Voting Beyond Borders: Evaluating UOCAVA's Treatment of U.S. Territories and Overseas Citizens

Macy Cecil*

* J.D. Candidate, Washington University in St. Louis School of Law. Thank you to the editors of the *Washington University Global Studies Law Review* for their hard work on this note. Thank you to my Executive Notes Editor, Emily Maise, for her exceptional feedback and guidance throughout the preparation process. I also want to thank Professor Travis Crum for his helpful comments and conversations as I worked through this note. Finally, thank you to my friends for enduring countless discussions about UOCAVA over the past two years.

ABSTRACT

The Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA) enfranchises millions of U.S. citizens living abroad, enabling their participation in federal elections. However, by defining "United States" to include only certain territories—namely, American Samoa, Guam, Puerto Rico, and the U.S. Virgin Islands—UOCAVA excludes their residents from qualifying as overseas voters. In contrast, former state residents who move to the Commonwealth of the Northern Mariana Islands or a foreign country retain the ability to vote absentee in federal elections in their former state. As a result, former state residents hold different federal voting power depending on where they relocate.

This arbitrary enfranchisement raises constitutional and international concerns, including violations of the Equal Protection Clause, the right to travel, and the principle of equal suffrage under international treaties. This note critiques UOCAVA's inconsistent treatment of select U.S. territories by assessing its compliance with the Constitution and international norms, and it proposes legislative reforms to address these inequities. These proposals include removing the territories from UOCAVA's definition provisions or granting the territories full voting rights through constitutional amendment. By rectifying these disparities, the United States can better fulfill its constitutional and international obligations while fostering a more inclusive electorate.

INTRODUCTION

Three identical people—Person A, Person B, and Person C—are lifelong residents of the same U.S. state. For various reasons, they each decide to relocate. Person A settles in a foreign country. Person B moves to the U.S. territory of the Commonwealth of the Northern Mariana Islands (CNMI). Person C chooses Guam, another territory just south of the CNMI. Under the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), Person A and Person B retain the right to vote in their former state. Person C does not.[1]

Granting citizens who reside outside their country of citizenship the right to vote is now the global norm, with more than 130 countries providing their non-resident citizens voting rights.[2] The United States is no exception to this trend, enfranchising its military members and overseas citizens with the right to vote absentee in federal elections through UOCAVA.[3] UOCAVA applies to an estimated three million U.S. citizens residing abroad who are eligible to vote.[4] This makes the number of overseas voters greater than the citizen voting age population of nearly half the states.[5] However, these estimates do not include citizens of U.S. states who move to the U.S. territories of the Commonwealth of Puerto Rico, Guam, the Virgin Islands, and American Samoa, all of whom lack full federal voting power.[6] The CNMI stands as the sole exception among U.S. territories included in UOCAVA's definition of overseas voters, despite

1 This descriptive scenario is adapted from the opening hypothetical of Judge Richard Paez's dissent in Borja v. Nago, 115 F.4th 971, 985 (9th Cir. 2024) (Paez, J., dissenting).

2 *See* Johanna Peltoniemi, Irina Ciornei, & Staffan Himmelroos, *Editorial: Voting From Abroad,* 3 FRONTIERS POL. SCI. 1, 1 (2022) (explaining that the growing trend of external voting is applicable to democratic and non-democratic regimes and varies widely in the qualifications and methods countries afford their expatriates).

3 52 U.S.C. §§ 20301-20311 (1986).

4 *See* FED. VOTING ASSISTANCE PROGRAM, 2020 OVERSEAS CITIZEN POPULATION ANALYSIS REP., 4 (2021), https://www.fvap.gov/uploads/FVAP/Reports/OCPA-2020-Final-Report_20220805.pdf (estimating 2.9 million voting eligible overseas citizens in 2018). Measuring the precise number of UOCAVA eligible voters is difficult as there is no method in place of counting this diverse group of citizens. *See* Barbra Sprunt, *Why Americans Living Abroad Are a Voting Bloc With Untapped Political Potential*, NPR (Nov. 6, 2022, 5:00 AM), https://www.npr.org/2022/11/06/1132730832/american-citizens-voters-overseas-abroad.

5 As of 2021, the citizen voting age population for twenty-two states and the District of Columbia is less than 3 million. *See* Estimates of the Voting Age Population for 2021, 87 Fed. Reg. 18354 (Mar. 30, 2022).

6 To be succinct, I will often refer to these territories collectively as the "U.S. territories" when discussing UOCAVA's failure to enfranchise state residents who move from their respective states to the Commonwealth of Puerto Rico, Guam, the Virgin Islands, or American Samoa. While the Commonwealth of the Northern Mariana Islands is a U.S. territory, its unique treatment under UOCAVA is a key point of this article, and it would be inefficient to consistently note this exception or restate the rest of the territory names when discussing UOCAVA's failure to enfranchise the rest of this voting group.

an identical lack of full federal voting power shared across all the territories.[7]

This anomaly is a result of how UOCAVA defines overseas voters, with all territories except the CNMI considered within the United States.[8] Such differential treatment calls into question the constitutionality of UOCAVA and the United States's adherence to its international agreements and norms. Despite challenges by former state residents, UOCAVA's non-applicability to all but one U.S. territory has withstood legal scrutiny, prompting continued concerns on four fronts.[9] First, UOCAVA's differential treatment of the CNMI creates unequal sovereignty among the territories.[10] Second, it results in voting disparities between former state citizens relocating to U.S. territories and those living abroad, with the former holding significantly less political power.[11] Third, UOCAVA restricts individuals' right to travel by conditioning voting rights on their choice of residency.[12] Fourth, UOCAVA's disparate treatment of voters in certain territories compared to those residing in foreign countries violates equal suffrage guarantees outlined in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.[13]

To resolve UOCAVA's constitutional and international violations, this note advocates for removing the territories from UOCAVA's definition provisions, or, more broadly, passing a constitutional amendment to fully enfranchise the territories.[14] By doing so, the United States can resolve the disparate treatment caused by UOCAVA and better fulfill its international obligations, ultimately fostering a more inclusive electorate.

Part I of this note reviews the history of overseas voting, the voting power of the territories, and the importance of UOCAVA and its impact on elections. Part II delves into the constitutionality of how UOCAVA treats the territories. Part III will outline international law that supports enfranchising former U.S. state citizens who move U.S. territories. Finally, Part IV will propose potential congressional avenues for remedying this issue, such as removing all the territories from UOCAVA or,

7 *See infra* Part I.B. It is important to note that the United States commonly governs all of its territories differently than it does its states, which makes UOCAVA's differential treatment of the territories even more of an abnormality. *See* Jon M. Van Dyke, *The Evolving Legal Relationships Between the United States and Its Affiliated U.S.-Flag Islands*, 14 U. HAW. L. REV. 445, 510 (1992) ("The United States has always governed its territories and possessions separately from the states.").

8 *See* 52 U.S.C. §§ 20310(6), (8) (1986).

9 *See infra* Part II.A.

10 *See infra* Part II.B.1.

11 *See infra* Part II.B.2.

12 *See infra* Part II.B.3.

13 *See infra* Part III.

14 *See infra* Part IV.

more broadly, enfranchising the U.S. territories with the same federal voting rights as states.

PART I: BACKGROUND TO UOCAVA AND THE TERRITORIES

A. The History of Overseas Voting in the United States

The U.S. Constitution does not afford an affirmative right to vote.[15] However, the Supreme Court has recognized the right to vote as a fundamental interest protected by the Equal Protection Clause of the Fourteenth Amendment.[16] The Constitution explicitly dictates federal and state governments' roles in elections. Article I, Section 4 of the Constitution grants Congress the authority to regulate elections,[17] and constitutional amendments concerning voting rights provide Congress with enforcement power[18] Federal statutes regulating federal elections—such as UOCAVA— are enacted through this authority the Constitution grants Congress. The Constitution provides states the power to enfranchise their citizens and provides that the people of the states are to be their electors.[19]

Absentee voting began as early as the Civil War, with individual states permitting their soldiers to vote absentee.[20] For states that did not permit absentee voting, federal law allowed soldiers to return to their respective states to vote.[21] Absentee voting for military members expanded to more states during World War I.[22] Pursuant to its power to

15 *See, e.g.,* Johnathan Soros, *The Missing Right: A Constitutional Right to Vote*, DEMOCRACY J. (2013), https://democracyjournal.org/magazine/28/the-missing-right-a-constitutional-right-to-vote/.

16 *See* Harper v. Virginia State Bd. of Elections, 383 U.S. 663, 667 (1966). The Fourteenth Amendment applies only to state and local governments, but equal protection is read into the Due Process Clause of the Fifth Amendment to apply to the federal government. *See* Bolling v. Sharpe, 347 U.S. 497, 499 (1954).

17 U.S. CONST. art. I, § 4 ("The times, places and manner of holding elections for Senators and Representatives shall be prescribed in each State by the Legislatures thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators.").

18 *See* U.S. CONST. amend. XV, § 2; *see also* U.S. CONST. amend. XIX; U.S. CONST. amend. XXIII, § 2; U.S. CONST. amend. XXIV, § 2; U.S. CONST. amend. XXVI, § 2.

19 *See* U.S. CONST. art. I, § 2 ("The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for the Electors of the most numerous Branch of the State Legislature."); *see also* U.S. CONST. art. II § 1 ("Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors"); U.S. CONST. amend. XVII ("The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote.").

20 *See* R. SAM GARRETT, CONG. RSCH. SERV., RS20764, THE UNIFORMED AND OVERSEAS CITIZENS ABSENTEE VOTING ACT: OVERVIEW AND ISSUES 1 (2016).

21 *See id.*

22 *See* Brian C. Kalt, *Unconstitutional But Entrenched: Putting UOCAVA and Voting Rights for Permanent Expatriates On A Sound Constitutional Footing*, 81 BROOK. L. REV. 441, 446 (2016). Federal legislation for military absentee voting was introduced in

regulate elections, Congress extended this right to federal elections during World War II through the Soldier Voting Act of 1942.[23] Congress relied on its war powers to require states to allow soldiers to vote in federal elections. Once the war was over and Congress's authority to legislate in this fashion was gone, the Act was amended to serve as a recommendation rather than a requirement.[24]

In 1955, Congress extended absentee voting to allow soldiers, military dependents, and federal employees living overseas to vote during peacetime by enacting the Federal Voting Assistance Act.[25] Although states were not obligated to adopt the expansion, most did.[26] Congress expanded this option again in 1968 to include all U.S. citizens temporarily living overseas.[27]

In 1975, Congress shifted its suggestion to an explicit requirement when it enacted the most similar predecessor to UOCAVA, the Overseas Citizens Voting Rights Act (OCVRA).[28] OCVRA required states to allow their former residents living abroad, temporarily or permanently, to vote absentee in federal elections.[29] Because UOCAVA was modeled after OCVRA, OCVRA's legislative history provides valuable insight into the legislative intent behind UOCAVA.[30]

Opponents of OCVRA contested its constitutionality, arguing that Congress acted outside its regulatory role, overstepped states' power to enfranchise voters within their boundaries, and disregarded the residency requirement of voting qualifications by granting permanent expatriates the right to vote in states where they do not intend to reside again.[31] OCVRA opponents also pointed to the People of the States Clauses.[32] Article I, Section 2, Clause 1 of the Constitution provides that "[t]he House of Representatives shall be composed of Members chosen

1918, but it was not enforced. *See* GARRETT, *supra* note 20, at 1 (explaining contradictory statements from the War Department about conducting overseas voting for soldiers in World War I, resulting in the federal legislation not being acted upon).

23 Soldier Voting Act of 1942, Pub. L. No. 77-712, 56 Stat. 753 (1942); *see also* GARRETT, *supra* note 20, at 1. The Soldier Voting Act allowed soldiers overseas to vote in federal elections during wartime, even if they had not registered to vote. *Id.*

24 GARRETT, *supra* note 20, at 1.

25 Federal Voting Assistance Act of 1955, Pub. L. No. 84-296, 69 Stat. 584.

26 *Id.*; *see also* GARRETT, *supra* note 20, at 2.

27 Act of June 18, 1968, Pub. L. No. 90-343, 82 Stat. 180. States were less likely to enfranchise these private citizens than they were government workers and their families. *See* Kalt, *supra* note 22, at 447-48.

28 Overseas Citizens Voting Rights Act of 1975, Pub. L. No. 94-203, 89 Stat. 1142. For a more in-depth discussion on the history of OCVRA and UOCAVA, see Kalt, *supra* note 22, at 446-51.

29 Overseas Citizens Voting Rights Act of 1975, Pub. L. No. 94-649, 89 Stat. 1142.

30 *See* Jeaqualyn Borgonia, *Voting Rights Denied By Residency: Enfranchising Millions of U.S. Citizens In U.S. Territories*, 19 SEATTLE J. SOC. JUST. 841, 855 (2021).

31 Kalt, *supra* note 22, at 449.

32 *Id.* at 457.

every second Year by the *People of the several States*."[33] The Seventeenth Amendment parallels this by stating, "[t]he Senate of the United States shall be composed of two Senators from each State, *elected by the people thereof*."[34] Opponents claimed OCVRA ignored these clauses by enfranchising people who were no longer a part of a state.[35] Meanwhile, proponents argued that the right to vote and the right to travel justified the law.[36]

In 1986, Congress consolidated, updated, and replaced the existing Acts providing overseas citizens the right to vote in federal elections through UOCAVA.[37] Administered by the Federal Voter Assistance Program (FVAP), UOCAVA allows military members and citizens living abroad to vote absentee in their former state of residence.[38] UOCAVA creates a floor requiring all states, the District of Columbia, and the U.S. territories to count the absentee votes in federal elections of former residents who establish residence in a foreign country or the CNMI.[39] Because the U.S. Virgin Islands, Puerto Rico, Guam, and American Samoa are treated the same as states under UOCAVA, states are not required to extend this right to former residents who move to these U.S. territories.[40]

---

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

34 U.S. CONST. amend. XVII (emphasis added).

35 Kalt, *supra* note 22, at 478-79. Additionally, opponents made passing claims that OCVRA violated the Qualification Clauses' symmetry requirement. *See id.* at 478-79 ("Being a 'person of the state' is a necessary but not sufficient basis for voting in congressional elections… these clauses state plainly that in order to vote in congressional elections, one must be qualified to vote in state-house elections. OCVRA violates this symmetry requirement.").

