
CHAPTER THREE

AMERICAN SAMOA AND THE CITIZENSHIP CLAUSE: A STUDY IN *INSULAR CASES* REVISIONISM

It is now commonly observed that the meaning of “federalism” is not fixed but shifts over time to serve various ends and to encompass different conceptions of the proper relationship between the states and the national government.¹ The same is increasingly true of a less familiar corner of constitutional law: the doctrine governing the reach of the Constitution in the territorial possessions of the United States. For more than a century, the series of Supreme Court decisions known as the *Insular Cases* has provided a framework under which some but not all constitutional rights extend to territorial residents. The doctrine has a checkered past. Critics both historical and modern have attacked it as an instrument of “Imperial Constitutionalism,”² colonial domination, and racist subordination of the U.S. territories. Some judge the doctrine to be “meaningless” today and regard the cases “as dead letters, as constitutional aberrations.”³ But the Supreme Court has continued to invoke the *Insular Cases* framework in twenty-first-century disputes involving the struggle against international terrorism among other cutting-edge issues. Other scholars, and increasingly federal judges, have lately recognized the opportunity to repurpose the framework in order to protect indigenous culture from the imposition of federal scrutiny and oversight. The *Insular Cases*, like Our Federalism,⁴ contain multitudes.⁵

The recent decision of the United States Court of Appeals for the District of Columbia Circuit in *Tuaua v. United States*,⁶ rejecting a plea for the extension of constitutional birthright citizenship to

¹ See, e.g., Randy E. Barnett, *Three Federalisms*, 39 LOY. U. CHI. L.J. 285, 285 (2008) (“[N]ot one, but three distinct versions of federalism . . . have developed since the Founding of this country. Each version of federalism developed during a different era in our constitutional history”); Heather K. Gerken, *Our Federalism(s)*, 53 WM. & MARY L. REV. 1549, 1551 (2012) (“[T]here are many federalisms, not one.”).

² Christina Duffy Ponsa, *When Statehood Was Autonomy*, in RECONSIDERING THE INSULAR CASES 1, 25 (Gerald L. Neuman & Tomiko Brown-Nagin eds., 2015).

³ Eric A. Posner, *The Limits of Limits*, NEW REPUBLIC (May 5, 2010), <https://newrepublic.com/article/74824/the-limits-limits-o> [<https://perma.cc/E7D5-RY6A>] (reviewing KAL RAUSTIALA, *DOES THE CONSTITUTION FOLLOW THE FLAG?: THE EVOLUTION OF TERRITORIALITY IN AMERICAN LAW* (2009)); see also BARTHOLOMEW H. SPARROW, *THE INSULAR CASES AND THE EMERGENCE OF AMERICAN EMPIRE* 214 (2006) (“[T]he *Insular Cases* — a hundred years later — seem to be the artifacts of a distant past, a different world.”).

⁴ *Younger v. Harris*, 401 U.S. 37, 44 (1971).

⁵ Gerken, *supra* note 1, at 1551; see also WALT WHITMAN, *LEAVES OF GRASS* 246 (Library of Am. 1992) (1891–92).

⁶ 788 F.3d 300 (D.C. Cir. 2015).

American Samoa,⁷ illustrates an important shift in the federal courts' use of the doctrine. While the *Insular Cases* were originally conceived as instruments of American expansion in the era of Manifest Destiny, they have today been reclaimed to serve as bulwarks for cultural preservation. Recent case law including *Tuaua* points up a conflict between the extension of individual constitutional rights and the protection of territorial culture. But that observation raises still more questions about the normative desirability of a pluralist Constitution and the appropriateness of the *Insular Cases* as a vehicle for that project.

A. *The Insular Cases and the Citizenship Clause: An Introduction*

1. *The Insular Cases*. — The American acquisition of Caribbean and Pacific territories beginning in the late nineteenth century spawned a host of constitutional controversies whose legacy remains with us today. In the *Insular Cases*, the early-twentieth-century Supreme Court crafted a two-tiered framework for the application of constitutional rights in the U.S. territories. In “incorporated” territories, destined ultimately for statehood, the Constitution applied “with full force.”⁸ Because Congress expressed a desire to so incorporate the territory of Alaska, for instance, the Court held in 1905 that the Sixth Amendment mandated a right to a jury trial in that territory.⁹

But in “unincorporated” territories — those lacking the necessary “anticipation of statehood” — only a narrower class of so-called “fundamental” constitutional rights applied.¹⁰ Thus, the Court held in *Dorr v. United States*,¹¹ in 1904, that residents of the Philippines did *not* enjoy the jury trial right unless Congress saw fit to confer it by statute.¹² As Justice Black later observed, the distinction was based on the perceived necessity for Congress to “govern temporarily territories with wholly dissimilar traditions and institutions.”¹³

The *Insular Cases* are a complex collection of decisions whose very definition is contested¹⁴ and whose combined holdings “cannot easily

⁷ *Id.* at 302.

⁸ *Examining Bd. of Eng'rs, Architects & Surveyors v. Flores de Otero*, 426 U.S. 572, 599 n.30 (1976).

⁹ *Rasmussen v. United States*, 197 U.S. 516, 525 (1905).

¹⁰ *Flores de Otero*, 426 U.S. at 599 n.30.

¹¹ 195 U.S. 138 (1904).

¹² *Id.* at 149.

¹³ *Reid v. Covert*, 354 U.S. 1, 14 (1957) (plurality opinion).

