POLITICAL RIGHTS — *CAROLENE PRODUCTS* — FIRST CIRCUIT DENIES EN BANC PETITION'S CLAIM OF NONAPPORTIONMENT TO PUERTO RICO. — *Igartúa v. Trump*, 868 F.3d 24 (1st Cir. 2017) (mem.).

Puerto Rico's 3.4 million residents are U.S. citizens, but because they live in a territory rather than a state, they do not enjoy the right to vote in U.S. federal elections.[1] The U.S. Constitution specifies only that *states* may appoint presidential electors and be apportioned representatives to the House of Representatives.[2] Recently, in *Igartúa v. Trump*,[3] the First Circuit denied rehearing en banc to plaintiffs challenging the disenfranchisement of Puerto Rican citizens.[4] The lead dissent invoked *United States v. Carolene Products Co.*[5] to suggest that the court should have allowed unorthodox constitutional claims because of the importance of the right to vote.[6] The rationale for judicial intervention embodied in *Carolene Products* is perhaps the plaintiffs' best legal argument. However, its applicability to this case is dubious because of key differences between the issue of Puerto Rican representation and cases decided under a *Carolene Products* framework.

Gregorio Igartúa filed his first pro se suit against the United States and other government defendants in 1991.[7] A U.S. citizen and resident of Puerto Rico, Igartúa claimed that U.S. citizens in Puerto Rico have the right to vote in presidential elections.[8] The First Circuit dismissed the suit because Article II of the Constitution does not grant citizens the right to vote for President but rather allocates presidential electors to states.[9] In 2008, Igartúa filed suit claiming that U.S. citizens in Puerto Rico have the right to vote for representatives to the U.S. House of Representatives and to be apportioned representatives to that body.[10]

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[1] José R. Coleman Tió, Comment, *Six Puerto Rican Congressmen Go to Washington*, 116 YALE L.J. 1389, 1389, 1393 (2007); Adam W. McCall, Note, *Why Congress Cannot Unilaterally Repeal Puerto Rico's Constitution*, 102 CORNELL L. REV. 1367, 1368 (2017).

[2] *See* U.S. CONST. art. I, § 2, cls. 1–3; *id.* art. II, § 2, cl. 2.

[3] 868 F.3d 24 (1st Cir. 2017) (mem.).

[4] *See id.* at 24.

[5] 304 U.S. 144 (1938).

[6] *Igartúa*, 868 F.3d at 26 (Torruella, J., dissenting from the denial of rehearing en banc).

[7] *See* Docket, Igartua de la Rosa v. United States, 842 F. Supp. 607 (D.P.R. 1994) (Civ. No. 91-2506).

[8] Igartua de la Rosa v. United States, 32 F.3d 8, 9 (1st Cir. 1994) (per curiam).

[9] *See id.* Igartúa brought similar claims in 2000 and 2004, which the First Circuit also rejected. *See* Igartúa-de la Rosa v. United States, 417 F.3d 145, 146–47 (1st Cir. 2005) (en banc); Igartua de la Rosa v. United States, 229 F.3d 80, 82–83 (1st Cir. 2000) (per curiam).

[10] Igartua v. United States, Civil No. 08-1174, 2009 WL 10668720, at *1 (D.P.R. June 3, 2009), *aff'd*, 626 F.3d 592 (1st Cir. 2010). Residents of Puerto Rico currently vote for a nonvoting representative in the U.S. House of Representatives. 48 U.S.C. § 891 (2012); *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, 492 (2016).