36 *Id.* at 477, 479. Supporters of OCVRA also claimed that OCVRA rectified unequal treatment of public and private sector overseas voters in states that had chosen not to enfranchise the latter. *Id.* at 447-48.

37 52 U.S.C. §§ 20310-11 (1986). *See also* Garrett, *supra* note 20, at 2.

38 *The Uniformed and Overseas Citizens Absentee Voting Act Overview*, FED. VOTING ASSISTANCE PROGRAM, https://www.fvap.gov/info/laws/uocava (last visited Mar. 5, 2024). For the first three decades of its implementation, the effectiveness of UOCAVA was practically limited. In 2009, for instance, the Overseas Vote Foundation surveyed UOCAVA voters and local election officials, finding one in four voters did not receive their requested ballots. Caroline Therese Schønheyder, *U.S. Policy Debates Concerning the Absentee Voting Rights of Uniformed and Overseas Citizens*, 1942-2011, at 3-4 (2021) (M.A. thesis, University of Oslo) (on file with the University of Oslo Research Archive). In response, Congress passed the Military and Overseas Voter Empowerment (MOVE) Act, requiring states to send absentee ballots to UOCAVA voters no later than 45 days before federal elections. *See id. at 94*; *see also* National Defense Authorization Act, Pub. L. No. 111-84, §§ 575-589, 123 Stat. 2190, 2318-35 (2009).

39 52 U.S.C. §§ 20310(6), (8) (1986).

40 Most states have not done so. *See* CONN. STATE ADVISORY COMM., VOTING RIGHTS IN U.S. TERRITORIES (Oct. 4, 2021), https://www.usccr.gov/files/2021-11/voting-rights-in-the-territories-advisory-memo-ct-sac.pdf. States may also decide whether U.S. citizens who have never resided in the U.S. can vote in their state based on their parents' or guardians' former residency there. *See* FED. VOTING ASSISTANCE PROGRAM, 2024-25 VOTING ASSISTANCE GUIDE (2023), https://www.fvap.gov/uploads/FVAP/States/eVAG.pdf. Further, states dictate the method of voting, allowing a range of mail-in only, fax, email, or online portals. *See UOCAVA Voting in U.S. States*, FED. VOTING ASSISTANCE PROGRAM, https://www.fvap.gov/info/interactive-data-

B. The Voting Power (or lack thereof) of the U.S. Territories

With the exception of American Samoa, residents of U.S. territories are U.S. citizens.[41] Unlike state-side citizens, territorial residents are not permitted to vote for president and lack full congressional representation.[42] American Samoa, Guam, the CNMI, and the Virgin Islands are represented by a non-voting delegate in the House of Representatives.[43] Puerto Rico is represented in Congress by a "resident commissioner," but this role is treated the same as a non-voting delegate.[44] The non-voting status of these representatives make them—and the over four million U.S. citizens they represent[45]—comparatively powerless.[46] The territories have no representation in the U.S. Senate.[47] Territorial citizens are permitted to participate in presidential party primaries, but they possess no further ability to vote for who will actually become president.[48] Moreover, even though UOCAVA and its predecessor were partially meant to ensure voting rights for U.S. military members regardless of their physical location, the restrictions on voting power for territorial residents also affects U.S. military members who have claimed residency in a U.S.

---

center/states (last visited Mar. 3, 2024). For guidance on more state specific overseas voting requirements, see *id.*

41 *See, e.g.*, Johnathan Lewallen & Bartholomew H. Sparrow, *Nothing On the Floor: Congress, the Territorial Delegates, and Political Representation*, 133 POL. SCI. Q. 729, 730 (2018).

42 *See, e.g.*, Amber L. Cottle, *Silent Citizens: United States Territorial Residents and the Right to Vote In Presidential Elections*, 1995 UNIV. CHI. LEGAL F. 315, 316-17 (1995). The differential treatment U.S. territories receive from the federal government goes beyond political representation. For examples of this, see Van Dyke, *supra* note 7, at 505-10 (discussing the customs, immigration, taxation, and other federal laws the territories are differential subject to, both among each other and the states); *see also* United States v. Vaello Madero, 596 U.S. 159, 162-63 (2022) (holding the tax status of Puerto Ricans was a rational basis for their exclusion from Supplemental Security Income benefits).

43 JANE A. HUDIBURG, CONG. RSCH. SERV., R40555, DELEGATES TO THE U.S. CONGRESS: HISTORY AND CURRENT STATUS 1, 7 (2022), https://sgp.fas.org/crs/misc/R40555.pdf. D.C. is also represented by a delegate in the House of Representatives. *Id.*

44 *Id.*

45 As of 2020, the population of Puerto Rico is 3,285,874; American Samoa's population is 49,710; the Northern Mariana Islands' population is 47,329; Guam's population is 153,836; and the U.S. Virgin Islands' population is 87,146 people. U.S. CENSUS BUREAU, 2020 CENSUS RESULTS, https://www.census.gov/programs-surveys/decennial-census/decade/2020/2020-census-results.html (last visited Mar. 4, 2024).

46 *See* HUDIBURG, *supra* note 43. Territorial representatives cannot vote on bills, but they "can speak, introduce bills and resolutions, and offer amendments on the House floor; they can speak, offer amendments, and vote in House committees." *Id.* These representatives "serve two-year terms and can participate in all house functions with the exception of voting on the House floor. The representative may serve on committees, has full voting rights at the committee level and may serve as committee chair. They may also make amendments to proposed legislation during discussion on the House floor." *Our District: American Samoa – A Territory of the United States*, CONGRESSWOMAN AUMUA AMATA COLEMAN RADEWAGEN, https://radewagen.house.gov/about/our-district#:~:text=U.%20S.%20House%20of%20Representatives,in%20the%20House%20of%20Representatives (last visited Mar. 1, 2024).

47 Lewallen & Sparrow, *supra* note 41, at 731.

48 *See, e.g.*, Cottle, *supra* note 42, at 317.

territory.[49] In other words, U.S. military members residing in U.S. territories cannot vote for their Commander-in-Chief.

Unlike other territories, American Samoa residents[50] are considered U.S. nationals rather than U.S. citizens.[51] This distinction carries significant ramifications. Unlike the citizens of the territories, if a person born in American Samoa relocates to a U.S. state, they cannot vote in the state's federal elections because they lack U.S. citizenship.[52] Additionally, U.S. states treat American Samoans differently, with some states preventing them from running for office, holding certain professions, and serving on juries.[53]

The subordinate political power given to citizens within the territories is a product of the *Insular Cases*, a set of Supreme Court cases decided in the early 1900s that determined the scope of the United States's power over its acquired territories.[54] The *Insular Cases* developed the doctrine of territorial incorporation, deeming a territory to be "unincorporated" if it had no intention of becoming a U.S. state.[55] American Samoa, Guam,

49 *See* Borgonia, *supra* note 30, at 856-57.

50 The use of the term "resident" here is referring to potentially voting-eligible residents of the territory, rather than the entire population. For an example providing further clarification, the term is not encompassing those who live in the territories but are citizens of a foreign country and could not be considered U.S. nationals or U.S. citizens.

51 In 2022, the Tenth Circuit overruled a decision finding that American Samoans should be U.S. citizens rather than U.S. nationals. *See generally* Fitisemanu v. United States, 1 F.4th 862 (10th Cir. 2021). The Supreme Court declined to hear Plaintiffs' appeal. Amy Howe, *Court Declines To Take Up Petition Seeking To Overturn Insular Cases*, SCOTUSBLOG (Oct. 17, 2022, 11:00 AM), https://www.scotusblog.com/2022/10/court-declines-to-take-up-petition-seeking-to-overturn-insular-cases/.

52 *See* Gabriela Meléndez Olivera & Adriel I. Cepeda Derieux, *"Nationals" But Not "Citizens": How the U.S. Denies Citizenship to American Samoans*, ACLU (May 22, 2020), https://www.aclu.org/news/voting-rights/nationals-but-not-citizens-how-the-u-s-denies-citizenship-to-american-samoans.

53 *Id.* Some of the jobs American Samoans are excluded from include "police officers, firefighters, paramedics, or public school teachers. They can't be court reporters in Utah, optometrists in New Mexico, or funeral home directors in Oklahoma . . . . Even getting a driver's license can be an issue." *Id.*

54 *See generally* BARTHOLOMEW H. SPARROW, THE *INSULAR CASES* AND THE EMERGENCE OF THE AMERICAN EMPIRE (2006) (providing a background on the United States's acquisition of the territories, and the *Insular Cases* subsequent effect on their political power and relationship at large with the United States); *see also* Christina Duffy Barnett, *Untied States: American Expansion and Territorial Deannexation*, 72 UNIV. OF CHICAGO L. REV. 797, 813 (2005) (discussing the *Insular Cases*' creation of unincorporated territories and its impact on American imperialism).

55 Van Dyke, *supra* note 7, at 449 (The *Insular Cases* "formulated the view that if a government had the power to expand its territory by any means, then that power also included the right to establish and determine the status of the newly-acquired territory. A newly-acquired territory does not, therefore, automatically become 'incorporated' and does not achieve that status until Congress acts to 'incorporate' it . . . . Territories that have become formally "incorporated" are usually thought to be in a transition stage on their way to becoming a state, although this linkage is not necessarily inevitable."); *see also* Stacey Plaskett, *The Second-Class Treatment Of U.S. Territories Is Un-American*, THE ATL. (March 11, 2021), https://www.theatlantic.com/ideas/archive/2021/03/give-voting-rights-us-territories/618246/ ("Which territories the Court determined were "unincorporated" turned largely on the justices' view of the people who lived there—people they labeled "half-civilized," "savage," "alien races," and "ignorant and lawless.").

the CNMI, Puerto Rico, and the U.S. Virgin Islands are all unincorporated territories.[56] Further, the *Insular Cases* and subsequent Supreme Court decisions held that "because [the territories] belong to the United States but are not 'incorporated into the United States as a body politic,' Congress's regulation of the territories under Article IV is not 'subject to all the restrictions which are imposed upon [Congress] when passing laws for the United States.'"[57] Instead, congressional regulation of the territories must only comply with fundamental constitutional rights.[58] What this legislative power allows is unclear as doctrine governing the territories has been largely inconsistent.[59] Congress has also inconsistently applied statutes and regulations to its different territories.[60]

The territories' lack of federal voting power also stems from the text of the Constitution, which grants the right to vote for president to the states, as opposed to U.S. citizens. Article II, section 1 of the Constitution provides that "[e]ach state shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors," whose function is to select the President.[61] States delegate this role to their citizens through the Electoral College.[62] In this way, *states* and not *territories* are given the power to vote for president. Further, Congress is granted broad authority to legislate over U.S. territories through the Territories Clause, which reads that Congress may "make all needful Rules and Regulations respecting the Territory . . . belonging to the United States."[63]

56 *See* Van Dyke, *supra* note 7, at 447. Puerto Rico and the Northern Mariana Islands are commonwealths, meaning they are allowed "a substantial amount of self-government (over internal matters) and some degree of autonomy on the part of the entity so designated." *Id.* at 451. As commonwealths, these territories derive their "authority not only from the United States Congress, but also by the consent of the citizens of the entity." *Id.*

57 Romeu v. Cohen, 265 F.3d 118, 122 (2d Cir. 2001) (quoting Dorr v. United States, 195 U.S. 138, 142-43 (1904)); *see also* Van Dyke, *supra* note 7, at 449.

58 *See Romeu*, 265 F.3d at 122; *see also* Van Dyke, *supra* note 7, at 449 ("In Justice White's view, the provisions of the Constitution are fully applicable to the residents of an incorporated territory, but not necessarily to those in an unincorporated territory. In the *Insular Cases*, the Court determined that Puerto Rico was an 'unincorporated' territory, and, therefore, that the Uniformity Clause of the Constitution was not applicable to Puerto Rico unless it was found to be a 'fundamental' aspect of our constitutional system (which it was not).").

59 *See* Van Dyke, *supra* note 7, at 510-12 (1992) (describing an "inconsistent pattern" of cases affording, or not affording, rights to the territories).

60 *See id.* at 512-13.

61 U.S. CONST. art. II, § 1; *see also* Bush v. Gore, 531 U.S. 98, 104 (2000) ("The individual citizen has no federal constitutional right to vote for electors for the President of the United States unless and until the state legislature chooses a statewide election as the means to implement its power to appoint members of the electoral college." (citing U.S. CONST. art. II, § 1).

62 *See Bush*, 531 U.S at 104.

