NOTE

CITIZENSHIP DENIED: THE *INSULAR CASES* AND THE FOURTEENTH AMENDMENT

*Lisa Maria Perez**

PURSUANT to the doctrine of territorial incorporation established in the Insular Cases*, Puerto Rico is an "unincorporated" territory, and as such, it does not form part of the United States within the meaning of the Constitution. As a result, persons born in Puerto Rico are not "born in the United States" under the Fourteenth Amendment and are not constitutionally entitled to citizenship. Because they enjoy only statutory citizenship, Congress arguably is able to expatriate most Puerto Ricans if the island is declared independent. Moreover, the inferior citizenship status of Puerto Ricans reveals a grave inconsistency in the law of the Fourteenth Amendment that has never been addressed. In response to* Dred Scott*, the Fourteenth Amendment constitutionalized the common law doctrine of* jus soli*, which provides that all persons born on U.S. territory and not subject to the jurisdiction of another sovereign are native-born citizens, regardless of race. Pursuant to this interpretation of the Citizenship Clause, persons born in Puerto Rico have been "born in the United States" since the ratification of the Treaty of Paris. By retroactively narrowing the scope of the term "United States," the Supreme Court took advantage of the unique geographical circumstances of the insular territories and prevented their inhabitants from obtaining equal citizenship. Thus, the doctrine of territorial incorporation reasserts* Dred Scott*'s race-based approach to citizenship and should be overruled.*

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INTRODUCTION

On April 7, 1998, a federal district court in Florida dismissed as unripe the declaratory claims of Jennifer Efrón, a minor resident of Dade County.[1] Jennifer had sued the United States in order to safeguard the permanence of her U.S. citizenship. Like all persons born in the Commonwealth of Puerto Rico, Jennifer enjoys her citizenship only by virtue of a statute, the Immigration and Nationality Act of 1952 ("INA").[2] While no court has ever ruled on the issue, Puerto Ricans have never been constitutionally entitled to U.S. citizenship in practice. Jennifer was painfully aware of this fact. She was also alarmed by the growing popularity of the "Young Bill," a Congressional effort to resolve Puerto Rico's political status by requiring persons domiciled there to choose between statehood and independence. Should Puerto Ricans choose independence, the Young Bill provided that Congress would automatically revoke the statutory U.S. citizenship of all Puerto Ricans residing on the island.[3]

[1] Efron ex. rel. Efron v. United States, 1 F. Supp. 2d 1468 (S.D. Fla. 1998).

[2] 8 U.S.C. § 1402 (2000). Pursuant to 8 U.S.C. § 1402, all persons born in Puerto Rico after January 13, 1941, who are "subject to the jurisdiction of the United States, are citizens of the United States at birth."

[3] H.R. 856, 105th Congress, § 4(a)(B)(4) (1997); see also *Efron*, 1 F. Supp. 2d at 1469. Although the Young Bill passed the House of Representatives by a one-vote margin of 209-208, it ultimately died after failing to reach a vote in the Senate. Nevertheless, as noted infra at note 9 and accompanying text, similar legislative measures seeking to resolve the status issue have since been introduced, and efforts to resolve Puerto Rico's status are still alive in Congress.

Faced with the possibility of losing her citizenship, Jennifer had attempted to "upgrade" her status to that of a "constitutional" citizen by filing an application for naturalization. Although it was unable to guarantee the irrevocability of her statutory citizenship, the Immigration and Naturalization Service ("INS") refused to process Jennifer's application because, technically, she was already a United States citizen.[4] Jennifer sought to repair the inherent weakness of her citizenship status by turning to the courts. In her suit against the United States, Jennifer requested that the court declare her citizenship irrevocable on constitutional grounds or, in the alternative, declare that her existing statutory citizenship did not render her unable to apply for naturalization.

The district court dismissed the action, holding that Jennifer's uncertainty regarding her future citizenship status was too speculative to warrant judicial intervention. According to the court, Jennifer would actually have to lose her U.S. citizenship or be on the verge of denaturalization in order to file a justiciable claim.[5] In so holding, the court failed to recognize the true injury at the heart of Jennifer's claim. Although denaturalization is indeed the ultimate harm Jennifer sought to prevent by filing suit, it is the statutory and potentially revocable nature of her citizenship that Jennifer sought to redress.

The inferior citizenship status of Puerto Ricans, though largely overlooked outside of the Puerto Rican legal community, reveals a grave inconsistency in the Supreme Court's Fourteenth Amendment jurisprudence. The constitutional inferiority of Puerto Ricans' U.S. citizenship derives from a retroactive narrowing of the geographical scope of the Fourteenth Amendment's Citizenship Clause by the Supreme Court during the *Plessy* era.[6] Because the federal government's claimed authority to revoke Puerto Ricans' U.S. citizenship derives from Supreme Court pronouncements, the Court should resolve this inconsistency without first requiring people like Jennifer to face the impending loss of their citizenship.

Moreover, persons born in Puerto Rico have legitimate reasons to fear a congressional revocation of their citizenship, especially in

[4] *Efron*, 1 F. Supp. 2d at 1469.
[5] Id. at 1470–71.
[6] U.S. Const. amend. XIV, § 1.

view of recent political trends. Near universal dissatisfaction with Puerto Rico's territorial status under the Constitution has led all three of its political parties to seek a permanent, nonterritorial status for the island.[7] Recently, the federal government has also demonstrated its willingness to resolve the issue. In response to a 2005 report by the President's Task Force on Puerto Rico's Status,[8] federal lawmakers introduced legislation calling for a binding two-step plebiscite that would ultimately force a choice between statehood and independence.[9] In view of the shift away from the status quo's acceptability, it appears that Puerto Rico will move toward a fundamental change in its political status. Throughout this process, the statutory citizenship of all persons born in Puerto Rico will be in play.

Should the Puerto Rican status debate culminate in a grant of independence, there is a strong possibility that Congress will elect to strip Puerto Ricans residing on the island of their U.S. citizenship.[10] Revocation provisions have been incorporated in prior plebiscite bills, and the two congressional committees in charge of Puerto Rican affairs repeatedly have taken the position that Congress is not bound by any significant constitutional constraints in

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[7] Puerto Rico's largest party is the Popular Democratic Party ("PDP" or "Commonwealth" party), which supports a permanent, nonterritorial autonomous status for Puerto Rico. The New Progressive Party ("NPP" or "Statehood" party), which supports statehood for Puerto Rico, comes closely behind the Commonwealth party in terms of membership and voter turnout. The Puerto Rican Independence Party ("PIP" or "Independence" party), supports independence for Puerto Rico. The PIP can usually only obtain about 5% of the Puerto Rican vote in any given election, but the absolute number of independence supporters is unknown, as a sizeable number of PDP voters support independence. Puerto Rico: Government, Administration and Social Conditions, Encyclopedia Britannica Online, (2008), http://www.britannica.com/eb/article-54537/Puerto-Rico/Puerto-Rico.

[8] President's Task Force on Puerto Rico's Status, Report by the President's Task Force on Puerto Rico's Status (2005) [hereinafter Task Force Report].

[9] Puerto Rico Democracy Act of 2007, H.R. 900, 110th Cong. (2007). The first step of this plebiscite would require persons domiciled in Puerto Rico to choose between the current territorial status and a permanent, nonterritorial status. Id. § 3(a). If the voters elect to pursue a permanent status, they would then be required to choose between sovereign independence and statehood. Id. § 3(c). Should statehood prove to be the winning option, Congress would remain free to reject Puerto Rico's petition, with the only remaining alternative being independence.

[10] See discussion infra Part II.

determining the citizenship status of Puerto Ricans.[11] Significantly, the President's Task Force on Puerto Rico's Status also concluded that if the island were ever to become independent, persons born in Puerto Rico would automatically "cease to be citizens of the United States, unless a different rule were prescribed by legislation or treaty."[12]

Part I of this Note will establish that the citizenship of persons born in Puerto Rico stands on a lesser footing than that of persons born within the fifty states. By operation of the doctrine of territorial incorporation—originally articulated during the early twentieth century in what are now known as the *Insular Cases*[13]—persons born in Puerto Rico are not "born in the United States" under the Citizenship Clause of the Fourteenth Amendment.[14] The framework behind the doctrine of territorial incorporation allowed the Supreme Court to conclude that, due to its unincorporated status, Puerto Rico did not form part of the United States for any consti-

[11] This interpretation of the citizenship status of Puerto Ricans was adopted by the House and Senate Committees on Natural Resources during the consideration of plebiscite legislation in Congress in 1993 and 1998, which was predicated on an analysis performed by the Congressional Research Service. See H.R. Rep. No. 104-713, pt. 1, at 33–34 (1996); Memorandum from the Am. L. Div., Cong. Research Serv. to the Honorable Bennet Johnston *in* 2 Puerto Rico: Political Status Referendum, 1989–1991, at 81–85 (P.R. Fed. Affairs Admin. ed., 1992).

[12] Task Force Report, supra note 8, at 9.

[13] The *Insular Cases* are a set of cases decided between 1901 and 1922 that set out the constitutional posture of Puerto Rico and the other insular territories, as well as Alaska. These cases are generally thought to include: *Balzac v. Porto Rico*, 258 U.S. 298 (1922); *Ocampo v. United States*, 234 U.S. 91 (1914); *Ochoa v. Hernandez y Morales*, 230 U.S. 139 (1913); *Dowdell v. United States*, 221 U.S. 325 (1911); *New York ex rel. Kopel v. Bingham*, 211 U.S. 468 (1909); *Kent v. Porto Rico*, 207 U.S. 113 (1907); *Grafton v. United States*, 206 U.S. 333 (1907); *Trono v. United States*, 199 U.S. 521 (1905); *Rassmussen v. United States*, 197 U.S. 516 (1905); *Mendezona y Mendezona v. United States*, 195 U.S. 158 (1904); *Kepner v. United States*, 195 U.S. 100 (1904); *Gonzalez v. Williams*, 192 U.S. 1 (1904); *Dorr v. United States*, 195 U.S. 138 (1904); *Hawaii v. Mankichi*, 190 U.S. 197 (1903); *Pepke v. United States*, 183 U.S. 176 (1901); *Dooley v. United States*, 183 U.S. 151 (1901); *Goetze v. United States*, 182 U.S. 221 (1901); *Huus v. N.Y. & P.R. Steamship Co.*, 182 U.S. 392 (1901); *Downes v. Bidwell*, 182 U.S. 244 (1901); *Dooley v. United States*, 182 U.S. 222 (1901); *De Lima v. Bidwell*, 182 U.S. 1 (1901); *Crossman v. United States*, 182 U.S. 221 (1901); and *Armstrong v. United States*, 182 U.S. 243 (1901). 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 104, 105 n.4 (Christina Duffy Burnett & Burke Marshall eds., 2001).

[14] U.S. Const. amend. XIV, § 1.

tutional purpose. Thus, on application, the doctrine of territorial incorporation necessarily requires that the Court exclude Puerto Rico from the domestic or constitutional "United States" as a first step in the analysis of any constitutional provision containing the term.

Part II will examine the territorial scope of the rule of *jus soli* at common law, its adoption into American law, and its incorporation in the Citizenship Clause. This long-standing doctrine provides that all persons born within the de facto territorial domains of the sovereign and not subject to the exclusive jurisdiction of another state are considered natural-born citizens, regardless of race or ethnicity. Part II will then evaluate the constitutional validity of the doctrine of territorial incorporation in light of the Court's failure to observe the rule of *jus soli* in its development of the doctrine. Part II will argue that the doctrine of territorial incorporation indirectly reasserts the racially premised approach to citizenship adopted in *Dred Scott v. Sandford*[15] and, therefore, should be overruled. Pursuant to a proper interpretation of the Fourteenth Amendment—one that looks to the common law doctrine of *jus soli* in defining the term "United States"—persons born in Puerto Rico have been "born in the United States" within the meaning of the Fourteenth Amendment since the ratification of the Treaty of Paris.[16]

Part III of this Note will examine whether a vested statutory right to U.S. citizenship can be revoked in the event that Congress declares Puerto Rico independent. Part III will conclude that current Supreme Court precedent leaves room for Congress to revoke citizenship, despite the substantial protection provided by the Fifth Amendment's Due Process Clause. Thus, through the doctrine of territorial incorporation, the Supreme Court left the door open to both the de-annexation of Puerto Rico and the unilateral denaturalization of its people. Finally, Part III will evaluate the likelihood of Puerto Rican independence in light of the current political climate.

[15] 60 U.S. (19 How.) 393 (1856).

[16] Treaty of Peace Between the United States of America and the Kingdom of Spain, U.S.-Spain, Dec. 10, 1898, 30 Stat. 1754. By extension, this conclusion also applies to all other territories over which the United States exercises exclusive political sovereignty, including Guam, the U.S. Virgin Islands, American Samoa and the Commonwealth of the Northern Mariana Islands.