Igartúa also argued that his constitutional claims should be referred to a three-judge court under 28 U.S.C. § 2284(a).[11] That provision requires that "[a] district court of three judges" be convened when a suit "challeng[es] the constitutionality of the apportionment of congressional districts."[12] Igartúa argued that the federal government's decision to not apportion Puerto Rico any representatives to the House of Representatives was unconstitutional and therefore must be reviewed by a three-judge court.[13] The U.S. District Court for the District of Puerto Rico dismissed the suit in 2009.[14] The First Circuit affirmed in 2010,[15] relying on the principles of res judicata and stare decisis.[16] This 2010 court mentioned the § 2284(a) question only in a footnote, stating simply that the constitutionality of apportionment was "not the issue in this case."[17]

Igartúa again brought suit after the 2010 congressional apportionment.[18] The First Circuit considered this new apportionment claim in November 2016.[19] Writing for the panel, Senior Judge Lipez[20] stated that he "now doubt[ed] the correctness of" the First Circuit's 2010 footnote rejecting the application of § 2284(a).[21] Judge Lipez explained that the Supreme Court's 2015 discussion of § 2284(a) in *Shapiro v. McManus*[22] might support Igartúa's request for a three-judge court, because it and additional Supreme Court precedent endorsed a broader reading of § 2284(a).[23] Despite arguments in favor of granting Igartúa's

[11] *Igartua*, 2009 WL 10668720, at *1.

[12] 28 U.S.C. § 2284(a) (2012). Three-judge district courts include at least one circuit judge, *id.* § 2284(b)(1), and their decisions are directly appealable to the Supreme Court, *see id.* § 1253.

[13] *Igartua*, 2009 WL 10668720, at *1.

[14] *Id.*

[15] Chief Judge Lynch delivered the opinion of the court, which was joined in part by Senior Judge Lipez. Judge Lipez also concurred separately, and Judge Torruella dissented.

[16] Igartúa v. United States, 626 F.3d 592, 602–03 (1st Cir. 2010); *id.* at 603–04 (Lynch, C.J.). The First Circuit applied the reasoning of its 1994, 2000, and 2004 decisions, stating that "the U.S. Constitution does not give Puerto Rico residents the right to vote for members of the House of Representatives because Puerto Rico is not a state." *Id.* at 594 (majority opinion).

[17] *Id.* at 598 n.6.

[18] *See* Igartúa v. Obama, 842 F.3d 149, 149 (1st Cir. 2016). The U.S. District Court for the District of Puerto Rico granted the United States' motion to dismiss, holding that Igartúa and his fellow plaintiffs lacked standing and did not bring claims that warranted the appointment of a three-judge court. Igartúa v. United States, 86 F. Supp. 3d 50, 52 (D.P.R. 2015), *aff'd sub nom.* Igartúa v. Obama, 842 F.3d 149.

[19] *Igartúa*, 842 F.3d at 149.

[20] Judge Lipez was joined by Judge Thompson.

[21] *Igartúa*, 842 F.3d at 151.

[22] 136 S. Ct. 450 (2015). Justice Scalia, writing for a unanimous court, stated that a court must grant a request for a three-judge court for any complaint that (1) satisfies the criteria of § 2284(a), *id.* at 454–55; and (2) presents "a substantial federal question," *id.* at 455. Justice Scalia acknowledged that the plaintiffs could "ultimately fail on the merits . . . , but § 2284 entitles them to make their case before a three-judge district court." *Id.* at 456.

[23] *Igartúa*, 842 F.3d at 153; *see also* Adams v. Clinton, 26 F. Supp. 2d 156, 157 (D.D.C. 1998); Adams v. Clinton, 90 F. Supp. 2d 35 (D.D.C. 2000) (per curiam) (three-judge court), *aff'd mem.* 531 U.S. 941 (2000).

request, Judge Lipez concluded that the panel was bound by the 2010 footnote.[24] Judge Lipez argued the § 2284(a) issue "should be reconsidered by the full court in an en banc rehearing."[25]

Despite this call to action, the First Circuit denied Igartúa's petition for a rehearing en banc.[26] Issuing a statement on the denial, Judge Kayatta[27] acknowledged that "[t]he prolonged inability of our fellow citizens to vote for certain federal officials" was a matter of concern.[28] However, he explained, Igartúa's claims did not meet § 2284(a)'s requirements to convene a three-judge court. Article I, Section 2 of the U.S. Constitution provides that "[r]epresentatives . . . shall be apportioned among the several *States*."[29] Judge Kayatta suggested that other provisions of the Constitution could not render an apportionment scheme unconstitutional simply because the scheme apportioned representatives to states and not territories.[30] Any such claim would be "wholly insubstantial"[31] and thus not "justiciable in the federal courts."[32]