63 U.S. CONST. art. IV, § 3, cl. 2.

C. The Importance of UOCAVA and Its Impact on U.S. Elections

Historically, most overseas voters have not taken advantage of the voting rights UOCAVA provides.[64] For example, "[i]n the 2020 general election, the FVAP estimates 224,139 votes were cast by citizens abroad who weren't in the military, the equivalent to a voting rate of 7.8%. That compares to an overall turnout rate of 66.8%."[65] Overseas voter turnout is growing, though--voters requested nearly double the number of ballots in 2020 compared to 2016 and 2012.[66]

Despite relatively low turnout, overseas voters have had a significant impact on U.S. elections in the past. For example, UOCAVA voters influenced the 2000 presidential election, the 2006 Senate race, and President Biden's 2020 election in key swing states.[67] The 2000 presidential election controversy, which sparked the Supreme Court's decision in *Bush v. Gore*[68] to stay Florida's recount, is another notable example of overseas voters' influence.[69] The last counted votes in Florida were late overseas ballots.[70] The Bush campaign ensured these ballots were counted, assuming correctly that military members would vote in his favor—which he would turn out to be correct on.[71] In 2006, overseas voters gave Jim Webb the narrow margin of victory needed in Virginia to win his Senate seat, giving Democrats control of the Senate.[72] In 2020, overseas ballots in close states, such as Arizona and Georgia, were crucial to Biden's electoral success in those states.[73]

U.S. citizens living abroad have proven their ability to impact election results, underscoring the need to closely examine who UOCAVA does and does not enfranchise. The exclusion of territorial residents is especially significant for considerations of increasing voter turnout

64 *See* Jay Sexton and Patrick Andelic, *Expatriate Americans Are the Most Important Voting Bloc You've Never Heard Of*, THE LONDON SCH. OF ECON. AND POL. SCI. BLOGS (Mar. 24, 2016), https://blogs.lse.ac.uk/usappblog/2016/03/24/expatriate-americans-are-the-most-important-voting-bloc-youve-never-heard-of/. Expatriates' low turnout and insignificant impact on elections is a reality for other countries as well. Derek Hutcheson and Jean-Thomas Arrighi de Casanova, *Keeping Pandora's (Ballot) Box Half-Shut: A Comparative Inquiry Into the Institutional Limits of External Voting in EU Member States*, 22 DEMOCRATIZATION 884, 886 (2015).

65 Sprunt, *supra* note 4.

66 Yaseem Serhan, *The Overlooked Voting Bloc That Could Impact US Midterms*, TIME (Nov. 3, 2022, 2:54 PM), https://time.com/6228023/overseas-voters-us-midterms-2022/.

67 *See* Sprunt, *supra* note 4.

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

69 Sprunt, *supra* note 4.

70 David Barstow & Don van Natta, Jr., *Examining the Vote: How Bush Took Florida: Mining the Overseas Absentee Vote*, N.Y. TIMES (July 15, 2001), https://www.nytimes.com/2001/07/15/us/examining-the-vote-how-bush-took-florida-mining-the-overseas-absentee-vote.html.

71 Sprunt, *supra* note 4.

72 *Id.*

73 *Id.*

through UOCAVA. Scholars studying overseas voting have speculated that the low turnout of expatriates in countries across the globe may be due to expats' disconnect from their home country.[74] In fact, Congress's decision to enfranchise overseas U.S. citizens was motivated in part by a desire to foster these citizens' sense of connection to the United States'.[75] It is reasonable to assume that this lack of connection would be dramatically decreased for former state residents who move to U.S. territories, given the United States' relation to the territories and these individuals' previous voting power in their former states.[76]

PART II: ANALYZING UOCAVA'S DISENFRANCHISEMENT OF STATE CITIZENS RELOCATED TO (MOST) U.S. TERRITORIES

Despite the difference in political power between U.S. states and territories, UOCAVA treats these entities—except for the CNMI—the same for the purpose of giving voting power to U.S. citizens who move outside the United States.[77] UOCAVA's exclusion of state residents who move to U.S. territories from the law's overseas voter protections is due to how the statute defines "overseas voters."[78]

When defining who is considered an overseas voter, UOCAVA defines a "State" as including a "State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, and American Samoa."[79] Similarly, UOCAVA defines "United States" as "the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, and American Samoa."[80] the CNMI is the only territory excluded from this definition.[81] As the last

74 *See, e.g.,* Micha Germann, *Internet Voting Increases Expatriate Voter Turnout*, 38 GOV. INFO. Q. 1, 9 (2021) ("[I]t can be speculated that many expatriates, especially if they have lived outside of their home country for a long time or were even born 'abroad', do not feel a sufficient connection to their home country and therefore have no desire to get involved."); *see also* Sarah Burton, *Locating the People: An Exploration of Non-Resident Enfranchisement and Political Belonging in* Frank v. Canada, 66 MCGILL L. J. 637, 641 (2021) (explaining that as technology expands, overseas voters will be able to feel more connected to their country of origin).

75 Cottle, *supra* note 42, at 334 (1995) (citing H.R. Rep. No. 94-649 at 2). Specifically, the committee noted "overseas citizens' close connection to and correspondence with the United States." *Id.* at 334. Congress also noted that "citizens abroad "keep in close touch with the affairs at home, through correspondence, television and radio, and American newspapers and magazines." *Id.* at 335 (citing H.R. Rep. No. 94-649 at 2).

76 U.S. territories have fought to gain more federal voting rights with little success. *See, e.g.,* Stacey Plaskett, *The Second-Class Treatment of U.S. Territories Is Un-American*, THE ATL. (March 11, 2021), https://www.theatlantic.com/ideas/archive/2021/03/give-voting-rights-us-territories/618246/. Normatively, it could be argued that those who move to a territory, only to lose the voting power they previously had within their state, might be particularly motivated to continue to vote.

77 *See* 52 U.S.C. §§ 20310(6), (8) (1986).

78 *See id.*

79 52 U.S.C. § 20310(6) (1986).

80 52 U.S.C. § 20310(8) (1986).

81 *See* 52 U.S.C. §§ 20310(6), (8) (1986).

U.S. territory, the CNMI's history is unique compared to the timeline of the rest of the U.S. territories that UOCAVA includes.[82] UOCAVA's exclusion of the CNMI may be because the statute was passed shorty before the CNMI became an official U.S. territory.[83] The CNMI did not even have a delegate in Congress until 2009.[84] In fact, UOCAVA's congressional record from the 99th Congress shows no mention of the CNMI.[85]

A. Challenges to UOCAVA in the Courts

Former state residents living in Puerto Rico, Guam, and the U.S. Virgin Islands have filed lawsuits claiming that the inclusion of their respective territories under UOCAVA is unconstitutional.[86] Plaintiffs in these cases argue that it is disparate treatment to lose their state voting rights upon moving to a listed territory, while former state residents who move to foreign countries or the CNMI retain theirs.[87] In turn, plaintiffs contended that UOCAVA violates their rights under the Equal Protection Clause and the right to travel.[88] Courts have thus far rejected all of these challenges.[89] This section will examine these cases and their arguments.

---

82 *See* Tom C.W. Lin, *Americans, Almost and Forgotten*, 107 CAL. L. REV. 1249, 1262 ("Prior to 1976, the CNMI was known as the Trust Territory of the Pacific Islands, which came under the administration of the United States pursuant to a trustee agreement with the United Nations in 1947. In 1976, the CNMI entered into a covenant with the United States that made the island an American territory with self-governing commonwealth status, and conferred American citizenship on the people of the CNMI.").

83 *See* Joseph Horey, *The Right of Self-Government In the Commonwealth of the Northern Mariana Islands*, ASIAN-PAC. L. & POL'Y J. 180, 231 (2003) (discussing when the CNMI became an official U.S. territory); *see also* Borja v. Nago, 115 F.4th 971, 975 (9th Cir. 2024) (explaining that UOCAVA was passed before the CNMI became an official U.S. territory).

84 *See* Lin, *supra* note 82, at 1262-63 (2019) (discussing the history of the Northern Mariana Islands' path to becoming a U.S. territory, and it's relationship with the United States today). The CNMI was also given a congressional delegate later than the rest of the territories, with its first delegate being sent to the 111th Congress in 2009. HUDIBURG, R40555, *supra* note 43, at 6. Puerto Rico was first given a resident commissioner in 1902, though this commissioner was not allowed to speak at the House. *Id.* at 5. Guam and the Virgin Islands were given delegates in 1972, and the American Samoa was given a delegate in 1978. *Id.* at 6. the CNMI Congressional Delegate Gregorio Kilili C. Sablan "believes the reason the CNMI was left out was because…the CNMI did not have a member in the U.S. Congress." Erwin Encinares, *'Every Citizen Has the Right to Vote,'* SAIPAN TRIB. (Oct. 10, 2017), https://www.saipantribune.com/news/front_page/every-citizen-has-right-to-vote/article_c85cc04c-9cb0-5bfc-9e9d-8a15ba6f6569.html.

85 *See generally Uniformed and Overseas Citizens Absentee Voting Act: Hearing On H.R. 4393 Before the H. Comm. On H. Admin.*, 99th Cong. (1986); *see also* H.R. REP. NO. 99-765 (1986).

86 *See* Igartua De La Rosa v. United States, 32 F.3d 8 (1st Cir. 1994) (*Igartua I*); *see also* Romeu v. Cohen, 265 F.3d 118, 124-26 (2d Cir. 2001); *see also* Segovia v. United States, 880 F.3d 384, 390-92 (7th Cir. 2018); *see also Borja*, 115 F.4th at 984.

87 *See Igartua I*, 32 F.3d at 10; *see also Romeu*, 265 F.3d at 124-25; *see also Segovia*, 880 F.3d at 390; *see also Borja*, 115 F.4th at 976.

88 *See infra* Part II.A.

89 *See Igartua I*, 32 F.3d at 8; *see also Romeu*, 265 F.3d at 124-26; *see also Segovia*, 880 F.3d at 390-92 (dismissing Plaintiffs' complaint against UOCAVA for lack of standing due to the traceability prong); *see also Borja*, 115 F.4th at 984.

In the late nineties and early 2000s, the First and Second Circuits rejected Plaintiffs' claims and upheld UOCAVA.[90] In *Igartua de la Rosa v. United States*,[91] the First Circuit, while applying rational basis review to UOCAVA's inclusion of Puerto Rico in its definition, reasoned that UOCAVA "does not distinguish between those who reside overseas and those who take up residence in Puerto Rico, but between those who reside overseas and those who move anywhere within the United States."[92] Further, the court distinguished the right to vote granted to citizens who move to Puerto Rico from those who moved to a foreign country by noting that, absent UOCAVA, citizens who take residence in a foreign country would lose all their voting rights.[93] On the other hand, citizens who move to Puerto Rico retain some ability to participate in federal elections.[94] The court found that rational basis review was appropriate because the plaintiffs were not a suspect class, nor did UOCAVA's treatment of them infringe on the fundamental right to vote.[95] The court explained that UOCAVA "does not infringe that right but rather limits the state's ability to restrict it."[96]

In *Romeu v. Cohen*, the Second Circuit echoed the *Igartua de la Rosa* court's reasoning while rejecting the plaintiff's request for strict scrutiny.[97] The court emphasized that UOCAVA was passed to prevent someone moving outside the U.S. from losing voting rights, and the territories are not technically outside of the U.S.[98] The court found that UOCAVA's purpose did not extend to the citizens who move to territories because they retain some voting power in federal elections.[99] Further, the Second Circuit reasoned that extending UOCAVA to state-side citizens who move to the territories would create a class of super-citizens who could vote for President and Senate representation, while the rest the territory could not.[100] Finally, the court held that UOCAVA does not violate the

90 *See generally Igartua I*, 32 F.3d 8; *see generally Romeu*, 265 F.3d 118.

91 This case was later brought again as Igartua De La Rosa v. United States, 229 F.3d 80 (1st Cir. 2000) (*Igartua II*) and was dismissed "[b]ecause *Igartua I* is binding authority." *Id.* at 85. The case was brought at third time, but this time the plaintiffs did not challenge UOCAVA and instead challenged only Puerto Rico's disenfranchisement as a whole. *See generally* Igartua-De La Rosa v. United States, 417 F.3d 145 (1st Cir. 2005) (*Igartua III*).

92 *Igartua I*, 32 F.3d at 10.

93 *Id.* at 10-11.

94 *Id.*

95 *Id.* at 10.

96 *Id.* at 10 n.2.

97 Romeu v. Cohen, 265 F.3d 118, 124 (2d Cir. 2001).

98 *Id.* at 124-25.

99 *Id.* at 124-25 ("[C]itizens who move outside the United States, many of whom are United States military service personnel, might be completely excluded from participating in the election of governmental officials in the United States but for the UOCAVA. In contrast, citizens of a State who move to Puerto Rico may vote in local elections for officials of Puerto Rico's government (as well as for the federal post of Resident Commissioner).").

100 *Id.* at 125.

right to travel because the loss of voting rights in a particular state is the same as if plaintiffs had moved from one state to another.[101] Further, the court explained that moving away from a state and, therefore, losing that state's benefits is a choice.[102]

In the Seventh Circuit, plaintiffs brought similar arguments, though their claims were unsuccessful for lack of standing.[103] In *Segovia v. United States*, former Illinois residents brought suit arguing that UOCAVA was unconstitutional after losing their right to vote in federal elections when moving to Guam, Puerto Rico, and the Virgin Islands.[104] The Seventh Circuit dismissed the claim for lack of standing after finding the plaintiffs failed to fulfill the traceability prong.[105] Specifically, the court held that the plaintiffs' injury was not traceable to UOCAVA but to Illinois's state law version of UOCAVA, which did not extend state voting rights to residents in U.S. territories.[106] The court reasoned:

> Federal law *requires* Illinois to provide absentee ballots for its former residents living in the Northern Mariana Islands, but it does not prohibit Illinois from providing such ballots to former residents in Guam, Puerto Rico, and the Virgin Islands. State law

101 *Id.* at 126 ("A citizen's decision to move away from her State of residence will inevitably involve certain losses.").

102 *Id.* ("Such consequences of the citizen's choice do not constitute an unconstitutional interference with the right to travel."). Interestingly, Judge Leval, who wrote the court's opinion, ends the majority opinion with his own personal thoughts, beginning with: "The writer, speaking for himself alone and not for the court, adds a few observations on the problem of extending presidential votes to U.S. citizens residing in the territories. These, of course, do not constitute either a holding or observations of the Court." *Id.* at 127. Judge Leval goes on to support this note's proposition that UOCAVA ought to be expanded to state residents who move to the territories, and argues this should be done through Congress, rather than the courts. He states:

> If, notwithstanding the command of Article II, section 1 that electors be appointed in the manner that the State legislature directs, Congress may nonetheless impose on the States a requirement that each accept the votes of certain U.S. citizens who are not residents of the State but reside outside the United States or in other States, I can see no reason why Congress might not also with respect to the presidential election require the State to accept the presidential votes of certain U.S. citizens who are nonresidents of the State residing in the U.S. territories… Congress might do so on the model of the UOCAVA by requiring States to accept the votes of U.S. citizens now residing in the territories who were formerly residents of the State. Indeed, even without congressional mandate, a State would no doubt have the power to pass statutes similar to the NYEL allowing its former residents now residing in a territory to participate in its federal elections…Indeed, given that Article IV, Section 3 of the Constitution gives Congress the power to 'make all needful Rules and Regulations respecting the Territor[ies],' Congress's source of constitutional authority to extend the presidential vote to citizens residing in the territories is clearer than its power to enact the UOCAVA….