Because the Citizenship Clause, interpreted in light of the doctrine of *jus soli*, provides that persons born in Puerto Rico and the other insular territories have been "born in the United States" since the ratification of the Treaty of Paris, this Note ultimately will contend that the Supreme Court should overrule the doctrine of territorial incorporation.

I. THE IMPLICATIONS OF THE DOCTRINE OF TERRITORIAL INCORPORATION ON THE U.S. CITIZENSHIP STATUS OF PUERTO RICANS

A. The History of U.S. Citizenship for Puerto Ricans and the Doctrine of Territorial Incorporation

1. The Citizenship Provisions of the Foraker and Jones Acts

Throughout its long rule over Puerto Rico, the federal government has consistently taken the position that persons born in Puerto Rico are not constitutionally entitled to U.S. citizenship. The Citizenship Clause of the Fourteenth Amendment provides that "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States."[17] Because this provision is self-executing,[18] if persons born in Puerto Rico were in fact "born in the United States" once Puerto Rico came under U.S. sovereignty, they would have become U.S. citizens by operation of the Amendment. At the time of Puerto Rico's acquisition, it was well established that its inhabitants became subject to the exclusive sovereignty of the United States. Nonetheless, upon the ratification of the Treaty of Paris,[19] the federal government firmly maintained that the citizenship status of the Puerto Rican people was subject to the will of Congress, pursuant to Article IX of that Treaty.[20] Although Puerto Ri-

[17] U.S. Const. amend. XIV, § 1.

[18] The citizenship clause was adopted in order to overturn *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, and to guarantee the U.S. citizenship of all native-born slaves and their descendants. Luella Gettys, The Law of Citizenship in the United States 4 (1934).

[19] Treaty of Peace Between the United States of America and the Kingdom of Spain, U.S.-Spain, Dec. 10, 1898, 30 Stat. 1754.

[20] Article IX of the treaty provided that "[t]he civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by the Congress." Id. at 1759.

cans were no longer Spanish citizens, Congress made no pronouncements on the issue of citizenship until the Foraker Act of 1900 established the first civil government for Puerto Rico under U.S. federal rule.[21] Under the Foraker Act, persons born in Puerto Rico were governed almost exclusively by federal decree, yet the Act declared them to be only "citizens of Porto Rico."[22] This was an "anomalous" and essentially meaningless citizenship status that did not convey Puerto Ricans any form of sovereignty and was not recognized by other nations.[23] It was not until the Jones Act of 1917 that all "citizens of Porto Rico" were declared to be citizens of the United States.[24] Even then, the grant of citizenship was only derivative, as the Jones Act did not make birth in Puerto Rico the rule for acquisition of U.S. citizenship.[25]

2. Downes v. Bidwell *and the Introduction of the Doctrine of Territorial Incorporation*

The Supreme Court sanctioned the exclusion of Puerto Ricans from U.S. citizenship in the *Insular Cases*. Under the doctrine of territorial incorporation, Puerto Rico does not form part of the "United States" under the Constitution. In *Downes v. Bidwell*, the first of these decisions, a divided majority of the Court held that Puerto Rico "is a territory appurtenant and belonging to the United States, but not a part of the United States within the revenue clauses of the Constitution."[26] *Downes* involved a dispute over the payment of a duty imposed under the Foraker Act on products

[21] Ch. 191, 31 Stat. 77 (1900) (codified as amended 48 U.S.C. §§ 733, 736, 738–40, 744, 866 (2000)). The Foraker Act provided for a Governor and Executive Council appointed by the President. The House of Delegates was the only governing body to be elected by qualified Puerto Ricans, but its acts were subject to final veto by the Executive Council, the Governor, or the U.S. Congress. José Trías Monge, Puerto Rico: The Trials of the Oldest Colony in the World 42–43 (1997).

[22] Ch. 191, 31 Stat. at 79.

[23] See Balzac v. Porto Rico, 258 U.S. 298, 308 (1922).

[24] Jones Act, ch. 145, 39 Stat. 951, 953 (1917) (current version at 8 U.S.C. § 1402 (2000)).

[25] Id; see also José Julián Alvarez González, The Empire Strikes Out: Congressional Ruminations on the Citizenship Status of Puerto Ricans, 27 Harv. J. on Legis. 309, 325 (1990). Persons born in Puerto Rico now obtain U.S. citizenship directly under § 1402 of the Immigration and Nationality Act. 8 U.S.C. § 1402 (2000).

[26] 182 U.S. 244, 287 (1901).

imported into the states from Puerto Rico.[27] The Petitioner had paid the duty under protest, arguing that Puerto Rico had become a U.S. territory immediately upon the ratification of the Treaty of Paris. As such, the petitioner claimed, Puerto Rico formed part of the United States within the meaning of the Uniformity Clause,[28] which provides that "all Duties, Imposts and Excises shall be uniform throughout the United States."[29]

In his opinion "for the Court," but in which no other Justice joined, Justice Brown premised the Court's holding on the ground that the term "United States," as used in the Constitution, excludes all territories. He emphasized that "[t]he Constitution was created by the people of the *United States*, as a union of *States*, to be governed solely by representatives of the *States*."[30] Justice Brown further represented that the Court understood the term "United States" to mean "the *States* whose people *united* to form the Constitution, and such as have since been admitted to the Union upon an equality with them."[31] Conceptualizing Puerto Rico as a territory "subject to the jurisdiction of the United States" but "not *of* the United States," he found that those "artificial or remedial rights" within the Constitution "which are peculiar to Anglo-Saxon jurisprudence," such as the Revenue Clauses, do not apply there.[32]

In his oft-cited concurring opinion that articulated the doctrine of territorial incorporation, Justice White disagreed with Brown's contention that the term "United States" excludes all territories. Instead, he maintained that there is a difference in constitutional status between those territories that had been "incorporated" into the Union that "form a part of the American family," and those "unincorporated" territories belonging to the United States, which are "not within the United States in the completest sense of those words."[33] Justice White's concurrence took the position, previously articulated by Abbott Lawrence Lowell in the *Harvard Law Re-*

[27] Id. at 247.
[28] Id. at 248–49.
[29] U.S. Const. art. 1, § 8, cl. 1.
[30] Downes v. Bidwell, 182 U.S. 244, 250–51 (1901).
[31] Id. at 277.
[32] Id. at 278, 282–83.
[33] Id. at 336–39 (White, J., concurring).

view,[34] that it is within the discretion of the treaty-making powers and Congress to determine the nature of the relationship between a newly acquired territory and the United States.[35] Because Article IX of the Treaty of Paris provided that "[t]he civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by the Congress,"[36] and Congress had not provided for the incorporation of Puerto Rico into the Union, Justice White concluded that Puerto Rico was an unincorporated territory.[37] As such, the island was not a foreign country, "since it was subject to the sovereignty of and was owned by the United States." But it was "foreign to the United States in a domestic sense," insofar as it was not a member of the American political community.[38] Because Puerto Rico was foreign to the United States under the Constitution, it was a "necessary consequence" that the Uniformity Clause was "not applicable to Congress in legislating for Porto Rico."[39]

The Court formally adopted White's incorporation model three years later, in an 8-1 decision in *Dorr v. United States*.[40] Thus, Justice White's narrow interpretation of the term "United States" was subsequently applied as a rule of decision in determining that the unincorporated territories were outside the purview of other constitutional provisions, such as the Fifth, Sixth, and Seventh Amendments.[41]

In light of *Downes*, the prevalent view among commentators addressing the citizenship status of Puerto Ricans is that, pursuant to the doctrine of territorial incorporation, persons born in Puerto Rico are not constitutionally entitled to U.S. citizenship. This "statutory citizenship" view maintains that because the doctrine of

[34] Abbott Lawrence Lowell, The Status of Our New Possessions—A Third View, 13 Harv. L. Rev. 155, 176 (1899).

[35] *Downes*, 182 U.S. at 300–01.

[36] Treaty of Peace Between the United States of America and the Kingdom of Spain, U.S.-Spain, art. IX, Dec. 10, 1898, 30 Stat. 1754, 1759.

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

[38] Id.

[39] Id. at 342.

[40] 195 U.S. 138, 142–43 (1904).

[41] See *Downes*, 182 U.S. 244; Hawaii v. Manchiki, 190 U.S. 197 (1903); Dorr v. United States, 195 U.S. 138 (1904); Rassmussen v. United States, 197 U.S. 516 (1905); Dowdell v. United States, 221 U.S. 325 (1911); Balzac v. Porto Rico, 258 U.S. 298 (1922).

incorporation excludes Puerto Rico from the constitutional definition of the term "United States," as employed in the Uniformity Clause, persons of Puerto Rican birth are not "born in the United States" under the Fourteenth Amendment's Citizenship Clause.[42]

In settling the question of Puerto Rico's "status" the *Downes* Court chose to adopt the novel test of "incorporation" in order to ensure that the constitutional definition of "United States" would not necessarily correspond with the nation's international boundaries. The act of "incorporation," in Justice White's view, bestowed upon a foreign population the right "to share the privileges and immunities of the people of the United States."[43] Therefore, the requirement that an acquired territory be incorporated before it could form part of the constitutional "United States" would allow the federal government to guard against "the immediate bestowal of citizenship on those absolutely unfit to receive it" as it pursued a policy of colonial expansion.

The *Downes* majority broadly articulated what Professor Gerald Neuman terms a "geographically restrictive social compact approach" in determining the scope of the Constitution.[44] This methodology limits the applicability of constitutional provisions to a territorially defined class of beneficiaries, and excludes any peoples whom Congress is not prepared to regard as equals.[45] Its application is evidenced throughout the *Insular Cases*. Justice White first premised his adoption of the incorporation test in *Downes* on the

[42] See Efrén Rivera Ramos, Puerto Rico's Political Status: The Long-Term Effects of American Expansionist Discourse, *in* The Louisiana Purchase and American Expansion, 1803–1898, at 165, 173 (Sanford Levinson & Bartholomew H. Sparrow eds., 2005). Alternately, at least one prominent casebook on immigration law maintains without explanation that "the reference in the fourteenth amendment to birth 'in the United States' includes birth in the U.S. Territories of the Virgin Islands, Panama Canal Zone, Puerto Rico, and Guam." Immigration and Nationality Law: Cases and Materials 711 (Richard A. Boswell ed., 2000). Scholars and policymakers continue to adhere to this view, see, e.g., Ramos, supra, at 173, despite the fact that in the 1957 case of *Reid v. Covert*, a plurality of the Court emphasized that "neither the [*Insular Cases*] nor their reasoning should be given any further expansion." 354 U.S. 1, 14 (1957) (plurality opinion). This is due in large part to the force with which the Court's rationale in *Downes* applies in the context of the Fourteenth Amendment's Citizenship Clause.

[43] *Downes*, 182 U.S. at 322–23 (White, J., concurring).

[44] Gerald L. Neuman, Strangers to the Constitution: Immigrants, Borders, and Fundamental Law 83 (1996).

[45] Id. at 83–85.

right of the American people to determine whether the inhabitants of an acquired territory were sufficiently "civilized" to allow admission of their native lands as "component constituents of the Union which composed the United States."[46] Later, in *Dorr v. United States*, the Court emphasized that "the United States may have territory, which is not incorporated into the United States *as a body politic*."[47] Even after Puerto Ricans had been granted citizenship under the Jones Act, the Court held in *Balzac v. Porto Rico* that Puerto Rico did not form part of the American polity, and that incorporation of such a "distant ocean communit[y] of a different origin and language from those of our continental people" would require a clear declaration from Congress.[48] Thus, the Court consistently regarded the Constitution as a fixed social compact that did not include Puerto Rico.

3. Balzac v. Porto Rico *and the Extension of the Doctrine of Territorial Incorporation*

Twenty-one years after *Downes*, in *Balzac v. Porto Rico*, the Court characterized the citizenship conferred to Puerto Ricans in 1917 as a matter of Congressional largesse rather than constitutional command.[49] In *Balzac v. Porto Rico*, the plaintiff argued that the Sixth Amendment's right to trial by jury applied in Puerto Rico because Section 5 of the Jones Act of 1917, which declared all "citizens of Porto Rico" to be citizens of the United States, had effectively incorporated the island into the Union.[50] Justice White had equated the extension of citizenship with incorporation in *Downes*.[51] But *Balzac v. Porto Rico* held that the two acts were distinct, and that the incorporation of such "distant ocean communities" as Puerto Rico may not result from a statutory grant of U.S. citizenship absent a clear Congressional statement.[52] Finding no clear statement of intent to incorporate Puerto Rico, the Court stressed that Section 5 of the Jones Act had merely given the

[46] 182 U.S. at 279–80, 322–26.
[47] 195 U.S. 138, 143 (1904) (emphasis added).
[48] Balzac v. Porto Rico, 258 U.S. 298, 311 (1922).
[49] Id. at 312–13.
[50] Id. at 307.
[51] *Downes*, 182 U.S. at 314–15, 333.
[52] *Balzac*, 258 U.S. at 311.