¹⁴ The seminal set of turn-of-the-century decisions does not enjoy a strict definition, but is generally considered to include some or all of *De Lima v. Bidwell*, 182 U.S. 1 (1901); *Goetze v. United States*, 182 U.S. 221 (1901); *Dooley v. United States*, 182 U.S. 222 (1901); *Armstrong v. United States*, 182 U.S. 243 (1901); *Downes v. Bidwell*, 182 U.S. 244 (1901); *Huus v. N.Y. & Porto Rico S.S. Co.*, 182 U.S. 392 (1901); *Dooley v. United States*, 183 U.S. 151 (1901); *Fourteen Diamond Rings v. United States*, 183 U.S. 176 (1901); *Hawaii v. Mankichi*, 190 U.S. 197 (1903); *Dorr*, 195 U.S. 138; and *Balzac v. Porto Rico*, 258 U.S. 298 (1922). See Efrén Rivera Ramos, *The Insu-*

be summarized.”¹⁵ Many of them were divisive even when decided, yielding close and fractured 5–4 decisions at a time with stronger norms of judicial cohesion than today.¹⁶ The question of exactly which rights would apply in the unincorporated territories has proven particularly vexing. The Court originally defined this inescapable core of restrictions on congressional power in terms of “fundamental” rights.¹⁷ But that class of rights proved difficult to define. In *Dorr*, for instance, Justice Harlan vigorously dissented from the Court’s conclusion that the constitutional provisions guaranteeing jury trial rights “relate to mere methods of procedure and are not fundamental in their nature.”¹⁸

Half a century later, in *Reid v. Covert*,¹⁹ the Justices appraised such difficulties in taking a notably jaundiced view of the *Insular Cases* framework as a whole. Justice Black remarked in his plurality opinion that he could “find no warrant, in logic or otherwise, for picking and choosing among the remarkable collection of ‘Thou shalt nots’ which were explicitly fastened on all departments and agencies of the Federal Government by the Constitution and its Amendments.”²⁰ For these and other reasons, the plurality expressed its view, in dicta, that “neither the [Insular C]ases nor their reasoning should be given any further expansion.”²¹

But Justice Harlan’s grandson, concurring in *Reid*, saw “a wise and necessary gloss on our Constitution” in the controversial cases.²² For him, their “basic” and correct teaching was that “there is no rigid and abstract rule that Congress, as a condition precedent to exercising power over Americans overseas, must exercise it subject to all the guarantees of the Constitution.”²³ Rather than defining the scope of applicable rights in terms of “fundamental” protections, however, the junior Justice Harlan would make a case-by-case determination, “in view of the particular circumstances, the practical necessities, and the

lar Cases: What Is There to Reconsider?, in RECONSIDERING THE INSULAR CASES, *supra* note 2, at 29, 30 n.2 (enumerating a longer list of twenty-three cases decided between 1901 and 1922, including those listed here); *see also* SPARROW, *supra* note 3, at 257–58 (expanding on the list cited by Ramos to reach a total of thirty-five cases). As described below, *see infra* section B.2, pp. 1690–96, *Downes* played a particularly key role in the D.C. Circuit’s analysis in 2015. *See Tuaua v. United States*, 788 F.3d 300, 303, 306–08 (2015).

¹⁵ Steve Vladeck, *The D.C. Circuit, Samoan Citizenship, and the Insular Cases*, JUST SECURITY (Feb. 4, 2015, 8:04 AM), <https://www.justsecurity.org/19658/samoan-citizenship> [https://perma.cc/XD3A-F9AS].

¹⁶ *See* ARNOLD H. LEIBOWITZ, *DEFINING STATUS* 24 (1989).

¹⁷ *See, e.g., Downes*, 182 U.S. at 294–95 (White, J., concurring).

¹⁸ *Dorr*, 195 U.S. at 154 (Harlan, J., dissenting).

¹⁹ 354 U.S. 1 (1957).

²⁰ *Id.* at 9 (plurality opinion).

²¹ *Id.* at 14.

²² *Id.* at 74 (Harlan, J., concurring in the result).

²³ *Id.*

possible alternatives which Congress had before it,” as to whether the extension of a particular right to a particular unincorporated territory would be “impractical and anomalous.”²⁴

Justice Harlan’s view in *Reid* has garnered support from the modern Court and Justice Kennedy in particular. In 1990, Justice Kennedy endorsed Justice Harlan’s general approach to the application of the Constitution outside of the states in his concurrence in *United States v. Verdugo-Urquidez*.²⁵ Nearly two decades later, in 2008, Justice Kennedy’s opinion for the Court in *Boumediene v. Bush*²⁶ explicitly reaffirmed this understanding of the *Insular Cases* framework and its continued vitality.²⁷

2. *The Citizenship Clause in the Territories.* — More recent cases have brought the *Insular Cases* framework to bear on the first section of the Fourteenth Amendment, which guarantees that “[a]ll 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.”²⁸

In June 2015, the D.C. Circuit ruled in *Tuaua v. United States* that “the United States” in the Fourteenth Amendment’s Citizenship Clause does *not* extend to unincorporated territories.²⁹ Because Congress has already extended birthright citizenship by statute to the residents of most territories,³⁰ the decision’s immediate impact is limited to the territory in which it arose: American Samoa. Unique among the territories held by the U.S. government today,³¹ persons born in American

²⁴ *Id.* at 75.

²⁵ 494 U.S. 259, 278 (1990) (Kennedy, J., concurring).

²⁶ 553 U.S. 723 (2008).

