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James Caleb Uhl

Brigham Young University, [caleb.uhl1@gmail.com](mailto:caleb.uhl1@gmail.com)

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# STATEHOOD ADMISSIONS CODIFICATION AS A PROTECTION OF VOTING RIGHTS

*James Caleb Uhl*<sup>1</sup>

In 1900, American Samoa ceded itself to the United States and officially became a United States territory.<sup>2</sup> A few short years later, the United States Supreme Court decided in the “Insular Cases” that the residents of American Samoa would be considered “nationals” instead of citizens, based on the pretext that American Samoans were not considered American or Anglo-Saxon enough to fully understand the United States federal election process and be granted voting rights.<sup>3</sup> Because these so-called nationals did not have the right to vote, the Supreme Court theorized that they could not be full citizens.<sup>4</sup>

In 2019, John Fitisemanu, Pale Tuli, and Rosavita Tuli sued the United States in Utah’s Federal District Court regarding their status as United States nationals. The plaintiffs sued for acknowledgment of their birthright citizenship under the Fourteenth Amendment.<sup>5</sup> The United States federal government responded by filing a Motion to Dismiss on procedural grounds. The District Court did not uphold

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1 James Caleb Uhl is a junior at Brigham Young University majoring in Philosophy. He plans to attend law school in the fall of 2022. He would especially like to thank his editor, Sophie Plantamura. She is a junior studying Political Science and English at Brigham Young University. She plans to attend law school in the fall of 2022.

2 *Instrument of Cession Signed on April 17, 1900, by the Representatives of the People of Tutuila*, OFFICE OF THE HISTORIAN, <https://history.state.gov/historicaldocuments/frus1929v01/d853> (last visited Feb. 9, 2021).

3 *Downes v. Bidwell*, 182 U.S. 244, 282–83 (1901).

4 *Downes*, 182 U.S. at 282-283.

5 *Fitisemanu v. United States*, 426 F. Supp. 3d 1155, 1157 (D. Utah 2019).

the Motion to Dismiss, heard the case, and decided in favor of Fitisemanu, Tuli, and Tuli. Almost immediately upon being granted citizenship by the Court, Fitisemanu registered to vote in the 2020 federal election in Utah.

Since 2019, this case has been appealed to the United States Court of Appeals for the Tenth Circuit, and Fitisemanu's voting registration has been put on hold, pending a decision by the Tenth Circuit. In September of 2020, the Tenth Circuit heard oral arguments on the case. Regardless of the outcome, the case is expected to be appealed to the United States Supreme Court for a final decision. This seemingly menial case is pivotal in the larger context of United States jurisprudence. An acknowledgement by the federal government of birthright citizenship for residents of U.S. territories would raise further questions about the rights of United States citizens who live in territories.

## BACKGROUND

Under current United States law, residents of territories do not vote in federal elections.<sup>6</sup> This has been justified by language in the Constitution barring citizens and residents of non-states from voting (the Constitution stipulates that members of Congress be elected by the several States). This means that territories like Puerto Rico have not been granted a voice in federal elections for over one hundred years, as it was granted territory status in 1917. More troubling than this is the fact that Congress has the authority to be arbitrary in their decisions to grant territories statehood. Oftentimes, as in the case of Puerto Rico, they decide to simply bar territories from becoming states. This plenary power has created some highly unethical wrinkles in the course of American history.

In the nineteenth century, the conflict over whether the territory Kansas would be admitted as a free state or slave state caused a minor civil war in the territory that lasted for several years. Due to Congress' popular sovereignty policy, pro-slavery and Free State militias poured into the territory to influence voters, oftentimes

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6 U.S. CONST. art. IV, § 3, cl. 2.

through violent means. In 1855, the situation was so volatile that the governor was forced to call in the Kansas militia to quell the infighting. The militia only served to exacerbate the situation further. Kansas was finally admitted as a free state only three months before the commencement of the Civil War and after southern states had begun to secede from the Union, forfeiting their voting power in Congress.

California was admitted to the United States as a result of the Mexican American War and through the Treaty of Guadalupe Hidalgo. The territory was granted statehood in record time due to the 1849 California Gold Rush. Congress swiftly recognized the economic benefits and value California would provide as a state and allowed the territory to circumvent the typical admission process, admitting California to the Union in record time.

Utah, on the other hand, was not allowed into the United States for decades over a single disagreement with the rest of the country: polygamy. In 1862, the United States federal government banned polygamy. This was upheld by *Reynolds v. United States* in 1879: the Court ruled that religion could not be cited as a reason to avoid criminal charges. Utah was not considered for statehood admission until the Church of Jesus Christ of Latter-day Saints officially abandoned polygamy in 1890. Utah was granted statehood shortly after, in 1896, further illustrating the underlying reason for its previous non-admission.

