NOTES

REDRESSING THE LEGAL STIGMATIZATION OF AMERICAN SAMOANS

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If we are Americans, then why not citizens?

—Loa Pele Faletogo, President of the Samoan Federation of America[1]

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1. *Meet the Plaintiffs*, WE THE PEOPLE PROJECT, http://www.equalrightsnow.org/plaintiffs (last visited Aug. 3, 2016).

INTRODUCTION

Although the plain text of the Fourteenth Amendment states that "[a]ll persons born . . . in the United States and subject to the jurisdiction thereof, are citizens of the United States,"[2] "[t]ens of thousands of Americans who hold U.S. passports are" not legally recognized "as U.S. citizens."[3] How is this possible? The answer is that these Americans were born in the United States territory of American Samoa rather than anywhere else in the United States.[4]

American Samoa is an "unorganized unincorporated territory" of the United States, located 2,500 miles south-southwest of Honolulu and 1,800 miles north-northeast of New Zealand in the South Pacific.[5] Despite having been a part of the United States for over a century, American Samoa is the only United States territory in which its people are not granted United States citizenship by virtue of birth within the territory.[6] The federal government classifies American Samoans as "non-citizen national[s]," a legal status subordinate to that of full citizenship.[7]

2. U.S. CONST. amend. XIV, § 1, cl. 1.

3. Neil Weare, *Citizenship Is a Birthright in U.S. Territories*, CNN OPINION (Feb. 19, 2014, 7:46 AM), http://www.cnn.com/2014/02/19/opinion/weare-citizenship-birthright-samoa/index.html.

4. *Id.* U.S. passports issued to American Samoans include a page with a statement known as "Endorsement Code 09," which states: "THE BEARER IS A UNITED STATES NATIONAL AND NOT A UNITED STATES CITIZEN." Fili Sagapolutele, *Citizenship Clause of 14th Amendmt [sic] at Center of Lawsuit*, SAMOA NEWS (July 12, 2012, 10:34 AM), http://www.samoanews.com/node/6749.

5. EDIBERTO ROMÁN, THE OTHER AMERICAN COLONIES: AN INTERNATIONAL AND CONSTITUTIONAL LAW EXAMINATION OF THE UNITED STATES' NINETEENTH AND TWENTIETH CENTURY ISLAND CONQUESTS 184 (2006).

6. Sean Morrison, *Foreign in a Domestic Sense: American Samoa and the Last U.S. Nationals*, 41 HASTINGS CONST. L.Q. 71, 72 (2013).

7. *About* Tuaua v. United States, WE THE PEOPLE PROJECT, http://www.equalrightsnow.org/case_overview (last visited Aug. 3, 2016). *See* U.S. CITIZENSHIP AND IMMIGRATION SERVS., OFFICE OF POLICY AND STRATEGY, CITIZENSHIP IN THE UNITED STATES 12 (2004) [hereinafter USCIS REPORT], http://www.ilw.com/resources/Citizenship_United_States.pdf ("Noncitizen nationals of the United States do not enjoy all of the rights afforded to U.S. citizens. Noncitizen nationals include persons born in the U.S. territory of American Samoa . . . .").

American Samoans' "second-class status" as American "nationals" prevents them from enjoying the full rights and privileges that would otherwise be granted them as American "citizens."[8] The government's official classification of "non-citizen national" imposes significant social harm because it stigmatizes American Samoans as "inferior and subordinate" to other Americans.[9] "Non-citizen national" status imposes economic and legal harms as well.[10] Among other things, American Samoans are unable to vote in state or federal elections,[11] are ineligible for certain employment opportunities,[12] and must go through the same expensive immigration and naturalization processes as foreigners in order to be fully recognized as U.S. citizens.[13]

On July 12, 2012, Leneuoti Fiafia Tuaua and seven other American Samoan plaintiffs, along with the Samoan Federation of America, filed a lawsuit, *Tuaua v. United States*,[14] challenging "the constitutionality of federal laws and policies that deny U.S. citizenship to" American Samoans.[15] Their main argument was that since the Fourteenth Amendment guarantees citizenship to "[a]ll persons born . . . in the United States,"[16] denying citizenship to persons born in American Samoa, a part of the United States, would be unconstitutional.[17]

The United States, as the primary defendant in the case, responded to the plaintiffs' complaint by filing a motion to dismiss.[18] It relied on a series of controversial early twentieth-century Supreme Court precedent known as the *Insular Cases* to support its argument that the Fourteenth Amendment's Citizenship Clause "[d]oes [n]ot [e]xtend to [u]nincorporated [t]erritories, [such as American Samoa]."[19] The United States also cited to more recent appellate court cases, such as *Rabang v.*

8. *See* USCIS REPORT, *supra* note 7, at 2; *About* Tuaua v. United States, *supra* note 7.

9. Complaint for Declaratory and Injunctive Relief at 21, Tuaua v. United States, No. 12-01143-RJL (D.D.C. July 10, 2012).

10. *Id.* at 21–22.

11. *Id.* at 22.

12. *Id.*

13. *Id.* at 18–19.

14. Complaint for Declaratory and Injunctive Relief, *supra* note 9.

15. Tuaua v. United States *(D.C. Cir.)*, CONSTITUTIONAL ACCOUNTABILITY CTR., http://theusconstitution.org/cases/tuaua-v-united-states (last visited Aug. 3, 2016).

16. The full text of the Citizenship Clause is as follows: "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." U.S. CONST. amend. XIV, § 1, cl. 1.

17. *About* Tuaua v. United States, *supra* note 7.

18. *Id.*

19. Defendants' Motion to Dismiss Plaintiffs' Complaint at 12, Tuaua v. United States, No. 12-01143-RJL (D.D.C. Nov. 7, 2012) [hereinafter Defendants' Motion to Dismiss].

I.N.S.[20] and *Eche v. Holder*,[21] but these decisions primarily relied on the authority derived from the *Insular Cases*.[22]

On June 26, 2013, U.S. District Court Judge Richard Leon granted the United States' motion to dismiss, pursuant to Federal Rule of Civil Procedure 12(b)(6).[23] Judge Leon acknowledged that the *Insular Cases* were not necessarily a conclusive source of legal authority given that "*Downes*[24] did not possess a singular majority opinion and addressed the right to citizenship only in dicta."[25] But Judge Leon ultimately sided with the defendants, reasoning that "in the century since *Downes* and the Insular Cases were decided, no federal court has recognized birthright citizenship as a guarantee in unincorporated territories."[26] Thus, despite shaky precedent, Judge Leon upheld the long "unbroken practice" of denying Fourteenth Amendment birthright citizenship to persons born in the territories.[27]

The American Samoan plaintiffs appealed the decision soon thereafter. Several amicus briefs were filed in support of the plaintiffs-appellants, including by constitutional law and legal history scholars who do not believe the *Insular Cases* should be relied upon or expanded,[28] by a former Bush Administration Deputy Assistant Secretary of the Interior for

20. Rabang v. I.N.S., 35 F.3d 1449, 1452–53 (9th Cir. 1994) ("In the *Insular Cases* the Supreme Court decided that the territorial scope of the phrase 'the United States' as used in the Constitution is limited to the states of the Union. . . . It is thus incorrect to extend citizenship to persons living in [the] territories . . . ." (footnote omitted)).

21. Eche v. Holder, 694 F.3d 1026, 1031 (9th Cir. 2012) ("The Naturalization Clause has a geographic limitation: it applies 'throughout the United States.' . . . In . . . one of the *Insular Cases*, the Supreme Court held that the Revenue Clause's identical explicit geographic limitation, 'throughout the United States,' did not [apply to] unincorporated territor[ies] . . . ." (internal citation omitted)).

22. *See* Defendants' Motion to Dismiss, *supra* note 19, at 17 (citing *Eche*, *Rabang*, and *Downes v. Bidwell*, 182 U.S. 244 (1901) (one of the *Insular Cases*) to conclude that the "limitation of the [Citizenship] Clause to the 'United States' does not extend to American Samoa").

23. Tuaua v. United States, 951 F. Supp. 2d 88, 94–98 (D.D.C. 2013).

24. Referring to *Downes v. Bidwell*, 182 U.S. 244 (1901), generally regarded as the most important of the *Insular Cases*. Christina Duffy Burnett, *A Note on the* Insular Cases, *in* FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION, AND THE CONSTITUTION 389, 389 (Christina Duffy Burnett & Burke Marshall eds., 2001).

25. *Tuaua*, 951 F. Supp. 2d at 95.

26. *Id.* (emphasis omitted).

27. *Id.* at 98 (citing Walz v. Tax Comm'n, 397 U.S. 664, 678 (1970) ("It is obviously correct that no one acquires a vested or protected right in violation of the Constitution by long use. . . . Yet an unbroken practice . . . is not something to be lightly cast aside.")).

28. Brief of Amici Curiae Scholars of Constitutional Law and Legal History in Support of Neither Party, Tuaua v. United States, 788 F.3d 300 (D.C. Cir. 2015) (No. 13-5272). Note—despite the title, this particular brief actually helps the plaintiffs-appellants; most of the scholars who contributed to this brief wrote in support of plaintiffs-appellants since it urges the appellate court to "reconsider the district court's mistaken reliance on the *Insular Cases*." *Id.* at 30.

Insular Affairs arguing that non-citizenship status harms American Samoans,[29] by members of Congress and former governors (for Guam, Puerto Rico, and the U.S. Virgin Islands) who explained how birthright citizenship has benefited their residents without harming local norms,[30] and by citizenship scholars who argued that the "non-citizenship national" status was a racially presupposed exception to the common law principle of *jus soli* citizenship.[31]

Former American Samoa Congressman Eni F.H. Faleomavaega and the American Samoan Government jointly filed an intervenor/amicus brief supporting the United States, arguing that the grant of citizenship should be a legislative, rather than a judicial, decision and that the "unbroken" precedent first established by the *Insular Cases* should be upheld.[32] In their appellate brief, the United States maintained that "over a century of jurisprudence affirm[s] the preeminence of Congress in guaranteeing [or denying] the rights of those in the outlying possessions."[33] It also argued that the "[p]laintiffs' argument invites an utterly impractical result" that would leave open the question of when a U.S. territory would "shift from an outlying possession to one whose inhabitants receive automatic

29. Brief of Amicus Curiae David B. Cohen in Support of Plaintiffs-Appellants and Reversal of the Decision Below at 2–3, *Tuaua*, 788 F.3d 300 (No. 13-5272). Those who oppose the grant of birthright citizenship for American Samoans frequently raise the argument that the grant of U.S. citizenship would result in harm to local customs and practices. *See, e.g.*, Brief for Intervenors, or in the Alternative, Amici Curiae the American Samoa Government and Congressman Eni F.H. Faleomavaega at 23–27, *Tuaua*, 788 F.3d 300 (No. 13-5272) [hereinafter Brief for Intervenors]. On the other hand, proponents for granting U.S. citizenship to American Samoans do not find this argument particularly persuasive, much less conclusive, given that U.S. citizenship has been granted to those born in other territories without undermining unique local traditions and customs. *See, e.g.*, Brief of Amici Curiae Certain Members of Congress and Former Governmental Officials in Support of Plaintiffs-Appellants and in Support of Reversal at 2, *Tuaua*, 788 F.3d 300 (No. 13-5272) [hereinafter Brief of Amici Curiae Certain Members of Congress and Former Governmental Officials]; Victor Figueroa, *For Some Samoans, a Fight for U.S. Citizenship*, KCRW: FOR THE CURIOUS (Aug. 6, 2015), http://curious.kcrw.com/2015/08/for-some-samoans-a-fight-for-u-s-citizenship ("In fact, in another U.S. territory, the Northern Mariana Islands, people born in the region have birthright citizenship and it doesn't conflict with its established rules and regulations concerning land ownership, which works in much the same way as in American Samoa.").