²⁷ *Id.* at 759 (“[T]he Court devised in the *Insular Cases* a doctrine that allowed it to use its power sparingly and where it would be most needed. This century-old doctrine informs our analysis in the present matter.”). *Verdugo-Urquidez* and *Boumediene* specifically addressed the related but distinct issue of the Constitution’s application beyond American borders altogether, rather than in the territories.

²⁸ U.S. CONST. amend. XIV, § 1.

²⁹ 788 F.3d 300, 302 (D.C. Cir. 2015).

³⁰ 8 U.S.C. § 1402 (2012) (“All persons born in Puerto Rico on or after January 13, 1941, and subject to the jurisdiction of the United States, are citizens of the United States at birth.”); *id.* § 1406(b) (“[A]ll persons born in [the Virgin I]slands on or after February 25, 1927, and subject to the jurisdiction of the United States, are declared to be citizens of the United States at birth.”); *id.* § 1407(b) (“All persons born in the island of Guam on or after April 11, 1899 . . . subject to the jurisdiction of the United States, are declared to be citizens of the United States . . .”).

³¹ See *id.* § 1101(a)(29) (“The term ‘outlying possessions of the United States’ means American Samoa and Swains Island[, an atoll administered as part of American Samoa.]”); *id.* § 1408 (“[T]he following shall be nationals, but not citizens, of the United States at birth: . . . A person born in an outlying possession of the United States on or after the date of formal acquisition of such possession . . .”). This statutory category also included the Philippines when that country was a territory of the United States before it gained independence in 1946. See *Tuaua*, 788 F.3d at 302 n.2. Similarly, between the American acquisition of Puerto Rico in 1898 and the passage of an organic act for the island in 1900, Congress declined to extend U.S. citizenship and simply designated

Samoa are designated under the Immigration and Nationality Act of 1952³² (INA) as “non-citizen nationals.”³³ The American Samoan plaintiffs in *Tuaua* sought to challenge the constitutionality of that statute and associated State Department regulations³⁴ under the Fourteenth Amendment.³⁵

In rejecting that challenge, the D.C. Circuit joined the conclusion of every federal court to have interpreted the Citizenship Clause in its application to unincorporated territories.³⁶ And while the D.C. Circuit granted that the clause was “textually ambiguous as to whether ‘in the United States’ encompasses America’s unincorporated territories,”³⁷ it grounded its decision in decades of Supreme Court case law stretching back to the *Insular Cases*.

Nevertheless, *Tuaua* drew national attention and controversy³⁸ — perhaps because of the continually vexed status of the *Insular Cases*,³⁹

those born in the territory “citizens of Porto Rico.” See Ponsa, *supra* note 2, at 27 (describing this “nebulous and undefined status that seemed to amount to little more than an embellished form of statelessness”).

³² Pub. L. No. 82-414, 66 Stat. 163 (codified as amended in scattered sections of 8 U.S.C.).

³³ *Tuaua*, 788 F.3d at 302; see also 8 U.S.C. § 1408.

³⁴ E.g., 7 U.S. DEP’T OF STATE, FOREIGN AFFAIRS MANUAL § 1125.1(b) (1996).

³⁵ *Tuaua*, 788 F.3d at 302.

³⁶ See, e.g., *Thomas v. Lynch*, 796 F.3d 535, 539–42 (5th Cir. 2015) (American military base in Germany); *Nolos v. Holder*, 611 F.3d 279, 284 (5th Cir. 2010) (Philippines); *Lacap v. INS*, 138 F.3d 518, 519 (3d Cir. 1998) (Philippines); *Valmonte v. INS*, 136 F.3d 914, 920 (2d Cir. 1998) (Philippines); *Rabang v. INS*, 35 F.3d 1449, 1453–54 (9th Cir. 1994) (Philippines); *Licudine v. Winter*, 603 F. Supp. 2d 129, 134 (D.D.C. 2009) (Philippines); see also *Eche v. Holder*, 694 F.3d 1026, 1031 (9th Cir. 2012) (interpreting “United States” in Article I’s Naturalization Clause the same way, so as not to include the Philippines pre-1946); *Tuaua v. United States*, 951 F. Supp. 2d 88, 97 (D.D.C. 2013) (“In short, federal courts have held over and over again that unincorporated territories are not included within the Citizenship Clause, and this Court sees no reason to do otherwise!”), *aff’d*, 788 F.3d 300.

³⁷ *Tuaua*, 788 F.3d at 302 (quoting U.S. CONST. amend. XIV, § 1).

³⁸ See, e.g., Noah Feldman, *People of American Samoa Aren’t Fully American*, BLOOMBERG VIEW (Mar. 13, 2016, 11:00 AM), <http://www.bloomberglaw.com/articles/2016-03-13/people-of-american-samoa-aren-t-fully-american> [https://perma.cc/U5YH-DF8P] (“Although the Supreme Court doesn’t ordinarily take cases to correct the errors of courts below, this case should be an exception. The most fundamental constitutional rights are at stake — and the D.C. Circuit panel’s opinion almost certainly got the law wrong.”); Mark Joseph Stern, *The Supreme Court Needs to Settle Birthright Citizenship*, SLATE (June 6, 2016, 4:39 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2016/06/the_supreme_court_needs_to_settle_birthright_citizenship.html [https://perma.cc/BTY2-ZFRD] (“There is nothing new in the government’s feeble justification for depriving American Samoans citizenship — just old, racist arguments re-framed in the modern language of the law. The Supreme Court should hear this case and grant American Samoans the citizenship rights guaranteed to them by the U.S. Constitution. Anything less would be a betrayal of the American constitutional project.”); see also Andrew Petrey, Case Comment, *Constitutional Confines: Determining the Applicability of the Citizenship Clause to American Samoa*: *Tuaua v. United States*, No. 12-01143, 2013 U.S. Dist. Lexis 89602 (D.D.C. June 26, 2013), 25 FLA. J. INT’L L. 483 (2013) (situating the D.D.C.’s *Tuaua* opinion in historical context and analyzing its likely effects).