Id. at 129-30.

103 Segovia v. United States, 880 F.3d 384, 387 (7th Cir. 2018).

104 *Id.* at 386.

105 *Id.* at 388-89.

106 *Segovia*, 880 F.3d at 388-89.

> could provide the plaintiffs the ballots they seek; it simply doesn't…[t]o be sure, federal law could have required Illinois to provide the plaintiffs absentee ballots. But that does not render federal law the cause of the plaintiffs' injuries.[107]

This reasoning suggests that UOCAVA's permissive grant to the states to afford voting rights to their citizens who move to the U.S. territories makes the cause of the injury a fault of Illinois, not the federal statute.

The Seventh Circuit went on to critique the merits of the plaintiffs' claim regarding the Illinois statute, which mirrors UOCAVA.[108] Echoing the Second Circuit's concerns in *Romeu*, the court stressed that extending overseas absentee voting to territorial citizens in this way would create a class of "super citizens" who can vote for president while other residents in the territories cannot.[109] The court also echoed the reasoning in *Romeu* and *Igartua*, indicating that these citizens are not overseas but are still in the United States.[110] Additionally, the court rejected the plaintiff's right to travel claim, reasoning that "[b]y choosing to move to a territory, the plaintiffs gave up the right to vote in Illinois and gained the right to vote in territorial elections."[111] Ultimately, the court stated that "absent a constitutional amendment, only residents of the 50 states have the right to vote in federal elections. The plaintiffs have no special right simply because they used to live in a state."[112]

The most recent litigation addressing this provision of UOCAVA is *Borja v. Nago*, a case heard in the Ninth Circuit on appeal from the United States District Court for the District of Hawaii.[113] Former Hawaii residents residing in the U.S. Virgin Islands and Guam challenged UOCAVA and Hawaii state law's version of the statute, HAR § 3-177-600, claiming disparate treatment in violation of equal protection.[114] The court declined to apply *Segovia*'s ruling on standing, finding that state law and the federal government under UOCAVA are equally responsible

---

107 *Id.* at 388 (emphasis original).

108 10 ILCS 5/20-2.2 ("Any non-resident civilian citizen, otherwise qualified to vote, may make application to the election authority having jurisdiction over his precinct of former residence for a vote by mail ballot containing the Federal offices only not less than 10 days before a Federal election.").

109 *Segovia*, 880 F.3d at 391 (citing Romeu v. Cohen, 265 F.3d 118, 125 (2d Cir. 2001)).

110 *Id.*

111 *Id.* at 391-92 (agreeing with the Second Circuit's reasoning in *Romeu*, 265 F.3d at 126-27). The *Segovia* court went as far as to refer to the plaintiffs' right to travel claim as "borderline frivolous." *Id.* at 391.

112 *Id.* at 390 (emphasis omitted). Note that, if the Seventh Circuit was correct in this articulation, then it would seem to suggest that UOCAVA in its entirety is unconstitutional. It does exactly what the court claims is unconstitutional: give citizens who no longer reside in *any* of the fifty states the right to vote in federal elections. For a broader discussion on this issue, *see* Kalt, *supra* note 22, at 467.

113 *See* Borja v. Nago, 115 F.4th 971 (9th Cir. 2024).

114 *Id.* at 974-76.

for disenfranchising citizens who relocate to the territorial United States and the exception carved out for the CNMI.[115] In line with its sister circuits, the Ninth Circuit upheld UOCAVA and Hawaii's state counterpart under rational basis review.[116]

The plaintiffs argued for strict scrutiny on the basis that voting as a fundamental right and that UOCAVA and its state counterpart "'discriminate against a politically powerless, suspect class.'"[117] The court rejected Plaintiffs' arguments, holding that UOCAVA did not infringe upon Plaintiffs' fundamental right to vote. Plaintiffs relied on *Dunn v. Blumstein*, a Supreme Court case which held, "'a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction.'"[118] Plaintiffs argued that "because other former residents of Hawaii can participate in Hawaii's federal elections, Plaintiffs must be afforded that same right under *Dunn*."[119] The Ninth Circuit rejected Plaintiffs' application of *Dunn*.[120] The court reasoned that *Dunn* was not controlling because *Dunn* governs challenges to unequal voting power of residents who presently physically reside in the jurisdiction in question.[121] Unlike *Dunn*, Plaintiffs in *Borja* no longer reside where they are seeking the right to vote.[122]

The court also rejected Plaintiffs' claim for heightened scrutiny as a suspect class.[123] While the court recognized that the territories have endured a long history of discrimination indicative of a quasi-suspect or suspect classification, the court found the Plaintiffs themselves could not avail themselves as part of that class by having moved from state-side to territorial United States.[124]

The Ninth Circuit joined the growing consensus among the circuit courts in applying rational basis review to uphold UOCAVA's treatment of certain U.S. territories.[125] In addressing UOCAVA's exclusion of the CNMI, the court recognized that the United States's relationship with the CNMI has evolved since UOCAVA was passed because the CNMI has become an official U.S. territory since UOCAVA was first passed. However, the court reasoned that even today, there are still rational justifications Congress could have for treating the CNMI differently than the rest of the territories. This includes CNMI's unique "covenant governing the

115 *Id.* at 977-78.
116 *Id.* at 977, 983.
117 *Id.* at 979.
118 *Id.* (quoting Dunn v. Blumstein, 405 U.S. 330, 336 (1972)).
119 *Id.*
120 *Id.*
121 *Id.* at 979-80.
122 *Id.*
123 *Id.* at 982.
124 *Id.*
125 *Id.* at 982-83.

CNMI's consensual relationship with the United States [that] continues to impose unique restrictions on the United States's ability to enact new legislation governing the CNMI. In addition, the full implementation of federal immigration law in the CNMI will not occur until December 31, 2029."[126]

Similarly, the court rejected Plaintiffs' concern of UOCAVA's differential treatment of certain U.S. territories and foreign countries. The court echoed the Second Circuit's reasoning in *Romeu* that UOCAVA treats Plaintiffs ""in the same manner as [they] treat citizens of a State who leave that State to establish residence in another State.'"[127] Finally, the court rejected that Congress enacted UOCAVA with animus towards territories other than the CNMI.[128] Accordingly, the court employed the highly deferential standard of rational basis review to uphold UOCAVA's failure to enfranchise voting-eligible Hawaii residents who relocated to a U.S. territory other than the CNMI.[129]

B. The Case for Heightened Scrutiny: UOCAVA's Disparate Treatment of Former State Citizens Relocating to U.S. Territories

The Equal Protection Clause of the Fourteenth Amendment states, "No State shall…deny to any person within its jurisdiction the equal protection of the laws."[130] Conflicting with this clause, the implementation of UOCAVA has led to glaring disparities in the treatment of former state citizens who relocate to certain U.S. territories compared to those who move to a foreign country or the CNMI. For example, "[a]n American who lives in, say, Florida who then moves to the British Virgin Islands can vote in presidential elections via an absentee ballot. But if that same person moves to the U.S. Virgin Islands, she cannot."[131] The courts have failed to recognize this disparate treatment as legally redressable under the Equal Protection Clause.[132]

Central to this failure is the application of rational basis review by the courts, the most deferential standard of scrutiny.[133] Plaintiffs have unsuccessfully asked for heightened review through three avenues: (1) asserting that those who move from a state to take up residence in one of

126 *Id.* at 983 (citations omitted).
127 *Id.* at 984 (quoting Romeu v. Cohen, 265 F.3d 118, 124-25 (2d Cir. 2001)).
128 *Id.*
129 *Id.*
130 U.S. CONST. amend. XIV, § 1. *See supra* note 15 (explaining that the Equal Protection Clause is applied to the federal government through the Due Process Clause of the Fifth Amendment); *see also* Bolling v. Sharpe, 347 U.S. 497, 499 (1954).
131 Andrew Hammond, *Territorial Exceptionalism and the American Welfare State*, 119 MICH. L. REV. 1639, 1642 (2021) (citations omitted).
132 *See supra* Part II.A.
133 *See id.* For a more detailed description of the tiers of scrutiny, see Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1268-78 (2007).

the listed territories are a suspect class,[134] (2) contending that the denial of federal voting rights to them under UOCAVA violates their fundamental right to vote,[135] and (3) arguing that UOCAVA violates their right to travel.[136] Though the courts have consistently rejected these arguments, this note argues the case for why Plaintiffs' claims should be entitled to heightened scrutiny.

1. The Fundamental Right to Vote

The right to vote is a recognized fundamental interest protected by the Equal Protection Clause.[137] Accordingly, a denial of that interest compels courts to apply strict scrutiny.[138] However, courts have rejected Plaintiffs' claims that UOCAVA violates their fundamental right to vote by relying on the territories' lack of voting rights.[139] Central to the circuit courts' argument against strict scrutiny is the position that, because the fundamental right to vote does not extend to the territories, plaintiffs residing there are not entitled to voting rights.[140] Put differently, the fundamental right to vote does not travel with someone when they move outside their state to certain territories.

It has long been accepted that strict scrutiny does not apply to discrimination in voting against non-residents of a jurisdiction, which is generally constitutionally permissible under rational basis review.[141] In *Holt Civic Club v. City of Tuscaloosa*, the Supreme Court rejected the claim that residents in an unincorporated community outside the city

134 Igartua De La Rosa v. United States, 32 F.3d 8, 10 (1st Cir. 1994) (*Igartua I*); Segovia v. United States, 880 F.3d 384, 390 (7th Cir. 2018); Borja v. Nago, 115 F.4th 971, 982 (9th Cir. 2024).

135 *Igartua I*, 32 F.3d at 10; Romeu v. Cohen, 265 F.3d 118, 122-23 (2d Cir. 2001); *Segovia*, 880 F.3d at 390; *Borja*, 115 F.4th at 979.

136 *Romeu*, 265 F.3d at 126; *Segovia*, 880 F.3d at 391-92.

137 *See* Harper v. Virginia State Bd. of Elections, 383 U.S. 663, 670 (1966) ("[T]he right to vote is too precious, too fundamental to be so burdened or conditioned."); *see also* Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 632 (1969).

138 *See Kramer*, 395 U.S. at 627. The dissenting opinion in *Borja* argued that instead of the tiers of scrutiny, the court should remand the case to the district court to apply *Anderson-Burdick* sliding-scale framework because the plaintiffs presented a constitutional challenge to a law regulating elections. *Borja*, 115 F.4th at 985-87 (Paez, Cir. J., dissenting). For further discussion on the origins of the *Anderson-Burdick* balancing test, see Daniel P. Tokaji, *Applying Section 2 To the New Vote Denial*, 50 HARV. C.R.-C.L. L. REV. 439, 468-70 (2015).

139 Igartua De La Rosa v. U.S., 32 F.3d 8, 10-11 (1994) (*Igartua I*) (describing the plaintiffs' loss of voting rights as a result of Puerto Rico's inability to vote in presidential elections); *Romeu,* 265 F.3d at 124 (reasoning the level of scrutiny is irrelevant because of Congress's power to regulate the territories); Segovia v. United States, 880 F.3d 384, 389 (7th Cir. 2018). ("[O]nly residents of the 50 States have the right to vote in federal elections. The plaintiffs have no special right simply because they used to live in a State."); *Borja*, 115 F.4th at 979 (reasoning Plaintiffs' constitutional right to vote applies only equal to others within the jurisdiction in which they reside).

140 *Igartua I*, 32 F.3d at 10-11; *Romeu*, 265 F.3d at 124; *Segovia*, 880 F.3d at 389; *Borja*, 115 F.4th at 979.

141 *See* Holt Civic Club v. City of Tuscaloosa, 439 U.S. 60, 70-71 (1978).

limits were denied equal protection because they could not vote in Tuscaloosa city elections.[142] The Court held that a jurisdiction can deny non-residents the right to vote.[143] In *Borja*, the Ninth Circuit's rejection of strict scrutiny partly rested on this rationale by reasoning that in the literal sense, former state citizens who relocate to a U.S. territory are no longer physically within that jurisdiction, rendering strict scrutiny inapplicable.[144]

However, Congress's decision to enfranchise only certain citizens who relocate outside the fifty states and D.C. through UOCAVA may still be subject to heightened scrutiny. This is because "statutes that selectively distribute the franchise" are reviewed under strict scrutiny.[145] In this context, *Holt Civic Club*'s authorization of excluding non-residents from voting in Tuscaloosa's municipal elections is distinguishable from UOCAVA's enfranchisement of only *some* non-residents. Unlike in *Holt Civic Club*, where the city sought to *restrict* the franchise from those outside its geographic boundaries,[146] Congress has already used its power to regulate federal elections to *expand* the electorate to only *certain* former state-side citizens. By granting citizens in foreign countries and the CNMI the right to vote and limiting this extension to not include those who relocate to Puerto Rico, Guam, American Samoa, and the U.S. Virgin Islands, Congress has "selectively distribute[d] the franchise."[147] This decision warrants heightened scrutiny.[148]

2. The Right to Travel

By excluding certain U.S. territories from overseas voting rights, UOCAVA imposes a cost on former state residents' who choose to relocate to one of those territories.[149] Accordingly, UOCAVA implicates individuals' fundamental right to travel, garnering strict scrutiny where an equal protection claim otherwise may not.[150]

142 *Id.* at 75.
143 *Id.* at 69.
144 *Borja*, 115 F.4th at 979-81.
145 Dunn v. Blumstein, 405 U.S. 330, 336 (1972) (citing Evans v. Cornman, 398 U.S. 419, 421-22, 426 (1970); Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 626-28 (1969); Cipriano v. City of Houma, 395 U.S. 701, 706 (1969); Harper v. Virginia State Bd. of Elections, 383 U.S. 663, 667 (1966); Carrington v. Rash, 380 U.S. 89, 93-4 (1965)).
146 *Holt Civic Club*, 439 U.S. at 62.
147 *See Dunn*, 405 U.S. at 336.
148 *Id.*
149 *See* Cottle, *supra* note 42, at 331-34 (discussing UOCAVA's violation of the right to travel).
150 *See id.*; *see, e.g.*, Shapiro v. Thompson, 394 U.S. 618, 629-30 (1969) (recognizing reiterating the fundamental right to travel as fundamentally).