Judges Torruella, Lipez, and Thompson each wrote separate dissents from the denial of rehearing en banc. In a lengthy dissent, Judge Torruella first described the "regrettable condition"[33] of the "total national disenfranchisement" of Puerto Rican citizens.[34] He criticized the majority's "consistently shallow grounds"[35] for disregarding *Carolene Products*, which calls for heightened scrutiny in instances of "prejudice against discrete and insular minorities . . . , which tends seriously to curtail the operation of those political processes ordinarily to be relied upon

[24] *Igartúa*, 842 F.3d at 160. The footnote could not be dismissed as mere dicta because it justified the 2010 panel's authority to hear Igartúa's case rather than send it to a three-judge district court. *See id.* at 152; *see also id.* at 152 n.4 ("Congress has directed that constitutionally based apportionment actions be heard by a three-judge district court in the first instance . . . and then by the Supreme Court, thereby foreclosing the courts of appeals from entertaining such claims." (citation omitted)). Judge Torruella disagreed: under his view, "[t]he utter lack of discussion and complete absence of analysis of the three-judge issue render[ed] [the footnote] dicta." *Id.* at 160 (Torruella, J., concurring in part, dissenting in part).

[25] *Id.* at 151 (majority opinion).

[26] *Igartúa*, 868 F.3d at 24.

[27] Judge Kayatta was joined by Chief Judge Howard and Judges Lynch and Barron.

[28] *Igartúa*, 868 F.3d at 24 (Kayatta, J., statement on denial of rehearing en banc).

[29] U.S. CONST. art. I, § 2, cl. 3 (emphasis added); *see Igartúa*, 868 F.3d at 25 (Kayatta, J., statement on denial of rehearing en banc).

[30] *Igartúa*, 868 F.3d at 25. The Supreme Court has implied that Puerto Rico is not a "state" within the meaning of the Constitution. *See* Puerto Rico v. Sanchez Valle, 136 S. Ct. 1863, 1875–76 (2016) (holding that Puerto Rico's prosecutorial powers, unlike those of states, are derived from Congress).

[31] *Igartúa*, 868 F.3d at 25 (Kayatta, J., statement on denial of rehearing en banc) (quoting Vazza v. Campbell, 520 F.2d 848, 850 (1st Cir. 1975)).

[32] *Id.* (quoting Shapiro v. McManus, 136 S. Ct. 450, 455 (2015)).

[33] *Id.* at 26 (Torruella, J., dissenting from the denial of rehearing en banc).

[34] *Id.* at 25.

[35] *Id.* at 26.

to protect minorities."[36] Turning to the substance of the decision, Judge Torruella argued that en banc review was proper because "the proceeding involves a question of exceptional importance," per Rule 35(a)(2) of the Federal Rules of Appellate Procedure.[37] Judge Torruella argued the question was of importance because (1) the First Circuit panel in 2016 had been bound by a footnote while deciding an issue related to the rights of millions of citizens,[38] (2) the Supreme Court had previously indicated that § 2284(a) courts may consider nonapportionment claims,[39] and (3) Congress provided for § 2284(a)'s three-judge court review precisely because challenges to apportionment were of importance.[40] Judge Torruella concluded that the case presented questions "at the very heart of what it means to be a democracy" that merited consideration and deliberation by an en banc court.[41]

Judge Lipez reiterated the importance of the case, arguing that Rule 35(a)(2) review was proper. He called the majority's decision "premature," given the complexity of the nonapportionment issue, the lack of on-point precedent, and the centrality of the right at stake.[42] Both Judge Lipez and, in a separate dissent, Judge Thompson emphasized the cursory nature of the 2010 footnote regarding § 2284(a) and urged for an en banc hearing supported by on-point briefings.[43] Judge Thompson's dissent concluded with a reminder that "'the right to vote' is 'the wellspring of all rights in a democracy'"[44] and called on the First Circuit to "at least take the time to explain our thinking in a binding en-banc opinion" "before depriving *millions and millions* of Americans of that right."[45]

The First Circuit's order, while addressing a narrow procedural question, reflects a larger debate on whether the judiciary can reverse

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[36] *Id.* (quoting United States v. Carolene Products Co., 304 U.S. 144, 153 n.4 (1938)).