³⁹ See, e.g., Martha Minow, *Preface* to RECONSIDERING THE INSULAR CASES, *supra* note 2, at vii, vii (“When the Supreme Court reached its judgments in the *Insular Cases*, prevailing gov-

and perhaps in part because of the conservative panel which decided the case.⁴⁰ Yet the political valence of the question presented in *Tuaua* is not as clear as it might seem. In fact, representatives of the government of American Samoa itself *opposed* the argument of the individual petitioners in the case, out of fears “that the extension of United States citizenship to the territory could potentially undermine . . . aspects of the Samoan way of life.”⁴¹ To wit: “the extension of citizenship could result in greater scrutiny under the Equal Protection Clause of the Fourteenth Amendment, imperiling American Samoa’s traditional, racially-based land alienation rules.”⁴²

Tuaua suggests a fundamental conflict between our commitments to local self-determination and to individual rights.⁴³ The controversial history of the *Insular Cases* makes it tempting to seek an easy villain⁴⁴ and declare the Samoan anomaly of noncitizen national status an unconstitutional anachronism. But the truth is more complicated.

In the end, the Supreme Court denied certiorari in *Tuaua*,⁴⁵ despite a flurry of national attention that led to eight amicus brief filings⁴⁶ and

ernmental attitudes presumed white supremacy and approved of stigmatizing segregation.”); 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. . . . [T]he dogma of the *Insular Cases* constitutes an outmoded anachronism when viewed within the framework of present-day constitutional principles . . .” (footnotes omitted)).

⁴⁰ See Feldman, *supra* note 38 (noting the D.C. Circuit’s resolution of the case via “a randomly drawn panel of three stalwart conservative judges — Janice Rogers Brown, David Sentelle and Laurence Silberman”).

⁴¹ *Tuaua*, 788 F.3d at 310.

⁴² *Id.*; see also, e.g., Stanley K. Laughlin, Jr., *U.S. Territories and Affiliated Jurisdictions: Colonialism or Reasonable Choice for Small Societies?*, 37 OHIO N.U. L. REV. 429, 440 (2011) (“[T]o use the equal protection principle to strike down territorial laws that restrict land ownership to indigenous people would ‘work’ as land would be sold to outsiders, but it could have disastrous consequences for a culture based on family land ownership.”).

⁴³ This conflict is also visible in the treatment of American Indian tribes, see generally Zachary S. Price, *Dividing Sovereignty in Tribal and Territorial Criminal Jurisdiction*, 113 COLUM. L. REV. 657 (2013); Angela R. Riley, *(Tribal) Sovereignty and Illiberalism*, 95 CALIF. L. REV. 799 (2007) (“[L]iberalism must navigate the sometimes treacherous course between upholding individual rights and accommodating a diverse array of cultures and organizations.” *Id.* at 800.), and of indigenous groups elsewhere in U.S. law, see, e.g., Christopher W. Schmidt, *Recent Development, Doe v. Kamehameha: Section 1981 and the Future of Racial Preferences in Private Schools*, 42 HARV. C.R.-C.L. L. REV. 557, 567 (2007) (contemplating “the hardest questions about law and social relations” in the context of Native Hawaiians).

⁴⁴ See, e.g., Stern, *supra* note 38 (describing the D.C. Circuit’s decision as “rooted in an overtly racist series of cases” and displaying a “faux-reverence” for American Samoa’s cultural traditions).

⁴⁵ *Tuaua v. United States*, 136 S. Ct. 2461 (2016) (mem.).

⁴⁶ See *Tuaua v. United States*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/tuaua-v-united-states> [<https://perma.cc/67XC-5RU2>].

the drafting of a petition by former Solicitor General Ted Olson.⁴⁷ Nevertheless, as recurrent cases across circuits involving the Philippines demonstrate, the issue is a live one.

The sections below lay out the constitutional arguments in *Tuaua* and related cases, explain the difficulties leading to the necessity of political judgments under the *Insular Cases* framework, and situate the case law within a broader, ongoing, and historically shifting debate on the extension of constitutional rights (and requirements) to indigenous communities within the “United States” as broadly defined.

Most significantly, *Tuaua* reflects the contemporary triumph of a once-controversial academic take on the *Insular Cases*. Where the doctrine once served colonial interests in an era of mainland domination of the territories, a revisionist argument would see it repurposed today to protect indigenous cultures from a procrustean application of the federal Constitution. The journey of this controversial theory from the academy in the 1980s to the D.C. Circuit’s unanimous panel in 2015 tells a compelling story of shifting ideology in a complicated doctrinal area.

B. *Tuaua v. United States*

Approximately 54,000 American “nationals” live in American Samoa, a portion of a South Pacific archipelago approximately midway between Hawaii and New Zealand.⁴⁸ The United States first claimed the territory in a 1900 treaty with Great Britain and Germany⁴⁹ and the Samoan government formally recognized U.S. sovereignty over the islands in 1900 and 1904.⁵⁰ This “outlying possession”⁵¹ of the United States was then administered by the Navy for four-and-a-half decades and by the Secretary of the Interior since 1951.⁵² The territory has its own constitution, approved by the Secretary, providing for a government of three branches.⁵³ Its residents have served in the U.S. military since 1900, including in Iraq and Afghanistan⁵⁴ — in fact, the territory “boasts the highest rate of military enlistment of any U.S. state or terri-

⁴⁷ See *Tuaua Plaintiffs to Seek Supreme Court Review*, WE THE PEOPLE PROJECT (Dec. 14, 2015), http://www.equalrightsnow.org/tuaua_plaintiffs_to_seek_supreme_court_review [<https://perma.cc/RW6W-MQ7N>].