Similar in its arbitrariness, Hawaii was denied statehood for over fifty years for racist and economic reasons.<sup>7</sup> After white settlers overthrew the legitimate government of Hawaii in the 1890s, Hawaii was annexed as a territory in 1900, but not admitted as a state until 1959. During that long period of political jockeying, Hawaii frequently petitioned for statehood. During World War Two, the United States touted ethnically Japanese Hawaiian residents as a “model minority” due to their involvement in the war effort, but government suspicions against and about the loyalty of Japanese residents of Hawaii in the post-war period stalled statehood talks.<sup>8</sup>

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7 Ellen D. Wu, *The Color of Success: Asian American and the Origins of the Model Minority* 211-219 (Princeton Univ. Press 1st ed. 2014).

8 *Id.* at 218.

In 1959, they were finally admitted, and then only because Democrats wanted Alaska to become a state (at the time, Hawaii leaned Republican). Ultimately, Hawaii was not admitted as a state until after Alaska's admission.

Finally, Puerto Rico has five times voted to join the United States as a state and has five times been rejected, effectively denying residents of their fundamental right to participate in elections. In *Igartua-de la Rosa v. United States*, the Supreme Court upheld that territories do not have the right to vote, including Puerto Rico. The Court contended that they were barred from voting due to the fact that “[t]he only jurisdiction, not a state, which participates in the presidential election is the District of Columbia, which obtained the right through the twenty-third amendment to the Constitution.”<sup>9</sup>

Given these various examples of statehood admission debacles, there is clearly a negative history associated with allowing states into the Union along arbitrary and unclear guidelines. Effective, fair law must be non-ambiguous and defined. The current statehood process is ambiguous and undefined. As situated, the statehood process is then ineffective and poor law. This poor law has allowed the inherent voting rights of the residents of the aforementioned areas to be violated.

This paper proposes that Congress must take legislative action in order to protect the rights of its citizens—rights which are being systematically violated by failure to define the statehood entry process. Appropriate legislative action includes creating a minimum threshold of pre-requirements, including a desire to become a state, a written constitution, population minimums, and a sufficiently stable and beneficial economy. These requirements, when met, would default a state into full-faith Union membership during a non-election year.

In Section One, this paper will defend the essential nature of voting rights for democracy. As far back as the thirteenth century, voting rights were internationally recognized as one of the most important guarantees of human rights. In Section Two, this paper will outline the United States' current statehood admission process

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9 *Igartua de la Rosa v. United States*, 32 F.3d 8, 10 (1st Cir. 1994) (regarding a question of whether an inability to vote in the United States presidential election violates their constitutional rights.)

and demonstrate why it is insufficient. Through the specific example of Puerto Rico, Section Two illustrates the real-world impact of this legal flaw. In Section Three, this paper proposes a solution to the failings of the current statehood admissions process: a Congressional act defining five specific criteria that result in automatic admission into the United States. This paper concludes with a summary of the significance of voting rights and the expected improvements resulting from the proposed legislation.

## I. VOTING RIGHTS

Voting rights are an integral part of democracy. Historically, democratic governments and their courts have upheld the importance of extending voting rights to all eligible citizens. Because residents of United States incorporated territories are citizens, this is their right as well. This section will focus on English Common Law's defense of voting rights<sup>10</sup> and the Supreme Court's insistence on extending voting rights to eligible parties. In 1993, the Supreme Court defended the concept that inherent rights granted under common law principles, such as the right to vote, can only be superseded by direct statute.<sup>11</sup> Many of the rights and protections guaranteed through English Common Law were first enshrined in the Magna Carta in 1215. These primarily referred to due process and the rule of law, which inherently includes the right to vote.<sup>12</sup> Naturally, the Magna Carta was historically used as a legal defense for the expansion of

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10 Herbert Pope, *The English Common Law in the United States*, 23 HARV. L. REV. 6, 7-9 (1910).

11 *United States v. Texas*, 507 U.S. 529 (1993) (“Just as longstanding is the principle that ‘[s]tatutes which invade the common law... are meant to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident.’”).

12 *Magna Carta Text*, CONST. RIGHTS FOUND., <https://www.crf-usa.org/foundations-of-our-constitution/magna-carta-text.html> (last visited Feb. 9, 2021).

voting rights in the United Kingdom.<sup>13</sup> In 1915, Helena Normanton cited the seven-hundred-year-old document, arguing that the United Kingdom denying voting rights to women was “expressly contrary to the Magna Carta.”<sup>14</sup> As such, the right to vote by citizens is a concept that is protected in English Common Law.