[37] *Id.* (quoting FED. R. APP. P. 35(a)(2)).

[38] *Id.* at 27.

[39] *Id.* at 27–28.

[40] *Id.* at 29. Judge Torruella also argued that the U.S. government may have violated the International Covenant on Civil and Political Rights (ICCPR), *adopted* Dec. 19, 1966, 999 U.N.T.S. 171, by failing to provide effective representation to Puerto Rico. *Igartúa*, 868 F.3d at 28 (Torruella, J., dissenting from the denial of rehearing en banc). Judge Torruella suggested that such a treaty-based claim would be a "constitutional claim" within the meaning of § 2284(a) because the Supremacy Clause makes treaties "the supreme Law of the Land." U.S. CONST. art. VI, cl. 2; *see Igartúa*, 868 F.3d at 28–29 (Torruella, J., dissenting from the denial of rehearing en banc). *But see Igartúa*, 868 F.3d at 25 (Kayatta, J., statement on denial of rehearing en banc). For more on the ICCPR's applicability to Puerto Rico's political status, see *Developments in the Law — The U.S. Territories*, 130 HARV. L. REV. 1616, 1678 (2017).

[41] *Igartúa*, 868 F.3d at 29 (Torruella, J., dissenting from the denial of rehearing en banc).

[42] *Id.* at 30 (Lipez, J., dissenting from the denial of rehearing en banc).

[43] *Id.*; *id.* at 30–31 (Thompson, J., dissenting from the denial of rehearing en banc).

[44] *Id.* at 31 (Thompson, J., dissenting from the denial of rehearing en banc) (quoting Bonas v. Town of N. Smithfield, 265 F.3d 69, 74 (1st Cir. 2001)).

[45] *Id.*

Puerto Rico's political disempowerment. Judge Torruella invoked *Carolene Products* to argue that the First Circuit's decision contravenes the court's role as a protector of minorities in the political process. The abstract rationale for judicial intervention embodied in *Carolene Products* may well be Igartúa's best legal argument, given the failure of his specific constitutional, treaty-based, and statutory claims over the past twenty-five years. But although *Igartúa* does seem on its face to be a classic *Carolene Products* case, the comparison is inapt. Unlike jurisprudence based on *Carolene Products*, *Igartúa* (1) challenges constitutional text rather than a statute, and (2) was brought amid apathy on the U.S. mainland and divided opinion on statehood in Puerto Rico, rather than amid popular mobilization. *Igartúa* thus highlights the limits of *Carolene Products* and its progeny, demonstrating that Puerto Ricans must look beyond courts for political relief.

At first glance, Puerto Rican disenfranchisement appears to be a classic case for judicial protection of minorities. As residents of one of the five populated territories currently held by the United States,[46] Puerto Rican citizens are not guaranteed all constitutional rights.[47] They have no voting representative in the federal government,[48] despite the government's near-plenary power over Puerto Rican affairs.[49] Federal welfare laws treat Puerto Rican residents and mainland U.S. citizens differently, a practice sanctioned by the Supreme Court.[50] Meanwhile, the

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[46] Laurence Arnold, *Is Puerto Rico Part of U.S.? That's Complicated*, BLOOMBERG BUSINESSWEEK (Oct. 6, 2017, 12:00 AM), https://www.bloomberg.com/news/articles/2017-10-06/is-puerto-rico-part-of-u-s-that-s-complicated-quicktake-q-a [https://perma.cc/9MBH-E82E].