⁴⁸ CIA, *Australia-Oceania: American Samoa*, THE WORLD FACTBOOK, <https://www.cia.gov/library/publications/the-world-factbook/geos/aq.html> [<https://perma.cc/5KBY-E8T3>].

⁴⁹ *Tuaua v. United States*, 951 F. Supp. 2d 88, 90 (D.D.C. 2013), *aff’d*, 788 F.3d 300 (D.C. Cir. 2015).

⁵⁰ *Id.*

⁵¹ *Id.* at 91.

⁵² *Id.* at 90.

⁵³ *Id.*

⁵⁴ *Id.*

tory”⁵⁵ — and, under a 1978 federal law, they elect a nonvoting delegate to the United States House of Representatives.⁵⁶

Despite those familial bonds to the United States, however, there is one thing that someone born in American Samoa does *not* share with a counterpart in Massachusetts, Puerto Rico, or Washington, D.C.: birthright citizenship.⁵⁷ Today, Americans born in a state enjoy birthright citizenship by dint of the Constitution;⁵⁸ those born in territories other than American Samoa receive it only by statute.⁵⁹ This issue came to the fore in a recent and illuminating court case.

1. *D.D.C.* — In an apparent case of first impression in 2012, five American Samoan noncitizen nationals, together with a nonprofit organization serving the Samoan community, brought suit in the District Court for the District of Columbia.⁶⁰ They asserted that the Fourteenth Amendment’s Citizenship Clause rendered unconstitutional the provisions of the INA denying them citizenship along with the State Department policy and practice implementing the law.⁶¹ The plaintiffs, some of whom had led “long careers in the military or law enforcement,” alleged a variety of harms flowing from the denial of citizenship, including the inability to vote and ineligibility for certain varieties of employment, for federal work-study programs in college, for firearm permits, and for foreign travel and immigration visas.⁶² They sought injunctive and declaratory relief against the United States and related parties as defendants.⁶³

But American Samoa’s delegate in Congress, Eni F.H. Faleomavaega, filed an amicus brief opposing the plaintiffs.⁶⁴ He resisted the plaintiffs’ quest for judicial recognition of a constitutional entitlement to birthright citizenship because he saw tension between such status and the existing arrangement’s protection of “the traditional Samoan way of life — *fa’a Samoa*.”⁶⁵ In particular, he stressed the

⁵⁵ Stern, *supra* note 38.

⁵⁶ *Tuaua*, 951 F. Supp. 2d at 90.

⁵⁷ *Id.* at 91.

⁵⁸ U.S. CONST. amend. XIV, § 1.

⁵⁹ See *supra* note 30.

⁶⁰ *Tuaua*, 951 F. Supp. 2d at 89–90; Complaint for Declaratory and Injunctive Relief, *Tuaua*, 951 F. Supp. 2d 88 (No. 12-1143).

⁶¹ *Tuaua*, 951 F. Supp. 2d at 90. The plaintiffs also challenged the State Department regulations as invalid under the Administrative Procedure Act, but the court did not reach this argument except on the jurisdictional question. *Id.* at 92.

⁶² *Id.* at 91.

⁶³ *Id.* at 90.

⁶⁴ *Id.* at 90 n.3.

⁶⁵ Reply of the Honorable Eni F.H. Faleomavaega as Amicus Curiae in Support of Defendants at 1, *Tuaua*, 951 F. Supp. 2d 88 (No. 12-1143).

Samoa people's rejection of attempts to change the present political association.⁶⁶

The defendants moved to dismiss the complaint for lack of subject matter jurisdiction and failure to state a claim.⁶⁷ In the district court, Judge Leon found jurisdiction but granted the motion to dismiss on the latter ground.⁶⁸ He noted the parties' agreement that American Samoa was "subject to the jurisdiction"⁶⁹ of the United States, as the Citizenship Clause required, but agreed with the defendants that the territory nonetheless failed to qualify for the clause's application because it did not meet the clause's separate requirement that it also be part of "the United States."⁷⁰ The court did not expressly find that language ambiguous, but it did invoke the presumption of a federal statute's validity unless its unconstitutionality could be "clearly shown."⁷¹

The district court first cited to dicta in *Downes v. Bidwell*⁷² — one of the most prominent *Insular Cases* — for the proposition that the Citizenship Clause did not extend to unincorporated territories (meaning those not "expressly made part of the United States by an act of Congress," and "not on a path toward statehood").⁷³ In one of the opinions in that fractured decision, Justice Henry Billings Brown⁷⁴ saw fit to "suggest, without intending to decide, that there may be a distinction between certain natural rights, enforced in the Constitution by prohibitions against interference with them, and what may be termed artificial or remedial rights, which are peculiar to our own system of jurisprudence."⁷⁵ Notably, Justice Brown went on to add that "rights to citizenship" belong to the "latter class" of nonfundamental rights.⁷⁶ Likewise, Justice Edward Douglass White, concurring with two Justices joining him, expressed doubt that territorial acquisition necessarily demanded the extension of birthright citizenship under the Constitution.⁷⁷

Judge Leon conceded that the divided decision in *Downes* did not offer binding precedent on the question of territorial incorporation of

⁶⁶ *Id.* at 5.