Puerto Ricans a "boon," consistent with their long-standing "yearning . . . to be American citizens."[53] Thus, in *Balzac v. Porto Rico* the Court corroborated the *Downes* Court's assertion that native-born Puerto Ricans had no constitutional right to U.S. citizenship.

B. The Impasse of Incorporation: The Downes *Court's Interpretation of "United States" as to the Uniformity Clause Applies Throughout the Constitution*

1. The Inviability of the "Divergent Definitions" View

While addressing the citizenship implications of the incorporation doctrine, several scholars have suggested that the term "United States" need not have a single constitutional definition. Professor Alvarez González, for example, has adopted the statutory citizenship view, but not without first emphasizing that the *Downes* definition of "United States" could be reconciled with a broader definition of the term in the context of citizenship.[54] Such a finding would be justified, because citizenship is "a concept closely connected to individual rights, and one more relevant to the international, rather than to the domestic, realm."[55] Alvarez González further notes that the *Downes* Court itself had drawn a distinction between the meaning of "United States" in an international sense, which includes Puerto Rico, and the meaning of the term in a domestic sense, which does not.[56]

What this "divergent definitions" view overlooks, however, is that the doctrine of incorporation is framed in such broad terms that one cannot properly reconcile Puerto Rico's unincorporated status with an interpretation of the Fourteenth Amendment that regards persons born in Puerto Rico as having been "born in the United States." Although the holding in *Downes* was limited to the Uniformity Clause, the Court reached its determination by simply drawing a general conclusion that Puerto Rico is not a part of the constitutional "United States" for any purpose. According to Justice White, "as a general rule, the *status* of a particular territory has

[53] Id. at 308.
[54] Alvarez González, supra note 25, at 334–35.
[55] Id.
[56] Id. at 335–36.

to be taken in view when the applicability of *any provision* of the Constitution is questioned" except in cases "when the Constitution has absolutely withheld from the government all power on a given subject."[57] Far from being based on the particular context of the Uniformity Clause, the Court's reasoning in *Downes* prescribes a rule of decision as to the scope of the term "United States" under the Constitution. This rule is premised on the Court's implicit finding that there is only one possible constitutional definition of the term "United States."

Moreover, although the *Downes* Court did acknowledge that Puerto Rico could form part of the United States "in an international sense," this was only meant to indicate that Puerto Rico belonged to the United States. It did not signify that the Court had recognized the possibility of an additional, international definition of the term United States under the Constitution. Indeed, the *Downes* Court expressly rejected the argument that the phrase "United States" includes all areas directly subject to U.S. sovereignty.[58] This "divergent definitions" view is premised upon Justice White's statement in *Downes* that Puerto Rico belonged to the United States, and was thus not a foreign country "in an international sense."[59] Yet this statement does not indicate an intention by the Court to acknowledge the possibility of a broader, international interpretation of the term "United States" for some constitutional provisions. Rather, by asserting that Puerto Rico belonged to the United States "in an international sense," the Court sought to clarify that Puerto Rico was subject to the plenary power of Congress under the Territory Clause. The Court was also sending a clear signal to the federal government that it was free to profit from its right to acquire territory by ruling Puerto Rico as a colony.[60]

In evaluating the potential scope of the *Downes* decision, Alvarez González also suggests that the nature of citizenship as an individual relationship between citizen and nation is so distinct from the states' rights concerns giving rise to the Uniformity Clause that the Supreme Court would be justified in adopting a more inclusive

[57] Downes v. Bidwell, 182 U.S. 244, 294 (1901) (emphasis added).
[58] Id. at 299–301.
[59] Id. at 341.
[60] Id. at 306.

interpretation of the term "United States" for purposes of the Citizenship Clause.[61] Alvarez González places particular emphasis on the idea that citizenship is "a concept which involves a reciprocal relationship between an individual and a nation, irrespective of where within that nation the individual may be found."[62] Yet he overlooks the fact that Justice White premised the doctrine of incorporation on the right of the people, acting through Congress, to determine whether the inhabitants of a newly acquired territory should be included in the constitutional compact and accorded citizenship.[63] In light of this rationale, it would be fairly incongruous for a subsequent Court to draw an exception to the doctrine premised on an inherent or individualized right to citizenship.

2. Collective Treatment with Respect to Citizenship Rights

The divergent definitions view is further undercut by the federal government's historical treatment of Puerto Ricans' citizenship status as a matter of collective privilege rather than individual right. Beginning with the Treaty of Paris in 1898, which postponed any decision as to the citizenship status of the newly acquired populations,[64] the political branches of the federal government have consistently ruled on the future citizenship status of native-born Puerto Ricans as a group. The Foraker Act of 1900 denied U.S. citizenship to all native-born Puerto Ricans without any individualized consideration.[65] Section 5 of the Jones Act of 1917 collectively conferred U.S. citizenship on all such "citizens of Porto Rico," as that term was defined by Section 7 of the Foraker Act.[66] The only semi-individualized treatment given to Puerto Ricans with respect to citizenship was under a provision in Section 5 of the Jones Act, which granted all "citizens of Porto Rico" the right to

[61] Alvarez González, supra note 25, at 334–36.
[62] Id. at 335.
[63] Downes v. Bidwell, 182 U.S. 244, 300–08 (1901).
[64] Treaty of Peace Between the United States of America and the Kingdom of Spain, U.S.-Spain, art. IX, Dec. 10, 1898, 30 Stat. 1754.
[65] Foraker Act, ch. 191, § 7, 31 Stat. 77 (1900) (codified as amended 48 U.S.C. §§ 733, 736, 738–40, 744, 866 (2000)).
[66] Jones Act, ch. 145, § 5, 39 Stat. 951, 953 (1917) (current version at 8 U.S.C. § 1402 (2000)).

reject the offer of U.S. citizenship within six months and retain their existing status of "citizens of Porto Rico."[67]

Furthermore, the Supreme Court has a long history of treating the citizenship status of discrete and insular minority populations as a matter for collective determination. In the *Dred Scott* decision, the Supreme Court ruled that all native-born descendants of African slaves lacked national citizenship status under the Constitution,[68] and in *Elk v. Wilkins*,[69] the Court determined that all Native Americans born to federally recognized tribes were not constitutionally entitled to U.S. citizenship because they were not sufficiently subject to the jurisdiction of the United States at the time of their birth. The Court has also made collective citizenship determinations with respect to Puerto Ricans. In *Gonzalez v. Williams*, which was decided in 1904, when Puerto Rican natives were still "citizens of Porto Rico" under the Foraker Act, the Court held that all native-born Puerto Ricans had the status of U.S. nationals under the federal immigration statutes and for purposes of international travel.[70] Thus, in light of the long-standing treatment of Puerto Ricans as a unified group for purposes of citizenship, it is unlikely that Alvarez González's individual rights argument will succeed in persuading the Court to adopt a broader definition of the term "United States" under the Citizenship Clause.[71]

Given that the doctrine of incorporation is premised on the use of a narrowly defined "United States" as a point of departure in constitutional analysis, and in view of the fact that the Court's intent in articulating the doctrine was to allow the federal government to "protect the birthright of its own citizens," one must inevitably conclude that Puerto Rico is excluded from the meaning of the term "United States" for purposes of the Citizenship Clause.[72] Because the *Downes* Court provided no real basis on which to dis-

[67] Id.

[68] Scott v. Sandford, 60 U.S. (19 How.) 393, 405–07 (1856).

[69] Elk v. Wilkins, 112 U.S. 94 (1884).

[70] Gonzalez v. Williams, 192 U.S. 1 (1904).

[71] This difficulty is further compounded by the uphill battle involved in persuading the Court that it would not be illogical to adopt different definitions of the term "United States" for different provisions, and that the framers did not necessarily have a single meaning of the term "United States" in mind when they drafted the Constitution.

[72] Downes v. Bidwell, 182 U.S. 244, 306 (1901).

tinguish the context of the Uniformity Clause from that of the Citizenship Clause or any other provision, the doctrine of territorial incorporation must be overruled in order to find that persons born in Puerto Rico are "born in the United States" under the Fourteenth Amendment.

II. THE DOCTRINE OF TERRITORIAL INCORPORATION: A RESTORATION OF *DRED SCOTT*'S EXCLUSIONARY APPROACH TO CITIZENSHIP

A. The Doctrine of Jus Soli*: The Proper Interpretation of the Citizenship Clause*

1. Calvin's Case *and the Doctrine of* Jus Soli

The American legal tradition of birthright citizenship was adopted directly from the British common law doctrine of *jus soli*. This doctrine was derived from medieval principles of communal organization that call for reciprocal obligations of allegiance and protection between the individual and the sovereign.[73]

Sir Edward Coke formally expounded these principles as the doctrine of *jus soli* in *Calvin's Case*, also known as the *Case of the Postnati*.[74] The plaintiff, Robert Calvin, was an infant born in Scotland after James I of England had acceded to the Scottish throne as James VI.[75] The central issue in the case concerned whether Calvin could inherit lands in England as a native-born subject of the British sovereign, or whether he was considered an alien and therefore ineligible to inherit title to property under English law.[76] Coke, along with fourteen other leading members of the English bench, held that all persons born within any territory ruled by the King of England were subjects of the King, and were therefore entitled to all the benefits of English law.[77] In support of this conclusion, Coke articulated "the first comprehensive theory of British subject-

[73] See generally Jonathan C. Drimmer, The Nephews of Uncle Sam: The History, Evolution, and Application of Birthright Citizenship in the United States, 9 Geo. Immigr. L.J. 667, 667, 669–70 (1995).

[74] Calvin's Case, (1608) 77 Eng. Rep. 377 (K.B.).

[75] Id. at 379.

[76] Id.

[77] See generally Polly J. Price, Natural Law and Birthright Citizenship in *Calvin's Case* (1608), 9 Yale J.L. & Human. 73 (1997).

ship."[78] He grounded this theory firmly on the principle of ascription, which provides that one's political identity is automatically assigned by the circumstances of one's birth.[79] As Professors Schuck and Smith have noted, Coke also looked to natural law to "direct this case," giving his theory of birthright citizenship the strongest possible foundation.[80]

The touchstone of citizenship under the rule of *Calvin's Case* is "birth within the allegiance, also called 'ligealty,' 'obedience,' 'faith' or 'power' of the King."[81] A person is born within the King's allegiance when he or she is born within "the King's dominion," which Coke identified as territory within the "actual possession" of the King of England.[82] Birth within the allegiance entails a reciprocal obligation—obedience by the subject and protection by the King. In Coke's view, an individual's political identity was fundamentally a question of his or her allegiance to a particular sovereign, and that allegiance was immutable because it derived from natural law.[83] But Coke likewise emphasized the reciprocity inherent in the connection between sovereign and subject, noting that "as the subject oweth to the King his true and faithful ligeance and obedience, so the Sovereign is to govern and protect his subjects."[84]

Unlike Roman law, the common law recognized only one political status, that of subjectship, and it did not draw facial distinctions among native inhabitants based on degrees of political membership.[85] Pursuant to Coke's theory of birthright subjectship, it is the commonality of allegiance to a particular sovereign that determines a person's political membership. As Schuck and Smith discuss, the question of one's allegiance under the doctrine of *jus soli* is not affected by such factors as language, ethnic origin, and na-

[78] James H. Kettner, The Development of American Citizenship 1608–1870, at 17 (1978).

[79] Peter H. Schuck & Rogers M. Smith, Citizenship Without Consent 13 (1985) (citing James H. Kettner, The Development of American Citizenship 1608–1870, at 17 (1978)).

[80] Id.

[81] United States v. Wong Kim Ark, 169 U.S. 649, 655 (1898).

[82] Calvin's Case, (1608) 77 Eng. Rep. 377, 399 (K.B.).

[83] Schuck & Smith, supra note 79, at 13.

[84] *Calvin's Case*, 77 Eng. Rep. at 382.