[47] *E.g.*, Downes v. Bidwell, 182 U.S. 244, 282 (1901). The Supreme Court declared in *Downes* that Puerto Rican citizens were guaranteed only congressionally granted rights and those held by the Supreme Court to be fundamental. *Id.* at 282–83. These fundamental rights include freedom of worship and expression, *id.* at 282, but not, for example, the right to a jury trial, Balzac v. Porto Rico, 258 U.S. 298, 309 (1922). *Downes* attributed this lack of full constitutional protection to the "differences of race, habits, laws and customs of the people" in the lands the United States had recently gained from Spain. 182 U.S. at 282. Through *Downes* and accompanying decisions in the line of so-called *Insular Cases*, the Supreme Court arguably provided the legal framework that enabled the United States to hold colonies, despite its own anticolonial heritage. *See* Efrén Rivera Ramos, *The Legal Construction of American Colonialism: The* Insular Cases *(1901–1922)*, 65 REVISTA JURÍDICA UNIVERSIDAD DE PUERTO RICO [REV. JUR. U. P.R.] 225, 226–29 (1996); *see also Downes*, 182 U.S. at 380 (Harlan, J., dissenting) ("The idea that this country may acquire territories anywhere upon the earth, by conquest or treaty, and hold them as mere colonies or provinces — the people inhabiting them to enjoy only such rights as Congress chooses to accord them — is wholly inconsistent with the spirit and genius as well as with the words of the Constitution.").

[48] *See* sources cited *supra* note 1.

[49] *See* Andrés L. Córdova, *Puerto Rico: Statehood as Equality*, THE HILL (July 3, 2017, 2:30 PM), http://thehill.com/blogs/congress-blog/politics/340534-puerto-rico-statehood-as-equality [https://perma.cc/JDY7-QZU4].

[50] *See* Harris v. Rosario, 446 U.S. 651, 651–52 (1980) (per curiam); *see also* Stewart W. Fisher, Recent Development, *The Supreme Court Says "No" to Equal Treatment of Puerto Rico: A Comment on* Harris v. Rosario, 6 N.C. J. INT'L L. & COM. REG. 127 (1980).

island territory suffers from a poverty rate of 46% and an unemployment rate of nearly 12%, over twice that of the level in the fifty states.[51] Without a voting federal representative, the territory has little opportunity to advocate for change. In this context, the judiciary's function of preventing "serious oppressions of [a] minor party"[52] seems especially necessary.[53]

Jurisprudence based on *Carolene Products* framed federal courts as guarantors of minority rights and the political process.[54] This function was summarized in the case's footnote four, which Judge Torruella invoked in his *Igartúa* dissent. The footnote suggested that the Fourteenth Amendment's Equal Protection Clause authorized courts to apply heightened scrutiny to cases where "prejudice against discrete and insular minorities" would obstruct "political processes ordinarily . . . relied upon to protect minorities."[55] *Carolene Products* thus provided an "antientrenchment and an antidiscrimination rationale for judicial intervention"; heightened judicial scrutiny is warranted if it targets systemic democratic failures that prevent a minority from achieving equality.[56] This sort of systemic failure is arguably present in Puerto Rico's current political status. The perceived injustice of Puerto Rico's disenfranchisement appears to have animated Judge Torruella's, Judge Lipez's, and Judge Thompson's spirited dissents, perhaps more so than did the procedural question of whether § 2284(a) applies to Igartúa's claim.

But while *Igartúa* did feature a discrete and insular minority, Judge Torruella's *Carolene Products* analogy is inapt. Igartúa's case differs from traditional applications of *Carolene Products* in two ways. First, Igartúa challenged a process derived directly from a constitutional provision, whereas *Carolene Products*' reasoning has usually been applied

[51] Mark Weisbrot, *Strangling Puerto Rico in Order to Save It*, N.Y. TIMES (Aug. 17, 2017), https://www.nytimes.com/2017/08/17/opinion/puerto-rico-economy-austerity.html [https://perma.cc/PZX2-526F] (explaining that "Puerto Rico's colonial status appears to be a major reason" for the territory's economic decline because it cannot default on its debt).

[52] THE FEDERALIST NO. 78, at 468 (Alexander Hamilton) (Clinton Rossiter ed., 2003).

[53] *But see* David A. Strauss, Lecture, *Is* Carolene Products *Obsolete?*, 2010 U. ILL. L. REV. 1251, 1266–67 (noting that "questions that seem to fit easily under the *Carolene Products* framework turn out to be more difficult than they appear," *id.* at 1266, because courts must judge whether minorities suffer disadvantage due to prejudice or due to legitimate legislative reasons).