⁶⁷ *Tuaua*, 951 F. Supp. 2d at 90.

⁶⁸ *Id.* at 90, 92.

⁶⁹ U.S. CONST. amend. XIV, § 1.

⁷⁰ *Tuaua*, 951 F. Supp. 2d at 94 (quoting U.S. CONST. amend. XIV, § 1).

⁷¹ *Id.* at 94 n.8.

⁷² 182 U.S. 244 (1901).

⁷³ *Tuaua*, 951 F. Supp. 2d at 94.

⁷⁴ Justice Brown is infamous in our time as the author of the majority opinion in *Plessy v. Ferguson*, 163 U.S. 537 (1896).

⁷⁵ *Downes*, 182 U.S. at 282.

⁷⁶ *Id.* at 283.

⁷⁷ *Id.* at 306 (White, J., concurring).

the Citizenship Clause.⁷⁸ But he noted recent support for the negative answer suggested in *Downes*.⁷⁹ In particular, *Boumediene* reinforced the continued vitality of the *Insular Cases* framework, denying the automatic extension of constitutional protections to unincorporated territories.⁸⁰

More fundamentally, however, in a century of case law since the *Insular Cases*, “no federal court ha[d] recognized birthright citizenship as a guarantee in unincorporated territories.”⁸¹ In the last twenty years alone, the D.D.C. and the Second, Third, Fifth, and Ninth Circuits specifically *denied* the *Tuaua* plaintiffs’ argument as applied to the Philippines when it was a territory — and often relied directly on *Downes* in so doing.⁸² Likewise, in *Eche v. Holder*,⁸³ the Ninth Circuit relied on the same logic and the same precedent to hold that “the United States” in Article I’s Naturalization Clause did *not* extend to the unincorporated territory of the Commonwealth of the Northern Mariana Islands (CNMI).⁸⁴ The *Tuaua* plaintiffs’ only proposed principle to distinguish those adverse precedents — the fact “that the

⁷⁸ *Tuaua*, 951 F. Supp. 2d at 95.

⁷⁹ *Id.* at 95–96.

⁸⁰ *Id.* at 96 (citing *Boumediene v. Bush*, 553 U.S. 723, 757–59 (2008)). Judge Leon noted but dismissed certain parts of the *Boumediene* opinion that suggested that the modern Court took a slightly less sanguine view of these precedents, and might be inclined to narrow them. *Id.* The *Boumediene* Court did, for instance, grant the possibility “that over time the ties between the United States and any of its unincorporated Territories strengthen in ways that are of constitutional significance,” 553 U.S. at 758, quoting Justice Brennan’s statement in *Torres v. Puerto Rico*, 442 U.S. 465 (1979), that “[w]hatever the validity of the [*Insular Cases*] in the particular historical context in which they were decided, those cases are clearly not authority for questioning the application of the Fourth Amendment — or any other provision of the Bill of Rights — to the Commonwealth of Puerto Rico in the 1970’s,” *id.* at 475–76 (Brennan, J., concurring in the judgment). But the district court declined to take that “vague statement crafted in a vastly different context” — the Guantanamo cases — as “license” for “this Court to turn its back on the more direct and more persuasive precedent and the legal framework that has predominated over the unincorporated territories for more than a century.” *Tuaua*, 951 F. Supp. 2d at 96.

⁸¹ *Tuaua*, 951 F. Supp. 2d at 95.

⁸² *Id.* at 96 (citing *Nolos v. Holder*, 611 F.3d 279 (5th Cir. 2010); *Lacap v. INS*, 138 F.3d 518 (3d Cir. 1998); *Valmonte v. INS*, 136 F.3d 914 (2d Cir. 1998); *Rabang v. INS*, 35 F.3d 1449 (9th Cir. 1994); *Licudine v. Winter*, 603 F. Supp. 2d 129 (D.D.C. 2009)). Judge Leon also noted but denied the relevance of the D.C. Circuit’s refusal to address the question of Philippine birthright citizenship in its “brief, per curiam opinion” in *Mendoza v. Social Security Commissioner*, 92 F. App’x 3, 3 (D.C. Cir. 2004). *Tuaua*, 951 F. Supp. 2d at 98 n.15. The D.C. Circuit’s omission indicated only that “the issue was simply unnecessary to the disposition of the case” — not that “it was necessarily ‘an open question.’” *Id.*

⁸³ 694 F.3d 1026 (9th Cir. 2012).

⁸⁴ *Id.* at 1027; *see also id.* at 1031 (“Like the constitutional clauses at issue in *Rabang* and *Downes*, the Naturalization Clause is expressly limited to the ‘United States.’ This limitation ‘prevents its extension to every place over which the government exercises its sovereignty.’ Because the Naturalization Clause did not follow the flag to the CNMI when Congress approved the Covenant, the Clause does not require us to apply federal immigration law to the CNMI prior to the CNRA’s transition date.” (internal citation omitted) (quoting *Rabang*, 35 F.3d at 1453)).