The Magna Carta is not the final example of a guarantee of voting rights in England—in 1536, the first of the Laws in Wales Acts granted a path for Wales to gain full representation in Parliament.<sup>15</sup> Although it was repealed by Parliament in 1993 for other reasons, it was a direct enshrinement of voting representation in English Common Law for a newly incorporated area.

Scotland was similarly incorporated under the umbrella government of the United Kingdom through the Acts of Union, which were ratifications of the Treaty of Union by the English and Scottish parliaments.<sup>16</sup> Under these, the Scottish and English Parliaments were merged<sup>17</sup> and sat as one Parliament from 1707 to 1999. By allowing Scottish citizens of the United Kingdom representation in a united Parliament, the right of the citizens of Scotland to vote was recognized and codified. As illustrated, English Common Law contains a clear and longstanding emphasis on the importance of the codification of the right of vote.

The United States has codified this same concept. In *United States v. Wong Kim Ark*, the United States Supreme Court ruled in favor of birthright citizenship for the plaintiff, Wong Kim Ark.<sup>18</sup>

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13 Alex Lock, *Magna Carta in the 20th Century*, BRITISH LIBRARY (Mar. 13, 2015), <https://www.bl.uk/magna-carta/articles/magna-carta-in-the-20th-century>.

14 Helena F. Normanton, *The Englishwoman*, vol. XXVI, no. 77, BRITISH LIBRARY (May 1915), <https://www.bl.uk/collection-items/article-on-magna-carta-and-women-from-journal-the-englishwoman>.

15 *Laws in Wales Act 1535*, WIKISOURCE (Sept. 10, 2015), [https://en.wikisource.org/wiki/Laws\\_in\\_Wales\\_Act\\_1535](https://en.wikisource.org/wiki/Laws_in_Wales_Act_1535).

16 Articles of Union I (1707).

17 *Id.*

18 *United States v. Wong Kim Ark*, 169 U.S. 649, 652 (1898).

Ark, a man born to Chinese immigrants in San Francisco, regularly visited China. Upon returning from one of these trips, he was denied re-entry into the United States by the state of California. The immigration officials assumed that because he was ethnically Chinese, he could not be a United States citizen. He sued and the Supreme Court decided in a 6-2 decision that the Fourteenth Amendment provides citizenship to any person born in the United States.

The Supreme Court further upheld voting rights as rights in *Baker v. Carr*. In this case, the Court held that unfair redistricting is a violation of the right to vote as protected under the Equal Protection Clause.<sup>19</sup> The decision in this case spawned a series of precedential decisions surrounding the strengthening of voting rights. Arguably, the most well-known concept that came out of *Baker* was the idea of “one person, one vote.” This concept was codified into United States law in 1964 in the Supreme Court’s ruling in *Reynolds v. Sims*.<sup>20</sup> Several cases followed shortly thereafter that further sustained the Court’s original ruling in *Baker*, cementing the protection of voting rights under the Fourteenth Amendment’s Equal Protection Clause.

The Twenty-sixth Amendment to the United States Constitution takes this idea one step further, suggesting that any citizen who is at least eighteen years of age will not have his or her right as a United States citizen to vote in federal elections abridged based on account of age.<sup>21</sup> If this right must not be abridged on account of age, and if this is a right of all citizens as written, then anyone born in the United States must be able to vote in federal elections.

As it stands, citizens in United States territories are unable to vote in any federal elections, and they do not have Representatives or Senators directly representing them in Congress. They also do not vote in United States presidential elections, as the Electoral College (as presently constructed) could not include their vote unless they were to receive representation in Congress.

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19 *Baker v. Carr*, Oyez, <https://www.oyez.org/cases/1960/6> (last visited Feb 9, 2021).

20 *Reynolds v. Sims*, 377 U.S. 533 (1964).

21 U.S. CONST. amend. XVI, § 1.

## II. INSUFFICIENT ADMISSIONS PROCESS

There is a clear historical precedent caused by the methodological ambiguity of statehood admissions. This ambiguity proves predated systematic violation of rights that should be protected by United States law. Without protecting the right to vote, as upheld in the Constitution, the United States allows a legal violation of essential human rights. This section will examine the implications of this overt infringement.

Residents of territories are United States citizens. Citizens have the right to vote, as previously discussed. Barring a Constitutional amendment providing for residents of United States territories to vote in federal elections, residents of territories are disallowed from voting in federal elections. As a minimum standard, The United States ought to allow participation in federal elections by residents of territories as soon as possible. The most appropriate legal practice to provide for this is then to clarify and codify the statehood admissions process.