[54] *See* United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938); *see also* Strauss, *supra* note 53, at 1254 ("[T]he theory underlying the *Carolene Products* footnote [was that] . . . [t]he courts should step in only when there is some problem that prevents the political process from functioning in the way that it should.").

[55] *Carolene Products*, 304 U.S. at 153 n.4.

[56] Pamela S. Karlan, *John Hart Ely and the Problem of Gerrymandering: The Lion in Winter*, 114 YALE L.J. 1329, 1333 (2005); *see also* JOHN HART ELY, DEMOCRACY AND DISTRUST 76, 148 (1980). *But see* Bertrall L. Ross II, *Democracy and Renewed Distrust: Equal Protection and the Evolving Judicial Conception of Politics*, 101 CALIF. L. REV 1565 (2013) (arguing that the Court has recently directed its scrutiny toward acts designed to benefit minorities).

to scrutinize legislative action.[57] Judicial activism has greater legitimacy in the latter case because, as Professor Bruce Ackerman describes, "the court is trumping the statutory conclusions of the deeply flawed real-world legislature by appealing to the hypothetical judgment of an ideally democratic legislature."[58] A court following *Carolene Products* is — according to this framework — not overruling the will of the people but rather ensuring that the legislature respects agreed-upon constitutional principles. Providing such an explanation in *Igartúa* is more difficult. Igartúa argued against Article I, Section 2's specific directive that representatives be apportioned among the states. In contrast, plaintiffs in *Brown v. Board of Education*,[59] *Reynolds v. Sims*,[60] and other cases cited by Judge Torruella and Igartúa[61] challenged legislative actions.[62] Commentators have argued that courts can overcome this constitutional difficulty by, for example, treating Puerto Rico as a state for the purposes of Article I, Section 2 because of its structural similarities to a state.[63] Embracing new interpretations of clear, specific constitutional provisions would arguably require greater judicial creativity than was required to invalidate state law in *Brown* or *Reynolds*.[64]

Second, Igartúa's case was not supported by sociopolitical mobilization of the type that has previously encouraged courts to apply *Carolene Products*' reasoning. The theory underlying *Carolene Products* allows the judiciary to expand civil rights while presenting itself as a prodemocracy actor.[65] Courts are sometimes more willing to effect significant political change in the context of shifting public perceptions and large-scale movements.[66] For example, in the year of the *Brown* decision,

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[57] *See, e.g.*, Graham v. Richardson, 403 U.S. 365, 371–72 (1971).

[58] Bruce A. Ackerman, *Beyond* Carolene Products, 98 HARV. L. REV. 713, 715 (1985).

[59] 347 U.S. 483 (1954).

[60] 377 U.S. 533 (1964).

[61] *See* Igartúa v. United States, 626 F.3d 592, 612, 638 n.59 (2010) (Torruella, J., concurring in part, dissenting in part); Appellant's Reply Brief at 11, Igartúa v. Obama, 842 F.3d 149 (2016) (No. 15-1336), 2015 WL 5092463.

[62] *See, e.g.*, *Reynolds*, 377 U.S. at 537; *Brown*, 347 U.S. at 487–88.

[63] *See* Luis Fuentes-Rohwer, *Bringing Democracy to Puerto Rico: A Rejoinder*, 11 HARV. LATINO L. REV. 157, 159–61 (2008). *But see supra* note 30. Others have argued that the Supreme Court should reverse the line of cases that first enabled the federal government to hold unincorporated territories that lack a clear path to statehood. *See* Nathan Muchnick, Note, *The Insular Citizens: America's Lost Electorate v. Stare Decisis*, 38 CARDOZO L. REV. 797, 800–01 (2016).

[64] *See* David A. Strauss, *The Supreme Court, 2014 Term — Foreword: Does the Constitution Mean What It Says?*, 129 HARV. L. REV. 1, 3–8, 59–60 (2015) (arguing courts are more likely to ignore the plain text of the Constitution when "a large body of precedent-based law has developed," *id.* at 5).