30. Brief of Amici Curiae Certain Members of Congress and Former Governmental Officials, *supra* note 29, at 10. For these territories, birthright citizenship was granted by statute rather than through the Fourteenth Amendment. *See id.* at 2.

31. Corrected Brief of Citizenship Scholars as Amici Curiae in Support of Appellants and Urging Reversal at 1, *Tuaua*, 788 F.3d 300 (No. 13-5272) [hereinafter Brief of Citizenship Scholars]. The common law principle of *jus soli*—"the right of the soil"—is that those "born within the dominion and allegiance of the United States are citizens of the United States." *Id.* at 2 (internal quotation marks omitted) (citing United States v. Wong Kim Ark, 169 U.S. 649, 655 (1898)).

32. Brief for Intervenors, *supra* note 29, at 7–8.

33. Brief for Appellees at 26, *Tuaua*, 788 F.3d 300 (No. 13-5272).

birthright citizenship."[34]

The D.C. Circuit Court of Appeals affirmed the lower court's decision on June 5, 2015.[35] Writing for the three-judge panel, Circuit Judge Janice Rogers Brown held that the "*Citizenship Clause* is textually ambiguous as to whether 'in the United States' encompasses [American Samoa]"[36] and that to hold in favor of the appellants would be "impractical and anomalous."[37] Judge Brown stated that "[a]lthough some aspects of the Insular Cases' analysis may now be deemed politically incorrect, the framework remains both applicable and of pragmatic use in assessing the applicability of rights to unincorporated territories [such as American Samoa]."[38] Thus, the D.C. Circuit denied U.S. citizenship to the American Samoan appellants by also relying on the controversial precedent set by the *Insular Cases*, despite acknowledging their widespread criticism.[39]

On February 1, 2016, attorneys for the appellants filed a Petition for Writ of Certiorari,[40] requesting that the Supreme Court review the appellate court's decision.[41] But on June 13, 2016, the Supreme Court denied certiorari,[42] leaving intact the heavily criticized *Insular Cases* as binding precedent that allows for the legal stigmatization of American Samoans.[43]

34. *Id.* at 40.

35. *Tuaua*, 788 F.3d at 312.

36. *Id.* at 302 (emphasis added).

37. *Id.* (citing Reid v. Covert, 354 U.S. 1, 75 (1957) (plurality opinion)). The D.C. Circuit also held that it would be "anomalous" to rule in favor of the appellants in part because democratically elected members of the American Samoan Government were opposed to the granting of U.S. citizenship to American Samoans. *See id.* at 310. But the appellate court failed to acknowledge that the Fourteenth Amendment—the text of the constitutional question at issue—was purposely added to the Constitution after the Civil War "to put th[e] question of citizenship and the rights of citizens . . . beyond the legislative power." Petition for Writ of Certiorari at 2, Tuaua v. United States, 2016 U.S. LEXIS 3881 (June 13, 2016) (No. 15-981) [hereinafter Petition] (quoting Afroyim v. Rusk, 387 U.S. 253, 263 (1967)). Moreover, places in which the majority seeks to deny constitutional rights to individuals should arguably invite more, not less, judicial incorporation. *See* Steve Vladeck, *Three Problems with Judge Brown's Opinion in* Tuaua, JUST SECURITY (June 7, 2015, 2:47 PM), https://www.justsecurity.org/23572/three-problems-tuaua/.

38. *Tuaua*, 788 F.3d at 307.

39. *See supra* notes 28–31, 38 and accompanying text.

40. Petition, *supra* note 37; Frances Kai-Hwa Wang, *American Samoa Citizenship Case Arrives at Supreme Court*, NBC NEWS (Feb. 2, 2016, 7:01 PM), http://www.nbcnews.com/news/asian-america/american-samoa-birthright-citizenship-case-arrives-supreme-court-n510101.

41. *About* Tuaua v. United States, *supra* note 7.

42. *Tuaua*, 788 F.3d 300, *cert. denied*, 2016 U.S. LEXIS 3881 (June 13, 2016).

43. *See* Tal Kopan, *Supreme Court Rejects Effort to Grant American Samoans U.S. Citizenship at Birth*, CNN (June 13, 2016, 11:28 AM) (quoting Steve Vladeck, Professor, Am. Univ. Wash. Coll. of Law), http://www.cnn.com/2016/06/13/politics/american-samoa-citizenship-supreme-court ("The real significance of [the] denial of review has everything to do with the continuing relevance of the Insular cases . . . . Despite wide-ranging criticisms that those rulings reflect an outdated, if not racist, approach

The Supreme Court left unanswered "a constitutional question of exceptional importance: Whether [the United States], notwithstanding the Fourteenth Amendment's explicit guarantee of birthright citizenship to those born within the sovereign territorial limits of the United States, may deny that right by fiat to persons born in a U.S. Territory."[44]

Although the Court denied review of *Tuaua*, this particular question could potentially be raised in a different case in the future.[45] Lower courts are still left with little guidance as to what extent the Constitution should protect the rights of Americans in the territories—other than the widely maligned *Insular Cases*, which indefensibly retain their relevance.

There have been many critics of the *Insular Cases*,[46] including current legal academics[47] and a sitting federal appellate judge.[48] Moreover, in 1957, a plurality of the Court in *Reid v. Covert* agreed with Justice Hugo Black's opinion that "neither the [*Insular*] cases nor their reasoning should be given any further expansion" and that they represented "a very dangerous doctrine [that] if allowed to flourish would destroy the benefit of a written Constitution and undermine the basis of our Government."[49] And the most recent Supreme Court decision to cite to the *Insular Cases*, *Boumediene v. Bush*,[50] did so to extend constitutional rights to those in a United States territory,[51] not deny them.[52]

to constitutional protections in the territories, the court of appeals extended their reasoning to also apply to birthright citizenship, and the Supreme Court today left that ruling intact.").

44. Petition, *supra* note 37, at 15.

45. *See* Leslie Berestein Rojas, *American Samoans Weigh Options After High Court Declines Citizenship Case*, 89.3 KPCC (June 15, 2016), http://www.scpr.org/news/2016/06/15/61644/american-samoans-weigh-options-after-high-court-de/.

46. The *Insular Cases* themselves had many dissenting opinions. *Downes v. Bidwell*, generally considered the most important of the *Insular Cases*, was so disputed that it produced five separate opinions and failed to garner a majority. Christina Duffy Burnett & Burke Marshall, *Between the Foreign and the Domestic: The Doctrine of Territorial Incorporation, Invented and Reinvented*, *in* FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION, AND THE CONSTITUTION, *supra* note 24 at 7.

47. *See* Brief of Amici Curiae Scholars of Constitutional Law and Legal History in Support of Neither Party, *supra* note 28 and accompanying text.

48. Juan R. Torruella, *The* Insular Cases*: The Establishment of a Regime of Political Apartheid*, 29 U. PA. J. INT'L L. 283, 286 (2007) ("[T]he *Insular Cases* were wrongly decided because, at the time of their ruling, they squarely contradicted long-standing constitutional precedent. Their skewed outcome was strongly influenced by racially motivated biases and by colonial governance theories that were contrary to American territorial practice and experience.").

49. Reid v. Covert, 354 U.S. 1, 14 (1957) (plurality opinion).

50. Boumediene v. Bush, 553 U.S. 723 (2008).

51. The *Boumediene* Court considered Guantanamo Bay, Cuba a legal equivalent of a U.S. sovereign territory since the United States has "*de facto* sovereignty" (in other words, practical control) over that territory, despite Cuba maintaining "*de jure* sovereignty." *Id.* at 755.

52. *See id.* at 771 (holding that a non-citizen enemy combatant in Guantanamo Bay, Cuba, a

So why are the *Insular Cases* still generally considered good law?[53] And why are they still used as primary authority to deny birthright citizenship to American Samoans?[54]

This Note will reexamine the *Insular Cases* to join the legal academic community[55] in their critique of these cases and challenge the "unbroken practice" of denying American Samoans birthright citizenship. It will challenge the contention that granting birthright citizenship would "invite[] an utterly impractical result"[56] at least as it relates to other U.S. territories and former territories—and most notably the Philippines, a former U.S. territory.[57] This Note will argue for a judicial clarification of the *Insular Cases* and propose a judicial solution so as to reconcile the plain text of the Citizenship Clause with prior precedent, particularly as it relates to the Philippines during the U.S. territorial period (1898–1946). Ultimately, this Note argues that the Court can, and thus perhaps should, distinguish American Samoa, a territory the U.S. has never intended to relinquish, from the Philippines, a territory the U.S. intended to hold only temporarily. By proposing a pragmatic judicial solution that clarifies—yet still conforms to—precedent, the Court could clarify the shaky precedent of the *Insular Cases*, grant U.S. citizenship to American Samoans, and resolve the potential issue that such a grant of citizenship would necessitate "impracticable and anomalous" consequences. Although the Court denied clarifying the doctrine of the *Insular Cases* in *Tuaua*, this Note proposes a judicial clarification that could allay ex post concerns in a future Court decision on the same or similar legal issue, should the Court ultimately

territory with *de facto* U.S. sovereignty, had a constitutional right of habeas corpus). *See also* Andrew Kent, Boumediene, Munaf*, and the Supreme Court's Misreading of the Insular Cases*, 97 IOWA L. REV. 101, 103 (2011) ("In 2008, the Court relied substantially on a few Insular Cases to sketch a vision of a global Constitution protecting rights around the world, even for military enemies. But in so relying on the Insular Cases, the Court . . . erred. Little that it wrote about the Insular Cases was correct . . . .").

