ORAL ARGUMENT NOT YET SCHEDULED

No. 13-5272

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

LENEUOTI FIAIA TUAUA, *et al.*,
Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA, *et al.*,
Defendants-Appellees.

On Appeal from the United States District Court
for the District of Columbia, No. 1:12-cv-01143 (Leon, J.)

BRIEF OF AMICI CURIAE SCHOLARS OF CONSTITUTIONAL LAW AND LEGAL HISTORY IN SUPPORT OF NEITHER PARTY

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Parties and Amici Curiae

All parties, movants-intervenors, and amici curiae in this case and the case below are listed in the Certificate as to Parties, Rulings, and Related Cases in Plaintiffs-Appellants' brief, with the exception of the following additional amici curiae appearing in this case:

As amici curiae in support of neither party, Professor Sanford V. Levinson, The University of Texas at Austin School of Law; Professor Bartholomew H. Sparrow, The University of Texas at Austin; and Professor Andrew Kent, Fordham School of Law.

As amici curiae in support of Plaintiffs-Appellants, former Governor Carl Gutierrez of Guam; former Governor Pedro Roselló of Puerto Rico; former Governor Charles W. Turnbull of the U.S. Virgin Islands; Professor Holly Brewer, the University of Maryland; Professor Linda Bosniak, Rutgers School of Law; Professor Kristin Collins, Boston University, currently visiting at Yale Law School; Professor Rose Cuison-Villazor, University of California at Davis School of Law, currently visiting at the University of California at Berkeley's Center for the Study of Law and Society; Professor Stella Elias, the University of Iowa College of Law; Professor Linda Kerber, the University of Iowa College of Law; Professor Bernadette Meyler, Stanford Law School; Professor Nathan Perl-

Rosenthal, the University of Southern California; Professor Michael D. Ramsey, the University of San Diego School of Law; Professor Lucy E. Salyer, the University of New Hampshire; Professor Rogers Smith, the University of Pennsylvania; and Professor Charles R. Venator-Santiago, the University of Connecticut.

As movant-amicus curiae in support of Plaintiffs-Appellants, former Assistant Secretary of the Interior for Insular Affairs Tony Babauta.

Rulings Under Review

Reference to the ruling under review is made in the Certificate as to Parties, Rulings, and Related Cases in Plaintiffs-Appellants' brief.

Related Cases

This case was not previously before this Court or any court other than the district court below. Counsel for amici are unaware of any related cases currently pending in this Court or any other court.

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INTEREST OF AMICI CURIAE[1]

Amici curiae are Christina Duffy Ponsa, Professor of Law at Columbia Law School; Gary S. Lawson, Philip S. Beck Professor of Law at Boston University School of Law; Sanford V. Levinson, W. St. John Garwood and W. St. John Garwood, Jr. Centennial Chair and Professor of Government at The University of Texas at Austin School of Law; Bartholomew H. Sparrow, Professor of Government at The University of Texas at Austin; and Andrew Kent, Professor of Law at the Fordham School of Law. Amici are scholars of constitutional law and legal history who have studied extensively the constitutional implications of American territorial expansion, including in the late nineteenth and early twentieth centuries. In particular, amici have written and edited collected works about the Supreme Court's early-twentieth-century decisions in the *Insular Cases*, on which the district court relied.

Pursuant to D.C. Circuit Rule 29(d), counsel certifies that this separate brief in support of neither party is necessary because amici, based on their academic expertise and scholarly research, have distinct insight into the *Insular Cases*' history and relevance to the constitutional status of U.S. territories. Amici have a

[1] Pursuant to Federal Rule of Appellate Procedure 29(c)(5), amici certify that no party's counsel authored this brief in whole or in part, and that no one other than amici and their counsel made any monetary contribution toward this brief's preparation or submission.

significant interest in aiding this Court's understanding of the *Insular Cases*, those decisions' approach to territoriality, and the scope of that approach's application. As amici explain, the *Insular Cases* do *not* extend or apply, either as governing precedent or persuasive authority, to the question in this case: Whether the Fourteenth Amendment guarantees birthright citizenship to people born in American Samoa. The district court erred in deciding otherwise.

On February 4, 2014, this Court granted amici's Motion for Leave To Participate as Amici Curiae (filed January 29, 2014), which listed Christina Duffy Ponsa and Gary S. Lawson as amici and noted that this amicus brief "may be joined by other professors and scholars of constitutional law and legal history." As amici's Notice of Additional Amici Curiae (filed May 9, 2014) reports, Plaintiffs-Appellants have consented to, and Defendants-Appellees take no position on, participation by the additional amici: Sanford V. Levinson, Bartholomew H. Sparrow, and Andrew Kent.

SUMMARY OF ARGUMENT

In concluding that those born in American Samoa lack birthright citizenship, the district court relied heavily on several misunderstandings about the Supreme Court's early-twentieth-century decisions in the *Insular Cases*. Although amici take no position on the ultimate question of whether the Fourteenth Amendment Citizenship Clause requires birthright citizenship for those born in American

Samoa, and hence file this brief in support of neither party, amici disagree with the district court's suggestion that the *Insular Cases* require or support its ruling or should be extended to apply to this case.