[85] In *State v. Manuel*, Justice Gaston emphasized that "[w]hatever distinctions may have existed in the Roman law between citizens and free inhabitants, they are unknown to our institutions." 20 N.C. (3 & 4 Dev. & Bat.) 20, 24 (1838).

tional origin.[86] Under English law, a child born within the king's domain to an alien and ethnically distinct family is just as much a British subject as a child born of an ancient and noble Anglo-Saxon line. This point was emphasized by Lord Chief Justice Cockburn, who stated in 1869 that "[b]y the common law of England, every person born within the dominions of the Crown, no matter whether of English or of foreign parents, and, in the latter case, whether the parents were settled, or merely temporarily sojourning, in the country, was an English subject."[87] As discussed in William Holdsworth's History of English Law, the doctrine also applied as the king's dominions expanded, and gave a uniform status to all those within the patchwork of communities that came to constitute the British Empire.[88]

According to Coke, and as reiterated by the noted nineteenth-century British jurist Lord A.V. Dicey, the rule of *jus soli* is subject to only two exceptions.[89] The first is if a hostile force occupies any part of the British dominions, and members of that force have issue during the occupation, that issue is an alien and not a natural-born subject.[90] The second exception excludes from British nationality the children of foreign ambassadors or other diplomatic agents born within the British dominions.[91] Because such children are not born under the allegiance of the British king, they are not to be regarded as his natural subjects, despite the fact of their birth within the realm.[92]

2. Reconciling Jus Soli *with a Community-Based Theory of Social Compact*

The doctrine of *jus soli* was initially premised on medieval notions of feudal obligation that have little application outside the context of an absolute monarchy. In *Calvin's Case*, Coke premised his rule of birthright citizenship on the feudalistic notion that a sub-

[86] Schuck & Smith, supra note 79, at 14.
[87] Alexander Cockburn, Nationality: Or the Law Relating to Subjects and Aliens, Considered with a View to Future Legislation 7 (London, William Ridgway 1869).
[88] 9 W.S. Holdsworth, A History of English Law 83 (1926).
[89] *Calvin's Case*, 77 Eng. Rep. at 398–99; A.V. Dicey, A Digest of the Law of England with Reference to the Conflict of Laws 173–77 (1896).
[90] Dicey, supra note 89, at 176.
[91] Id. at 177.
[92] Id. at 175–76.

ject owes a "natural" and permanent debt of allegiance to his lord in return for the protection received at birth.[93] In exchange, the sovereign also owed a permanent duty of protection to the subject, so long as the sovereign remained able to provide it.[94] The resulting political community consisted of an aggregation of feudal relationships between sovereign and subject.[95] Enlightenment theorists such as John Locke began challenging Coke's view of civil society in the late seventeenth century, even as the rule of *jus soli* gained broad acceptance among British jurists.[96] Locke maintained in the second of his *Two Treatises of Government*, for example, that individuals are not "naturally subject to a sovereign," and that because man is naturally born free, he enters into a state of civil society willingly.[97] By the eighteenth century, British jurists had come to embrace Locke's views of consensual membership and community sovereignty, even as they consistently applied the rule of *jus soli*.[98] Thus, long before the American Revolution, Coke's rule of assigning citizenship at birth and Locke's consent-based notions of political community came to coexist within the common law of subjectship.

Although Locke's theory of community sovereignty gained wide acceptance among British jurists, his consent-based approach to political membership was not incorporated into the common law as a constitutive doctrine.[99] Thus, despite the tension between Coke's ascriptive principles of birthright citizenship and Locke's consent-based theories of popular sovereignty, jurists of the post-Enlightenment period elected to preserve the doctrinal contours of the rule of *jus soli* as they had been initially articulated in *Calvin's Case*. They did, however, adopt a more egalitarian justification for the mutual bond between sovereign and subject, based on the principles of individual consent and community sovereignty.[100] Ulti-

[93] Schuck & Smith, supra note 79, at 15.
[94] Id. at 17 (citing *Calvin's Case*, 77 Eng. Rep. at 392–93, 407).
[95] Kettner, supra note 78, at 23.
[96] See Drimmer, supra note 73, at 673–74; see also Schuck & Smith, supra note 79, at 34–39.
[97] Drimmer, supra note 73, at 674–75 (citing John Locke, Two Treatises of Government §4 (Ian Shapiro ed., Yale Univ. Press 2003) (1690)).
[98] Id. at 675; Schuck & Smith, supra note 79, at 42–43.
[99] See Schuck & Smith, supra note 79, at 36–41.
[100] Drimmer, supra note 73, at 675–76; Kettner, supra note 78, at 45.

mately, the rationale behind the rule of *jus soli* had evolved sufficiently by the late eighteenth century as to allow early American courts to apply the rule as one of citizenship rather than subjectship.

3. Early American Experience with Jus Soli

Because they formed part of the sovereign domain of the King of England, the doctrine of *jus soli* applied with full force in the American colonies. It has been widely acknowledged that as a result of the doctrine all native-born colonists were English subjects at birth, and that they were consequently entitled to the benefits and protections attendant to British subjectship.[101] When the colonies gained independence, the common law of England was incorporated into American law and, along with it, the doctrine of *jus soli* as expounded by Blackstone.[102] According to Professor Jonathan Drimmer, "[c]olonists viewed their independent polities as Lockean associations formed by communal consent for the mutual preservation of fundamental individual rights."[103] Although the colonists viewed the community itself as sovereign, they retained the rule of *jus soli* as their organizing principle for purposes of political membership.[104] Thus, birth within the territorial boundaries of the state gave rise to a reciprocal relationship between the individual and the polity, whereby the people were obliged to jointly protect individual rights in exchange for each person's allegiance.[105] While those "born within the allegiance" were now citizens entitled to a broader range of political rights—at least in the case of white land-owning men—American courts determined their entitlement to membership within the political community according to essentially the same common law rules that applied before the Revolution as to the status of subjectship.

When determining which persons were entitled to membership in the political community, revolutionary-era courts routinely ap-

[101] See Inglis v. Sailor's Snug Harbor, 28 U.S. 99, 120–21 (1830); Ainslie v. Martin, 9 Mass. 400, 454 (1813).
[102] Schuck & Smith, supra note 79, at 42–43.
[103] Drimmer, supra note 73, at 677–78.
[104] Id. at 678.
[105] Id.

plied the common law principle of *Calvin's Case*.[106] Consistent with the common law's conception of political membership as irrevocable, early American courts recognized the right of British loyalists to retain their British subjectship through relocation. Because persons born before the Declaration of Independence were British subjects, the courts applied an "elective" theory in order to determine whether the persons' status as English subjects had transferred to their state of residence upon independence.[107] Pursuant to the elective doctrine, the courts presumed that those individuals who had chosen to remain in the community after the Declaration of Independence had "elected" state citizenship, while those who returned to England had chosen to remain British subjects.[108] This doctrine is evidenced in the case of *Inglis v. Sailor's Snug Harbor*, where the Court held that all British subjects who were born in the colonies before the Revolution and remained loyal to the British became aliens upon the Declaration of Independence.[109] The *Inglis* Court also emphasized that while the British Crown did not apply the doctrine of perpetual allegiance to those former subjects who chose to stay in America after the Revolutionary War, it recognized and retained the allegiance of those who exercised their right of election and relocated to England as a result of the war.[110]

Moreover, because the original Constitution did not provide a definition of the term "citizen of the United States," Coke's rule remained the governing standard after the ratification. The North Carolina Supreme Court case of *State v. Manuel* illustrates this general acceptance of the rule of *jus soli* and its requirement that all persons born within the nation's sovereign territory be regarded as native-born citizens.[111] In *Manuel*, Justice Gaston asserted that "[b]efore our Revolution, all free persons born *within the dominions of the King of Great Britain*, *whatever their color or complexion*, were native-born British subjects; those born out of his allegiance were aliens."[112]

[106] Id. at 680–81.
[107] Id. at 680.
[108] Id.
[109] 28 U.S. 99, 120–22 (1830).
[110] Id. at 122–23.
[111] 20 N.C. (3 & 4 Dev. & Bat.) 144 (1838).
[112] Id. at 148 (emphasis added).

Indeed, in the decades before the *Dred Scott* decision, American courts repeatedly applied Coke's definition of "birth within the dominions" in determining which persons were entitled to native citizenship. For example, in *Inglis v. Sailor's Snug Harbor*, Justice Story reiterated Blackstone's definition of "allegiance," and emphasized that, in order to create citizenship, there must be both "birth locally within the dominions of the sovereign," and "birth within the protection and obedience" of the sovereign.[113] Importantly, Justice Story defined the term "dominions of the sovereign" to mean all places "*where the sovereign is at the time in full possession and exercise of his power*."[114] One of the exceptions to the doctrine, which Justice Story took as confirmation of the overall rule, provided that a person born on the high seas obtains the citizenship of his parents, "for he is still deemed under the protection of his sovereign."[115] Similarly, the Supreme Court of Massachusetts held in *Kilham v. Ward* that "[t]he doctrine of the common law is that every man born within its jurisdiction is a subject of the sovereign of the *country where he is born*; and allegiance is not personal to the sovereign . . . . [I]t is due to him in his political capacity of *sovereign of the territory* where the person owing the allegiance was born."[116] Thus, the interpretation of "birth within the allegiance" that predominated in U.S. courts was the same as under the common law: if a person is born in a territory subject to the actual control of the United States and is not subject to the allegiance of any other sovereign, that person is a native-born U.S. citizen.

Several noted nineteenth-century commentators echoed this interpretation of "birth within the dominions." Chancellor Kent noted in his Commentaries that "[n]atives are all persons born *within the jurisdiction* and allegiance of the United States . . . without any regard or reference to the political condition or allegiance of their parents."[117] The Court in *United States v. Wong Kim Ark*, quoting an 1853 paper by Mr. Binney, also maintained that the right of citizenship is "incident[al] to birth *in the country*."[118] These

[113] 28 U.S. at 155.
[114] Id. (emphasis added).
[115] Id.
[116] Kilham v. Ward, 2 Mass. 236, 264–65 (1806) (emphasis added).
[117] James Kent, 2 Commentaries *39.
[118] United States v. Wong Kim Ark, 169 U.S. 649, 665 (1898).

statements serve to further demonstrate that, under nineteenth-century U.S. common law, the existence or nonexistence of native citizenship depended on whether birth had taken place within the effective national sovereignty of the United States, and not, as urged by the Fuller Court, in a subset of territory deemed "incorporated."

4. Dred Scott *and the Shift to Racial Membership Classifications*

In the infamous *Dred Scott* decision, the Supreme Court held that the native-born descendants of African slaves were not, and could never be, U.S. citizens under the Constitution. Contrary to the dictates of the common law, *Dred Scott* articulated a theory of U.S. citizenship that was explicitly premised on the drawing of racial classifications within the native-born population.[119] Chief Justice Taney emphasized that, at the time of the Constitution's drafting, African slaves and their descendants were not regarded as part of the "sovereign people" for whose benefit it had been adopted.[120] Rather,

> they were at that time considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, . . . remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them.[121]

Thus, the court employed the principles of social contract and communal association to exclude a group it regarded as inferior from the American political community.

5. The Citizenship Clause: The Constitutionalization of Jus Soli

In response to *Dred Scott*, the framers of the Fourteenth Amendment provided an ascriptive definition of citizenship,[122] which mandates that "[a]ll persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of

[119] Scott v. Sandford, 60 U.S. (19 How.) 393, 406 (1856).
[120] Id. at 404.
[121] Id. at 404–05.
[122] Smith & Schuck, supra note 79, at 3–7, 73.

the United States and of the State wherein they reside."[123] Through the Citizenship Clause,[124] the framers of the post-Civil War amendments codified the long-standing common-law doctrine of *jus soli*. They did so in order to eliminate potential judicial or legislative discretion to exclude discrete minority groups from birthright citizenship on grounds of race. Indeed, the Supreme Court itself has noted on several occasions that its power in the area of citizenship is limited because the Amendment "provides its own constitutional rule in language calculated completely to control the status of citizenship."[125] Due to their fear that a subsequent Congress or Court would invalidate the rights provided under the Civil Rights Act of 1866,[126] including the right of equal citizenship, the framers intended the Amendment to "settle[] the great question of citizenship and remove[] all doubt as to what persons are or are not citizens of the United States."[127] In view of their familiarity with the common law, the framers of the Fourteenth Amendment understood that the Citizenship Clause would extend birthright citizenship to all persons born within the sovereign territory of the United States who were not exclusively subject to the allegiance of another country. Moreover, subsequent case law suggests that this aim of the framers was well understood among jurists.

In the decades between the passage of the Amendment and the *Insular Cases*, the Supreme Court consistently recognized that the Fourteenth Amendment was deeply grounded in common law principles. In *Minor v. Happersett*, Chief Justice Waite employed the terms birth "in a *country*" and birth "*within the jurisdiction*" as satisfying the common law requirement of birth within the king's dominions.[128] The Fuller Court itself stated in *United States v. Wong Kim Ark* that the Fourteenth Amendment "must be interpreted in the light of the common law."[129]

In *Wong Kim Ark*, the Court held that an American-born child of Chinese immigrants was entitled to citizenship under the Four-

[123] U.S. Const. amend. XIV, § 1.
[124] Id.
[125] Afroyim v. Rusk, 387 U.S. 253, 262 (1967).
[126] Id.
[127] Cong. Globe, 39th Cong., 1st Sess., 2890 (1866) (statement of Sen. Howard).
[128] 88 U.S. (21 Wall.) 162, 167–68 (1874).
[129] 169 U.S. 649, 654 (1898).

teenth Amendment, and thus the travel restrictions embedded in the Chinese Exclusion Act did not apply to him. Recognizing its obligation to interpret the Citizenship Clause pursuant to the common law rule of *jus soli*, the *Wong Kim Ark* Court emphasized that whether a person is "born in the United States" within the meaning of the Fourteenth Amendment depends upon whether that person can be said to have been "born within the allegiance" of the United States at common law.[130] Because the plaintiff was concededly born within the dominions of the United States and was not subject to the allegiance of any other state, the Court found that he was a natural-born citizen. His race played no part in the analysis.[131] Thus, the same Court that held that Congress is not required to extend citizenship to persons born in the insular territories held in *Wong Kim Ark* that the Citizenship Clause could only be interpreted by reference to common law definitions.