Philippines, unlike American Samoa, was a territory only ‘temporarily’ — was not a distinction which any of those courts had cited as dispositive or relevant, and did not apply at all to the CNMI decision.⁸⁵

Finally, the district court bolstered its constitutional theory by reference to the historical gloss of America’s experience with territorial citizenship in the twentieth century.⁸⁶ Since the time of the *Insular Cases*, Congress had seen fit to confer U.S. citizenship by statute on the residents of the unincorporated territories of Puerto Rico, Guam, the U.S. Virgin Islands, and the CNMI — in all cases, “many years after the United States acquired [the territories].”⁸⁷ But such legislation would have been superfluous if the Fourteenth Amendment already conferred birthright citizenship on those U.S. nationals as a matter of constitutional right.⁸⁸ Although “longstanding practice is not sufficient to demonstrate constitutionality,” the court observed that “such a practice requires special scrutiny before being set aside.”⁸⁹

For all those reasons, secure in its constitutional conclusion, the district court found it unnecessary to “address the Amicus’s [Delegate Faleomavaega’s] arguments about the potentially deleterious effects of mandating birthright citizenship on American Samoa’s traditional culture.”⁹⁰ But the court’s generous citation to that amicus brief⁹¹ suggests, perhaps, that such arguments played an important role in framing the issue for Judge Leon — as they would for the D.C. Circuit.

2. *D.C. Circuit.* — A unanimous panel of the D.C. Circuit affirmed the district court’s decision in *Tuaua*.⁹² Writing for the court in reviewing Judge Leon’s dismissal de novo, Judge Brown⁹³ reached much the same result on the basis of a subtly different chain of reasoning.⁹⁴ In some ways, her opinion showed greater sympathy for the plaintiffs’

⁸⁵ *Tuaua*, 951 F. Supp. 2d at 96–97. Judge Leon also dismissed the plaintiffs’ argument that the legislative history leading up to the adoption of the Fourteenth Amendment supported an expansive interpretation of the Citizenship Clause, finding their evidence either unpersuasive or unclear. *Id.* at 97 n.14.

⁸⁶ *Id.* at 98.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.* (citing *Jackman v. Rosenbaum Co.*, 260 U.S. 22, 31 (1922) (Holmes, J.) (“If a thing has been practised for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it . . .”); *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.”)); cf. Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411 (2012).

⁹⁰ *Tuaua*, 951 F. Supp. 2d at 98 n.16.

⁹¹ *Id.*

⁹² *Tuaua v. United States*, 788 F.3d 300, 302 (D.C. Cir. 2015).

⁹³ Judge Brown was joined by Senior Judges Silberman and Sentelle.

⁹⁴ *Tuaua*, 788 F.3d at 302.

“individual plights, apparently more freighted with duty and sacrifice than benefits and privilege.”⁹⁵ But those interests were outweighed in the end by a competing interest: that of the American Samoan people in their own collective self-governance. The court was not persuaded to overcome its reluctance “to impose citizenship by judicial fiat — where doing so requires us to override the democratic prerogatives of the American Samoan people themselves.”⁹⁶

Unlike the court below, the D.C. Circuit expressly found the Citizenship Clause “textually ambiguous as to whether ‘in the United States’ encompasses America’s unincorporated territories.”⁹⁷ Judge Brown canvassed arguments on both sides of the question from the vantage points of text, legislative history, constitutional structure, and common law tradition.⁹⁸

On the one hand, the plaintiffs urged a broad reading of the Citizenship Clause and its “use of the overarching term ‘in the United States,’” in comparison with the Fourteenth Amendment’s neighboring Apportionment Clause, which “speaks narrowly in terms of apportionment of representatives ‘among the several *States*.”⁹⁹ Conversely, as the defendants claimed — and as Justice Brown suggested in *Downes*¹⁰⁰ — a comparison of the Fourteenth Amendment with the Thirteenth arguably militated in favor of a narrow reading.¹⁰¹ The Thirteenth Amendment proscribes slavery “within the United States, *or* any place subject to their jurisdiction,”¹⁰² whereas the Citizenship Clause of the Fourteenth Amendment applies to persons “born . . . in the United States, *and* subject to the jurisdiction thereof.”¹⁰³ Conceivably, then, “the Thirteenth Amendment’s phraseology contemplates areas ‘not a part of the Union, [which] [a]re still subject to the jurisdiction of the United States,’ while the Fourteenth Amendment incorporates a ‘limitation to persons born or naturalized in the United States[] which is not extended to persons born in any place ‘subject to their jurisdiction.’”¹⁰⁴

⁹⁵ *Id.* at 301–02.

⁹⁶ *Id.* at 302.

⁹⁷ *Id.*

⁹⁸ *Id.* at 303–04.

⁹⁹ *Id.* at 303 (quoting U.S. CONST. amend. XIV, § 1).

¹⁰⁰ 182 U.S. 244, 251 (1901).

¹⁰¹ *Tuaua*, 788 F.3d at 303. Judge Leon, in the decision below, also noted this textual argument, though without much comment beyond a general expression of deference to the Supreme Court’s apparently long-held view. *See Tuaua v. United States*, 951 F. Supp. 2d 88, 95 (D.D.C. 2013).

¹⁰² *Tuaua*, 788 F.3d at 303 (emphasis omitted) (citation omitted) (quoting U.S. CONST. amend. XIII, § 1 (emphasis added)).

¹⁰³ *Id.* (citation omitted) (quoting U.S. CONST. amend. XIV, § 1 (emphasis added)).

¹⁰⁴ *Id.* (first and second alterations in original) (quoting *Downes*, 182 U.S. at 251).