While the Supreme Court has confirmed that the right to travel is fundamental, its textual hook in the Constitution is not precise.[151] The right to travel has been recognized in the Privileges and Immunities Clause of Article IV, the Privileges and Immunities Clause of the Fourteenth Amendment, the Due Process Clause of the Fifth Amendment, and the Commerce Clause.[152] Despite this textual elusiveness, the Supreme Court has assigned the right to travel to protect three components, including:

> [1] the right of a citizen of one State to enter and to leave another State, [2] the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State, and, [3] for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State.[153]

In *Oregon v. Mitchell*, eight Justices upheld Section 202 of the Voting Rights Act Amendments of 1970,[154] preventing states from subjecting their new citizens to durational residency requirements before exercising the right to vote.[155] Six of these Justices recognized the right to interstate travel, reasoning that citizens should not have to choose between their right to travel and their right to vote.[156] Two years later, the Court in *Dunn v. Blumstein* affirmed that the right to travel subjects laws to strict scrutiny when they impose penalties on the voting power of

151 *See Shapiro*, 394 U.S. at 630 ("We have no occasion to ascribe the source of this right to travel interstate to a particular constitutional provision."); *see also* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 346 (2022) (Kavanaugh, J., concurring) (referring to the Constitution's protection of interstate travel without attaching the right to interstate travel to a specific provision of the Constitution).

152 *See* United States v. Wheeler, 254 U.S. 281, 298-300 (1920) (recognizing the right to interstate travel is inherently protected in the Privileges and Immunities Clause of Art. IV § 2); *see also* United States v. Guest, 383 U.S. 745, 759 (1966) (relying on the Commerce Clause in finding a right to travel); Saenz v. Roe, 526 U.S. 489, 501-03 (1999) (grounding the right to travel in the Privileges and Immunities Clauses of Art. IV § 2 and the Privileges and Immunities Clause of the Fourteenth amendment); Aptheker v. Sec'y of State, 378 U.S. 500, 505-07 (1964) (recognizing the Fifth Amendment's Due Process Clause's protection of the right to travel abroad); Erienne Reniajal Lewis, *It's Not Squarely Settled: Why States Can Still Attempt To Limit Interstate Travel For Abortions Despite a Fundamental Right To Travel Between States*, 25 GEO. J. OF GENDER L. 175, 179-86 (2023) (providing a history of the Supreme Court's jurisprudence on the right to travel).

153 *Saenz*, 526 U.S. at 500. In *Saenz*, the Court discusses the right to travel based on the Privileges and Immunities Clause of Art. IV, § Sec. 2 and the Fourteenth Amendment. *Id.* at 501-03.

154 Oregon v. Mitchell, 400 U.S. 112 (1970); Pub. L. No. 91-285, 84 Stat. 314 (1970) (codified as amended at 42 U.S.C §§ 1973 to 1973bb-1 (2012).

155 *Mitchell*, 400 U.S. at 149. This decision dealt with durational residency requirements, in which states would require their new citizens to reside in the state for a certain amount of time before granting them the right to vote in their new state. *Id.* at 147-48; *see also* Cottle, *supra* note 42, at 332-34.

156 *Mitchell*, 400 U.S. at 292; *see also* Cottle, *supra* note 42, at 333 ("The VRA Amendments prevent citizens from having to choose between exercising their right to travel and exercising their right to vote.").

citizens who have exercised that right.[157] In *Kent v. Dulles*[158] and *Aptheker v. Secretary of State*,[159] the Supreme Court recognized that the right to travel extends to international travel, though the right to international travel "can be regulated within the bounds of due process."[160] The Court has assumed that travel to the territories is considered interstate travel and therefore is "virtually unqualified."[161]

When granting overseas citizens the right to vote through OCVRA, UOCAVA's predecessor, Congress pointed to the right to travel and *Mitchell* as part of the justification for enacting the law.[162] Despite this, UOCAVA fails to resolve the cost in losing significant federal voting rights that results from relocating from a state to only certain territories. The court in *Romeu* recognized this loss[163] but failed to acknowledge that UOCAVA places a cost on traveling to territories, a cost that is not placed on traveling to another state or a foreign country.[164]

Specifically, the loss of power to vote for President and loss of Senate representation is not commensurate with the loss of voting rights one suffers when moving to another state.[165] U.S. citizens who move from one state to another retain their ability to vote for President, Senate, and a voting member of the House – the only difference is the state these votes are tallied within, and for which representatives. Similarly, citizens who move from a state to a foreign country may still vote for President and congressional representation in their former state of residence.[166] Former state citizens who relocate to a territory by contrast are unable to vote for President or full representation in Congress.[167]

If the Supreme Court's assumption that the right to travel to the territories is as virtually unqualified as traveling to another state is true,[168] then a statute causing such a significant loss of voting power should be

157 Dunn v. Blumstein, 405 U.S. 330, 341-42 (1972).
158 Kent v. Dulles, 357 U.S. 116, 120-23 (1958).
159 Aptheker v. Sec'y of State, 378 U.S. 500, 505-07 (1964).
160 Califano v. Torres, 435 U.S. 1, 4 n.6 (1978).
161 *Id.*
162 Cottle, *supra* note 42, at 334 ("The committee concluded that, in the same way the VRA Amendments permitted a citizen moving to a new state to vote in her last state of bona fide voting residence, UOCAVA could permit a citizen moving overseas to vote in her last state of bona fide voting residence. Thus, both the VRA Amendments and UOCAVA were passed to protect the citizens' inherent right to travel, without penalizing their right to vote.").
163 *See* Romeu v. Cohen, 265 F.3d 118, 126 (2d Cir. 2001) ("It is true that the UOCAVA and the New York statute have placed a cost on his becoming a permanent resident of Puerto Rico. On abandoning his residence in New York, he would have retained the right to vote in the presidential election had he moved to any place other than a U.S. territory.").
164 Cottle, *supra* note 42, at 334.
165 *See Romeu*, 265 F.3d at 125.
166 Thanks to UOCAVA. *See* 52 U.S.C. § 20302(a)(1).
167 *See supra* Part I.B.
168 Califano v. Torres, 435 U.S. 1, 4 n.6 (1978).

found to interfere with the right to travel in the same way it does if moving to another state. However, the lack of voting rights the territories themselves possess complicates this issue. The Supreme Court has limited the right to travel to "insuring new residents the same right to vital governmental benefits and privileges in the States to which they migrate as are enjoyed by other residents."[169]

To be sure, if one considers this rule from a literal understanding of a citizen's physical location, then those relocating to certain territories who lose their federal voting rights do retain equal voting power with others within that territory. However, this rationale mistakes the appropriate political community against which Plaintiffs' voting rights should be assessed. While the courts in the cases challenging UOCAVA focus on the political power of the territories themselves, the relevant political community should be the former state Plaintiffs relocated from.[170] By extending voting rights to citizens abroad and in the CNMI, UOCAVA rejects this literal interpretation of who belongs within a jurisdiction and redefines the relevant political community as including those beyond the state's geographic boundaries.

Further, focusing on these citizens' new domicile runs contrary to the framework UOCAVA establishes. The comparative voting rights of citizens in foreign countries and the CNMI are not equal to those of their neighbors, as they clearly lack federal voting rights. From this perspective, when courts consider the cost UOCAVA places on the right to travel, they ought to measure if citizens abroad have the right "to participate in elections on an equal basis" amongst other expatriates from their former state.[171] The lack of political power citizens who relocate to only certain territories have answers this in the negative.

C. Irrational Rational Basis Review

Rational basis review is highly deferential to the legislature.[172] Any conceivable basis for the law is accepted, even if it is not the true reason for the legislation.[173] This note does not dispute that, if rational basis review truly is the correct standard, then UOCAVA's inclusion of certain

169 Mem'l Hosp. v. Maricopa Cnty., 415 U.S. 250, 261 (1974). The Seventh Circuit in *Segovia* cited this when rejecting the plaintiffs' claim that UOCAVA violated their right to travel, calling the claim "borderline frivolous." Segovia v. United States, 880 F.3d 384, 392 (7th Cir. 2018).

170 *See* Igartua De La Rosa v. United States, 32 F.3d 8, 10-11 (1st Cir. 1994); *Romeu*, 265 F.3d at 124-25; Segovia v. United States, 880 F.3d 384, 391 (7th Cir. 2018); Borja v. Nago, 115 F.4th 971, 984 (9th Cir. 2024).

171 *See* Dunn v. Blumstein, 405 U.S. 330, 336 (1972).

172 *See, e.g.,* Jeffrey D. Jackson, *Putting Rationality Back Into the Rational Basis Test: Saving Substantive Due Process and Redeeming the Promise of the Ninth Amendment*, 45 U. RICH. L. REV. 491, 493 (2011).

173 *Id.*

territories passes the lenient muster that rational basis review requires of courts.[174] When applying rational basis review, however, the circuit courts have left significant flaws in their analysis. These flaws indicate two propositions. First, if heightened scrutiny was applicable, UOCAVA's treatment of the territories would likely be unconstitutional.[175] Second, while the doctrinal path to a heightened standard of review may not be in Plaintiffs' favor as the rising circuit consensus suggests, the intuitively arbitrary nature of UOCAVA's inclusion of certain territories should encourage Congress to act to resolve this problem.[176]

1. Incorrectly Equating the Voting Power of the Territories with States and the "Super Citizen" Myth

Courts have rejected claims that UOCAVA causes disparate treatment prohibited by the Equal Protection Clause by reasoning that these citizens receive the same treatment they would receive if they moved from one state to another, namely not being able to vote in the federal elections of that state.[177] Further, the courts have distinguished the right to vote granted to citizens who move to one of the territories from those who move to a foreign country by noting that, absent UOCAVA, citizens who take residence in a foreign country would lose all their voting rights.[178] On the other hand, citizens who move to one of the territories retain some ability to participate in federal elections.[179]

By equating the move to a U.S. territory to that of a move to another state, courts have failed to take adequate account of the differing voting rights the United States affords its territories compared to citizens of the states. Unlike moving from one state to another, citizens who take up residence in the listed territories lose significant political power.[180] These losses pale in comparison to moving from one state to another, where the citizen only changes the representatives they can vote for, not losing that

174 *See* Borja v. Nago, 115 F.4th 971, 983 (9th Cir. 2024) (describing the ease of rational basis review generally and as applied to UOCAVA).

175 *See, e.g.,* Jackson, *supra* note 172, at 492 ("[S]trict scrutiny is almost always 'fatal in fact' for the infringing law…[when] a right is fundamental.").

176 *See infra* Part IV (discussing proposed solutions).

177 *See* Romeu v. Cohen, 265 F.3d 118, 125 (2d Cir. 2001) ("[I]n excluding citizens who move from a State to Puerto Rico from the statute's benefits, the UOCAVA treats them in the same manner as it treats citizens of a State who leave that State to establish residence in another State."); *see also* Igartua De La Rosa v. United States, 32 F.3d 8, 10 (1st Cir. 1994) (*Igartua I*) ("[T]he Act does not distinguish between those who reside overseas and those who take up residence in Puerto Rico, but between those who reside overseas and those who move anywhere within the United States.").

178 *See Igartua I*, 32 F.3d at 10-11; *see also Romeu*, 265 F.3d at 125-27.

179 *See Igartua I*, 32 F.3d at 10–11; *see also Romeu*, 265 F.3d at 124-25.

180 *See supra* Part I.B (discussing the territories' congressional representation). In the House, the territories are afforded a nonvoting delegate and have no representation at all in the Senate, making their congressional representation significantly shortchanged compared to their state-side counterparts. *See id.* These citizens also lose their ability to vote for President. *See id.*

representation altogether.[181] Because of UOCAVA, the political power of that citizen on the federal level is significantly diminished in a way that would not happen had that citizen moved to any foreign country in the world.[182]

Due to the diminutive federal voting power the territories are granted, courts have argued that affording full federal voting power to citizens who relocate from the states to the territories while leaving the rest of those in the territories without such abilities would create a class of "super citizens."[183] While removing territories from UOCAVA's jurisdiction would afford more voting rights to some territorial residents than others, the courts' reasoning behind their "super citizens" argument can be refuted on two grounds.

First, if a class of "super citizens" within the territories is a constitutional concern, then UOCAVA's grant of state voting rights to those who move from their respective state and take up residency in the CNMI should be unconstitutional. Like all U.S. territories, the CNMI natives do not have the same right to vote as state-side U.S. citizens.[184] They are restricted from voting for a voting member in the House, have no representation in the Senate, and are not granted Electoral College votes for President.[185] Because UOCAVA does not include the CNMI within its definition of "United States," former mainland citizens who move to the CNMI retain their right to vote absentee in the state they formerly were registered to vote in.[186] UOCAVA itself already creates the exact "super citizens" that concern the First and Second Circuits.

Additionally, this same argument applies to states' discretion to further extend voting rights to their former residents who move to U.S. territories.[187] Under the First and Second Circuits' interpretation, UOCAVA should violate the Equal Protection Clause for such allocation of power because states that have exercised this discretion have already created

181 *See id.*

182 *See* 52 U.S.C. §§ 20310 (1986).