6. Applying Jus Soli *to the Insular Territories: Persons Born in Puerto Rico Are Constitutionally Entitled to Birthright Citizenship*

In light of these facts, it is readily apparent that birth "in the United States" within the meaning of the Fourteenth Amendment is tantamount to birth in "the King's dominion" at common law. Because one only had to be born in a place where the sovereign was in the actual exercise of his power to be born "in the King's dominion" at common law, persons born in any place subject to the exclusive de facto sovereignty of the United States are "born in the United States" pursuant to the Fourteenth Amendment.

As discussed in the next Section, the Fuller Court articulated a narrow definition of the term "United States" that excluded the insular territories for all purposes under the Constitution, in order to prevent the insular populations from obtaining birthright citizenship. Given that the adoption of the Reconstruction Amendments was fairly recent history in 1901, when *Downes* was first articulated,[132] and in view of the Court's finding only three years earlier that the Citizenship Clause was to be interpreted by reference to

[130] Id. at 655.
[131] Id. at 705.
[132] See Downes v. Bidwell, 182 U.S. 244, 250–51 (1901).

the common law of England,[133] the *Downes* Court's novel interpretation of the term "United States" was an impermissible modification of the Fourteenth Amendment.

Because the common law rule of *jus soli*—as enshrined by the framers of the Fourteenth Amendment—establishes that the grant of birthright citizenship extends to all persons born within the territorial domains of the sovereign, regardless of race or national origin, the doctrine of territorial incorporation should be overturned. There is no question that persons born in the so-called unincorporated territories are born "within the allegiance" of the United States as that term was understood at common law. The unincorporated territories are subject to the exclusive sovereign authority of the United States, and thus, persons born there are born within the sovereign domains of the United States as required by the doctrine of *jus soli*. Moreover, because persons born in the unincorporated territories are not subject to the exclusive authority of any other sovereign, the exceptions to the rule of *jus soli* do not apply.

In addition to being born "in the United States" under the proper interpretation of the Fourteenth Amendment, persons born in Puerto Rico and the other insular territories are "subject to the jurisdiction of the United States" as the Citizenship Clause requires. Although, in *Elk v. Wilkins*, the Court held that birth within the territorial limits of the United States is not in itself sufficient to satisfy the requirement of birth "subject to the jurisdiction of the United States,"[134] persons born in Puerto Rico satisfy the additional requirements identified by the Court. In *Elk*, the Supreme Court held that Native Americans born within the territorial limits of the United States, who were members of, and owing immediate allegiance to, a recognized Native American tribe, are "no more 'born in the United States and subject to the jurisdiction thereof,' . . . than the children of subjects of any foreign government born within the domain of that government, or the children born within the United States, of ambassadors or other public ministers of foreign nations."[135] Yet because the United States has never regarded Puerto Rico as a semi-sovereign nation, persons born in Puerto

[133] See *Wong Kim Ark*, 169 U.S. at 662–63.
[134] 112 U.S. 94, 95 (1884).
[135] Id. at 102.

Rico owe a direct and immediate allegiance to the United States at the time of birth, and they are completely subject to the political jurisdiction of the United States.

Despite certain similarities in their political status, Puerto Rico and the Native American tribes are not similarly situated with respect to the Citizenship Clause. Although the Commonwealth of Puerto Rico is subject to the plenary power of Congress like the Native American tribes, it does not have any independent sovereign authority, whether of a quasi-sovereign nature or otherwise. Unlike the Tribes, to which Congress has accorded the status of "dependent nations,"[136] the Commonwealth of Puerto Rico is not authorized to enter into treaties with the United States or any other sovereign, nor does the government of Puerto Rico regard itself as an independent sovereign entity, as the Tribes do.[137] Indeed, Puerto Rico's constitution was established in 1952 pursuant to an ordinary congressional statute, and it is subject to repeal at any time.[138] Furthermore, although Puerto Ricans and Native Americans both enjoy only statutory U.S. citizenship under current law, persons born in Puerto Rico do not enjoy an additional grant of citizenship akin to the tribal citizenship enjoyed by Native Americans.[139]

Because persons born in Puerto Rico and the other insular territories are "born in the United States" and "subject to the jurisdiction" thereof according to common law principles, the *Downes* Court took advantage of the unique political and geographical circumstances of the insular territories in order to retroactively reinterpret the rule of *jus soli* enshrined in the Citizenship Clause. Under a proper interpretation of that provision, persons born in Puerto Rico should have been considered U.S. citizens upon the ratification of the Treaty of Paris.

[136] See Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831).
[137] See id.
[138] See Task Force Report, supra note 8, at 4.
[139] See generally Rogers M. Smith, The Bitter Roots of Puerto Rican Citizenship, *in* Foreign in a Domestic Sense: Puerto Rico, American Expansion, and the Constitution 374 (Christina Duffy Burnett & Burke Marshall eds., 2001).

B. The Insular Cases*: A Facially Race-Neutral Reinstitution of* Dred Scott

In response to *Dred Scott*, the Citizenship Clause of the Fourteenth Amendment was intended to eliminate the Court's ability to impose racial qualifications on U.S. citizenship. A straightforward reading of the Citizenship Clause, informed by the well-understood common law doctrine of *jus soli*, would have led the Fuller Court to conclude in *Downes* that the phrase "United States" includes all territories over which the United States exercises exclusive sovereignty. From that provision, the Court should have determined that all U.S. territories were part of the United States under the Constitution, unless it could find a principled reason to hold that the term "United States" had a narrower definition under the Uniformity Clause. Yet the Fuller Court did not engage in this analysis in *Downes*, or in any of the other *Insular Cases*.

Indeed, the Court did not look to the common law of *jus soli* for guidance as to the meaning of the term "United States" at any point in *Downes*. This omission is surprising, especially considering the Court's strict emphasis on interpreting the Citizenship Clause by reference to common law principles only three years earlier in *Wong Kim Ark*.[140] Instead, Justice Brown determined that the term "United States" excludes all territories because the Thirteenth Amendment contained a provision prohibiting slavery in all places "subject to their jurisdiction." Both he and Justice White concluded that this distinction was intended to exclude Puerto Rico from the constitutional "United States" without first looking to the intent of the framers of that Amendment, or to the common law. Had Justice Brown undertaken even a cursory examination of the applicable case law, he would have discovered that persons born in the U.S. territories had been considered citizens of the United States since the time of the Declaration of Independence. He would have also noticed that African-Americans born in the U.S. territories were instantly made citizens upon the ratification of the Fourteenth Amendment. Perhaps because he recognized the historical and precedential difficulties involved in taking Justice Brown's position, Justice White maintained that the term "United States" did not exclude all territories. Instead, he ruled that Puerto

[140] United States v. Wong Kim Ark, 169 U.S. 649, 654 (1898).

Rico was excluded from the meaning of the term because it had not met the requirement of "incorporation," a test previously unknown to American constitutional law, despite one hundred years of territorial expansion.[141] Indeed, Justice White's idea of incorporation was so novel that both of the dissenting opinions characterized it as having an unknown "occult meaning."[142]

In seeking to explain why the *Downes* majority regarded the term "United States" under the Constitution as having been open to interpretation without any guidance from the common law doctrine of *jus soli*, one cannot overlook the fact that the United States gained sovereignty over the former Spanish colonies of Guam, Puerto Rico, and the Philippines during the height of Social Darwinism in the post-Reconstruction era. In light of the perceived threat posed by the insular peoples to the fragile, racially premised sectional reconciliation of the time,[143] most of the country felt strongly that the inhabitants of the newly acquired insular territories should be kept outside the contours of the American political community.[144]

Because it was asked to determine the constitutional status of the newly acquired insular territories well after the enactment of the Fourteenth Amendment, the Court was prevented from excluding their inhabitants from a constitutional entitlement to U.S. citizenship on the basis of overtly racial classifications. Yet, by drawing a facially race-neutral distinction on grounds of birthplace between the alien peoples of the former Spanish colonies and the remainder of the population, the Court was able to retroactively redefine the meaning of the phrase "in the United States" under the Fourteenth Amendment in order to exclude the insular territories. Thus, the *Insular Cases* managed to give full rein to the impe-

[141] Smith, supra note 139, at 375–76.

[142] Downes v. Bidwell, 182 U.S. 244, 373, 391 (1901).

[143] See generally Christina Duffy Burnett, *Untied* States: American Expansion and Territorial Deannexation, 72 U. Chi. L. Rev. 797 (2005).

[144] See Frank E. Guerra Pujol, The Pamphlet Wars: The Original Debate Over Citizenship in the Insular Territories, 38 Rev. Der. P.R. 221, 222–28 (1999). Indeed, even noted anti-imperialists such as Judge Simeon Baldwin, who argued that the Constitution applied of its own force in the insular territories, believed such an outcome to be undesirable, as they were populated by "semi-civilized" races. Simeon E. Baldwin, The Constitutional Questions Incident to the Acquisition and Government by the United States of Island Territory, 12 Harv. L. Rev. 393, 412, 415 (1899).

rialist and Social Darwinist impetus of the age while appearing to respect the strictures of a republican Constitution.

1. The Racist Underpinnings of the Doctrine of Territorial Incorporation

In the academic debates preceding the *Insular Cases*, as in the cases themselves, one can detect a significant degree of preoccupation over the possibility that the insular populations could one day attain citizenship under the Constitution. This was due in large measure to the perceived racial inferiority of the insular inhabitants and the resulting need, in what would ultimately be the view of both judges and commentators, to preserve the Anglo-Saxon character of the nation.[145] Less than two years before the first of the *Insular Cases* was decided, a small number of noted legal scholars addressed the constitutional status of the newly acquired territories, and raised the concern that the "semi-civilized" inhabitants of the former Spanish colonies could one day have an equal say in the affairs of the nation.[146] James Bradley Thayer, for instance, noted with apprehension that "grave questions . . . will present themselves as to the permanent status of the islands."[147] He further cautioned that the federal government should "beware, at every step, promising to the islands, not excepting Hawaii, any place in the Union," as they would then play a role in governing the entire nation.[148] Likewise, Christopher Columbus Langdell "sincerely hoped" that the island territories would never be granted statehood and a voice in Congress.[149]

These scholarly apprehensions reflected the general public's sentiments about the prospect of bestowing equal membership upon the insular inhabitants. Indeed, some anti-imperialist pamphlets of the age urged that the United States should not repeat the "mistake" committed during Reconstruction of admitting blacks to equal citizenship. For example, a pamphlet entitled "Should We

[145] Baldwin, supra note 144, at 412, 415.
[146] See id.; C.C. Langdell, The Status of Our New Territories, 12 Harv. L. Rev. 365, 391 (1899); Lowell, supra note 34, at 175–76; James Bradley Thayer, Our New Possessions, 12 Harv. L. Rev. 464, 484 (1899).
[147] Thayer, supra note 146, at 484.
[148] Id.
[149] Langdell, supra note 146, at 391.

Acquire Colonies?" declared: "The unwisdom of admitting an inferior race to common citizenship without reference to their capacity for self-government has been demonstrated. . . . [T]he negro problem in the south [is] due to the folly of not making their admission to citizenship dependent on their fitness."[150]

Several noted commentators of the age developed narrow interpretations of the term "United States" that specifically exclude the insular populations, especially in the context of birthright citizenship. These interpretations were subsequently employed by the Fuller Court in order to justify the doctrine of territorial incorporation. Langdell, for instance, recognized that "[w]hat is the true meaning of 'United States' [under the Citizenship Clause] is certainly a question of great moment, for on its answer depends the question whether all persons hereafter born in any of our recently acquired islands will be by birth citizens of the United States."[151] Despite the fact that the Citizenship Clause was phrased in broad terms and that its import had been to place the definition of citizenship outside the realm of judicial discretion, Langdell contended that the Citizenship Clause applied only with respect to African-American persons, and therefore, its provisions had no relevance in the realm of American imperial expansion.[152]

Langdell also claimed that the framers of the Fourteenth Amendment did not contemplate that the Citizenship Clause would apply to territories because the text of the clause provides that persons born in the United States "shall be citizens of the State in which they reside," as opposed to the "State *or Territory* in which they reside."[153] While the text of the Citizenship Clause could conceivably be read to presume the existence of state citizenship, the clause should not be parsed in the way Langdell suggests. Because the U.S. territories had not by definition achieved the status of partial sovereignty conferred to the states under the Constitution, there was no basis for the framers of the Fourteenth Amendment to provide for an alternative of territorial citizenship. Apart from the fact that persons born in the territories were not deliberately excluded from the text of the Citizenship Clause, it was well

[150] Pujol, supra note 144, at 227–28.
[151] Langdell, supra note 146, at 376.
[152] Id.
[153] Id (emphasis added).

established at the time of Langdell's writing that the Fourteenth Amendment had the immediate effect of extending citizenship to all native-born former slaves, including those born in the territories.[154]

It was also well established at the time that a person can be a citizen of the United States without being a citizen of a state, as in the case of persons born in the District of Columbia or of persons born in a state who subsequently become domiciled in a foreign country.[155] Thus, while the text of the Citizenship Clause and abundant historical practice suggested that its framers had meant to codify the familiar doctrine of *jus soli*, Langdell's faulty analysis called for the Court to shrink the scope of the Citizenship Clause for the purpose of keeping the inhabitants of the insular territories outside of its provisions.

