that the right to vote has become a norm of CIL because UN resolutions and judicial decisions, as well as the general practice of nations, international agreements and scholarly opinion evidence, not only worldwide consensus, but also the existence of this right under CIL.<sup>303</sup>

Additionally, the right to vote as CIL is not inconsistent with the Constitution. The right to vote is not one of those constitutionally protected rights not explicitly found in the Constitution but recognized by the Supreme Court.<sup>304</sup> Unlike such rights as the right to privacy, the Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments explicitly recognize "[t]he right of citizens of the United States to

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Oxman, *supra*, at 43. The recognition and incorporation of the right to vote comports with the views of both Prof. Ramsey and Dean Koh.

<sup>300</sup> See *supra* Part IV.D.

<sup>301</sup> See *supra* Part IV.A. The right to vote as CIL would restrict as well as enhance voting rights to different voting groups because—while the right to vote as CIL supports the expansion of voting rights to U.S. residents residing in Puerto Rico and other U.S. territories—it may also support the denial of voting rights to non-U.S. citizens and some convicted criminals. See *supra* notes 255-60 and accompanying text.

<sup>302</sup> See *supra* Part IV.A.

<sup>303</sup> See *supra* Part IV.

<sup>304</sup> See, e.g., *Lawrence v. Texas*, 539 U.S. 558 (2003) (protecting the right to private sexual conduct); *Zablocki v. Redhail*, 434 U.S. 374 (1978) (recognizing the right to marry); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (protecting the right to privacy).

vote.”<sup>305</sup> Thus, U.S. courts can use evidence of the right to vote as CIL to interpret constitutional provisions to protect a clearly enumerated constitutional right of *every* U.S. citizen.<sup>306</sup>

## VI. CONCLUSION

The right to vote has become CIL.<sup>307</sup> First, most nations provide universal suffrage.<sup>308</sup> An overwhelming majority of democracies—the nations most intimately connected with the issue—grant every citizen the right to vote.<sup>309</sup> Second, this strong evidence of the general practice of nations is accompanied by the required *opinio juris* as expressed in relevant UN resolutions, judicial decisions, and international agreements.<sup>310</sup> Furthermore, this norm of CIL is compatible with our nation’s history of expanding voting rights and its foreign policy of promoting universal suffrage.<sup>311</sup>

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<sup>305</sup> For a more detailed look at these constitutional amendments, *see supra* notes 137-41 and accompanying text.

<sup>306</sup> For example, the Court could interpret the word “States” in Article II, Section 1 to include Puerto Rico as suggested in *Igartúa II*, 229 F.3d at 88-89. Chief Justice Marshall, in 1820, recognized that “[t]he district of Columbia, or the territory west of the Missouri, is not less within the United States, than Maryland or Pennsylvania” when ruling that Congress’ taxation of D.C. residents was constitutional despite the requirement under Article I, Section 2, clause 3 that taxes be apportioned among the states without any explicit mention of D.C. or the territories. *Loughborough v. Blake*, 18 U.S. 317, 319 (1820). Other courts have recognized that, in some contexts, the word “States” encompasses territories. *Andres v. United States*, 333 U.S. 740, 745 (1948) (interpreting the word “States” to include the territory of Hawaii); *Mora v. Mejias*, 206 F.2d 377, 386-87 (1st Cir. 1953) (including the territory of Puerto Rico within the word “States”). *See* 42 U.S.C. § 1973ff-6(6) (defining “State” as the states of the Union, Washington, D.C., Puerto Rico, Guam, the Virgin Islands, and American Samoa).

The Court could also recognize the right to vote under the Ninth Amendment or apply the Twenty-Third Amendment to Puerto Rico. *See* Brief for Michael Richardson as Amicus Curiae in Support of Appellants’ Petition for Writ of Cert. at 5-8, *Igartúa v. United States*, 126 S. Ct. 1569 (2006) (No. 05-650), 2006 WL 622513 (arguing that the Puerto Rico residents’ right to vote is protected by the Ninth Amendment).

<sup>307</sup> *See* *Igartúa v. United States (Igartúa III)*, 417 F.3d 145, 179 (1st Cir. 2005) (Torruella, J., dissenting); CASSESE, *supra* note 71, at 371; Raskin, *supra* note 1, at 560; Wouters, *supra* note 226, at 195.

<sup>308</sup> *See supra* Part IV.A.

<sup>309</sup> *See* FAIR VOTE, *supra* note 130.

<sup>310</sup> *See supra* Parts IV.C-E; *see also* Frankowska, *supra* note 202, at 383 (“[W]here [judicial] decisions uphold a rule of international law, those decisions may also be said to reflect an *opinio juris*”); Shirey, *supra* note 202, at 33 (“[T]o prove that a custom-making practice is followed through a sense of legal obligation researchers must look to such evidence as declarations, resolutions and treaties”).

<sup>311</sup> *See supra* Part IV.B.