53. Pedro A. Malavet, *The Inconvenience of a "Constitution [That] Follows the Flag . . . But Doesn't Quite Catch Up With It": From* Downes v. Bidwell *to* Boumediene v. Bush, 80 MISS. L.J. 181, 195 (2010) ("Though they disagree as to whether those cases apply to the Guantánamo detentions, all members of the current Supreme Court clearly agree that the Insular Cases are still good law.").

54. Tuaua v. United States, 951 F. Supp. 2d 88, 95–98 (D.D.C. 2013).

55. *See* Brief of Amici Curiae Scholars of Constitutional Law and Legal History in Support of Neither Party, *supra* note 28 and accompanying text.

56. *See supra* note 34 and accompanying text.

57. The first question asked by the three-judge appellate panel during the February 9, 2015 oral arguments was "What about all the cases dealing with the Philippines in various circuits?" Oral Argument at 1:12, Tuaua v. United States, 788 F.3d 300 (D.C. Cir. 2015), https://www.courtlistener.com/audio/11180/leneuoti-tuaua-v-united-states/. This Note proposes a pragmatic judicial solution, discussed *infra* Part II, that would preserve the holdings of such cases while also allowing for the American Samoan appellants to be granted U.S. citizenship under the Citizenship Clause of the Fourteenth Amendment.

decide to redress the legal stigmatization of American Samoans.

Part I of this Note examines the *Insular Cases*, the doctrine of territorial incorporation, and how this series of Supreme Court decisions were unconstitutional[58] innovations made by a Court under pressure to legitimize U.S. imperialistic ambitions. Part II will discuss the effect that granting American Samoans birthright citizenship in accordance with the Citizenship Clause of the Fourteenth Amendment might have on other U.S. territories, specifically arguing that a judicial clarification of the doctrine would not be impracticable because it could allow American Samoans to be granted Fourteenth Amendment birthright citizenship without also granting it to Filipinos born in the Philippines during the territorial period. Part III briefly concludes by discussing possible solutions to redress the current legal stigmatization of American Samoan non-citizen nationals and explains why the grant of birthright citizenship should be a judicial, rather than a legislative, decision.

I. BACKGROUND

A. THE *INSULAR CASES* AND THE DOCTRINE OF TERRITORIAL INCORPORATION

1. The Historical Context of the *Insular Cases*

The *Insular*[59] *Cases* were decided at the turn of the twentieth century during the era of America's imperialistic expansion.[60] As Christina Duffy Burnett has noted, these cases "introduced and developed the 'doctrine of territorial incorporation,' and with it the category of 'unincorporated territories,' which shaped and continue to govern the status of territories taken by the United States in 1898 and thereafter."[61] Although none of the *Insular Cases* directly involved American Samoa, the legal doctrine that

58. The meaning of "unconstitutional" here is in the sense that the Court broke from established precedent to produce a series of holdings that allowed the federal government to exercise sovereignty over newly acquired territories while allowing Congress to determine to what extent the Constitution would apply. Part I.A.2 discusses this further.

59. The word "insular" is derived from the Latin root for "island," and in this context "insular" means "of, [or] relating to, . . . an island." *Insular*, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/insular (last visited Aug. 4, 2016). The cases are known as the "*Insular Cases*" because they mostly involved the United States' newly annexed island territories, acquired as a result of the nation's victory in the Spanish-American War of 1898. Kent, *supra* note 52, at 107–08.

60. BARTHOLOMEW H. SPARROW, THE *INSULAR CASES* AND THE EMERGENCE OF AMERICAN EMPIRE 78 (2006) ("[M]any . . . newspapers and political commentators[] [wondered] if the Supreme Court would uphold the 'McKinley policy of imperialism.'").

61. Burnett, *supra* note 24, at 389.

developed through the *Insular Cases* set precedent for how the United States was to treat all of its insular territories, including American Samoa, which became a United States island territory in 1900.[62] Legal historians have differing opinions as to exactly how many cases should be comprised in the series after it began in 1901,[63] but nearly all agree that the most important case in the series is *Downes v. Bidwell*, decided in 1901, ("because it produced the most detailed exposition of Justice White's doctrine of [territorial] incorporation")[64] and that the series culminates in *Balzac v. Porto Rico*, decided in 1922 (because it reaffirmed and extended the doctrine of territorial incorporation through a majority opinion).[65]

Before *Downes v. Bidwell* was decided in 1901, the prevailing assumption was that all territories acquired by the United States were to proceed on an eventual path toward statehood.[66] But the newly acquired territories from the Spanish-American War in 1898—Guam, Puerto Rico, and the Philippines—were different from almost all other prior acquisitions in that these were distant non-contiguous territories, considered "unamenable to colonization by settlement on the part of Anglo-Americans," and, most significantly, they were densely populated by alien peoples widely thought to be racially and culturally inferior to the Anglo-Americans on the continent.[67] Furthermore, unlike in Hawai'i, in which U.S. citizens were a large and powerful group on the islands even prior to annexation, the newly annexed territories from Spain had "almost no United States citizens residing therein when the change in sovereignty took place."[68] Since the territories were likely to "remain non-Anglo-Saxon indefinitely," most Americans thought that these territories, unlike prior

62. ROMÁN, *supra* note 5, at 187.

63. EFRÉN RIVERA RAMOS, THE LEGAL CONSTRUCTION OF IDENTITY: THE JUDICIAL AND SOCIAL LEGACY OF AMERICAN COLONIALISM IN PUERTO RICO 74–75 (2001). Ramos explains that the *Insular Cases* were originally a series of nine decisions rendered in 1901, but that some scholars have also included in the series another set of thirteen cases decided from 1903 to 1914, as well as the 1922 decision, *Balzac v. Porto Rico*, the "culmination of the series," at least as it relates to the doctrine of territorial incorporation. Ramos lists all twenty-three of the case names at 74–75, nn.12–14.

64. Burnett, *supra* note 46, at 7.

65. Burnett, *supra* note 24, at 389.

66. RAMOS, *supra* note 63, at 73; KAL RAUSTIALA, DOES THE CONSTITUTION FOLLOW THE FLAG?: THE EVOLUTION OF TERRITORIALITY IN AMERICAN LAW 34 (2009).

67. RAMOS, *supra* note 63, at 73–74. *See also id.* at 36–37 ("Th[e] 'right to expand' was . . . predicated on a very strong belief in the principle of the inequality of peoples. . . . [T]he White, Anglo-Saxon race was the privileged pole in the discourse of power; the 'others,' . . . were to be on the receiving end of the exercise of that power."). It is also relevant to note that at the time, Social Darwinism was a prevalent theory that offered further justification for the United States' right to rule over "weaker" powers and races. *Id.* at 38.

68. Torruella, *supra* note 48, at 289.

territorial acquisitions, should not be set on the path toward eventual statehood and full incorporation into the United States.[69]

Congress, the academic community, the press, and members of the public debated on what to do with the newly acquired territories and whether it was constitutionally legitimate to hold on to them if they were not to be granted eventual statehood.[70] "Anti-imperialists" argued that the newly acquired territories should be relinquished, given that a colonial policy would unconstitutionally lead to two separate classes of Americans, a racially inferior class in the colonies and a superior class of mostly white elites on the continent, returning the nation to the dualities of the *Dred Scott* era.[71] "Imperialists," on the other hand, argued that the federal government could hold territories as "permanent dependencies," given that other European imperial powers were doing so in their respective empires.[72] Ultimately, the "imperialists" won the political debate with imperialist President McKinley winning re-election in 1900 over anti-imperialist William Jennings Bryan and with the passage of the Foraker Act in 1900 in Congress, which replaced the military government in Puerto Rico with a civilian one, under the assumption that the United States could hold on to territories without "steering them toward statehood."[73]

To imperialists, keeping the newly acquired territories indefinitely as "permanent dependencies" meant that Congress could continue to exercise broad plenary powers over the territories pursuant to the Territorial Clause[74] of the Constitution and the "inherent powers of a national sovereign government."[75] But legal academics debated the extent of the President's and Congress's power in the territories and to what extent their powers could be constrained by the Constitution.[76] Some argued that there were no constitutional limitations to the exercise of plenary powers in the territories; some argued that the Constitution limited all government power; and some took an "in-between" position by arguing that although Congress's power was less limited in the territories, "'fundamental'

69. RAUSTIALA, *supra* note 66, at 77.

70. *See* RAMOS, *supra* note 63, at 39.

71. *See id.* at 40.

72. *Id.* at 74.

73. *Id.*; SPARROW, *supra* note 60, at 108–09.

74. *See* U.S. CONST. art. IV, § 3, cl. 2. The Territorial Clause states, in relevant part: "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . . ." *Id.*

75. RAMOS, *supra* note 63, at 73 (quoting ARNOLD H. LEIBOWITZ, DEFINING STATUS: A COMPREHENSIVE ANALYSIS OF UNITED STATES TERRITORIAL RELATIONS 10–16 (1989)).

76. *Id.* at 75.

provisions of the Constitution" still applied.[77] This question, summarily posed as "Does the Constitution follow the flag?,"[78] inevitably made its way to the Court, which first attempted an answer in 1901.[79]

2. From *De Lima* to *Downes*: An Unconstitutional[80] Innovation

The first of the *Insular Cases* to be decided[81] was *De Lima v. Bidwell*,[82] which addressed the question of whether sugar imported from Puerto Rico to New York could be subject to tariffs under the U.S. Tariff Act of 1897, which imposed duties "upon all articles imported from foreign countries."[83] Mr. Bidwell, the customs collector of the port of New York, viewed Puerto Rico as a "foreign country" within the meaning of the Tariff Act and taxed the sugar import accordingly "during the autumn of 1899."[84] The petitioner argued that Puerto Rico was not a "foreign country" given that Puerto Rico had become a United States territory after the April 11, 1899 ratification of the treaty with Spain and that the statutory imposition of taxes on goods from Puerto Rico violated the Uniformity Clause[85] of the Constitution.[86] Justice Brown, writing for the majority in a 5-4 decision, sided with the petitioner and held that Puerto Rico was not a "foreign country," which as defined by Chief Justice Marshall and Justice Story,

77. *Id.* Ramos cites a list of law review articles written from 1898–1899 that argue these points in nn.15–17. As this Note will discuss further, the Court ultimately adopted the "in-between" position.

78. This question was answered in opposite ways by imperialists and anti-imperialists. Anti-imperialist presidential candidate William Jennings Bryan proclaimed that the Constitution "followed the flag" during his campaign, and that wherever the United States extended its sovereignty, constitutional protections followed. The Constitution followed the flag because territories would eventually be granted statehood with full constitutional protections. *See* SPARROW, *supra* note 60, at 2–3. On the other hand, imperialists did not want the United States' overseas expansion to be limited in any way, even by the Constitution, and if territories were never to become states, the Constitution would not "follow the flag." Morrison, *supra* note 6, at 97, 103.