In an article entitled, *The Status of Our New Possessions—A Third View*, Abbott Lawrence Lowell provided the first formulation of the theory of incorporation later adopted by Justice White.[156] Although Lowell's proffered definition of the term "United States" did not yield as many historical inconsistencies as Langdell's, his use of race in reinterpreting the scope of the Citizenship Clause was more visible: rather than couching his analysis on the textual requirements of the Fourteenth Amendment, Lowell stated explicitly that the rights guaranteed by U.S. citizenship should only extend to "a people whose social and political evolution has been consonant with our own."[157] Like Langdell, Lowell narrowed the legal definition of "United States" by contending that the insular territories would be foreign to the United States

[154] Chester James Antieau, The Intended Significance of the Fourteenth Amendment 5 (1997); see also Rogers Smith, Civic Ideals: Conflicting Visions of Citizenship in U.S. History 310 (1997); Sarah Cleveland, Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs, 81 Tex. L. Rev. 1, 197 (2002).

[155] Gettys, supra note 18, at 5–6; see also John S. Wise, A Treatise on American Citizenship 66–67 (1906).

[156] See Lowell, supra note 34.

[157] Id., at 176. Indeed, as emphasized by Rogers Smith, this statement as to citizenship was reflective of Lowell's more general view, expressed in an earlier article published in the Atlantic Monthly, that the "theory that all men are equal politically" should not be followed with regard to the nation's new colonial acquisitions because only the "Anglo-Saxon race" had been made capable of self-governance by "centuries of discipline." Smith, supra note 139, at 377–78.

under the Constitution by operation of the doctrine of incorporation.

Lowell acknowledged that the Supreme Court in *United States v. Wong Kim Ark* had based citizenship upon birth within the allegiance of the United States, regardless of race.[158] He argued that *Wong Kim Ark* is nevertheless distinguishable from cases involving native-born insular populations, because the Court did not address the issue of whether the nation could "hold possessions which were not a part of the United States, so that persons born in them would not be citizens within the meaning of the Fourteenth Amendment."[159] He further noted that there was nothing in the opinion to indicate that the justices had in mind the particular issue of alien races residing in colonies.[160] Lowell's ultimate suggestion, in view of *Wong Kim Ark*, was that while the language of the Citizenship Clause prevented the Supreme Court from excluding from citizenship persons of "alien races" born in the continental United States, the Court could hold the clause not to apply to offshore territories that were geographically distinguishable from the "United States," defined as the members of a preexisting social compact.

Justice White's concurrence in *Downes* also sought to safeguard the Republic from the "grave evils" of a permanent union between the American polity and the inhabitants of the insular territories.[161] While adopting Lowell's conceptual framework, Justice White referenced the "evil of immediate incorporation,"[162] arguing that the admission of the Puerto Ricans and the other insular peoples into the constitutional "United States" would cause substantial fiscal damage and permanently alter the political character of the nation.[163] Indeed, Justice White referred to Congress's purported authority to incorporate as the "power to protect the birthright of its own citizens," signaling his belief that the American polity would be tainted by the "immediate bestowal of citizenship on those ab-

[158] Lowell, supra note 34, at 175 (citing United States v. Wong Kim Ark, 169 U.S. 649 (1898)).
[159] Id.
[160] Id.
[161] Downes v. Bidwell, 182 U.S. 244, 342–44 (1901) (White, J., concurring). For a full treatment of the deannexation aspects of the doctrine of territorial incorporation, see Burnett, supra note 146.
[162] *Downes*, 182 U.S. at 313 (White, J., concurring).
[163] Id. at 306.

solutely unfit to receive it."[164] He feared that conferring citizenship on territorial populations that Congress could deannex at will would "degrade the whole body of American citizenship," and render it "precarious and fleeting."[165]

Justice Brown's opinion, which he derived largely from Langdell's conceptual framework, similarly noted that "in the annexation of outlying and distant possessions grave questions will arise from differences of race, habits, laws and customs of the people."[166] Justice Brown also emphasized that the founding document was not meant to extend throughout "the American Empire," to lands "inhabited by alien races, differing from us in religion, customs, laws, methods of taxation and modes of thought."[167]

These undercurrents of racism, expressed by two leading scholars whose theoretical work formed the basis for the current constitutional definition of the term "United States," and echoed by the two Justices who authored opinions based on that work, suggest that the Court's holding in *Downes* was motivated by a desire to exclude the insular populations from any entitlement to citizenship, contrary to the requirements of the Citizenship Clause. Because a straightforward application of the doctrine of *jus soli* required an expansive interpretation of the term "United States," Langdell and Lowell sought to establish alternative means to define the phrase. A majority of the Supreme Court, led by Justices Brown and White, subsequently adopted one version or another of these facially race-neutral formulations, which enabled them to prevent the insular populations from obtaining the right to permanent and equal membership in the Union.

2. Redefining the Citizenship Clause

In the *Insular Cases*, the Fuller Court ultimately adopted Lowell's suggestion for avoiding the "grave evil" of constitutionally mandated political membership for the insular populations: it would retroactively narrow the scope of the Citizenship Clause by

[164] Id.
[165] Id. at 314–15 (White, J., concurring).
[166] Id. at 282 (Brown, J., writing alone but announcing the judgment of the Court).
[167] Id. at 286–87.

altering the constitutional definition of "United States" to include some but not all territories.

Historically, the Constitution had long been interpreted as granting U.S. citizenship to territorial citizens both before and after ratification of the Fourteenth Amendment. Justice Story, sitting on circuit in the 1828 case of *Picquet v. Swan*, noted that "[a] citizen of one of our territories is a citizen of the United States."[168] The dissenting Justices in *Dred Scott* echoed this position, arguing that in the United States, the term "citizen" had long been synonymous with "freeman."[169] The Court later recognized in the *Slaughter-House Cases* that the Amendment bestowed birthright citizenship on the inhabitants of the U.S. territories.[170] It seems quite plain, then, that the phrase "United States" as used in the Citizenship Clause was originally understood to refer to the sovereign dominion of the United States.

Ignoring this history, Justice Brown initially espoused Langdell's position that the Fourteenth Amendment applies only to states because the Citizenship Clause refers only to the "United States," and not, as the Thirteen Amendment does, to all other places "subject to their jurisdiction." While Justice Brown was certainly correct in noting that the Fourteenth and Thirteenth Amendments differ in their phrasing, at least one scholar has emphasized that the phrase "any place subject to their jurisdiction" could have been devised to ensure that the Thirteenth Amendment's ban on slavery applied outside the sovereign domain of the United States, including to forts, consuls, and vessels abroad.[171] It is also plausible to conclude that the scope of the Thirteenth Amendment was framed more broadly so that it would definitely encompass the seceded southern states immediately upon its adoption in January 1865.[172]

In his concurrence in *Downes*, Justice White also sought to prevent the insular populations from attaining full U.S. citizenship by

[168] Picquet v. Swan, 19 F. Cas. 609, 616 (Story, Circuit Justice, C.C.D. Mass. 1828) (No. 11,134).

[169] Scott v. Sandford, 60 U.S. (19 How.) 393, 531 (1857) (McLean, J., dissenting); id. at 573 (Curtis, J., dissenting) (quoting State v. Manuel, 20 N.C. (4 Dev & Bat.) 144, 144 (1838)).

[170] See Slaughter-House Cases, 83 U.S. 36, 72–74 (1873).

[171] Cleveland, supra note 154, at 197.

[172] Id.

embracing a narrow constitutional definition of "United States."[173] Justice White avoided some of Justice Brown's historical difficulties by adopting Lowell's slightly broader definition of "United States," which excluded only the newly acquired insular territories from the scope of the Fourteenth Amendment. Reflecting Lowell's approach, Justice White justified his finding that the insular inhabitants were not entitled to immediate incorporation in more overtly racial terms than did Justice Brown. In embracing Lowell's distinction between incorporated and unincorporated territories, Justice White maintained that the inhabitants of the insular territories should not be regarded as citizens until Congress deigned to incorporate them.[174] He emphasized that as a matter of international law, the United States possessed an inherent sovereign right both to acquire foreign territory by conquest and to determine the relationship of the newly acquired territory to the federal government.[175] Justice White insisted that any restraint on the power of the United States to "protect the birthright of its own citizens" by excluding the acquired territory from incorporation would negate the nation's ability to exercise the right of conquest, and would thus render the United States "helpless in the family of nations."[176]

Because the nation's authority under international law must necessarily give way to the requirements of the Constitution, Justice White also argued against a constitutional requirement of immediate incorporation on separation of powers grounds. He emphasized that if the President's treaty-making power included the capacity to incorporate territory through the mere act of conquest, "then millions of inhabitants of alien territory, if acquired by treaty, can, without the desire or consent of the people of the United States speaking through Congress, be immediately and irrevocably incorporated into the United States, and the whole structure of the government be overthrown."[177] This objection ultimately rested on an asserted right of the people to act through both

[173] Downes v. Bidwell, 182 U.S. 244, 311–12 (1900) (White, J., concurring).
[174] Id. at 312–13; see also Christina Duffy Burnett, The Constitution and Deconstitution of the United States, *in* The Louisiana Purchase and American Expansion (1803–1898) 181, 198–99 (Sanford Levinson & Bartholomew H. Sparrow eds., 2005).
[175] *Downes*, 182 U.S. at 305–06 (White, J., concurring).
[176] Id. at 306.
[177] Id. at 312–13.

houses of Congress in vetoing the incorporation of recently acquired populations that are not, in their estimation, fit to join the Union. The dissenting Justices noted the inherent weakness of this argument by pointing to the fact that it was Congress that had established an organized civil government in Puerto Rico under U.S. sovereignty.[178] Chief Justice Fuller also noted that Congress's power under the Constitution "can only be exercised as prescribed," and thus, in taking possession of Puerto Rico, the federal government remained a constitutional government with limited powers.[179] Justice Harlan then underscored that the founding fathers "never intended that the authority and influence of this nation should be exerted otherwise than in accordance with the Constitution."[180] With these considerations in mind, it seems plain that Justice White erred in concluding that Congress had the authority to keep the insular territories in an unincorporated status as a means of preventing their residents' citizenship rights from vesting under the Constitution.

III. THE PLAUSIBILITY OF COLLECTIVE DENATURALIZATION: STATUTORY CITIZENSHIP AND THE DUE PROCESS CLAUSE

Although the Constitution does not by its terms distinguish between statutory and constitutional citizens with regard to their enjoyment of the privileges and immunities of citizenship, the Supreme Court has determined that the Fourteenth Amendment does not always protect statutory citizens from denaturalization. In fact, statutory citizenship has long been subject to revocation under certain conditions.

Congress does not, however, have unconstrained discretion regarding the citizenship status of Puerto Ricans. Due to the fact that statutory citizenship was conferred to Puerto Ricans without any express qualifications as to its retention, the Due Process Clause provides a substantial obstacle to the denaturalization of persons born in Puerto Rico. For example, it is doubtful that Congress could denaturalize all persons born in Puerto Rico while retaining

[178] Id. at 372 (Fuller, C.J., dissenting); id. at 391 (Harlan, J., dissenting).
[179] Id. at 369, 373 (Fuller, C.J., dissenting).
[180] Id. at 386 (Harlan, J., dissenting).

full sovereignty over them.[181] Yet in view of the Supreme Court's past emphasis on preserving congressional flexibility in the context of statutory citizenship, the Due Process Clause may not provide enough protection against the threat of involuntary denaturalization. In the event of Puerto Rican independence, a deferential Court opting to treat Puerto Ricans as a unit for citizenship purposes could conceivably find that their statutory citizenship has always been subject to the implied condition of continued U.S. sovereignty, and that the collective denaturalization of persons born in Puerto Rico upon a transfer of sovereignty is not an arbitrary deprivation of liberty.