[65] Strauss, *supra* note 53, at 1254–55 ("The *Carolene Products* footnote accepts the idea that the courts should not be anti-democratic; in fact, it accepts that idea with a vengeance.").

[66] *See* Michael J. Klarman, *Civil Rights Litigation and Social Reform*, YALE L.J.F. (Sept. 1, 2006), https://www.yalelawjournal.org/forum/civil-rights-litigation-and-social-reform [https://perma.cc/79VN-DQ47]; *see also* William N. Eskridge, Jr., *Channeling: Identity-Based Social

Justice Jackson "acknowledged the 'profound change' in public opinion that had occurred . . . as a consequence of American awareness [of] the racism which generated the Holocaust."[67] Former Director-Counsel of the NAACP Legal Defense Fund Theodore M. Shaw later emphasized that his organization's post-*Brown* "legal struggle [was] most effective when it [was] part of a broader struggle."[68] More recently, participants in the gay rights movement affirmed that "extralegal, social movement–type efforts" could increase the "plausibility" of judicial claims.[69] Igartúa's claim, however, may lack this plausibility. Five referenda have been held on the political status of Puerto Rico since 1967[70]: a majority of Puerto Rican voters first expressed a desire for statehood only in the most recent 2017 referendum — but critics dismissed the results of this referendum as illegitimate, and voter turnout was concerningly low.[71] The First Circuit therefore had little impetus to countenance a new interpretation of the Constitution that would upend the current political balance and alter the rights of several million citizens.

Igartúa is thus left as an example of how *Carolene Products* can fall short. The judiciary might protect minorities in the political process, but that role is circumscribed by the clear text of the Constitution and by the scope of contemporary political debates. Unfortunately, these limits have left a clearly "discrete and insular" minority disempowered. Each remaining avenue for Puerto Rican relief — independence, statehood, legislative enfranchisement, or constitutional amendment[72] — requires national mobilization, which is particularly difficult for a disenfranchised population to generate. Remedying the Puerto Rican injustice may therefore require political organizing on the mainland, in recognition that the United States' maintenance of near-colonial holdings runs contrary to its founding principles.

Movements and Public Law, 150 U. PA. L. REV. 419, 419 (2001) ("Social movements have been one engine driving constitutional evolution . . . .").

[67] Theodore M. Shaw, Address, *The Race Convention and Civil Rights in the United States*, 3 N.Y.C. L. REV 19, 23 (1998) (quoting a 1954 memorandum written by Justice Jackson).

[68] *Id.* at 35.

[69] Suzanne B. Goldberg, Obergefell *at the Intersection of Civil Rights and Social Movements*, 6 CALIF. L. REV. CIRCUIT 157, 158 (2015) (arguing that the "coalescence [of legal reform and social change movements] enabled social changes to propel legal changes"). The Supreme Court has never held that lesbian, gay, and bisexual individuals form a "discrete and insular minority"; however, recent decisions suggest the Court treats "sexual orientation [as] a tier of its own." *See* Russell K. Robinson, *Unequal Protection*, 68 STAN. L. REV. 151, 165 (2016).

[70] *See* Charles R. Venator-Santiago, *Puerto Rico Votes on Statehood — Fifth Time's the Charm?*, SALON (June 10, 2017, 1:30 PM), https://www.salon.com/2017/06/10/puerto-rico-votes-on-statehood-fifth-times-the-charm_partner/ [https://perma.cc/QL7Q-U8UU].

[71] *See* Frances Robles, *Despite Vote in Favor, Puerto Rico Faces a Daunting Road Toward Statehood*, N.Y. TIMES (June 12, 2017), https://www.nytimes.com/2017/06/12/us/trump-puerto-rico-statehood-congress.html [https://perma.cc/4GEF-JZUB].

[72] César A. López Morales, Note, *A Political Solution to Puerto Rico's Disenfranchisement: Reconsidering Congress's Role in Bringing Equality to America's Long-Forgotten Citizens*, 32 B.U. INT'L L.J. 185, 199, 209 n.128, 216 (2014).