Judge Brown found neither textual argument “fully persuasive” or “[s]ufficient to divine the Citizenship Clause’s geographic scope.”¹⁰⁵ Both textual comparisons had some merit but remained “incomplete”¹⁰⁶ because they produced, at most, a vague inference as to how broadly or narrowly the clause should be read. Nor was the court impressed by the plaintiffs’ attempt to “rely on scattered statements from the legislative history to bolster their textual argument.”¹⁰⁷ Some of these statements, to be sure, suggested a broad reading of the clause.¹⁰⁸ But in addition to voicing a general skepticism as to the utility of such “[i]solated statements” in constitutional or statutory interpretation,¹⁰⁹ Judge Brown noted the Supreme Court’s longstanding warnings against the perils of such an enterprise in this area in particular, where “the legislative history of the Fourteenth Amendment . . . contains many statements from which conflicting inferences can be drawn.”¹¹⁰

The court gave greater attention to, but also ultimately rejected, plaintiffs’ attempts to interpret the clause and the relevant precedents “in light of the common law tradition of *jus soli*.”¹¹¹ This doctrine of “the right of the soil” was an “inheritance from the English common law” under which birthright citizenship broadly “extended beyond the British Isles to include, for example, persons born in the American colonies.”¹¹² The plaintiffs argued that the 1898 case of *United States v. Wong Kim Ark*¹¹³ constitutionally codified that common law rule with regard to “outlying territories” such as American Samoa.¹¹⁴ But the court distinguished that case, which undisputedly involved a California-born person and thus offered no binding precedent on the territorial reach of the Citizenship Clause beyond the

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 304.

¹⁰⁸ For instance, Senator Trumbull was recorded as stating that “[the Citizenship Clause] refers to persons everywhere, whether in the States or in the Territories or in the District of Columbia.” CONG. GLOBE, 39th Cong., 1st Sess. 2894 (1866).

¹⁰⁹ *Tuaua*, 788 F.3d at 304 (quoting *Garcia v. United States*, 469 U.S. 70, 78 (1984) (alteration in original)).

¹¹⁰ *Id.* (quoting *Afroyim v. Rusk*, 387 U.S. 253, 267 (1967)).

¹¹¹ *Id.*

¹¹² *Id.* (citing *Inglis v. Trs. of the Sailor’s Snug Harbor*, 28 U.S. (3 Pet.) 99, 120–21 (1830)).

¹¹³ 169 U.S. 649 (1898).

¹¹⁴ *Tuaua*, 788 F.3d at 304. This was the case primarily relied upon by academic critics of the D.C. Circuit’s decision, *see, e.g.*, Feldman, *supra* note 38 (“There’s a Supreme Court precedent from 1898 that explains the meaning of [the Citizenship Clause of the Fourteenth Amendment] . . . Remarkably, the D.C. Circuit didn’t apply this precedent to the Samoans’ case.”). As the D.C. Circuit noted, however, its distinguishing of this precedent accords with the conclusions of the Ninth and Fifth Circuits on the same question in the Philippine context. *Tuaua*, 788 F.3d at 304–05 (citing *Rabang v. INS*, 35 F.3d 1449, 1454 (9th Cir. 1994); *Nolos v. Holder*, 611 F.3d 279, 284 (5th Cir. 2010)).

states.¹¹⁵ *Wong Kim Ark* itself lent arguable support to that reading with its emphasis of the interpretive maxim that “general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision.”¹¹⁶

Moreover, the D.C. Circuit was unconvinced of the *jus soli* argument on the merits, because that doctrine also incorporated “a requirement of allegiance to the sovereign” that would not necessarily extend to politically distinct entities like American Samoa.¹¹⁷ Judge Brown again cited *Downes* to support her skepticism of the view that the Fourteenth Amendment’s framers “intended to extend birthright citizenship to distinct, significantly self-governing political territories within the United States’ sphere of sovereignty.”¹¹⁸ On similar grounds, as the D.C. Circuit noted,¹¹⁹ the Supreme Court long ago rejected the constitutional argument for Native American birthright citizenship in *Elk v. Wilkins*.¹²⁰ In that case even the first Justice Harlan, dissenting, came down against a broad interpretation of the Citizenship Clause to extend to distinct political entities under the United States government:

They are ‘subject to the jurisdiction’ of the United States only in a much qualified sense; and it would be obviously inconsistent with the semi-independent character of such a tribe, and with the obedience they are expected to render to their tribal head, that they should be vested with the complete rights, or, on the other hand, subjected to the full responsibilities of American citizens. *It would not, for a moment, be contended that such was the effect of [the Fourteenth A]mendment.*¹²¹

In the Native American context, *Elk* was never overruled as a constitutional matter and U.S. birthright citizenship was conveyed only by statute.¹²² For American Samoa, likewise, the D.C. Circuit found the *jus soli* argument for constitutional citizenship unavailing.¹²³

Finally, Judge Brown embraced the *Insular Cases* framework to resolve the textual ambiguity in the case at bar.¹²⁴ She acknowledged the modern argument that these precedents’ “territorial incorporation

¹¹⁵ *Tuaua*, 788 F.3d at 304–05.

¹¹⁶ 169 U.S. at 679 (quoting *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 399 (1821)).

¹¹⁷ *Tuaua*, 788 F.3d at 305.

¹¹⁸ *Id.* at 306 (citing *Downes v. Bidwell*, 182 U.S. 244, 305 (1901) (White, J., concurring)).

¹¹⁹ *Id.* at 305–06.

¹²⁰ 112 U.S. 94, 99 (1884); *accord id.* at 119 (Harlan, J., dissenting).

¹²¹ *Id.* at 119–20 (Harlan, J., dissenting) (emphasis added).

¹²² See DANIEL MCCOOL ET AL., NATIVE VOTE 6–7 (2007); see also Indian Citizenship Act, Pub. L. No. 68-175, 43 Stat. 253 (1924) (codified as amended at 8 U.S.C. § 1401(b) (2012)).

¹²³ *Tuaua*, 788 F.3d at 306.

¹²⁴ *Id.*

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