79. *See* RAUSTIALA, *supra* note 66, at 80. *See also* Malavet, *supra* note 53, at 181 n.1 (explaining that when confused reporters asked imperialist Secretary of War Elihu Root how the Justices had replied to the question, "Does the Constitution follow the flag?" in 1901, Root responded by stating that the "Constitution . . . follows the flag . . . but doesn't quite catch up with it"; this response summed up the Court's conclusion that the federal government could hold onto the insular territories indefinitely without granting them statehood or full incorporation into the Union).

80. *See supra* note 58.

81. Seven of the first group of nine *Insular Cases* were decided on the same day: on May 27, 1901, beginning with *De Lima v. Bidwell*. RAMOS, *supra* note 63, at 76.

82. De Lima v. Bidwell, 182 U.S. 1 (1901).

83. *Id.* at 180.

84. RAMOS, *supra* note 63, at 76. This date is significant since it was before the Foraker Act was passed in 1900, which differentiates the case from *Downes v. Bidwell*, which involved matters after the Foraker Act was passed. *Id.* at 79.

85. U.S. CONST. art. I, § 8, cl. 1. The Uniformity Clause states, in relevant part: "[A]ll Duties . . . and Excises shall be uniform throughout the United States." *Id.*

86. RAMOS, *supra* note 63, at 76–77 (citing *De Lima*, 182 U.S. at 180).

was "one exclusively within the sovereignty of a foreign nation and without the sovereignty of the United States."[87] To Justice Brown, the "mere cession and possession" of the territory "had the effect of changing" a territory's status "from foreign to domestic," at least for *De Lima* and the first few *Insular Cases*.[88]

In *Downes v. Bidwell*[89] however, decided on the same day as *De Lima*, Justice Brown wrote "the conclusion and judgment of the court"[90]—despite the fact that no other Justices joined in his opinion[91]—and held that Puerto Rico was "a territory appurtenant and belonging to the United States, but not a part of the United States within the revenue clauses of the Constitution."[92] Like in *De Lima*, *Downes* involved a question of whether imported goods from Puerto Rico—in this case, oranges rather than sugar—could be subject to tariffs at the port of New York. But the key difference was that in *Downes*, the tariffs were imposed on the imported goods in November 1900, after Congress had passed the Foraker Act in April 1900, which included an express provision that imposed duties on products imported to the continental United States from Puerto Rico.[93] Thus, the question became whether the Foraker Act was constitutional in light of the Uniformity Clause, or in other words, whether the tariffs that would otherwise have violated the Uniformity Clause were now constitutionally valid since Congress had expressly imposed them through the Foraker Act.

"[U]nwilling to throw water on the imperialist fires burning in the nation," the Supreme Court upheld the constitutionality of the Foraker Act by a highly fractured plurality vote in which five separate opinions were written, with Chief Justice Fuller's dissent garnering the most votes.[94] In

87. *Id.* at 77 (first citing *De Lima*, 182 U.S. at 180 (Brown, J.); then citing The Eliza, 8 F. Cas. 455 (C.C. D. Mass. 1813) (No. 4.346) (Story, J.); then citing Taber v. United States, 23 F. Cas. 611 (C.C. D. Mass. 1839) (No. 13.722) (Story, J.); and then citing The Adventure, 1 F. Cas. 202 (C.C. D. Va. 1812) (No. 93) (Marshall, J.)).

88. *Id.* The reasoning in *De Lima* was consistent with the reasoning in *Goetze v. United States*, 182 U.S. 221 (1901), *Grossman v. United States*, 182 U.S. 221 (1901), *Dooley v. United States*, 182 U.S. 222 (1901), and *Armstrong v. United States*, 182 U.S. 243 (1901). *See* RAMOS, *supra* note 63, at 78–79.

89. Downes v. Bidwell, 182 U.S. 244 (1901).

90. *Id.* at 247.

91. Although no Justices joined in his opinion, a plurality agreed with the specific holding that the phrase "United States" did not necessarily include the territories, and two separate dissenting opinions disagreed. *See* Burnett & Marshall, *supra* note 46, at 7–8.

92. *Downes*, 182 U.S. at 287. The Uniformity Clause is itself a part of one of the revenue clauses of the Constitution. *See id.* at 249.

93. *Id.* at 247.

94. RAUSTIALA, *supra* note 66, at 81 (quoting T. ALEXANDER ALEINIKOFF, SEMBLANCES OF

what Judge Juan R. Torruella describes as "a strict constructionist's worst nightmare,"[95] Justice Brown concluded that the "broader question" of whether the provisions of the Constitution—including the Uniformity Clause—"extend[ed]" to the territories was answered "not in the Constitution itself but . . . 'in the nature of the government created by that instrument, in the opinion of its contemporaries, in the practical construction put upon it by Congress and in the decisions of this court.'"[96] Thus, to Justice Brown, the Uniformity Clause did not apply in Puerto Rico since Congress, in its "practical interpretation" of the Constitution, chose not to have it "extend" to the territory by passing the presumptively constitutional Foraker Act.[97]

Justice Brown argued that constitutional provisions applied to the territories "only when and so far as Congress shall so direct" since, unlike the States and the District of Columbia,[98] in which the Constitution applied in full,[99] the territories were not a part of "the United States."[100] Justice Brown arrived at this premise in part by interpreting the Thirteenth Amendment's prohibition of slavery "within the United States, or any place subject to their jurisdiction"[101] as a suggestion that there were places under the jurisdiction of the United States—in other words, the territories—that were not "within the United States."[102] In doing so, Justice Brown summarily dismissed Chief Justice Taney's prior opinion that the Constitution applied throughout the territories in *Dred Scott v. Sanford*[103]

SOVEREIGNTY: THE CONSTITUTION, THE STATE, AND AMERICAN CITIZENSHIP 81 (2002)); Torruella, *supra* note 48, at 306.

95. Torruella, *supra* note 48, at 306.

96. *Id.* (quoting *Downes*, 182 U.S. at 249).

97. *See Downes*, 182 U.S. at 278–79 ("[T]he practical interpretation put by Congress upon the Constitution has been long continued and uniform to the effect that the Constitution is applicable to territories acquired by purchase or conquest, only when and so far as Congress shall so direct.").

98. *Id.* Justice Brown makes an exception for the District of Columbia as being a part of the United States, since it was originally a part of the State of Maryland and thus "within the United States." *Id.* at 260–61.

99. Or at least, the Constitution is not limited in the States to the extent that it is in the territories. Christina Duffy Burnett points out that the Constitution does not apply in full even in the States, since not all constitutional provisions are incorporated. *See* Christina Duffy Burnett, *A Convenient Constitution? Extraterritoriality After* Boumediene, 109 COLUM. L. REV. 973, 976 (2009).

100. *Downes*, 182 U.S. at 278–79.

101. U.S. CONST. amend. XIII, § 1. The Thirteenth Amendment prohibits slavery "within the United States, or any place subject to their jurisdiction." *Id.*

102. *Downes*, 182 U.S. at 251.

103. Dred Scott v. Sanford, 60 U.S. 393 (1857). *See, e.g.*, *id.* at 450 ("And this prohibition is not confined to the States, but the words are general, and extend to the whole territory over which the Constitution gives it power to legislate, including those portions of it remaining under Territorial Government, as well as that covered by States.").

as dictum.[104] Justice Brown then compared the text of the Thirteenth Amendment to the Citizenship Clause of the Fourteenth Amendment[105] to explain in dicta that persons born in the territories were born "subject to their jurisdiction," but not "in the United States,"[106] ignoring the Court's prior precedents in the *Slaughter House Cases*[107] and in *Wong Kim Ark v. United States*.[108]

By upholding the Foraker Act, the Court essentially held that the Constitution applied to the territories only to the extent granted by Congress and with Congress's broad plenary powers over the territories limited only by "fundamental limitations in favor of personal rights."[109] Thus, as Judge Torruella explains, in a "five-to-four plurality, in which a dissenting opinion garnered the most votes, and against all precedent, the Supreme Court sanctioned a colonial regime that has existed for over one hundred years to the present day."[110] Kal Raustiala explains further that when *Downes* was decided, it was "widely seen as one that bent principle in favor of political expediency" in order to legitimize the nation's imperialistic ambitions.[111]

3. The Development of the Doctrine of Territorial Incorporation

In an attempt to clarify Justice Brown's seemingly inconsistent positions between *De Lima* and *Downes*, Justice White stated in his concurrence that "whilst in an international sense Porto Rico was not a foreign country, . . . it was foreign to the United States in a domestic sense, because the island had not been incorporated into the United States, but

104. SPARROW, *supra* note 60, at 88. *See also Downes*, 182 U.S. at 274 ("It is sufficient to say that the country did not acquiesce in the opinion, and that the civil war, which shortly thereafter followed, produced such changes in judicial, as well as public sentiment, as to seriously impair the authority of this case.").

105. *See supra* note 16 for the full text of U.S. CONST. amend. XIV, § 1, cl. 1.

106. Morrison, *supra* note 6, at 100–01 (citing *Downes*, 182 U.S. at 251).

107. Chief Justice Fuller cited the *Slaughter House Cases*, 83 U.S. 36 (1873), in his dissent, stating: "[T]his court naturally held, in the *Slaughter House Cases*, that the United States included the District and the territories." *Downes*, 182 U.S. 244, 357 (Fuller, J., dissenting) (citation omitted). Justice Brown did not mention the *Slaughter House Cases* in his solo opinion.

108. United States v. Wong Kim Ark, 196 U.S. 649, 693 (1898) ("The Fourteenth Amendment affirms the ancient and fundamental rule of citizenship by birth within the territory, in the allegiance and under the protection of the country . . . ."). For more detailed arguments as to why birth within the territories is legally equivalent to birth "within the United States," see Brief of Citizenship Scholars, *supra* note 31, at 13–15.

109. RAMOS, *supra* note 63, at 80 (quoting *Downes*, 182 U.S. at 268). Although this quote is from Justice Brown's solo opinion, the concurring opinions also held that, at minimum, "fundamental" limitations would apply. *Downes*, 182 U.S. at 291 (White, J., concurring). *See infra* note 117.