U.S. courts should recognize the right to vote as CIL. Even though the right cannot be directly incorporated into U.S. law, U.S. courts should recognize it as CIL and should enfranchise Puerto Rico residents through indirect incorporation of this norm of CIL. The judiciary is empowered to identify, clarify, and apply CIL.<sup>312</sup> CIL has been instrumental in interpreting the Constitution, federal statutes, and treaties.<sup>313</sup> In fact, the Supreme Court has used CIL to interpret the Constitution in two recent cases: *Lawrence v. Texas* and *Roper v. Simmons*.<sup>314</sup> Recognizing the right to vote as CIL would accord with U.S. foreign policy supporting the expansion of the right to vote worldwide.<sup>315</sup> Consequently, judicial recognition of every citizen's right to vote in presidential elections is compatible with the judiciary's constitutional role. The judiciary must not ignore its duty to ensure these disenfranchised stepchildren are more fully integrated within the greater American family.

Once the Supreme Court recognizes the right to vote as CIL and the possibility of indirect incorporation of the norm, it should find the voting restriction on Puerto Rico residents unreasonable under the test employed by international tribunals. First, the restriction deprives Puerto Rico residents' right to vote such that its essence is impaired and it is deprived of its effectiveness.<sup>316</sup> The complete denial of Puerto Rico residents' right to vote is similar to the complete denial of the right to vote for British citizens residing in Gibraltar in *Matthews* and for U.S. citizens residing in Washington, D.C. in *Statehood Solidarity Committee*. Those denials were held to be unreasonable.<sup>317</sup> Thus, the denial of Puerto Rico residents' right to vote is also unreasonable.

Second, the restriction does not pursue a legitimate purpose. The purpose for the denial of Puerto Rico residents' right to vote is that this right is constitutionally a state right, not an individual right.<sup>318</sup> This purpose is no longer legitimate because all states delegated this right to

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<sup>312</sup> See *The Paquete Habana*, 175 U.S. 677, 700 (1900); Kundmueller, *supra* note 80, at 367.

<sup>313</sup> See PAUST, *supra* note 71, at 13; Lillich, *supra* note 78, at 408, 411; Trimble, *supra* note 76, at 672.

<sup>314</sup> For additional information on these cases, see *supra* notes 94-101 and accompanying text.

<sup>315</sup> *Supra* Part IV.B.

<sup>316</sup> Moreover, the Supreme Court stated that the right to vote cannot be denied outright in *Reynolds*. *Reynolds v. Sims*, 377 U.S. 533, 555 (1964). Yet, the right to vote has been denied outright to Puerto Rico residents.

<sup>317</sup> See *supra* Part IV.D.

<sup>318</sup> See U.S. CONST. art. II, § 1 (requiring that the President be elected indirectly through each state).



their citizens.<sup>319</sup> Additionally, nations may not invoke domestic law, constitutional or otherwise, to justify non-fulfillment of their international obligations.<sup>320</sup> Thus, denying presidential voting rights based on constitutional interpretations is not a legitimate purpose.

Finally, the means used to restrict Puerto Rico residents' right to vote are disproportionate. If the United States sought to protect the states' rights over territories' rights, the complete denial of the right to vote was not the only option available. The United States could have selected a method that differentiated between states and territories without completely disenfranchising Puerto Rico residents.<sup>321</sup> Moreover, the means proposed by the judiciary to rectify the situation are so impractical that they become a further method of restricting the right to vote.<sup>322</sup> Expecting citizens to gain access to the political process through the very process they are denied is unreasonable, if not illogical. Thus, the means used to restrict Puerto Rico residents' right to vote are disproportionate because the United States could have instituted methods other than complete disenfranchisement to protect states' rights over territories' rights.

Assuming U.S. courts find that the denial of Puerto Rico residents' right to vote is unreasonable, they should then grant Puerto Rico residents a declaratory judgment stating that they may vote in presidential elections.<sup>323</sup> Congress, recognizing the declaratory judgment, would then develop a framework for incorporating Puerto

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<sup>319</sup> *Bush v. Gore*, 531 U.S. 98, 104 (2000); *Romeu v. Cohen*, 265 F.3d 118, 123 (2d Cir. 2001).

<sup>320</sup> *Higuchi v. Perú*, Case No. 11.428, Inter-Am. C.H.R. 119/99, 1999 INTER-AM. Y.B. HUM. RTS. 2666, 2688 (1999); Crawford, *supra* note 234, at 117. See also Vienna Convention on the Law of Treaties, *supra* note 171, art. 27 ("A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty").

<sup>321</sup> For instance, the United States could have followed a scheme similar to that instituted for Washington, D.C. in the Twenty-Third Amendment.

<sup>322</sup> *Igartúa v. United States (Igartúa III)*, 417 F.3d 145, 179 (1st Cir. 2005) (Torruella, J., dissenting).