A. Afroyim, Bellei, *and the Significance of Constitutional Citizenship*

In a 2001 memorandum to Senator Frank Murkowski, then-Chairman of the Senate Energy and Natural Resources Committee, Robert Raben, then-Assistant Attorney General, noted that because the Court had declared in *Afroyim v. Rusk*[182] that citizenship is inalienable, "there is at least an argument" that persons born in Puerto Rico would have a constitutional right to retain their U.S. citizenship, even if they continue to reside on the island after independence.[183] Raben stated that, in view of the tension between *Afroyim* and other authorities such as *American Insurance v. Canter*,[184] which support the proposition that "nationality follows sovereignty," it is "unclear whether [an] Independence proposal's possible provision for congressional revocation of United States citizenship passes constitutional muster."[185]

Raben is certainly right to suggest that the Court's rationale in *Afroyim*, read alone, is sufficiently broad to encapsulate the statu-

[181] See discussion infra Section III.A.

[182] Afroyim v. Rusk, 387 U.S. 253, 257 (1967).

[183] Memorandum from Robert Raben, Assistant Att'y Gen., to Frank H. Murkoski, Chairman, Senate Energy & Natural Res. Comm. 4 (Jan. 18, 2001) [hereinafter Raben Memorandum], available as Appendix E *to* Report of the President's Task Force on Puerto Rico's Status (Dec. 2007), at 23, 26, available at http://www.usdoj.gov/opa/documents/2007-report-by-the-president-task-force-on-puerto-rico-status.pdf.

[184] See Am. Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511, 542 (1828) (Marshall, C.J.).

[185] Raben Memorandum, supra note 183, at 4 (citing *Canter*, 26 U.S. at 542; Boyd v. Nebraska ex rel. Thayer, 143 U.S. 135, 162 (1892); United States ex rel. Schwarzkopf v. Uhl, 137 F.2d 898, 902 (2d Cir. 1943)).

tory citizenship of persons born in the territories. In *Afroyim*, the Court found that Congress could not constitutionally denaturalize a naturalized citizen who had not voluntarily renounced his citizenship. The Court spoke in general terms, rejecting the idea that "aside from the Fourteenth Amendment, Congress has any general power, express or implied, to take away an American citizen's citizenship without his assent."[186] Mere sovereignty, the Court noted, cannot convey a general power to denaturalize because "[i]n our country the people are sovereign and the Government cannot sever its relationship to the people by taking away their citizenship."[187] The Court went so far as to quote favorably Chief Justice Marshall's dictum in *Osborn v. Bank of the United States*, which states that in the area of citizenship, Congress's power is absolutely limited to prescribing a uniform rule of naturalization.[188]

Yet *Afroyim* is both factually and legally distinguishable from the context of statutory citizenship. The case involved the denaturalization of a constitutional citizen, and the Court ultimately rested its reasoning on the Fourteenth Amendment. It emphasized that while there may have been some doubts prior to the Amendment's passage as to whether Congress had any power to denaturalize a citizen against his will, these "should have been removed by the unequivocal terms of the Amendment itself."[189] While the Court stated that the intent of the Amendment was to put the question of citizenship beyond the power of government, it expressly limited its holding to citizenship conferred by the Constitution: "[o]nce acquired, this *Fourteenth Amendment citizenship* was not to be shifted, canceled, or diluted at the will of the Federal Government, the States, or any other governmental unit."[190]

The Court in *Rogers v. Bellei*, speaking through Justice Blackmun, limited the reach of *Afroyim*.[191] It held that the statutory citizenship of persons born abroad to U.S. citizen parents is not fundamentally irrevocable and may be conditioned by Congress. *Bellei*

[186] *Afroyim*, 387 U.S. at 257.
[187] Id.
[188] Id. at 261 (quoting Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 827 (1824)).
[189] Id. at 261–62.
[190] Id. at 262 (emphasis added).
[191] 401 U.S. 815 (1971).

involved the denaturalization of a dual Italian and American citizen who acquired U.S. citizenship at birth by operation of Paragraph (7) of Section 301(a) of the Immigration and Nationality Act,[192] but failed to meet the residence requirements of Section 301(b).[193] In response to plaintiff Bellei's argument that his denaturalization was unconstitutional under *Afroyim*, the Court distinguished the case on the basis that Mr. Afroyim had been a constitutional citizen.[194] It explicitly stated that the *Afroyim* Court's holding that Congress has no power to forcibly denaturalize a citizen did not extend to statutory citizenship.[195] The Court stressed the importance of protecting congressional expectations in conferring statutory citizenship, and noted that "[a] contrary holding would convert what is congressional generosity into something unanticipated and obviously undesired by the Congress."[196] It also rejected the argument that Bellei's conditional grant of citizenship was "second-class," stressing that "[t]he proper emphasis is on what the statute permits him to gain from the possible starting point of noncitizenship, not on what he claims to lose from the possible starting point of full citizenship to which he has no constitutional right in the first place."[197]

In addition, the *Bellei* Court found that the plaintiff's deprivation of citizenship had not violated the Due Process Clause of the Fifth Amendment. It noted that with respect to the revocation of statutory citizenship, Congress need only show that its exercise of power is "not unreasonable, arbitrary, or unlawful" in order for it to withstand constitutional scrutiny.[198] Upon applying this standard, the *Bellei* Court held that Congress had not acted arbitrarily in imposing a condition subsequent of residence in the United States because it "has an appropriate concern with problems attendant on dual nationality" such as divided loyalties and the risk of conflict-

[192] Pub. L. No. 85-316, § 16, 71 Stat. 644 (repealed 1972).
[193] Section 301(b) provides that those who are citizens at birth under § 301(a)(7) shall lose their citizenship unless, after age fourteen and before age twenty-eight, they are physically present in the United States continuously for five years. *Bellei*, 401 U.S. at 816.
[194] Id. at 822–23.
[195] Id. at 835.
[196] Id.
[197] Id. at 836.
[198] Id. at 831.

ing obligations.[199] The Court buttressed its finding that the revocation had been reasonable by pointing out that the plaintiff had been given abundant written notice of the requirements of Section 301(b) and had opted not to comply with them.[200]

Although some may claim that the constitutional inferiority of Puerto Rican birth has no practical impact on a person's citizenship in light of *Afroyim*, *Bellei* rejects this notion. *Bellei* implies that in the area of discretionary grants of citizenship, Congress does have a "general power" to revoke citizenship or, at minimum, to set the conditions for its retention. Due to the *Insular Cases*, persons born in the unincorporated territories have no constitutional right to U.S. citizenship, and claims regarding their citizenship status will be determined according to the framework in *Bellei*, not *Afroyim*. Thus, the proper starting point in evaluating the denaturalization of Puerto Ricans is that of noncitizenship, and the applicable standard of review is one of substantial deference.

Ultimately, for all of Justice Blackmun's insistence that the term "second-class citizenship" is just a cliché, the practical effect of the Court's reasoning in *Bellei* is to confirm that there are two tiers of citizenship under U.S. law, and that the difference can be felt most starkly in the area of denaturalization. This distinction establishes that the constitutional caliber of the U.S. citizenship held by Puerto Ricans matters in practical terms.

B. The Protective Role of the Due Process Clause

In spite of the fact that persons born in Puerto Rico enjoy an inferior grant of citizenship by virtue of *Plessy*-era racism, the Due Process Clause nevertheless affords them some protection from congressionally mandated revocation of that citizenship. As the Court established in *Downes*, and has repeatedly emphasized since, the insular populations are guaranteed the most fundamental of constitutional rights.[201] These include an entitlement to due process of law with respect to the revocation of statutory benefits. Because citizenship is a fundamental liberty interest, a strong argument can

[199] Id. at 831–33.
[200] Id. at 819–20.
[201] See Downes v. Bidwell, 182 U.S. 244, 282–83 (1901); see, e.g., Torres v. Puerto Rico, 442 U.S. 465 (1979).

be made that although Congress was never required to extend U.S. citizenship to Puerto Rico, it cannot retroactively withdraw it without violating the Due Process Clause.

Indeed, the Congressional Research Service ignored the powerful role of the Due Process Clause in protecting statutory citizenship rights when it concluded in a 1989 study that Congress had broad discretion to revoke the U.S. citizenship of most Puerto Ricans in the event of independence.[202] For example, Alvarez González makes the case that unilateral revocation would violate due process by emphasizing the factual distinctions between the terms of the citizenship grant in *Bellei* and the statutory citizenship of Puerto Ricans.[203] He contends that according to *Bellei*, Congress is only authorized to impose conditions subsequent for the retention of statutory citizenship at the time that citizenship is granted.[204] Because Congress extended U.S. citizenship to all Puerto Ricans in 1917 subject to no conditions, and given that subsequent statutes conferring U.S. citizenship at birth to persons born in Puerto Rico likewise did not contain any conditions for its retention, Congress could not revoke that grant without running afoul of the Due Process Clause.[205]

Yet the analysis does not end there. The mere fact that *Bellei* is factually distinguishable would not necessarily prevent a deferential Court from affirming a political fait accompli.[206] Since the statu-

[202] Alvarez González, supra note 25, at 314 (citing Cong. Research Serv., Discretion of Congress Respecting Citizenship Status of Puerto Rico (1989)).

[203] Id.

[204] Id. at 340.

[205] Id.

[206] Such highly deferential review is especially likely in light of the fact that the Supreme Court generally regards itself as unable to confer a remedy in citizenship cases, even in the event of a constitutional violation, where the grant of citizenship is bestowed by statute and not by the Fourteenth Amendment. See Fiallo v. Bell, 430 U.S. 787, 792 (1977) ("'Our cases have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control.'" (quoting Shaughnessy v. Mezei 345 U.S. 206, 210 (1953))); Miller v. Albright, 523 U.S. 420, 452 (1998) (Scalia, J., concurring); United States v. Ginsberg, 243 U.S. 472, 474 (1917) ("An alien who seeks political rights as a member of this Nation can rightfully obtain them only upon terms and conditions specified by Congress. Courts are without authority to sanction changes or modifications."). While the Court's inability to provide a remedy would probably cause it to favor avoiding the question entirely on prudential grounds, see Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies—And Their*

tory citizenship of Puerto Ricans was not made subject to any express conditions, one can make a strong argument that the citizenship conveyed was intended to be permanent at the outset. Therefore, as Alvarez González argues, "Congress cannot retroactively impose conditions that it does not generally recognize as causes of revocation of citizenship for all other United States citizens."[207]

But the *Bellei* Court did not rule out the possibility that statutory citizenship could be made subject to an *implied* condition subsequent in certain contexts, as in the context of territorial affairs. While the Court placed some emphasis on the fact that the plaintiff in *Bellei* had actual notice of the condition, it rested its holding on the importance of respecting Congress's entitlement to make qualified grants of statutory citizenship.[208] Thus, under *Bellei* it is possible for a future Court to find that, given Puerto Rico's status as an unincorporated territory and in light of Congress's right to withdraw from such territories entirely, U.S. citizenship was extended to its people on the implied condition that the island would remain under U.S. sovereignty.

Additionally, a future Court could find that Congress's legitimate governmental interest in guarding against the conflicting obligations and divided loyalties created by dual citizenship would be entitled to even greater weight with respect to Puerto Rico. Should Puerto Rico become independent, and if due process would preclude Congress from revoking the U.S. citizenship of Puerto Ricans, the deannexation of Puerto Rico could create upwards of four or five million dual citizens.[209] The Court could also find that Congress has a legitimate governmental interest in preventing a mass exodus from Puerto Rico to the continental United States that would compromise the island's ability to sustain itself as an independent entity, imposing an impermissible strain on American

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Connections to Substantive Rights, 92 Va. L. Rev. 633 (2006), it already has a history in *Bellei* of deciding Fifth Amendment denaturalization claims, and the denaturalization of Puerto Ricans, should it ever take place, would be such a high profile issue internationally that the Court would likely feel pressure to take up the issue.

[207] Alvarez González, supra note 25, at 340.

[208] Rogers v. Bellei, 401 U.S. 815, 835 (1971).

[209] See U.S. Census Bureau, Census 2000 Data for Puerto Rico (2003), http://www.census.gov/census2000/states/pr.html. The Census figure of 3.8 million persons domiciled in Puerto Rico does not include the millions of Puerto Rican-born U.S. citizens residing in the fifty states.

resources. Because the Puerto Rican economy is heavily subsidized by the federal government, Congress could reasonably expect that a pronouncement of Puerto Rican independence would trigger such an exodus. Should Congress establish a credible possibility of an overwhelming influx of persons seeking to relocate to the United States, the Court could potentially regard the preemptive revocation of citizenship as a reasonable exercise of legislative power.

An effort to justify the collective denaturalization of Puerto Ricans under the Due Process Clause would face great difficulty in establishing that they had reasonable notice of the fact that their citizenship was conferred subject to an implied condition of continued U.S. sovereignty. The U.S. government would also have a very difficult time establishing that it is not fundamentally unfair to endow a domestic population with a conditional form of citizenship that cannot be made permanent by the individual citizen.