110. Torruella, *supra* note 48, at 306.

111. RAUSTIALA, *supra* note 66, at 81.

was merely appurtenant thereto as a possession."[112] Justice White's concurring opinion, joined by Justice Shiras and Justice McKenna in what eventually became the "unquestioned position of the [*Downes*] Court,"[113] expounded upon the doctrine of "territorial incorporation," the idea that whether particular constitutional provisions applied depended on whether a territory was "incorporated."[114] To Justice White, "incorporated territories" were an "integral part of the United States,"[115] in which constitutional provisions applied as they did in the States.[116] On the other hand, unincorporated territories were "foreign . . . in a domestic sense," in which constitutional provisions ostensibly applied, but only to a much lesser extent.[117] The determination as to when a territory was to be "incorporated" was solely up to Congress.[118] Since Congress did not assent, expressly or implicitly, to "incorporate" Puerto Rico into the United States, Puerto Rico was an "unincorporated territory" in which most constitutional provisions, including the Uniformity Clause, did not apply.[119]

The doctrine of territorial incorporation developed over time and gained greater acceptance in subsequent cases. In 1904, in *Dorr v. United States*,[120] the Court finally embraced Justice White's doctrine of territorial incorporation in a majority opinion.[121] In *Dorr*, the Court held that the constitutional right to a jury trial was not a "fundamental right" and thus did not extend to the Philippines, an "unincorporated territory" of the United States.[122] Since Congress did not expressly or implicitly "incorporate" the Philippines into the United States, only "fundamental" rights, and those rights Congress established for the Philippines by "affirmative legislation," were required to apply in the unincorporated territory of the Philippines.[123] The Court did not expressly define "fundamental rights," but it implied that certain rights, such as the right to a jury trial, were not fundamental and should be withheld if "the result may

112. *Downes*, 182 U.S. at 341–42 (White, J., concurring).

113. RAMOS, *supra* note 63, at 80.

114. Torruella, *supra* note 48, at 308.

115. *Downes*, 182 U.S. at 299, 312 (White, J., concurring).

116. *See id.* at 341–42.

117. *Id.* at 290–91, 341 ("Whilst, therefore, there is no express or implied limitation on Congress in exercising its power to create local governments for any and all of the territories . . . this does not suggest that every express limitation of the Constitution which is applicable has not force . . . .").

118. *Id.* at 312 ("[T]he determination of when such [a] blessing [of incorporation and the eventual grant of statehood] is to be bestowed is wholly a political question . . . .").

119. *See id.* at 340.

120. Dorr v. United States, 195 U.S. 138 (1904).

121. RAMOS, *supra* note 63, at 87.

122. *Dorr*, 195 U.S. at 148–49.

123. *Id.* at 148.

be to work injustice and provoke disturbance rather than to aid the orderly administration of justice."[124] Since the Court felt that trial by jury in a "territory peopled by savages" would be impracticable, the Court viewed this right to be non-fundamental, and thus not applicable in the Philippines.[125]

In 1922, in *Balzac v. Porto Rico*,[126] the Court unanimously affirmed the doctrine of territorial incorporation and further clarified the requirements for "incorporation."[127] In *Balzac*, despite the statutory grant of citizenship to all those born in Puerto Rico through the 1917 Jones Act,[128] Puerto Rico was still an "unincorporated territory" and would remain so unless Congress acted "deliberately, and with a clear declaration of purpose" to incorporate Puerto Rico into the United States.[129] Since the 1917 Jones Act did not expressly include the term "incorporate," Puerto Rico remained an unincorporated territory, despite the fact that Puerto Ricans were granted U.S. citizenship.[130]

The *Balzac* Court held that non-fundamental constitutional provisions—here, the right to a jury trial—would not apply in unincorporated territories.[131] Writing for the Court, Chief Justice Taft upheld the territoriality of the law by holding: "It is locality that is determinative of the application of the Constitution, in such matters as judicial procedure, and not the status of the people who live in it."[132] Thus, since Puerto Rico was an "unincorporated territory," not even the grant of U.S. citizenship would allow Puerto Ricans the ability to exercise the full range of their constitutional rights in Puerto Rico.

In *Balzac*, Taft sanctioned the racially biased[133] denial of constitutional rights to those in the territories by holding that Puerto

124. *Id.*

125. *Id.*

126. Balzac v. Porto Rico, 258 U.S. 298 (1922). It is relevant to note that by 1922, Chief Justice Taft, former imperialist President and former colonial Governor of the Philippines, commanded considerable influence on the Court, and Justice Harlan, the lone dissenter in *Dorr*, was no longer serving. *See* Torruella, *supra* note 48, at 326 (describing how "[i]n *Balzac* Taft simply was blinded by his desire to reach a pre-determined outcome").

127. *See* Burnett, *supra* note 24, at 389.

128. Officially known as the Organic Act of Porto Rico of March 2, 1917, c. 145, 39 Stat. 951.

129. *Balzac*, 258 U.S. at 311.

130. Morrison, *supra* note 6, at 105.

131. *Balzac*, 258 U.S. at 309–10, 312.

132. *Id.* at 309.

133. *See* RAMOS, *supra* note 63, at 37 ("[N]on-White peoples and non-Europeans, as well as those of mixed races . . . were [thought to be] the barbarous, the stagnant, the irrational, the indolent, the disorderly, and the undeserving, more fit to be governed than to govern.").

Ricans, like the Filipinos in *Dorr*, were not suitable as jurors, despite the fact that Puerto Rico had been conducting civil and criminal jury trials in the U.S. District Court for Puerto Rico for twenty-three years, since 1899.[134] Given that the *Balzac* Court did not offer any clarification as to what makes a constitutional right "fundamental," and thus applicable in an unincorporated territory, other than the notion that impracticable rights were *ipso facto* non-fundamental, the lasting aspect of the *Insular Cases* and the doctrine of territorial incorporation has been that "Congress could draw intraterritorial distinctions between one territory and another"[135] and so arbitrarily choose which rights to extend (or deny) based on what might be considered "impracticable," and in some cases even "inconvenient."[136]

By normatively concluding that certain territories under the sovereignty of the United States could be classified as "unincorporated," the Court declared it constitutionally legitimate to treat such "unincorporated territories"—and their peoples—as those with lesser status than the incorporated States and peoples "in the United States."[137] Despite the fact that both Justice Brown and Justice White supported their positions in *Downes* by intimating that such rules for governing the insular territories were justifiable perhaps only as temporary and pragmatic exceptions to the supremacy of the Constitution,[138] these "temporary" rules have remained intact for over a century.[139] The doctrine of territorial incorporation, which started off as shaky and uncertain precedent that was later reaffirmed by an imperialistic and racially biased Court in *Balzac*, is now largely forgotten[140] and even misinterpreted,[141] but still remains "good law."[142]

134. Torruella, *supra* note 48, at 325–27.

135. RAUSTIALA, *supra* note 66, at 84.

136. *See* Burnett, *supra* note 99, at 975–76 (explaining how the Court applied the "impracticable and anomalous" test developed from *Reid v. Covert*, 354 U.S. 1 (1957), *Johnson v. Eisentrager*, 339 U.S. 763 (1950), and the *Insular Cases* to evaluate whether "fundamental" constitutional rights would apply in "unincorporated" territories).

137. RAMOS, *supra* note 63, at 126–27. See *id.* for a more detailed description of the Court's "power of naming" and how normatively labeling the territories as "unincorporated" constituted "legitimation."

138. *See* Downes v. Bidwell, 182 U.S. 244, 287 (1901) (Brown, J., solo opinion) ("If those possessions are inhabited by alien races, differing from us in . . . modes of thought, the administration of government and justice, according to Anglo-Saxon principles, may *for a time* be impossible; and the question at once arises whether large concessions ought not to be made *for a time* . . . ." (emphasis added)); *id.* at 344 (White, J., concurring opinion) ("[T]he presumption necessarily must be that that department . . . will be faithful to its duty under the Constitution, and, therefore, when the unfitness of particular territory for incorporation is demonstrated the occupation will terminate.").

139. Malavet, *supra* note 53, at 230–31.

140. *See* Burnett & Marshall, *supra* note 46, at 1. *See also* Kent, *supra* note 52, at 110 ("[T]oday the Insular Cases are despised, dimly understood, or entirely unknown. Most who peruse *Boumediene* have likely never heard of the Insular Cases.").

The fact that the *Insular Cases* have not been overturned has preserved the normative mindset that it is constitutionally legitimate to treat Americans in the territories as "lesser than" those in the incorporated States and even deny them certain constitutional rights, including citizenship.[143]

4. Unincorporated Territories and the "Non-Citizen" Status of Their Peoples

One of the *Insular Cases*, *Gonzales v. Williams*,[144] decided a few months before *Dorr* in 1904, grappled with the question of what status should be accorded to people from the "unincorporated territories,"[145] given the presumption earlier in *Downes* that "unincorporated territories" were not "part of the United States" within the meaning of the revenue clauses of the Constitution. In *Gonzales*, Isabella Gonzales, a Puerto Rican woman who was a native inhabitant of Puerto Rico when it was acquired in 1899, attempted to enter New York in 1902 but was denied entry.[146] She was detained by the Commissioner of Immigration at the Port of New York under the 1891 Immigration Act, given that he considered her to be an "alien immigrant" "likely to become a public charge."[147] The *Gonzales* Court disagreed with the detention and ordered her release, holding that Gonzales was not an "alien immigrant" within the meaning of the 1891 Act since the "citizens of Porto Rico" owed "permanent allegiance" to the United States and "live[d] in the peace of the dominion of the United States."[148] But the Court chose not to discuss "the contention of Gonzales' counsel that the cession of Porto Rico accomplished the naturalization of its people; or that of Commissioner Degetau . . . that a citizen of Porto Rico, under the act of 1900, is necessarily a citizen of the United States."[149] In

141. *See* Kent, *supra* note 52, at 103 ("In 2008, the Court relied substantially on a few Insular Cases to sketch a vision of a global Constitution protecting rights around the world, even for military enemies. But . . . the Court in 2008 erred. Little that it wrote about the Insular Cases was correct—as to law or fact.").

142. *See* Malavet, *supra* note 53, at 195 and accompanying text.

143. *See* USCIS Report, *supra* note 7, at 12–15 (citing the *Insular Cases* to explain how the term "noncitizen national" exists and that "[n]oncitizen nationals of the United States do not enjoy all of the rights afforded to U.S. citizens").

144. Gonzales v. Williams, 192 U.S. 1 (1904).

145. The term "unincorporated territories" as used in this Note refers to the statuses of Puerto Rico, the Philippines during the territorial period (1898–1948), American Samoa, Guam, and other island territories of the United States that have not attained statehood status, yet still remain under the complete sovereignty of the United States.

146. *Gonzales*, 192 U.S. at 7.

147. *Id.* at 7–8.

148. *Id.* at 13.