183 *See Romeu*, 265 F.3d at 118, 125 (arguing such inclusion would create "a distinction of questionable fairness among Puerto Rican U.S. citizens, some of whom would be able to vote for President and others not, depending whether they had previously resided in a State"); *see also* Segovia v. United States, 880 F.3d 384, 391 (7th Cir. 2018) (employing the term "super citizens"); *see also* Borja v. Nago, No. CV 20-00433 JAO-RT, 2022 WL 4082061, *31-2 (D. Haw. Sept. 6, 2022) ("Concern about the disparity that would result from the creation of super citizen territorial residents who could vote in federal elections is a plausible policy reason for treating the subject territories as part of the 'United States.'"). This concern is further exacerbated by the notion that those with the means to relocate to a territory may have more wealth than those who have always resided there. *See Romeu*, 265 F.3d at 125.

184 *See, e.g., D.C., Puerto Rico, and the U.S. Territories: An Explainer,* ROCK THE VOTE (Nov. 24, 2021), https://www.rockthevote.org/explainers/washington-d-c-puerto-rico-and-the-u-s-territories/.

185 *See id.*

186 52 U.S.C. § 20302 (1986).

187 *See id.*

"super citizens" within these respective territories.[188] Further, if a state enfranchises their former residents who move to, for example, Puerto Rico but not those that move to Guam, is there a valid Equal Protection claim against that state for the disparate treatment of some territories but not others because such an allocation would lack a rational basis? None of the opinions addressing this issue have considered whether either UOCAVA's inclusion of the CNMI or options for states to expand overseas voting rights further are unconstitutional.[189] Because it is within states' rights to enact such laws, these questions ought to be examined when considering the constitutionality of UOCAVA and the power it allocates to the states.

2. The Northern Mariana Islands Exception

The justification for including Guam, American Samoa, the Virgin Islands, and Puerto Rico in the UOCAVA statute's definition of the "United States" rests primarily on the premise that residents of these territories are technically within the United States.[190] However, reconciling this reasoning with UOCAVA's exception for the CNMI—which is also within the United States's jurisdiction—proves difficult. The courts have rationalized this oddity by explaining that the CNMI may be viewed as more like a foreign country than other territories because it was not fully a U.S. territory when UOCAVA was enacted.[191]

On one hand, this rationale makes sense. Since residents of the CNMI did not have U.S. citizenship until months after UOCAVA was enacted and did not have representation in Congress until two decades later, Congress may have viewed the CNMI as more similar to a foreign country than other territories when passing UOCAVA in 1986.[192] This is no longer true today, though. Most importantly, the overall lack of voting power citizens in U.S. territories have compared to their state counterparts is consistent across the territories—including the CNMI.[193] All U.S. territories, including the CNMI, possess similar structures of self-governance, representation in the House of Representatives, lack of

188 *See* Part II.A.

189 *See* Igartua De La Rosa v. United States, 32 F.3d 8 (1st Cir. 1994) (*Igartua I*); *see also* Romeu v. Cohen, 265 F.3d 118 (2d Cir. 2001); *see also* Segovia v. United States, 880 F.3d 384 (7th Cir. 2018); *see also* Borja v. Nago, 115 F.4th 971 (9th Cir. 2024).

190 *See Romeu*, 265 F.3d at 124 ("Congress may distinguish between those U.S. citizens formerly residing in a State who live outside the U.S., and those who live in the U.S. territories."); *see also Segovia*, 880 F.3d at 391.

191 *See Borja*, 115 F.4th at 983-84. In *Segovia*, the Seventh Circuit held that Illinois's state version of UOCAVA survives rational basis review for this same reason. *Segovia*, 880 F.3d at 390.

192 *See supra* Part I.B.

193 *See supra* text accompanying note 117.

representation in the Senate, and inability to vote for the President.[194] Accordingly, a consideration of the CNMI's contemporary political power compared to the rest of the territories reveals that UOCAVA's deferential treatment of the CNMI results in unequal and unjustified distributions of sovereignty among the territories.[195]

Furthermore, if courts' concern that removing territories from UOCAVA would create unequal voting privileges between those who relocated to a territory and those native to the territory would result in "super citizens,"[196] then the CNMI should already demonstrate such disparity by virtue of its exclusion from UOCAVA.[197] This is not to say that the CNMI should be added to the list of territories in UOCAVA—this note does not advocate for further extending territorial disenfranchisement—rather, this highlights the arbitrary nature of UOCAVA including some territories while excluding others.[198]

The justification for excluding the CNMI from UOCAVA's definitional provision becomes even more dubious when considering UOCAVA's inclusion of the American Samoa. Unlike other territories, American Samoa residents are considered U.S. nationals rather than U.S. citizens.[199] As U.S. nationals, American Samoans cannot vote in federal elections or enjoy many benefits exclusive to U.S. citizenship.[200] The Seventh Circuit partly addressed this in *Segovia*, where Plaintiffs challenged Illinois's state law that allows former residents who relocate to the American Samoa to vote in state elections.[201] The court held that this expansion survived rational basis review because American Samoans' status as U.S. nationals, rather than U.S. citizens, allows the territory to be rationally viewed as more like a foreign country than the other territories, whose residents are U.S. citizens.[202]

---

194 *See* R. SAM GARRETT, CONG. RSCH. SERV., IF11792, STATEHOOD PROCESS AND POLITICAL STATUS OF U.S. TERRITORIES: BRIEF POLICY BACKGROUND (Mar. 19, 2021).

195 *See id.* (discussing the territories' equal sovereignty with regards to their relationship with the United States).

196 *See* Romeu v. Cohen, 265 F.3d 118, 125 (2d Cir. 2001); *see also Segovia*, 880 F.3d at 391 (citing *Romeu*, 265 F.3d at 125.).

197 *See* 52 U.S.C. §§ 20310(6), (8) (1986) ("'State' means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, and American Samoa…'United States's, where used in the territorial sense, means the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, and American Samoa").

198 When upholding UOCAVA under rational basis review, the District Court of Hawaii reasoned, "[i]t is conceivable that Congress viewed — and still views — the NMI as more analogous to a sovereign country than a territory due to its history." Borja v. Nago, No. CV 20-00433 JAO-RT, 2022 WL 4082061, at *11 (D. Haw. Sept. 6, 2022).

199 *See supra* Part I.B (discussing citizens of American Samoa unique status as U.S. nationals).

200 *See* Olivera & Derieu, *supra* note 52 and accompanying text (discussing the restrictions placed on American Samoans because their lack of U.S. citizenship).

201 *Segovia*, 880 F.3d at 390-91.

202 *Id.* at 391.

Compared to the CNMI, the American Samoan's inclusion in UOCAVA as part of the "United States" is untenable. Residents of the CNMI have the same citizenship status as the other U.S. territories, exempting them from the same restrictions faced by American Samoans.[203] If the rationale behind territory exclusion from UOCAVA is based on similarities to a foreign country,[204] then former state citizens who relocate to American Samoa should especially be granted overseas voting rights through UOCAVA. Once again, the contemporary relationships between the United States and its territories underscores the arbitrary nature of territory inclusion within UOCAVA.

PART III: INTERNATIONAL AGREEMENTS AND NORMS

UOCAVA's unequal treatment of citizens moving to certain U.S. territories raises concerns about the United States' compliance with its international norms and obligations, especially as allowing voting from abroad grows. Around 130 countries give voting access in their national elections to voters abroad in some capacity.[205] Countries vary in the manner in which they enfranchise their expat voters, impacting the accessibility and interest of these voters in participating in their home country's elections.[206] As the number of countries that enfranchise their citizens abroad grows, so does international pressure against those countries that have not yet done so.[207] By not enfranchising all citizens who move

203 Olivera & Derieu, *supra* note 52.

204 *See* Borja v. Nago, 115 F.4th 971, 983 (9th Cir. 2024); *see also Segovia*, 880 F.3d at 391.

205 *Id.*

206 Important factors that differ include the time restrictions, method of voting, and representation of overseas voters in policymaking bodies. *See generally*, Henry S. Rojas, *A Comparative Study of the Overseas Voting Laws and Systems of Selected Countries*, DEV. ASSOC. OCCASIONAL PAPER (Sept. 2004), https://pdf.usaid.gov/pdf_docs/PNADA596.pdf. Some countries place time restrictions on how long it has been since the citizen left the country when enfranchising them from abroad. *Id.* at 3-4. For example, these restrictions existed in Canada and the United Kingdom until recently. *See* Kathleen Harris, *Supreme Court of Canada Guarantees Voting Rights for Expats*, CBC NEWS (Jan. 11, 2019), https://www.cbc.ca/news/politics/supreme-court-expat-voting-rights-ruling-1.4970305 (discussing Canada's Supreme Court ruling ending the time restriction); *see also* Lisa O'Carroll, *Britons Living Abroad Regain Right to Vote I UK Elections as 15-Year Rule Ends*, THE GUARDIAN (Jan. 15, 2024, 19:00 PM), https://www.theguardian.com/uk-news/2022/mar/31/britons-living-overseas-for-15-years-get-the-right-to-vote-in-uk-elections. The U.S. does not provide overseas voters their own representation in policymaking bodies, instead opting for their votes to contribute to those in their previous state of residence. *See* 52 U.S.C. § 20302(a). This is not true everywhere, however. Thirteen countries allow overseas voters to elect their own representatives. Jean Michel Lafleur, *The Enfranchisement of Citizens Abroad: Variations and Explanations*, 22 DEMOCRATIZATION 10 (2015). These countries include Algeria, Angola, Cape Verde, Colombia, Croatia, Ecuador, France, Italy, Mozambique, Panama, Portugal, Romania and Tunisia. *Id.*

207 *See* Laurie A. Brand, *Authoritarian States and Voting From Abroad: North African Experiences*, 43 COMPAR. POL. 81, 87 (2010) (discussing international norms regarding migrants' rights and "international incentives or pressures to broaden political

outside of the fifty states and D.C., the United States fails to comply with global norms of expatriate enfranchisement.

Beyond norms, not affording the citizens of U.S. territories full voting power goes further by running afoul of the United States's international commitments to provide equal suffrage.[208] However, when brought before a court, such claims have found little success. In *Igartua-De La Rosa II* and *Igartua-De La Rosa III*,[209] the First Circuit rejected the plaintiffs' reliance on customary international law and international treaties when challenging Puerto Rico's lack of federal voting power.[210] The First Circuit reasoned, "[C]ustomary international law is a diffuse and often highly uncertain body of norms whose force and enforceability vary greatly even in the international sphere; and its status in our domestic courts is even more qualified."[211] No other plaintiffs challenging UOCAVA's inclusion of the territories have presented arguments based on international law.[212] Despite the First Circuit's rejection of such arguments and plaintiffs' hesitancy to employ them in their cases against UOCAVA, there remains strong grounds that the United States is failing to meet its international obligations by failing to enfranchise the territories. For the narrower focus of this note, UOCAVA's differential treatment of only certain territories is contrary to these commitments.

The right to vote is recognized in many international agreements.[213] Along with the recognition of the right to vote comes the recognition

---

participation" as evidence for why nondemocratic states have increased enfranchising citizens abroad).

208 *See* Neil Weare, *Equally American: Amending the Constitution to Provide Voting Rights in the U.S. Territories and the District of Columbia*, 46 STETSON L. REV. 259, 278 (2017).

209 *See supra* note 91 (discussing *Igartua De La Rosa* being brought on three separate occasions).

210 *See* Igartua De La Rosa v. United States, 229 F.3d 80, 82-83 (1st Cir. 2000) (*Igartua II*); *see also* Igartua-De La Rosa v. United States, 417 F.3d 145, 148 (1st Cir. 2005) (*Igartua III*) ("No treaty claim, even if entertained, would permit a court to order that the electoral college be enlarged or reapportioned. Treaties—sometimes—have the force of domestic law, just like legislation; but the Constitution is the supreme law of the land, and neither a statute nor a treaty can override the Constitution."); *Id.* at 151 ("No serious argument exists that customary international law, independent of the treaties now invoked, requires a particular form of representative government.").

211 *Igartua III*, 417 F.3d. at 151.

212 *See generally* Part II.A.

213 These agreements include:

> Article 25 of the ICCPR, Article 21 of the Universal Declaration, Article 2(b) of the OAS Charter, Article 23 of the American Convention on Human Rights, Article 20 of the American Declaration of the Rights and Duties of Man, Article 13 of the African Charter on Human and Peoples' Rights, Article 7 of the Convention on the Elimination of All Forms of Discrimination against Women, Article 29 of the United Nations Convention on the Rights of Persons with Disabilities, and Article 3 of the First Protocol to the European Convention on Human Rights and Fundamental, among others.

Paulo Montenegro, *The Inter-American System of Human Rights and the Right to Vote for Convicts: The Case of Felony Disenfranchisement as a Social Conflicting Application*

that states have some ability to restrict the franchise within "certain constitutional standard, e.g., be non-discriminatory in intent."[214] The United States' disenfranchisement of former state citizens who move to UOCAVA-included territories is an impermissible restriction according to the international customs regarding voting rights under the Universal Declaration of Human Rights[215] and the International Covenant on Civil and Political Rights.[216] While these arguments have been made in support of enfranchising the territories as a whole,[217] the questions of what may be "equal suffrage" among expatriates prompts a narrower consideration of UOCAVA's impact.

A. Universal Suffrage and the 1948 Universal Declaration of Human Rights

Neglecting to provide citizens who move to certain U.S. territories—and, more broadly, all citizens who live in the territories—the same voting rights as citizens residing stateside implicates universal suffrage principles. "The basic idea [of universal suffrage] is that every citizen has the right to participate in every direct election of representative state organs because the formal–judicial equality of all citizens is guaranteed by the law or the constitution."[218] Universal suffrage is outlined in Article 21 of the Universal Declaration of Human Rights (UDHR).[219] It states, "The 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."[220] However, the UDHR is nonbinding, and therefore it is not considered international law.[221] Nor has

and Its Full Impropriety Under International Human Rights Law 46 (2019) (M.A. thesis, Panteion University of Social and Political Sciences) (Global Campus Europe).