<sup>323</sup> Declaratory judgment is a remedy unto itself. See *Wacker v. Bisson*, 348 F.2d 602, 607 (5th Cir. 1965); *Martin's Landing Found., Inc. v. Landing Lake Assocs.*, 707 F.2d 1329, 1332 (11th Cir. 1983); *Auto. Equip., Inc. v. Trico Prods. Corp.*, 11 F. Supp. 292, 293 (W.D.N.Y. 1935). Thus, no further remedy would be necessary unless the political branches refused to recognize the declaratory judgment.

If Congress refused to recognize a declaratory judgment recognizing Puerto Rico residents' right to vote in presidential elections, then Puerto Rico residents could return to the courts and request further remedies. In his *Igartúa II* concurrence, Judge Torruella suggests the courts could then follow the example of the desegregation cases. *Igartúa v. United States*, 229 F.3d 80, 88-89 (1st Cir. 2000). Further explanation of how the courts could implement this declaratory judgment is beyond the scope of this Article.

Rico residents' votes into presidential elections either under the territorial clause or through a constitutional amendment.<sup>324</sup>

The United States can, and should, take steps to silence its critics at the UN. Spain entrusted Congress to determine Puerto Rico residents' civil rights and political status.<sup>325</sup> Congress has ignored its international obligations and has provided second-class citizenship to those residing in Puerto Rico.<sup>326</sup> For over a hundred years, the United States has dominated and controlled Puerto Rico<sup>327</sup> and eighteen U.S. presidents have governed Puerto Rico without the consent of its people.<sup>328</sup> United

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<sup>324</sup> Puerto Rico residents' votes can be incorporated into presidential elections in three ways: (1) a framework analogous to the Twenty-Third Amendment, (2) a framework analogous to that used for U.S. citizens residing in the states, or (3) a *pro rata* framework. See *Romeu*, 265 F.3d 118.

The most appropriate framework for incorporating Puerto Rico residents' votes would be one analogous to the Twenty-Third Amendment. *Id.* at 128 (Walker, J., concurring). This framework would be the same as the one applied to Washington, D.C. Puerto Rico would have three presidential electors, the same number of electors as the least populous state. *Id.* Puerto Rico would not enjoy the full number of presidential electors it would otherwise have unless and until it became a state. The incentive to attain statehood would remain intact. This framework would also protect the states' rights over territories' rights because it would be most advantageous for states. This method would be well-received by the states because the number of presidential electors from Puerto Rico would not be greater than any state's.

The most straightforward framework for incorporating Puerto Rico residents' votes would be one analogous to that used for U.S. citizens residing in the states. Puerto Rico would receive the number of electors it would have if it were a state under Article II. Puerto Rico would currently have eight presidential electors under this scheme. *BEA*, *supra* note 29, at 20. This framework is not the most appropriate one because it would eliminate one of main incentives for attaining statehood by granting full presidential voting rights. This framework would protect states' rights to the same extent as territories' rights because both would be treated equally. However, allowing a territory to have a greater number of electors than many states would not be well-received by the states.

The final framework for incorporating Puerto Rico residents' votes is a *pro rata* method proposed by Judge Leval. *Romeu*, 265 F.3d at 130. Under this framework, every state would include in its popular vote its *pro rata* share of the votes cast by Puerto Rico residents. For example, if Puerto Rico casts 1 million votes (60% for candidate X and 40% for candidate Y) and New York has 10% of the total population of Puerto Rico residing within its borders, then New York would be allocated 100,000 (10% of 1 million) of Puerto Rico's votes, with 60,000 votes to be cast for candidate X and 40,000 votes for candidate Y. This framework, while mathematically elegant, might prove confusing. Moreover, states would have to include votes from another jurisdiction, which might alter their election results and inaccurately reflect the people's will in either jurisdiction. Such a scheme would likely be unappealing to both the states and Puerto Rico. *Id.* at 130 n.7.

<sup>325</sup> Treaty of Paris, *supra* note 27, arts. II, IX.

<sup>326</sup> See generally Hermilla, *supra* note 12 (describing how Congress has ignored its international responsibilities towards Puerto Rico).

<sup>327</sup> Napoli, *Colonized People*, *supra* note 12, at 175.

<sup>328</sup> Bragg, *supra* note 9, at 1; Roselló, *supra* note 5.

States courts should ensure Congress understands that Puerto Rico residents' disenfranchisement in presidential elections must end.<sup>329</sup>

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<sup>329</sup> Having failed to do so, Puerto Rico residents have followed the lead of D.C. residents in *Statehood Solidarity Committee v. United States* and filed a complaint before the Organization of American States alleging violations of the ACHR, IADC, and the UDHR. Yaisha Vargas, *Ante la OEA Queja por Voto Presidencial* [Complaint for Presidential Vote Before the OAS], EL NUEVO DÍA [THE NEW DAY] (PR) (July 29, 2006), available at <http://www.endi.com/XStatic/endi/template/nota.aspx?n=43240>.