In 2019, Puerto Rico was devastated by Hurricane Maria. In February 2020, H.R. 5687, a disaster relief bill for Puerto Rico, was introduced on the floor of the House of Representatives.<sup>22</sup> It passed and was sent to the Senate, where it died in committee. The citation for non-consideration of the bill was that states—Nebraska, in particular—needed the money more. This decision was justified by the Robert T. Stafford Disaster Relief and Emergency Assistance Act, which states that the federal government may provide federal disaster relief to states but not territories.<sup>23</sup> As a result, Puerto Rico regularly does not receive the federal aid it both deserves and needs.

If Puerto Rico were a state, it would likely have been granted additional disaster relief. The territory already pays a large portion of the taxes state residents do—social security taxes, business taxes, and payroll taxes are a few such examples—yet their support remains unreciprocated. The withholding of necessary aid provides

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22 H.R. 5687, 116th Cong. (2020).

23 Robert T. Stafford Disaster Relief and Emergency Assistance Act, Pub. L. No. 100-707, § 301, 102 Stat. 4689, 4691 (1988).

yet another example of the potential abuse by the federal government of citizens who are not residents of states.

Since its incorporation as a territory under the Jones-Shafroth Act in 1917, the residents of Puerto Rico have been granted statutory United States citizenship.<sup>24</sup> Since 1917, Puerto Rico has five times voted on the question of becoming a state.<sup>25</sup> In 1998 and 2012, Puerto Rico voted to become a state. In their most recent referendum in 2017, over 97% of voters affirmed their desire to become a state.<sup>26</sup> The United States Congress typically funds for referendums, but Congress persistently refuses to vote on Puerto Rico's statehood. In 2019, H.R. 4901 was proposed to the United States Congress. This bill proposes another referendum, this time exclusively over the question of Puerto Rican Statehood.<sup>27</sup> This bill has not yet reached the floor of the House of Representatives. Therefore, Puerto Rico's exclusion from statehood is a testament to the failure of the current statehood admissions process, illustrating the necessity of incorporating this protection into United States jurisprudence.

### III. PROPOSED CONGRESSIONAL ACT

The territories of the United States would be well served if Congress enacted legislation containing criteria that, when met, will default a territory into Union membership. Such legislation would necessarily contain five distinct criteria for a territory to become a state: first, a majoritarian desire to enter the union; second, possessing a written and adopted constitution; third, having a sufficiently numerous population; fourth, meeting predetermined criteria for economic stability; and fifth, the admission of new states only during non-election years. By determining these criteria in advance and by passing

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24 Jones-Shafroth Act, Pub. L. No. 64-368, 39 Stat. 951 (1917).

25 H.R. REP. NO. 105-131, at 2 (1989).

26 Frances Robles, 23% of Puerto Ricans Vote in Referendum, 97% of Them for Statehood, N.Y. TIMES (June 11, 2017), [https://www.nytimes.com/2017/06/11/us/puerto-ricans-vote-on-the-question-of-statehood.html?\\_r=0](https://www.nytimes.com/2017/06/11/us/puerto-ricans-vote-on-the-question-of-statehood.html?_r=0).

27 Puerto Rico Statehood Admissions Act, H.R. 4901, 116th Cong. (2019).

them through Congressional legislation, enough flexibility will be retained to react to unforeseen circumstances while still achieving the plethora of benefits gleaned by codifying the admission process. This paper will explain the merits and legal basis of these five criteria in the following paragraphs.

The first and primary criteria that must be met for entry into statehood is for a territory to display a majoritarian desire to enter the Union. During the Civil War, Abraham Lincoln laid out The Proclamation of Amnesty and Reconstruction, his blueprint for allowing seceded southern states to re-enter the Union.<sup>28</sup> In this Proclamation, Lincoln required that ten percent of the population of the seceded states be required to swear an oath of allegiance in order for the said state to rejoin the Union. He hoped that by having such a low threshold, he could entice the South into rejoining the Union, effectively blunting their rebellious sentiments. He also pardoned the citizens of any state that would rejoin of any political wrongdoing.

By modifying the model set forth in The Proclamation of Amnesty and Reconstruction, removing the requirement to swear a binding oath of allegiance to the United States, and increasing the requisite percentage of residents who consent to statehood to fifty percent, a similar outcome to The Proclamation of Amnesty and Reconstruction would likely be accomplished. Because the means and desired outcomes are similar, it can be assumed that the outcomes would ultimately be similarly derived from the modified proposition. These outcomes could be implemented while also acknowledging the importance of a majoritarian desire to become a state by the residents of a given territory.