214 Alexander Kirshner, *The International Status of the Right to Vote*, DEMOCRACY COAL. PROJECT 11; *see also* Montenegro, *supra* note 213, at 47 ("As it is not an absolute right, the universality of the right to vote it is not really universal, but still it has to be defined as inclusive as possible, under the principle of equality among the electorate; however, some requirement, as minimum age, and mental health, can be established.").

215 G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

216 999 U.N.T.S 171, International Covenant on Civil and Political Rights, art. 25 (Dec. 16, 1966). While the UDHR and the ICCPR are nonbinding, they form the basis for international human rights. *International Bill of Human Rights*, UNITED NATIONS, https://www.ohchr.org/en/what-are-human-rights/international-bill-human-rights (last visited Mar. 21, 2024).

217 *See* Weare, *supra* note 208, at 277-79.

218 ANDREW ELLIS ET AL., THE INTERNATIONAL IDEA HANDBOOK, VOTING FROM ABROAD 71 (2007), https://www.idea.int/sites/default/files/publications/voting-from-abroad-the-international-idea-handbook.pdf.

219 Universal Declaration of Human Rights, *supra* note 215.

220 *Id.*

221 Kirshner, *supra* note 214, at 3. However, as Circuit Judge Torruella recognized in his dissent in *Igartua-De La Rosa III*, the Supreme Court has recognized the UDHR as

Article 21 of the UDHR—which outlines the universal suffrage principle[222]—been accepted as enforceable customary international law.[223] Despite this, the UDHR is relevant for the importance it places on universal and equal suffrage.

While non-binding, the UDHR lends support towards enfranchising U.S. citizens who relocate to a U.S. territory with the same voting rights they possessed in their former state. An argument against nations against enfranchising overseas citizens is their disconnect from the political community of their home countries.[224] In fact, residency in the country one votes in is a classic requirement of universal suffrage.[225] However, this disconnect is arguably minimal for state citizens who move to the territories, as they are more likely than other overseas voters to remain connected to U.S. federal issues due to their strong ties to the United States and its federal elections.[226] These territorial citizens are more clearly defined as an extension of the political community–especially those who used to reside stateside and were governed by state laws.[227] UOCAVA itself acknowledges this reality when extending the right to

---

a form of "moral authority," and has cited to its informative nature and influence multiple times:

> Although the Supreme Court has ruled that "the [UDHR] does not of its own force impose obligations as a matter of international law," Sosa, 124 S.Ct. at 2767, it has nevertheless recognized its "moral authority," id., and has cited to its provisions on several occasions. See Knight v. Florida, 528 U.S. 990, 996, 120 S.Ct. 459, 145 L.Ed.2d 370 (1999) (Breyer, J., dissenting) (noting U.N. Human Rights Committee decisions that a ten-year delay between death sentence and execution is not necessarily a violation of UDHR as informative precedent in Eighth Amendment case); Dandridge v. Williams, 397 U.S. 471, 520 n. 14, 90 S.Ct. 1153, 25 L.Ed.2d 491 (1970) (citing UDHR Article 25 as informative "[o]n the issue of whether there is a 'right' to welfare assistance"); Zemel v. Rusk, 381 U.S. 1, 14 n. 13, 85 S.Ct. 1271, 14 L.Ed.2d 179 (1965) (citing UDHR Article 13 in discussion of scope of due process); Kennedy v. Mendoza–Martinez, 372 U.S. 144, 161 n. 16, 83 S.Ct. 554, 9 L.Ed.2d 644 (1963) (noting, in rejecting revocation of U.S. citizenship as consequence of remaining abroad to evade military service, the UDHR's guarantee "of the right of every citizen to retain a nationality"); Am. Fed'n of Labor v. Am. Sash & Door Co., 335 U.S. 538, 549 n. 5, 69 S.Ct. 258, 93 L.Ed. 222 (1949) (Frankfurter, J., concurring) (citing UDHR provisions on freedom from mandatory association in context of discussing foreign standards of labor law).

417 F.3d at 172.

222 *See* Universal Declaration of Human Rights, *supra* note 215.

223 Kirshner, *supra* note 214, at 3.

224 Germann, *supra* note 74, at 9.

225 ELLIS ET AL., *supra* note 218, at 69-73. The theory of political representation assumes that residents are able to contribute to state institutions and state legitimacy in a way nonresidents cannot. *Id.* The global trend in enfranchising citizens who take up residency outside of their country of citizenship counters this theory. As globalization has increased, the trend of enfranchising expatriates has risen, with recognition of expatriates' connections to their home countries. *Id.*

226 *See* Cottle, *supra* note 42, at 335.

227 *Id.*; *see also* Borja v. Nago, 115 F.4th 971, 983 (9th Cir. 2024) ("'Plaintiffs may ultimately be correct that "former Hawaii residents living in [those Territories] have a *greater* interest in federal elections than former Hawaii residents living in foreign countries because former state residents living in the territories are subject to the federal government's direct control[.]'").

vote to overseas citizens, even recognizing that permanent expatriates have connections to their former state that are sustainable and are afforded the right to vote.[228] In this sense, the residency requirements in the understanding of universal suffrage lean toward enfranchising former state residents under UOCAVA, and the global trends prompted by globalization lend toward furthering that trend to remove certain territories from UOCAVA's text.

One could counter this claim by arguing that the U.S. territories are given some federal voting power, so these citizens do not lack suffrage. However, U.S. territories do not possess the same full political rights given to state residents. By moving to Puerto Rico, Guam, the U.S. Virgin Islands, or American Samoa, former state residents lose significant political power.[229] Universal suffrage and overseas voting laws are meant to combat such an effect.

B. The International Covenant on Civil and Political Rights

Unlike the UDHR, the International Covenant on Civil and Political Rights (ICCPR), ratified by the United States in 1992, is binding[230] and obligates countries who have ratified the treaty to take measures to ensure its protections of basic human rights and enshrine "universal and equal suffrage."[231] The relevant portion of the ICCPR states:

> Every *citizen* shall have the right and the opportunity . . . and without unreasonable restrictions: (a) [t]o take part in the conduct of public affairs, directly or through freely chosen representatives [and] (b) [t]o vote and to be elected 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.[232]

Under the Supremacy Clause of the U.S. Constitution, ratified treaties have the force of federal law against the United States.[233] However, because the ICCPR is not self-executing, its provisions do not automatically create enforceable rights without additional implementing legislation.[234]

---

228 Cottle, *supra* note 42, at 335 ("It is possible to have a legitimate connection to the state without a physical presence—the experience of the states with respect to overseas citizens proves this.").

229 *See supra* Part I.B.

230 Kirshner, *supra* note 214, at 3.

231 International Covenant on Civil and Political Rights, *supra* note 216.

232 *Id.* (emphasis added).

233 *See* Carlos Manuel Vázquez, *Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties*, 122 HARV. L. REV. 599, 606 (2008).

234 Sosa v. Alvarez-Machain, 54 U.S. 692, 735 (2004) ("[T]he United States ratified the Covenant on the express understanding that it was not self-executing and so did not itself create obligations enforceable in the federal courts.").

While plaintiffs cannot directly invoke the ICCPR to secure voting rights in federal elections,[235] the United States' noncompliance with the ICCPR should compel Congress to pass legislation aligning domestic law with its international commitments.[236] By denying certain territorial residents equal voting rights while enfranchising overseas voters, UOCAVA fails to fulfill the principle of equal suffrage guaranteed by the ICCPR.

It may be said that because the ICCPR calls for "equal suffrage," providing former state citizens in the territories more voting power than those who have never lived stateside would be yet another violation of the ICCPR. However, offering *more* voting rights to provide *more* equal voting rights amongst U.S. citizenry would help move the United States closer to its promise under the ICCPR, not further away from it. The federal disenfranchisement of territorial U.S. citizens, when the ICCPR grants these rights to all "citizens," is a larger encompassing violation of ICCPR than even UOCAVA's differential treatment of those who move to a territory and those who move to a foreign country or the CNMI.[237] One larger violation cannot be a justification for solving another it encapsulates. Even if the baseline for what is considered "equal suffrage" is the voting rights the territories themselves are given, this justification fails because of UOCAVA's differential treatment of the CNMI.

PART IV: PROPOSED SOLUTIONS

While this note argues that there may be avenues for the courts to find unconstitutional and in violation of international law UOCAVA's exclusion of state residents who relocate to certain territories, plaintiffs' failure so far to find judicial support for this claim calls for looking to Congress for a solution.[238] To resolve the issues of the current UOCAVA framework, Congress can revise UOCAVA to add the CNMI to its definition of "State" and "United States," revise UOCAVA to redefine "State"

235 Citizens of Puerto Rico have unsuccessfully attempted to use the ICCPR in the First Circuit to challenge their exclusion from the same federal voting power enjoyed by citizens of U.S. states. *See* Igartua De La Rosa v. United States, 229 F.3d 80, 84-85 (1st Cir. 2000) (Igartua-De La Rosa II); *see also* Igartua-De La Rosa v. United States, 417 F.3d 145, 151-52 (1st Cir. 2005) (Igartua-De La Rosa III). The plaintiffs in *Igartua-De La Rosa I* argued that article 25 of the ICCPR garnered their right to vote in presidential elections. Igartua De La Rosa v. United States, 32 F.3d 8, 11 n.1 (1st Cir. 1994). However, the First Circuit rejected this argument in a footnote, writing, "[e]ven if Article 25 could be read to imply such a right, Articles 1 through 27 of the Covenant were not self-executing and could not therefore give rise to privately enforceable rights under United States law." *Id.* This note is not claiming that the ICCPR could have force of law within a United States court, but that does not mean that implications against the ICCPR's promises should not be considered or weighed by lawmakers.

236 *See Igartua-De La Rosa*, 417 F.3d at 174 (Torruella, J., dissenting).

237 *See* Weare, *supra* note 208, at 277-78 for a larger discussion on territorial disenfranchisement and the ICCPR.

238 *See* Nicholas O. Stephanopoulos, *The Sweep of Electoral Power*, 36 CONST. COMMENT 1, 11-20 (2021) (discussing why Congress poses less of a threat to democratic values than the courts).

and "United States" to not include any U.S. territories, or enfranchise the territories at large with the same voting rights as the states. This note endorses expanding voting rights for the former state residents who move to the territories, and, more broadly, the territories themselves.

A. The Restrictive View: Add the Northern Mariana Islands to UOCAVA

To address the arbitrary exception UOCAVA makes for the United States' newest territory, Congress could level down its enfranchisement of territorial voters by including the CNMI to its definition of what constitutes a "State" for the statute's purposes. Bills attempting to add the CNMI to UOCAVA have been proposed to Congress before, but none of these have made it out of committee.[239] The statute would read as follows:

> (6) "State" means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, ~~and~~ American Samoa[, and the Commonwealth of the Northern Mariana Islands];…
>
> (8) "United States", where used in the territorial sense, means the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, ~~and~~ American Samoa, [and the Commonwealth of the Northern Mariana Islands].[240]

This approach would resolve equal sovereignty issues stemming from the differing treatment of the territories. As discussed, UOCAVA was passed months before the CNMI became an official U.S. territory.[241] Adding the CNMI to the statute would work as providing this territory the same treatment under UOCAVA as the other territories, which may have occurred had it been a commonwealth by the time UOCAVA was passed. This alteration would provide voting-eligible citizens in U.S. territories the right to vote for offices granted to their territory, but no territorial citizen would have the same voting power as citizens of a former state. Such an approach is supported by the Seventh Circuit's dicta in *Segovia* when it stated that a solution could be to treat "*all* the territories as part of the United States."[242]

While the territories themselves would be on equal footing under UOCAVA, this approach is a highly undesirable because it still leaves a

239 GARRETT, *supra* note 20, at 13-14 (2016) (discussing the 112th Congress's bill, H.R. 5799, provision that would apply UOCAVA to the Northern Mariana Islands, and the 113th Congress's H.R. 3576 and S. 1728, which would have done the same).

240 *See* 52 U.S.C. §§ 20310(6), (8) (1986). This note is adopting the format to show changes to UOCAVA used in Borgonia, *supra* note 30, at 867-68.

241 *See* Borja v. Nago, 115 F.4th 971, 983 (9th Cir. 2024).

242 *See* Segovia v. United States, 880 F.3d 384, 391 (7th Cir. 2018) (emphasis added).

select group of U.S. citizens disenfranchised.[243] Adding the CNMI to UOCAVA does not resolve the unequal voting power amongst all citizens who relocate away from the U.S. or resolve harms against the individual's right to travel, as former state residents who relocate to the territories would still lose voting rights.[244] Similarly, principles of universal suffrage and the ICCPR's assurance of equal suffrage are still implicated by former state citizens' choices to move to a territory rather than a foreign country.[245]

Further, restricting voting rights to resolve an equal protection concern has not been done before, and it is beyond the bounds of a constitution meant to promote political participation. The CNMI residents have relied on UOCAVA's extension of federal voting rights to their former state for decades. To take this right away now would not only be highly unpopular, but it would also be antidemocratic.[246]

B. Remove the Territories from UOCAVA's Definition of "State" and "United States"

Rather than further restricting voting rights of those who relocate to a territory, Congress should eliminate the territories from UOCAVA's definition of "State" and "United States." The statute would read as follows:

> (6) "State" means a State of the United States, [and] the District of Columbia[247], the Commonwealth of Puerto Rico, Guam, the Virgin Islands, and American Samoa;…
>
> (8) "United States", where used in the territorial sense, means the several States, [and] the District of Columbia[.], the Commonwealth of Puerto Rico, Guam, the Virgin Islands, and American Samoa.[248]

---

243 *See supra* Part I.B.

244 *See supra* Part II.B.