149. *Id.* at 12.

ruling narrowly, the Court avoided the greater question as to Gonzales's status, consistent with the normative mindset of the Court to find a compromise solution so as to allow an imperialist regime to expand by treating the territories and those within them as "foreign in a domestic sense."[150]

As a practical matter, the narrow holding of the *Gonzales* Court "gave Congress [the] power" to "withhold citizenship from Puerto Ricans."[151] Gonzales's counsel, Frederic Coudert, "perhaps sensing—correctly—that his primary argument [that Gonzales was a U.S. citizen] would not persuade the Court," argued that Puerto Ricans—who were certainly not "American [a]liens"—should at least be afforded an intermediate status "somewhere between citizenship and alienage."[152] Although Coudert won perhaps the best possible outcome for Gonzales at that time by appealing to a racist and imperialistic Court looking for a solution that allowed for "territorial expansion and colonial governance,"[153] the compromise status between citizenship and alienage of "non-citizen national" has since developed to normatively allow for the second-class treatment of certain Americans born in unincorporated territories.[154] The federal government now uses the term "non-citizen national" to treat certain Americans neither as U.S. citizens nor as "foreigners," but essentially as those with statuses similar to that of inferior colonial subjects.[155]

B. THE ENDURING LEGACY OF THE *INSULAR CASES* FOR AMERICA'S "NON-CITIZEN NATIONALS"

The United States' primary argument as the defendant-appellee in *Tuaua* was that the treatment of unincorporated territories and their peoples as "lesser than" those in the States can—and thus should—legitimately continue.[156] But just because the Court embraced and developed an

150. *See* RAMOS, *supra* note 63, at 82, 93, 140.

151. Christina Duffy Burnett, *"They Say I Am Not an American…": The Noncitizen National and the Law of American Empire*, 48 VA. J. INT'L L. 659, 713 (2008).

152. Brief of Frederic R. Coudert, Jr., for Appellant at 4, 23, *Gonzales*, 192 U.S. 1 (No. 225); Burnett, *supra* note 151, at 672.

153. Burnett, *supra* note 151, at 713 (emphasis omitted). By allowing Congress to decide whether to grant or deny citizenship to those in an annexed territory, the Court established the United States as an empire and earned it international recognition as an equal to contemporary European empires with their second-class colonial subjects. *Id.*

154. The State Department first started using the term "national" in 1906 in reference to non-citizens owing allegiance to the United States. *Id.* at 715 n.198. The term is now widely used in government documents and reports.

155. *See* USCIS Report, *supra* note 7, at 12–15.

156. *See* Brief for Appellees, *supra* note 33, at 26 (referring to the "unbroken string of court

incorrectly decided precedent in the past does not make the "fruits of the poisonous tree" any less poisonous. The *Downes* Court started many other wrongfully decided precedents that were later correctly overturned, most notably *Plessy v. Ferguson*[157] and *Lochner v. New York*,[158] which were ultimately reversed decades after they were decided with such words as "separate but equal has no place"[159] and "[t]he day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws . . . ."[160] Although the Court must respect prior precedent, "the rule of *stare decisis* is not an 'inexorable command,'" and incorrect precedent can be overruled if the benefits of overruling an intolerable rule outweigh the costs.[161]

The Court has rightfully criticized the racial biases and presuppositions of *Plessy* and the laissez-faire Social Darwinism that was allowed reinforcement in *Lochner*. It would thus be inconsistent for the Court to assert that the racially biased, Social Darwinist decision in *Downes* should be reaffirmed, given that *Downes* was decided "against all precedent," sanctioned a *de facto* colonial regime in which Congress could deny certain classes of Americans rights otherwise constitutionally guaranteed, and returned the nation to the dualities of the *Dred Scott* era in which Americans were normatively and legally divided into separate and distinct classes of unequal status.[162]

American Samoans, classified as "non-citizen nationals," still live in the early twentieth-century legal reality of a colonial and racial caste system that legitimizes the "second-class" treatment of certain Americans—this system should not be upheld. Similarly analogous legal systems put in place by *Dred Scott* and *Plessy* were overturned only through significant political pressure through the Civil War and the Civil Rights Movement, respectively, in which large numbers of Americans

decisions" since the *Insular Cases* to imply that differential treatment can, and should, legitimately continue).

157. Plessy v. Ferguson, 163 U.S. 537 (1896).

158. Lochner v. New York, 198 U.S. 45 (1905).

159. Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954) (internal quotation marks omitted).

160. Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 488 (1955).

161. Planned Parenthood v. Casey, 505 U.S. 833, 854 (1992). Factors to be considered in overruling precedent include whether the central rule has been found "unworkable"; whether overturning the rule would cause "special hardship" or inequity to those who have relied upon it; whether the old rule is "no more than a remnant of abandoned doctrine"; and whether facts have changed to render the holding irrelevant or unjustifiable. *Id.* at 854–55.

162. Torruella, *supra* note 48, at 305–06. Free blacks were not recognized as U.S. citizens until the Fourteenth Amendment superseded the *Dred Scott* ruling; today, non-citizen nationals are also not recognized as U.S. citizens.

fought to guarantee equal rights for all Americans. But for American Samoans, a group of about 54,000 people in a small island territory in the Pacific,[163] a clear description of a "discrete and insular minorit[y],"[164] significant political pressure may not be possible. Thus the Court should conduct a "more searching judicial inquiry"[165] to reexamine the precedent of the *Insular Cases*, given that they are still being relied upon to deny American Samoans their constitutional rights, including the Fourteenth Amendment right of citizenship, as Americans. Although the Court chose not to do so when it denied review of *Tuaua*, should a circuit split later arise on the same constitutional question that should compel the Court's review, the Court would have to address the antiquated doctrine of the *Insular Cases* in a judgment that is practicable yet conforms to precedent.

II. A PRACTICABLE JUDICIAL SOLUTION

A. OVERCOMING IMPRACTICABILITY CONCERNS THROUGH DOCTRINAL CLARIFICATION

While a strong case can be made that the Court should renounce the *Insular Cases* in their entirety, this seems unlikely absent any initial action from the legislative or executive branches. But the Court need not contravene existing doctrine to mitigate some of the worst sins associated with it, given that the *Insular* Court is presumed to have overstretched the permissive bounds of prior precedent in order to offer the imperialistic nation a politically expedient judicial solution. Instead, the Court could clarify the existing territorial incorporation doctrine in a future ruling so as to fit the doctrine more appropriately within the confines of precedent.

It appears that part of the federal government's insistence on upholding the *Insular Cases* is similar to much of the reasoning exhibited

163. *The World Factbook: American Samoa*, CIA, https://www.cia.gov/library/publications/the-world-factbook/geos/aq.html (last updated July 19, 2016).

164. United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938) ("[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.").

165. *Id.* Similar arguments have been made in other legal scholarship—using the *Carolene Products* case and its famous footnote four as primary precedent—that the Court should apply "heightened judicial review" to protect those in the island territories who have been "locked out" of the political process. *See, e.g.*, Adriel I. Cepeda Derieux, Note, *A Most Insular Minority: Reconsidering Judicial Deference to Unequal Treatment in Light of Puerto Rico's Political Process Failure*, 110 COLUM. L. REV. 797, 802, 827–28, 830 (2010) (arguing that Puerto Rico's status as an unincorporated territory has deprived its inhabitants from participating in the political process and that the federal courts should thus apply "heightened scrutiny" to protect the constitutional rights of Americans in Puerto Rico).

within the cases themselves—that it would be impracticable not to uphold them since the doctrine has been a pragmatic political solution to determining the status of peoples in the territories.[166] The doctrine of territorial incorporation is, and has been for more than a century, the normatively acceptable "political reality" of America's past "colonial project,"[167] offered to solve the question of whether to grant the Fourteenth Amendment right to citizenship to those born in the "unincorporated" territories by letting Congress choose whether to grant the status that would guarantee such constitutional rights.[168]

Given that the United States no longer seeks to actively expand its territorial empire as a matter of policy as it did at the turn of the twentieth century, the primary impetus for preserving this anachronistic doctrine seems merely to be political and judicial inertia—no significant need has yet arisen that would require disturbing the status quo.[169] Many critics of the doctrine, such as Efrén Rivera Ramos, have long called for its "judicial reassessment," given its dubious constitutionality and so that the United States could abandon the notion that it can legitimately treat peoples in the unincorporated territories as inferior to those in the States and in the District of Columbia.[170] Dramatic judicial reassessment, absent initial action from Congress or the executive branch, appears unlikely.[171] Nevertheless, it may be possible to overcome ex ante impracticability concerns through judicially clarifying the territorial incorporation doctrine.

166. *See* text accompanying *supra* note 34.

167. RAMOS, *supra* note 63, at 124.

168. The doctrine originated as a result of constitutional compromise. *See id.* at 140–41 (describing the doctrine of territorial incorporation as a compromise between those who opposed acquisition "on racist grounds," since it meant incorporating "inferior peoples into the American polity," and those who argued that the Constitution should always apply in full wherever the United States is sovereign).

169. *See* Burnett & Marshall, *supra* note 46, at 2.

170. Efrén Rivera Ramos, *Deconstructing Colonialism: The "Unincorporated Territory" as a Category of Domination*, *in* FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION, AND THE CONSTITUTION, *supra* note 24, at 114 ("I propose that it is time for the United States to abandon the notion that it may keep other peoples in conditions of political subordination. . . . One way to achieve those objectives would be through a judicial reassessment of the incorporation doctrine.").

171. *See id.*

B. A PROPOSED SOLUTION: SUB-CLASSIFICATIONS IN THE STATUS SPECTRUM OF TERRITORIES

Even if the constitutional justifications for preserving the doctrine were to be unquestionably assumed, the doctrine, as it stands, does not necessitate that those within each territory be apportioned the same status as those in other territories.[172] Although the doctrine draws a line between "incorporated" and "unincorporated" territories, it does not also require that all those in "unincorporated territories" be treated identically. Given that the distinction between incorporated and unincorporated territories was created primarily as a result of judicial interpretation of legislative intent, it would be consistent—and pragmatic—for the judiciary to clarify the doctrine by creating additional distinctions within these categories so as to more closely match the extent to which the federal government intended to hold on to the territory as an indefinite "domestic" possession or as a temporary "foreign" holding.[173] Although "foreign" and "domestic" are the two extremes between which the "foreign in a domestic sense" category of unincorporated territories originated, the Court should create further sub-classifications so as to allow for a more precise degree of constitutional application over each particular territory to match legislative intent.

Additional sub-classifications that can be added to the status spectrum to categorize the insular territories more precisely can be found in Table 1.

172. Through the doctrine of territorial incorporation, the Court established a previously "nonexistent difference between 'incorporated' and 'unincorporated' territories" to "allow[] Congress and the executive the maximum leeway possible [for overseas expansion]." RAMOS, *supra* note 63, at 141. Further sub-classifications within each category would not necessarily be inconsistent with this doctrine.