In *Bellei*, the plaintiff was given individualized written notice of the condition impacting his citizenship, along with the opportunity to meet its terms through individual action. In the insular context, however, any actual notice to individual Puerto Ricans as to the revocability of their U.S. citizenship would have to stem from public knowledge of its statutory nature and from isolated policy statements, such as the Task Force Report, which are subject to change.[210] If the residents of Puerto Rico were to select independence in a federally sponsored plebiscite, individualized written notice as to the revocability of their U.S. citizenship in the event of independence would be provided to a substantial number of Puerto Rican-born persons through the electoral process. But such ballot-conferred notice would fall far short of the degree of the notice in *Bellei*, as it would be provided only once, in an untimely manner, and only to qualified voters domiciled in Puerto Rico. Importantly, such notice would not be provided to the large number of Puerto Rican-born citizens domiciled in the United States who have never been entitled to vote in status referenda.[211] There would also be no

[210] See, e.g. Task Force Report, supra note 8, at 9–10; Raben Memorandum, supra note 183, at 4.

[211] For a full discussion of this issue, see Rafael A. Declet, Jr., The Mandate Under International Law for a Self-Executing Plebiscite on Puerto Rico's Political Status,

means of corroborating that such qualified voters actually understood that their citizenship was conditioned on the island's political status.

It would be reasonable to find, in view of the *Insular Cases*, that legal notice exists as to the statutory character of the U.S. citizenship of Puerto Ricans. The presence of legal notice regarding an implied condition of continued U.S. sovereignty is more difficult to establish, given that Justice White's discussion in *Downes* as to the "fleeting" nature of insular citizenship was merely dicta within a concurring opinion. Also, at least one jurist has concluded that in 1917 Congress intended to assert the permanence of its relationship to Puerto Rico by bestowing citizenship upon its inhabitants.[212]

The *Insular Cases*, coupled with the line of authority regarding cession beginning with *American Insurance Co. v. Canter*[213] could support a finding of legal notice, as those latter cases establish that territory can be subject to deannexation under international law and that citizenship follows sovereignty. Yet it seems highly unlikely, in view of the Court's emphasis on actual notice in *Bellei*, and given that citizenship is perhaps the most fundamental of all liberty interests, that the Court would only require constructive notice of a condition affecting the revocability of statutory U.S. citizenship.

A colorable argument could be made that a combination of public notice and legal notice, along with the actual notice conferred by a plebiscite on most of the affected parties, could be sufficient to make native-born Puerto Ricans aware of an implied condition attached to their citizenship and thereby satisfy the requirements of due process. Nonetheless, a judicial finding to this effect would water down notice requirements generally and increase the flexibility with which Congress can revoke the statutory citizenship of *jus sanguinis* citizens. It would also work an injustice on the millions of Puerto Rican-born citizens who would not receive actual notice of the threat to their citizenship.

One the one hand, if the Court were to require that any condition subsequent imposed upon a grant of citizenship be capable of

and the Right of U.S.-Resident Puerto Ricans to Participate, 28 Syracuse J. Int'l L. & Com. 19 (2001).

[212] José A. Cabranes, Citizenship and the American Empire 81 (1979).

[213] 26 U.S. (1 Pet.) 511, 542 (1828) (Marshall, C.J.).

individual performance such that the recipient's statutory citizenship can thereby be rendered permanent, then any revocation of the U.S. citizenship of Puerto Ricans would almost certainly be declared unconstitutional. As *Efrón* demonstrated, the conditional nature of the statutory U.S. citizenship held by Puerto Ricans is immutable. Because they are already citizens by virtue of the INA, persons of Puerto Rican birth are neither permitted to apply for naturalization in order to upgrade their citizenship nor can they be freed from the constitutional infirmity attendant to their citizenship by establishing their domicile in one of the states. Furthermore, the deannexation of Puerto Rico is not a matter that is subject to individual will. The *Insular Cases* established that Congress may relinquish Puerto Rico unilaterally at will, and as the Task Force Report emphasizes, any status option selected by Puerto Ricans in a federally sponsored plebiscite would be subject to congressional approval.[214]

On the other hand, it must once again be noted that both Congress and the courts have consistently dealt with the U.S. citizenship of Puerto Ricans in group terms. American citizenship was both initially denied and subsequently conferred to Puerto Ricans on a collective basis, and the Court in the *Insular Cases* ruled upon their overall constitutional status as a group. If the Court maintains this approach in the context of denaturalization, it could find that the Due Process Clause has not been violated if Congress can demonstrate that it gave Puerto Ricans a collective opportunity to select their future status.

In light of the fact that citizenship is regarded as an individual right, Congress should not be permitted to revoke the statutory citizenship of Puerto Ricans on a collective basis. Even if Puerto Rico were to become independent through a process of self-determination rather than by congressional fiat, any revocation of citizenship that would follow would bear no correlation to individual choice. It would also deprive a substantial number of persons who would either vote in opposition of independence or could not vote as a practical or legal consequence of their American residence.

[214] Task Force Report, supra note 8, at 5, 10.

Finally, in evaluating whether the collective denaturalization of persons born in Puerto Rico is plausible, one must bear in mind that the Court applies an inordinately deferential standard of review with respect to exercises of congressional power regarding the territories. In fact, the Court has generally refused to give constitutional claims stemming from congressional actions affecting Puerto Rico any more than the most cursory review. It is telling in this respect that over the course of 110 years of American rule in Puerto Rico, "the Supreme Court has never held a federal law unconstitutional for violating the rights of residents of Puerto Rico."[215]

For example, the Court in *Harris v. Rosario* summarily approved the differential treatment of Puerto Ricans with respect to the disbursement of federal welfare funds in a one-and-a-half-page per curiam opinion issued without full briefing or oral argument.[216] In Dean Alexander Aleinikoff's view, *Harris* is "a startling and troubling example of the Court's unwillingness to give any serious scrutiny—indeed any serious thought—to congressional exercises of power over the territories."[217] One of its more troubling aspects is that the Court decided the question by reference to an earlier per curiam opinion upholding the exclusion of Puerto Rico from the federal Supplemental Security Income program.[218] Moreover, as Dean Aleinikoff noted, the three grounds articulated by the Court for concluding that the disparate treatment of Puerto Rico was rational provided a thin justification at best.[219] Two out of the three justifications offered—that welfare payments cost money and may affect local economies by influencing decisions to work, and that the more welfare recipients in a state, the higher the cost—apply equally to every state, rather than distinguishing the island. The remaining basis—that Puerto Ricans pay no federal taxes—also fails to go very far toward justifying the differential treatment of Puerto Rico given that welfare recipients and taxpayers are generally distinct populations.[220]

[215] Alvarez González, supra note 25, at 339.
[216] 446 U.S. 651, 651–52 (1980).
[217] T. Alexander Aleinikoff, Puerto Rico and the Constitution: Conundrums and Prospects, 11 Const. Comment. 15, 22 (1994).
[218] *Harris*, 446 U.S. at 652 (citing Califano v. Torres, 435 U.S. 1 (1978) (per curiam)).
[219] Aleinikoff, supra note 217, at 23–24.
[220] Id.

While some believe that U.S. citizenship cannot be revoked from persons born in Puerto Rico without triggering a due process violation, one cannot ignore the possibility that the Court would be willing to take a more flexible approach to due process in the area of territorial legislation. Alvarez González raises a critical objection in emphasizing that the statutory citizenship bestowed upon the inhabitants of Puerto Rico is not subject to any express conditions. But Congress's ability to identify governmental interests rationally furthered by a policy of revocation cannot be overlooked, especially in light of the Court's troublesome refusal to impose any real scrutiny on exercises of congressional power in the territories.

For this reason, a due process objection to the unilateral denaturalization of Puerto Ricans cannot rest solely on the contention that their U.S. citizenship was conferred on an unqualified basis, and therefore its revocation would constitute an arbitrary deprivation under *Bellei*. The claim must also stress the defects involved in subjecting such a fundamental liberty interest to an implicit condition that is not within the power of the individual to meet. Finally, a proper due process challenge must draw attention to the fact that citizenship is an individual right that should not be revoked according to majority rule. U.S. citizenship is the only grant of citizenship that persons born in Puerto Rico generally have. Thus, requiring even a minority of unwilling Puerto Ricans to accept a newly formed Puerto Rican citizenship over the citizenship they have come to rely on is very different from requiring dual citizens residing abroad to take certain steps in order to preserve their secondary citizenship.

C. The Likelihood of Puerto Rican Independence

In political terms, the prospect of Puerto Rican independence may not seem particularly imminent to the outside observer, and thus one might question the utility of reversing the doctrine of incorporation. Indeed, even those who are closely acquainted with Puerto Rican politics have reason to question the likelihood that Puerto Rico will either seek out independence or face the prospect of unilateral deannexation. After all, Puerto Rico has been under U.S. sovereignty for over a century, and its people have enjoyed U.S. citizenship for over ninety years. Moreover, independence historically has been the least favored status option, as the Puerto Ri-

can Independence Party ("PIP") has never been able to control more than five percent of the Puerto Rican vote.[221]

In view of current trends in the status debate, it appears to be increasingly likely that the Puerto Rican status process will culminate in a binding vote between the current territorial status and a permanent status in the form of either statehood or independence. Given the overwhelming dissatisfaction of Puerto Ricans with the current political status, the most probable outcome of such a first-round plebiscite would be a vote for a permanent status. Indeed, the voting members of the PIP and the New Progressive or "Statehood" Party ("NPP") would arguably have enough votes between them to defeat the Popular Democratic or "Commonwealth" party ("PDP") in the event of such a plebiscite.[222] Moreover, a substantial wing of the PDP has come to support "free association,"[223] a form of independence, as the most desirable status alternative.[224] Thus, the permanent status option would have the support of two of the island's three political parties, as well as the votes of a substantial portion of the PDP, whose members include both "free associationists" and hesitant supporters of independence.

The outcome of a second-round plebiscite between independence and statehood is less predictable, as it would depend on how the PDP vote is divided as between statehood and independence. If the overwhelming majority of the PDP votes in favor of independence—whether backed by a promise of free association or otherwise—then a PDP-PIP bloc could potentially defeat the NPP. If, however, a measurable percentage of the PDP backs statehood,

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[221] See Task Force Report, supra note 8, at 4.

[222] Id. Adding the numbers, the Statehood and Independence parties together received 50.7% of the vote in 1993 and 49.03% of the vote in 1998.

[223] Free association is one of the more popular status options among members of the island's biggest party. It is a form of independence akin to that of the British Commonwealth nations whereby Puerto Rico and the United States would agree by compact to act jointly in certain areas. The "compact of free association" between the United States and the Marshall Islands, for example, provides that the United States will continue to provide security, defense, and various other types of financial assistance and services. Amended Compact Act of 2003 (U.S.-Marsh. Is.), Pub. L. No. 108-188, 117 Stat. 2720 (2003).

[224] See Luis Dávila Colón, Independencia Asociada, El Vocero, July 22, 2006, at 26; Eudaldo Báez Galib, Popular, ¿a dónde te diriges?, El Vocero, July 24, 2006, at 36; Gloria Ruiz Kuilan, Admiten molestia dentro del PPD, El Nuevo Día Sept. 29, 2006, at 35.

this status option would win relatively easily, as the NPP represents nearly half of the Puerto Rican electorate.

Another factor militating in favor of independence is that even if statehood wins in Puerto Rico over the increasingly popular choice of free association, a petition for statehood could be rejected in Congress, and independence would present the only remaining option. Such an outcome would arguably be likely given that the admission of Puerto Rico as a state would require significant redistricting, due to its population of approximately four million. Due to its fairly substantial indigent population, Puerto Rico would likely be entitled to a greater proportion of federal entitlement funds than its tax base would be able to contribute in terms of revenue.[225] Moreover, a petition for Puerto Rican statehood may face significant opposition among nativists in Congress, in view of the substantial differences in language and culture between Puerto Rico and the continental United States.

One cannot be certain of when or how Puerto Rico's status will be resolved, but given that nearly all Puerto Ricans are dissatisfied with the current status, Congress will need to address the issue at some point. It is therefore critical that the Supreme Court give Congress a clear understanding of the citizenship rights of Puerto Ricans under the Constitution, and that it correct the scope of the Citizenship Clause by reversing the doctrine of territorial incorporation.

CONCLUSION

This Note has argued that the *Insular Cases* have had the injurious effect of depriving persons born in Puerto Rico and the other insular territories of their constitutional birthright. By imposing an artificially narrow definition of the term "United States" throughout the Constitution, the Court effectively negated the Fourteenth Amendment's core mandate against racially premised restrictions on citizenship. Like Chief Justice Taney in *Dred Scott*, the Fuller Court employed social contract principles to prevent discrete racial groups from obtaining permanent and equal membership in the American polity. Properly interpreted, the Citizenship Clause of the Fourteenth Amendment extends native citizenship to all per-

[225] See Aleinikoff, supra note 217, at 22–23.

sons born on lands subject to U.S. sovereignty. In view of the pervasive exclusionary rationale of the *Insular Cases*, it is doubtful that the Court will be able to properly correct the scope of the Citizenship Clause without overruling the doctrine of incorporation.