245 *See supra* Part III. These principles are also of concern when it comes to enfranchising the territories as a whole. *See id.*

246 *See* Encinares, *supra* note 84.

247 Note that, by keeping UOCAVA's inclusion of Washington, D.C. within its definitions, state citizens who relocate to D.C. still lack the ability to vote for a representative in the House or Senate. In fact, many of the arguments regarding lack of enfranchisement the territories have applies to D.C. as well, with respect to congressional representation. For further discussion on enfranchising D.C., *see generally*, Mark S. Scarberry, *Historical Considerations and Congressional Representation for the District of Columbia: Constitutionality of the D.C. House Voting Rights Bill in Light of Section Two of The Fourteenth Amendment and the History of the Creation of the District*, 60 ALA. L. REV. 783 (2009).

248 *See* 52 U.S.C. §§ 20310(6), (8) (1986). *See also* Borgonia, *supra* note 30, at 867-68 (using the same format to edit the territories out of UOCAVA's definition).

By removing the listed territories from UOCAVA's definition section, moving from a state to any of the U.S. territories would have the same effect as moving to a foreign country, granting these citizens absentee voting power in their former state. This solution is not only ideal because it expands the political franchise in a manner consistent with equal suffrage,[249] but it should garner far further congressional support. Since it was Congress's original intent when passing OCVRA and UOCAVA to preserve the right to travel by ensuring citizens who move outside a state retain their federal voting power, it would further Congress's purpose for it to provide absentee voting rights to those who move to the U.S. territories as well.[250]

Notably, this proposal can be acquired through the judicial branch as well. On appeal, remaining Circuit Courts could recognize UOCAVA's framework as violating Equal Protection,[251] and plaintiffs' remedies would be altered to this specific declaration, requiring the subjected territories to be excluded from UOCAVA's definition of the United States.[252]

Under this version of UOCAVA, former state citizens who relocate to a U.S. territory could presumably also vote for offices afforded to the territory they reside in, including the congressional delegate for their territory. Arguably, this would give these citizens more congressional representation than any other U.S. citizen, with a nonvoting delegate in the House as well as the Representative of their former state, as reflected by the courts' "super citizen" contention.[253] However, the lack of influence non-voting delegates have in Congress makes such an increase in political power trivial, as evident by the ineffective power territorial delegates currently possess.[254]

Further, this solution would garner equal suffrage amongst the territories themselves, eliminating the unique treatment given to the CNMI seemingly because of its unique status and relationship with the United

249 *See* Part III. Here, equal suffrage is comparing the voting rights between former state citizens who relocate to the territories and those who relocate to a foreign country. Notably, this solution would not provide equal suffrage between U.S. citizens who reside in U.S. territories and all other U.S. citizens residing elsewhere. *See infra* Part IV.C. for a more encompassing solution to territorial disenfranchisement.

250 Cottle, *supra* note 42, at 334 (discussing Congress's intent when passing OCVRA).

251 *See supra* Part II.B.1 (explaining how UOCAVA's inclusion of certain territories violates equal protection).

252 *See* Reeves v. Nago, 535 F. Supp. 3d 943, 955 (D. Haw. 2021) (dismissing case without prejudice finding declaratory relief alone insufficient for standing, leaving room to amend Plaintiffs' complaint)*; see also* Borja v. Nago, No. CV 20-00433 JAO-RT, 2022 WL 4082061 at *3 (D. Haw. Sept. 6, 2022) (finding Plaintiffs' request that the subjected territories be removed from UOCAVA's definitions sufficient to meet the redressability prong of standing).

253 Former state-side citizens who have relocated to the CNMI currently possess such power. *See* 52 U.S.C. §§ 20310(6), (8) (1986).

254 *See supra* Part I.B.

States at the time UOCAVA was passed.[255] The political power the CNMI has in the U.S. federal government is no longer different than the rest of the U.S. territories included in UOCAVA, making any reasoning behind its deferential treatment obsolete.[256]

Further, this solution does not cause concerns over the United States's compliance with international commitments. Because the unequal voting power between U.S. states and U.S. territories has been found constitutional in the *Insular Cases*[257] and has never been found to violate customary international law,[258] this proposal (while likely not as desirable as full enfranchisement of the territories) is consistent with the United States's international obligations.

C. Pass an Amendment Granting Citizens in U.S. Territories the Right to Vote

The most expansive resolution for those who lose voting power when moving to the territories would be to expand voting rights for all territorial citizens.[259] The call to enfranchise the territories from a constitutional amendment and overturn the controversial *Insular Cases* is not new.[260] The United States's failure to enfranchise the territories as a whole has been described as a "democratic deficit that was but a *temporary* condition for territories prior to the *Insular Cases* [that] has now resulted in a quasi-permanent colonial status that is the antithesis of America's democratic and constitutional principle."[261]

255 *See supra* notes 82-85 and accompanying text.

256 *See supra* Part II.C.2.

257 *See supra* notes 54-60 and accompanying text.

258 *See supra* Part III.

259 Or in the American Samoa's case, U.S. nationals.

260 *See, e.g.*, Weare, *supra* note 208, at 263 (discussing efforts to enfranchise the territories since the 1970s); *see also* Cottle, *supra* note 42, at 320-23 (discussing passing an amendment to enfranchise the territories); *see generally* Sigrid Vendrell-Polanco, *Puerto Rican Presidential Voting Rights: Why Precedent Should Be Overturned, and Other Options for Suffrage*, 89 BROOK. L. REV. 563 (2024). Supreme Court Justice Gorsuch has also called for overruling the *Insular Cases*. *See* Vaello Madero, 596 U.S. at 180-89 (Gorsuch, J., concurring). However, not all the territories are against the *Insular Cases*' effects. *See* Steve Limtiaco, *The CNMI Indigenous Back Controversial Insular Cases*, PAC. DAILY NEWS (Aug. 8, 2022), https://www.guampdn.com/news/cnmi-indigenous-groups-back-controversial-insular-cases/article_0995a2c0-1608-11ed-b12c-9f59830d19c8.html.

261 Weare, *supra* note 208, at 261. The territories consist of more than 98% racial or ethnic minorities, calling their disenfranchisement further into question. Stacey Plaskett, *The Second-Class Treatment of U.S. Territories Is Un-American*, THE ATL. (Mar. 11, 2021), https://www.theatlantic.com/ideas/archive/2021/03/give-voting-rights-us-territories/618246/.

A constitutional amendment[262] would need to be passed to enfranchise the territories.[263] Congress has extended the right to vote through six constitutional amendments since the Founding.[264] Extending voting rights to the U.S. territories would be another extension of the political community for millions of U.S. citizens.

This amendment could model the 23rd Amendment, which grants D.C. electors the right to vote for President.[265] Similar to the 23rd Amendment, an amendment granting territories presidential voting power would not provide the territories statehood; they would not gain further congressional representation, but they could have some electoral college influence beyond the presidential primaries.[266] This proposal resolves the

---

262 Article V of the United States Constitution governs the amendment process. U.S. CONST. art. V. It requires a proposed amendment to be supported by two-thirds of the House of Representatives and the Senate or by a convention with two-thirds of the state legislatures. *Id.* Then, the amendment must be ratified by three-fourths of the states or three-fourths of the state conventions. *Id.* U.S. CONST. art. V. states in full:

> The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

Id.

263 Or the territories could be given statehood. For a larger discussion arguing for territorial statehood, *see generally* Joshua Stephen Ebiner, *Democracy's Forgotten Possessions: U.S. Territories' Right to Statehood Through Constitutional Liquidation*, 98 NOTRE DAME L. REV. 885 (2022).

264 *See* Cottle, *supra* note 42, at 322 ("[T]he Fifteenth Amendment guarantees the voting rights of former slaves; the Seventeenth Amendment provides for the direct election of United States Senators; the Nineteenth Amendment grants the vote to women; the Twenty-Third Amendment enfranchises citizens residing in the District of Columbia; the Twenty-Fourth Amendment abolishes poll taxes as a prerequisite to voting; and the Twenty-Sixth Amendment enfranchises citizens over the age of eighteen."); U.S. CONST. amend. XV; U.S. CONST. amend. XVII; U.S. CONST. amend. XIX; U.S. CONST. amend. XXIII; U.S. CONST. amend. XXIV; U.S. CONST. amend. XXVI.

265 U.S. CONST. amend. XXIII, § 1. The Twenty-Third Amendment reads:

> The District constituting the seat of Government of the United States shall appoint in such manner as the Congress may direct:
>
> > A number of electors of President and Vice President equal to the whole number of Senators and Representatives in Congress to which the District would be entitled if it were a State, but in no event more than the least populous State; they shall be in addition to those appointed by the States, but they shall be considered, for the purposes of the election of President and Vice President, to be electors appointed by a State; and they shall meet in the District and perform such duties as provided by the twelfth article of amendment.

U.S. CONST. amend. XXIII.

See also Borgonia, *supra* note 30, at 868-83 (promoting a constitutional amendment giving territorial residents the right to vote for President, modeled after the Twenty-Third Amendment.).

266 *See also* Borgonia, *supra* note 30, at 869-72 (citing Weare, *supra* note 208) (discussing potentially bipartisan support for an amendment enfranchising the territories

loss of presidential voting power UOCAVA causes those who move to territories to endure. Although these citizens would lose the congressional representation they previously had in their former states, this outcome aligns with the Circuit Courts' reasoning that moving to a territory should have the same effect as moving from one state to another: losing the right to vote in the state they no longer reside in.[267]

Along this line, a constitutional amendment would avoid creating "super citizens," where some territorial residents are enfranchised with political power than others because they had once resided state-side.[268] Assuming "super citizens" is a fair constitutional concern, this amendment would resolve the disparity between citizens who relocate to the CNMI (and any other territory a state expands overseas voting to include) and are afforded voting powers in their former state through UOCAVA and citizens who have never lived stateside.[269] One could go further and argue that Americans outside a U.S. territory are "super citizens" themselves because of their superior voting power.[270]

A constitutional amendment could also go further, granting the territories (and D.C., for that matter) full congressional representation along with the right to vote for President.[271] This would be a more ideal solution, as it would fully resolve the power gaps between U.S. citizens residing in the U.S. territories compared with U.S. citizens living in any other part of the world. Though there is a strong historical gloss in favor of unincorporated territories lacking full congressional representation as

---

because they territories may be swing votes); *cf.* Glenn C. Altschuler, *Amend the Constitution to Guarantee Americans the Right to Vote*, THE HILL (Jan. 28, 2024, 9:00 AM), https://thehill.com/opinion/civil-rights/4433909-amend-the-constitution-to-guarantee-americans-the-right-to-vote/ (discussing Rick Hasen's, professor of law and political science at UCLA specializing in election law, decision not to add enfranchising the territories to his proposed constitutional amendment securing the right to vote "[t]o increase support from Republicans, independents and supporters of states' rights.")."

267 *See supra* note 177 and accompanying text.

268 Not allowing for "super citizens" avoids potential wealth disparities that may accompany those who have the ability to move from a state to a territory. *See* Romeu v. Cohen, 265 F.3d 118, 125 (2d Cir. 2001) .

269 *See supra* notes 196-98 and accompanying text. (countering the super citizens claim by noting UOCAVA already allows for this discrepancy by not including the Northern Mariana Islands and allowing states to choose to further enfranchise their citizens who move to any other territory, despite its inclusion in UOCAVA).

270 I use the phrase "Americans outside a U.S. territory" rather than "state-side citizens" because UOCAVA grants U.S. citizens in a foreign country more voting power than those who live in a Puerto Rico, Guam, American Samoa, and the U.S. Virgin Islands. An additional argument could be made for D.C. citizens as well because they similarly lack congressional representation. *See generally* Weare, *supra* note 208 (discussing fully enfranchising the territories *and* D.C.).

271 Such an amendment would likely also include D.C., who similarly lacks full congressional representation. *See generally* Colin P.A. Jones, *The Territorial and District Representation Amendment: A Proposal*, 36 B.Y.U. J. PUB. L. 175 (2022) (arguing for and drafting an amendment that would enfranchise the territories and D.C. equally to the states).

they do not enjoy the same benefits as states do,[272] providing the territories this level of voting power would resolve the disparate treatment they receive compared to their stateside counterparts.

Additionally, fully enfranchising the territories aligns with the United States' international obligations and pressure from the international community to fix this "democratic deficit."[273] Enfranchising the territories as a whole would be an act of Congress fulfilling the United States promise when endorsing the UDHR, whose principles form the basis of customary international human rights law, and the obligations the United States undertook when ratifying the ICCPR over three decades ago.[274] The colonialist goldilocks problem of the territories being too American for citizens who relocate there to vote using UOCAVA, but not American enough to enjoy the same voting rights U.S. citizens elsewhere hold would be resolved.

CONCLUSION

UOCAVA has enfranchised millions of Americans across the globe. Where this effort falls short, however, is the statute's unjust failure to enfranchise former citizens of U.S. states who relocate to American Samoa, Guam, Puerto Rico, and the U.S. Virgin Islands. By treating these territories as if their political power is equivalent to a U.S. state, UOCAVA ignores and entrenches the United States's continued violations of fundamental constitutional law and international agreements. the CNMI's arbitrary exclusion from UOCAVA makes the disparate treatment of citizens who relocate to only *certain* territories, rather than the CNMI or any foreign country in the world, even more troubling.

By removing American Samoa, Guam, Puerto Rico, and the U.S. Virgin Islands from UOCAVA's definition of what is within the "United States," Congress can resolve this anomaly and the disparate treatment that may arise depending on where a stateside U.S. citizen chooses to relocate. By granting the territories equal political power to the states, Congress can further resolve the United States's violations of its international obligations and expectations implicated by its centuries-long failure to enfranchise its territories. Regardless of the solution, Congress ought to act to expand the electorate.

272 *See* Jones, *supra* note 271, at 182-83.
273 Weare, *supra* note 208, at 277-78.
274 *See supra* Part III.