173. *See supra* Part I.

TABLE 1. Legal Sub-classifications[174] in the Status Spectrum

Territory	← *Hawai'i*	*Puerto Rico (1899–present)*	*American Samoa (1900–present)*	*The Philippines (1899–1946)*	*Cuba* → *(1899–1902)*
Legal Status	State (1959–present) Incorporated Territory (1900–1959)	Unincorporated Territory	Unincorporated Territory	Former Unincorporated Territory	Foreign Territory Under Temporary U.S. Sovereignty
Legal Sub-Classification	Fully Incorporated Territory	Semi-incorporated Territory	Semi-incorporated Territory[175]	Semi-unincorporated Territory	Fully Unincorporated Territory

On one end of the status spectrum of acquired insular territories is a "fully incorporated" territory such as Hawai'i,[176] which, according to the Court in *Hawaii v. Mankichi*,[177] attained formal incorporation into the Union in 1900 after Congress passed the Newlands Resolution[178] and was admitted as a state in 1959.[179] On the other end of the spectrum of territories is Cuba, which, according to the Court in *Neely v. Henkel*,[180] was a "foreign territory" that never actually became an acquired territory of the United States, despite the fact that Spain ceded control of Cuba to the United States through the 1898 Treaty of Paris (the same Treaty through which the United States acquired Guam, Puerto Rico, and the Philippines) and the United States exercised control over Cuba through a provisional military government.[181]

In *Neely*, Justice Harlan, who wrote the unanimous opinion of the

174. Additional distinctions involving other territories such as Guam, Guantanamo Bay, Haiti, and the Dominican Republic could also be made, given that each of these respective territories were or continue to be within the sovereign control of the United States. But since most of the national debate on how to classify the newly acquired territories revolved around Puerto Rico and the Philippines, those other territories will not be addressed further here.

175. American Samoa is more like Puerto Rico than the Philippines (1899–1946) since there was no express intent to relinquish sovereignty.

176. Any of the other forty-nine states could also fit within this category, but this Note uses Hawai'i as an example here to compare the disparate treatment of the island territories (and the former island territories) of the United States.

177. Hawaii v. Mankichi, 190 U.S. 197 (1903).

178. *Id.* at 209–11.

179. An Act to Provide for the Admission of the State of Hawaii into the Union, Pub. L. No. 86-3, 73 Stat. 4, 4 (1959).

180. Neely v. Henkel, 180 U.S. 109 (1901).

181. *See* Burnett, *supra* note 24, at 390.

Court, asserted that the fact that Cuba was under the temporary control of the United States never changed Cuba's status from "foreign."[182] The United States was merely holding Cuba "in trust for the inhabitants of Cuba to whom it rightfully belong[ed] and to whose exclusive control it [would eventually] be surrendered."[183] Justice Harlan's opinion that the island was "unquestionably foreign" was derived from the public declarations of the President[184] and Congress[185] regarding America's intentions toward Cuba, to hold the island only temporarily.[186] Thus, according to the *Neely* Court, the test of whether a territory is "foreign" (with the Constitution not fully applying within the territory) rather than "domestic" (with the Constitution fully applying within the territory) depends primarily on legislative, and to a certain extent executive, intent—and, in particular, how this intent was expressed in the Organic Acts[187] passed by Congress—and whether the federal government ultimately intended to relinquish sovereignty over the territory. *Neely* preceded the development of the doctrine of territorial incorporation, but applying the *Neely* approach to the doctrine could allow for distinct sub-classifications of the territories under U.S. sovereignty.

Between the two status extremes of Hawai'i, a territory the United States expressly intended to be "domestic," and Cuba, a territory the United States expressly intended to be "foreign," are "unincorporated territories" that were considered "foreign in a domestic sense"[188]: Puerto Rico and the Philippines when it was a U.S. territory from 1898–1946.[189] Many in

182. *Neely*, 180 U.S. at 120.

183. *Id.*

184. *E.g.*, *id.* at 120 "In his message to Congress of December 6, 1898, the President said that 'as soon as we are in possession of Cuba and have pacified the Island, it will be necessary to give aid and direction to its people to form a government for themselves'" until a stable government is established and so replaces the need for U.S. military occupation. *Id.*

185. *E.g.*, *id.* at 115–16. Congress passed a joint resolution in 1898 that stated that "the United States hereby disclaims any disposition or intention to exercise sovereignty, jurisdiction or control over [Cuba] except for the pacification thereof, and asserts its determination, when that is accomplished, to leave the government and control of the Island to its people." *Id.* (quoting Joint Resolution for the Recognition of the Independence of the People of Cuba, 30 Stat. 738, 55 Pub. Res. 24 (1898)).

186. WINFRED LEE THOMPSON, THE INTRODUCTION OF AMERICAN LAW IN THE PHILIPPINES AND PUERTO RICO 1898–1905, 188 (1989).

187. Congressional acts that set forth how a territory was to be organized and what form of territorial government would be established in each particular U.S. territory were commonly referred to as Organic Acts. *See, e.g.*, *supra* note 179 (Hawai'i); *supra* text accompanying notes 182–86 (Cuba); *infra* text accompanying note 194 (Puerto Rico); *infra* note 196 (the Philippines).

188. *See supra* notes 112–14 and accompanying text.

189. Spain ceded the Philippines to the United States through the Treaty of Paris on December 10, 1898. ROMÁN, *supra* note 5, at 172. From the ratification of the Treaty in 1899, the Philippines was not fully independent until 1946. *Id.* at 123, 180. Although the federal government was initially uncertain as to how to classify the Philippines and other newly acquired territories at the turn of the century, the United States eventually came to view and classify the Philippines and the other insular possessions as

Congress at the time distinguished Puerto Rico from the Philippines as a more favorable and less "alien" territory given Puerto Rico's closer geographic proximity and its much more substantial "European roots."[190] Thus, Puerto Rico and the Philippines can be differentiated in the status spectrum of territories based on the disparate treatment afforded the respective territories by the legislative and executive branches.

In 1899, President McKinley's annual message to Congress included comments that praised the civilized qualities of Puerto Ricans and stated that they would be capable of self government; as a result, Senator Joseph B. Foraker introduced a bill to organize local Puerto Rican government and to grant Puerto Ricans U.S. citizenship.[191] But the passage of the Foraker Bill stalled due to the fact that an insurrection was still ongoing in the Philippines as the bill was being considered,[192] and Congress did not want to pass a law granting citizenship that could also have a precedential effect on the much less favored Filipinos.[193] Although the Foraker Act (also known as the Organic Act of 1900) was eventually approved in April 1900, establishing a civil government in Puerto Rico, the provisions granting citizenship were deleted so as to prevent the potential problem of allowing Filipinos to attain U.S. citizenship.[194]

In contrast, after "acquiring" the Philippines from Spain in the 1899 Treaty of Paris, the United States continued to fight local Filipinos until the Philippine insurrection was finally quelled in 1902.[195] Coinciding with the official end of the insurrection, Congress passed a law[196] that same year to create a civil government in the Philippines.[197] But in a significant departure from Puerto Rico's Organic Act, the Philippine Organic Act

"unincorporated territor[ies]" as a result of the Supreme Court's decisions in the *Insular Cases*. *Id.* at 177.

190. RAMOS, *supra* note 63, at 145. For a sampling of some of the more outwardly racist and disparaging statements made by members of Congress in their negative descriptions of Filipinos during the Congressional debates at the time, see, for example, Torruella, *supra* note 48, at 298 ("[B]eware of those mongrels of the East, with breath of pestilence and touch of leprosy. Do not let them become a part of us with their idolatry, polygamous creeds, and harem habits.") (quoting 33 CONG. REC. 3616 (1900) (statement of Sen. Bate)).

191. Torruella, *supra* note 48, at 297.

192. Fighting broke out when the Filipinos learned that the United States planned to annex and subjugate the territory rather than aid them in their struggle for independence against Spain. *Id.*

193. *Id.* at 297–98.

194. *Id.* at 299.

195. ROMÁN, *supra* note 5, at 175–76.

196. An Act Temporarily to Provide for the Administration of the Affairs of Civil Government in the Philippines Islands, Pub. L. No. 235, ch. 1369, 32 Stat. 691 (1902). This Act is also known as the Philippine Organic Act. ROMÁN, *supra* note 5, at 177.

197. THOMPSON, *supra* note 186, at 122.

specified that "[t]he provisions of section eighteen hundred and ninety-one of the Revised Statutes of eighteen hundred and seventy-eight shall not apply to the Philippine Islands."[198] With these words, Congress excluded the Philippines from being a territory over which the Constitution would apply and possibly even "ruled out the possibility that the Philippines would ever be annexed to the American union."[199] Furthermore, Congress later stated in the Jones Act of 1916,[200] which superseded the Philippine Organic Act of 1902, that "it is, as it has always been, the purpose of the people of the United States to withdraw their sovereignty over the Philippine Islands and to recognize their independence as soon as a stable government can be established therein."[201]

A comparison of these express statutory provisions relating to the Philippines with the Jones-Shafroth Act of 1917,[202] which superseded the Foraker Act of 1900 and granted Puerto Ricans U.S. citizenship, depicts widely dissimilar legislative intents towards whether the United States intended to view each unincorporated territory as an indefinite "domestic" possession or as temporary "foreign" holding. Although both territories were classified as "unincorporated," Puerto Rico, like Hawai'i, was intended to be more of a domestic possession, whereas the Philippines, like Cuba, was never intended to be held indefinitely. Thus, by applying the *Neely* approach,[203] Puerto Rico could be justifiably classified into a different sub-category of unincorporated territories than the Philippines during its territorial period (1898–1946).

Much like Puerto Rico is more similar to Hawai'i than it is to Cuba, American Samoa shares greater similarity with Puerto Rico than it does with the Philippines. American Samoa was never "organized"[204] through an Act of Congress as was Puerto Rico and the Philippines, but from the time

198. An Act Temporarily to Provide for the Administration of the Affairs of Civil Government in the Philippines Islands, Pub. L. No. 235, ch. 1369, 32 Stat. 692 (1902). Section 1891 of the Revised Statutes of 1878 was a provision that allowed for the Constitution to apply to the organized territories. Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 211 (2002).

199. THOMPSON, *supra* note 186, at 124.

200. An Act to Declare the Purpose of the People of the United States as to the Future Political Status of the People of the Philippine Islands, and to Provide a More Autonomous Government for Those Islands, Pub. L. No. 240, ch. 416, 39 Stat. 545 (1916).

201. *Id.*

202. An Act to Provide a Civil Government for Porto Rico, and for Other Purposes, Pub. L. No. 368, ch. 145, 39 Stat. 951 (1917).