After having the citizens of the former states swear allegiance to the United States, Lincoln required that a Constitution be written by the oath-taking citizens.<sup>29</sup> Under current United States law, in order for a territory to be organized, it must have a written constitution.<sup>30</sup> Historically, written constitutions have typically been codified through Organic Acts, as in the most recent cases of

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28 Proclamation of Amnesty and Reconstruction, 13 Stat. 737 (1863).

29 *Id.*

30 Selden Bacon, Territory and the Constitution, 10 YALE L.J. 99, 100 (1901).

Alaska,<sup>31</sup> Hawaii,<sup>32</sup> and Oklahoma.<sup>33</sup> All United States territories are currently unorganized, although many of them have written governing documents or, in some cases, constitutions that have not been ratified in the standard constitutional process, as in the case of Puerto Rico<sup>34</sup> and the Northern Mariana Islands.<sup>35</sup> Under the proposed legislation, territories would be required to have written constitutions, which would encompass and supersede the purpose and use of Organic Acts.

The third criterion for territorial admission to the Union as a state would require a territory to contain a requisitely large population. The Northwest Ordinance, a common basis for enabling acts throughout United States history, recommended that a territory have a population of at least 60,000 people before becoming a state.<sup>36</sup> As presently constituted, each Congressional District represents approximately 700,000 voters. Under the proposed legislation, in order to become a state, a territory would be required to have this number of permanent resident citizens. After each Congressional reapportionment, the new number average number of people represented by each Congressional district would become the new minimum population for territorial admission. This would allow for precedential consistency as presented in the Northwest Ordinance while also acknowledging the changing nature and volume of American representative government.

The fourth criterion for territorial admission relates to economic stability. Because of the expressed concerns of Congress with the economic stability of territories—as in the case of Puerto Rico—the proposed legislation would generate an index that would account for

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31 Alaska Statehood Act, Pub L. No. 85-508, 72 Stat. 332 (1958).

32 An Act to Provide for the Admission of the State of Hawaii into the Union, Pub. L. No. 56-339, 31 Stat. 141 (1900).

33 Oklahoma Organic Act of 1890, Pub. L. No. 51-182, 26 Stat. 81 (1890).

34 P.R. CONST. art. IX, §10

35 N. MAR. I. CONST. schedule on transitional matters, §1

36 *Transcript of Northwest Ordinance (1787)*, OUR DOCUMENTS, <https://www.ourdocuments.gov/doc.php?flash=false&doc=8&page=transcript> (last visited Feb. 23, 2021).

standard economic indicators such as Gross Domestic Product, poverty levels, and debt. If a territory met a certain score on this index for enough consecutive months, they would qualify for statehood admission. This index, determined by Congress upon consideration of the legislation, would then be codified by Congress.

The final criterion in the proposed legislation would require that new states only be admitted during non-election years. This requirement would best protect new states under the equal footing doctrine<sup>37</sup> by allowing enough time for apportionment of electors and congresspersons. By disallowing states from new entry during non-election years, they are provided with additional time to create and manage election infrastructure and voting processes, as well as grant internal, local governments sufficient time to prepare for federal elections.

#### IV. CONCLUSION

For people like John Fitisemanu, the fight for acknowledgement of their voting rights is still being fought. Disenfranchised for decades, Americans around the globe who live in territories do not have the opportunity to vote, despite their monumental efforts. These people continue to fight racism embedded in legal precedents, bipartisan bickering, and nebulous traditionalism in order to simply have their rights acknowledged.

To best protect the voting rights of these disenfranchised persons, the statehood admission process must be clarified through Congressional legislation that codifies specific minimum threshold requirements that lead to consistent default into Union membership. United States citizens' rights, no matter where they live or who they are, must be equally protected under the law.

This protection must be implemented based on the longstanding precedent in English Common Law establishing the importance of the right to vote in an equitable society. Recognition of the historical shortcomings of the United States federal government in fairly and expeditiously establishing voting rights through statehood admis-

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37 U.S. CONST. art. I, § 3, cl. 1

sions must be recognized, and Congress must urgently act to rectify the historical ignorance embedded in American institutions. The protection of voting rights must be implemented through congressional legislation establishing specific criteria that will default a territory to become a state.

This solution will enable Congress to retain its plenary power over the process of statehood admission by allowing Congress to decide on the admission criteria for new states while simultaneously superseding the oftentimes ill-motivated and ever-present dearth that currently accompanies the process. Finally, these changes will provide equal opportunity for residents of United States territories to gain a known and established path to full enfranchisement.