203. *See supra* text accompanying notes 182–187.

204. ROMÁN, *supra* note 5, at 184.

American Samoa was first acquired by the United States in 1900,[205] there was never any express legislative intent for the United States to ultimately relinquish American Samoa as a territorial "foreign" possession.[206] Thus, American Samoa more closely resembles Puerto Rico, given the United States' continuous and indefinite exercise of sovereignty over both territories since they were acquired, rather than the Philippines, a former unincorporated territory that the United States intended only to hold temporarily. Much like the way Puerto Rico continues to exist in its quasi-colonial relationship with the United States as its sovereign, American Samoa's status as a vassal state has also persisted over time.[207]

C. APPLYING THE SUB-CLASSIFICATIONS TO AMERICAN SAMOANS

Even if, in the future, the Supreme Court later ruled that American Samoans are entitled to Fourteenth Amendment birthright citizenship in a ruling that could be applied analogously to those in other U.S. territories,[208] it does not follow that Filipinos born in the Philippines during the territorial period should also be granted birthright citizenship.[209] Despite normatively categorizing all those in the unincorporated territories as those with "lesser status" than those on the continent,[210] the Court has also held that the facts and circumstances of each territory should be taken into account when applying constitutional doctrines.[211] By applying the *Neely* approach and

205. *Id.* at 187; 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, 493–94 (1992). Congress did not formally accept the cession of American Samoa by the Samoan chiefs on Tutuila until 1929, *id.*, but given that this distinction has no bearing on this Note's analysis, the year of acquisition of American Samoa by the United States will be listed as 1900 (rather than 1929) throughout this Note.

206. *See* Jean L. Johnson, *Access to Justice for Hawaii's Migrants from Pacific Islands Associated with the United States*, HAW. B.J. 5, 6 (2012) ("Congress has never granted American Samoa an organic act or other explicit Congressional directive on governance.").

207. *See* ROMÁN, *supra* note 5, at 144–46, 188 (explaining that Puerto Rico's new Commonwealth status in the early 1950s was granted so as to allow more local control, but also to keep the unincorporated territory as a quasi-colony, and that similar changes were made in American Samoa's status during that time to maintain the imperialistic structure indefinitely).

208. Broad analogous application may be unlikely if the Court produces a sufficiently narrow holding since American Samoa is the only U.S. island territory in which its residents do not already have U.S. citizenship and the Philippines has not been a U.S. territory since gaining independence in 1946. Only a small minority of Filipinos (who are above the age of sixty-nine as a result of having been born prior to 1946) would even have the standing to bring a constitutional citizenship claim.

209. As will be discussed further in this Section, the converse of this statement is also true: even if Filipinos born in the Philippines during the territorial period have been previously denied constitutional claims of citizenship, it does not necessarily follow that American Samoans must be similarly denied.

210. *See* RAMOS, *supra* note 63, at 161.

211. *See* Neely v. Henkel, 180 U.S. 109, 120–22 (1901) (holding Cuba to be a foreign country despite the United States' sovereignty and temporary control over it, similar to the United States' control over Puerto Rico at that time).

dividing the territories into legal sub-classifications that better reflect Congressional intent, the Supreme Court could allow for American Samoans to be granted Fourteenth Amendment citizenship while also avoiding impracticability concerns that would arise if simply any territory over which the United States exercises sovereignty would be made to grant U.S. citizenship to its birth residents. Since the Philippines, during the territorial period, was intentionally held temporarily, much like Cuba was held "in trust" during the United States' provisional military rule (1898–1902), appellate decisions such as *Rabang v. I.N.S.*,[212] which denied U.S. citizenship to peoples born in the Philippines during the territorial period, would remain intact even with a Supreme Court ruling that granted American Samoans U.S. citizenship under the Fourteenth Amendment.

In the District Court's decision for the United States in *Tuaua*, Judge Richard Leon, in deference to precedent, maintained that people born in different unincorporated territories should all be apportioned similar status.[213] Judge Leon stated that this status, unlike for those in the "incorporated" territories, did not entitle people access to Fourteenth Amendment Citizenship given that "federal courts have held over and over again that unincorporated territories are not included within the Citizenship Clause."[214] Judge Leon pointed out that no precedent has yet to hold that unincorporated territories should be treated dissimilarly regarding the application of the Citizenship Clause. Thus, he held that appellate decisions denying constitutional citizenship claims from the former unincorporated U.S. territory of the Philippines during the territorial period[215] would also apply to the claim from the American Samoan plaintiffs.[216]

A future Supreme Court precedent that clarifies the territorial incorporation doctrine by further sub-classifying within the incorporated/unincorporated distinction would allow for a ruling that would reconcile upholding the plain text of the Citizenship Clause while also more accurately accounting for Congressional intent regarding the classification of each territory. Thus, this doctrine should be clarified so as to reconcile precedent while also answering the question of first impression in regards to the constitutional claim for American Samoan U.S. citizenship and for all other Americans currently living in the territories who are also

212. Rabang v. I.N.S., 35 F.3d 1449 (9th Cir. 1994).

213. Tuaua v. United States, 951 F. Supp. 2d 88, 97 (D.D.C. 2013).

214. *Id.*

215. *E.g.*, *Rabang*, 35 F.3d 1449 (relying on the *Insular Cases* to hold that the Citizenship Clause did not apply to non-state territories in the Union such as the insular territory of the Philippines).

216. *Tuaua*, 951 F. Supp. 2d at 96–97.

being denied Fourteenth Amendment birthright citizenship.

This new approach to the doctrine would also solve potential applicability issues relating to other territories within the "foreign in a domestic sense" status spectrum. For example, Judge Leon asserted that granting American Samoans U.S. citizenship would contradict *Eche v. Holder*,[217] "the Ninth Circuit's recent holding that the Northern Mariana Islands—a current and longstanding territory—is not included within the bounds of the Citizenship Clause."[218] But by categorizing dissimilar territories into separate and distinct sub-classifications, a future holding for Tuaua would not necessarily contradict *Eche* given that American Samoa and the Northern Mariana Islands were treated dissimilarly by the United States. Unlike American Samoa, which was formally acquired by the United States under the Treaty of Berlin in 1900,[219] the Northern Mariana Islands were never "acquired" by the United States, but were merely held "in trust" under the newly formed United Nations trusteeship system after World War II.[220] Despite securing the islands from Japanese troops during the war, President Truman refused annexation, and the United States governed the territory as a trustee until the Northern Mariana Islands elected to terminate the trusteeship and form a commonwealth system with the United States.[221]

Thus, even if American Samoans were to be granted Fourteenth Amendment citizenship in a future Supreme Court ruling by virtue of their birth within the territory, any such judicial precedent—with the requisite doctrinal clarification of territorial sub-classifications—would not necessarily be required to apply in territories the federal government never intended to hold indefinitely, such as Cuba, the Philippines, and the Northern Mariana Islands.

CONCLUSION

The legal stigmatization of American Samoans as second-class "non-citizen nationals" must be redressed. Possible solutions involve either legislation—in other words, passing a law in Congress to grant citizenship by virtue of birth within the territory (as was passed for Puerto Rico in 1917[222])—or judicial interpretation—in other words, through a future Court

217. Eche v. Holder, 694 F.3d 1026 (9th Cir. 2012).
218. *Tuaua*, 951 F. Supp. 2d at 96–97 (citing *Eche*, 694 F.3d at 1027–28).
219. ROMÁN, *supra* note 5, at 187.
220. *Id.* at 249.
221. *Id.* at 249–52.
222. *See supra* note 128 and accompanying text.

holding that the Citizenship Clause guarantees U.S. citizenship to persons born within American Samoa, a U.S. territory "within the United States." However, even if a legislative solution were to ameliorate the plight of non-citizen national American Samoans, a statutory grant of citizenship could still be considered inferior to the constitutional grant of citizenship guaranteed for those in the States.[223] Furthermore, a solution involving judicial interpretation would be able to accomplish what legislation alone could not. Although the Court chose not to hear the constitutional question at issue in *Tuaua*, should the same question arise in a future case as a result of a circuit split, the Court should redress the racially and imperialistically motivated case law derived from the *Insular Cases*, if not by overturning them entirely, by clarifying the territorial incorporation doctrine to reconcile the plain text of the Constitution with the political and legal realities the doctrine has established. At the very least, the *Insular Cases* should most certainly not be relied upon to deny American Samoans—and all other Americans in the territories—Fourteenth Amendment birthright citizenship since such a precedent would not only be incorrectly decided,[224] but it would also perpetuate harm to American Samoans and to the American democratic system[225] as a whole.

The Citizenship Clause of the Fourteenth Amendment was drafted after the *Dred Scott* decision (and the Civil War) to unambiguously remove the question of citizenship from lawmakers.[226] The current application of the territorial incorporation doctrine, which effectively allows Congress to decide whether to allow the Citizenship Clause to apply over the insular territories, runs contrary to this intent. The Court reaffirmed in *Boumediene*[227] that "[t]he Constitution grants Congress and the President the power to acquire, dispose of, and govern territory, not the power to decide when and where its terms apply."[228] The Court missed its opportunity to reassert its duty to say "what the law is"[229] in a ruling in

223. *See, e.g.*, Pedro A. Malavet, *Puerto Rico: Cultural Nation, American Colony*, 6 MICH. J. RACE & L. 1, 3 (2000) ("Puerto Rico's colonial status—particularly its intrinsic legal and social constructs of second-class citizenship for Puerto Ricans—is incompatible with contemporary law or a sensible theory of justice and morality.").

224. The Citizenship Clause was not at issue in *Downes*, as it is in *Tuaua*. See sources cited *supra* note 28 for a more detailed explanation as to why relying on the *Insular Cases* in *Tuaua* would be a matter of incorrect judicial interpretation.

225. Normatively perpetuating disparate legal classes of Americans with unequal rights contributed to the circumstances immediately precipitating the Civil War. *See supra* Part I.B.

226. *See supra* text accompanying note 37.

227. Boumediene v. Bush, 553 U.S. 723 (2008).

228. *Id.* at 765.

229. Marbury v. Madison, 5 U.S. 137, 177 (1803).

favor of *Tuaua* that would have clarified the doctrine while reclaiming the power to decide "when and where" the Citizenship Clause of the Fourteenth Amendment should apply. If the constitutional question raised in *Tuaua* were ever to appear before the Court again in the future, the Court should not hesitate to redress the legal stigmatization of American Samoans and all other Americans who live in the territories without the Constitution's full protection. By doing so, the Court would be able to reaffirm the plain text and intent of the Citizenship Clause from which the *Insular Cases* and their progeny have departed.