As the brief explains, none of the *Insular Cases* resolved a claim under the Citizenship Clause. Nor does their reasoning logically extend to the question. *Downes v. Bidwell*, the landmark *Insular Cases* decision, concerned the materially different Uniformity Clause, and its divergent opinions in any event lack precedential import. Later *Insular Cases* concerned constitutional provisions that, unlike the Citizenship Clause, do not specify their own geographic reach.

The *Insular Cases* should not be considered even *persuasive* authority for analyzing the Citizenship Clause. That Clause differs in text, history, and function from the Clause at issue in *Downes*. More broadly, the *Insular Cases*' approach to the constitutional status of the U.S. territories lacks any grounding in constitutional text, structure, or history. The *Insular Cases*, rather, reflected the assumptions of the time that the United States, like the great European powers of that era, *must* (despite being constrained by a written Constitution) be capable of acquiring overseas possessions without admitting their "uncivilized" and "savage" inhabitants of "alien races" to equal citizenship. That reasoning, even if it were constitutionally relevant, is the product of another age. It has no place in modern jurisprudence even if (as amici doubt) it had any validity in earlier times.

ARGUMENT

I. THE *INSULAR CASES* DO NOT CONTROL THIS CASE

As one amicus has explained, "The standard account of the *Insular Cases* has long overstated their holding with respect to constitutional extraterritoriality." Christina Duffy Burnett,[2] *A Convenient Constitution? Extraterritoriality After* Boumediene, 109 Colum. L. Rev. 973, 984 (2009). In particular, several courts have mistakenly assumed that the *Insular Cases* dictate the geographic scope of every constitutional provision.[3] In fact, that overstates both the *Insular Cases*' holdings and the necessary import of their reasoning.

The district court here fell victim to this misunderstanding, stating that "[t]he Supreme Court famously addressed the extent to which *the Constitution* applies in territories in a series of cases known as the Insular Cases." JA47 (emphasis added). The movants-intervenors in this case go so far as to claim that *Downes v.*

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[2] Amicus Professor Christina Duffy Ponsa was formerly Christina Duffy Burnett.

[3] *E.g.*, *Rabang v. INS*, 35 F.3d 1449, 1452 (9th Cir. 1994) ("In the *Insular Cases* the Supreme Court decided that the territorial scope of the phrase 'the United States' as used *in the Constitution* is limited to the states of the Union." (emphasis added) (footnote omitted)); *Valmonte v. INS*, 136 F.3d 914, 917 (2d Cir. 1998) (indicating that the *Insular Cases* were authoritative on "the territorial scope of the term 'the United States' *in the … Fourteenth Amendment*" (emphasis added)); *Lacap v. INS*, 138 F.3d 518, 519 (3d Cir. 1998) (following *Rabang v. INS*); *Nolos v. Holder*, 611 F.3d 279, 282-284 (5th Cir. 2010) (following *Rabang v. INS* and *Valmonte*).

Bidwell, the most important of the *Insular Cases*,[4] "*held* that the Citizenship Clause of the Fourteenth Amendment does not extend birthright citizenship to U.S. nationals born in unincorporated territories," Motion To Intervene (D.C. Cir. Dkt. #1458364) at 1-2 (Sept. 26, 2013) (emphasis added), even though no claim of citizenship was before the Supreme Court in *Downes*.

This Court should not accept that invitation to error. As amici explain, the *Insular Cases* decided far less than these overbroad descriptions suggest.

A. The *Insular Cases* Do Not Decide The Citizenship Clause's Scope

As a threshold matter, the *Insular Cases* do not *hold* anything about the Fourteenth Amendment Citizenship Clause. Not one of the *Insular Cases*[5] resolved a Citizenship Clause claim.

1. *Downes v. Bidwell*

Downes v. Bidwell, 182 U.S. 244 (1901), the seminal *Insular Cases* decision on which the district court (JA48) and other courts, *e.g.*, *Rabang v. INS*, 35 F.3d at 1452-1453, have relied, simply does not control here.

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[4] Christina Duffy Burnett, *A Note on the* Insular Cases, *in* FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION, AND THE CONSTITUTION 389, 389 (Burnett & Marshall eds., 2001).

[5] Burnett, *A Note on the* Insular Cases, *supra*, at 389-390 (although scholars differ about which decisions constitute the *Insular Cases*, there is "nearly universal consensus that the series [begins with 1901 decisions and] culminates with *Balzac v. Porto Rico* in 1922").

First, *Downes* did not involve a claim under the Citizenship Clause. *Downes* instead concerned the Uniformity Clause, which provides that "all Duties, Imposts and Excises shall be uniform throughout the United States." U.S. Const. art. I, § 8; *see* 182 U.S. at 247-249 (solo opinion of Brown, J.). The Court adjudged only that Congress could impose a tariff on products shipped from Puerto Rico to ports in the mainland United States without running afoul of that Clause. *Downes*, 182 U.S. at 287; *id.* at 288 (White, J., concurring in judgment); *id.* at 345 (Gray, J., concurring in judgment). But, contrary to movants-intervenors' claim, *Downes* did not—and, given the narrow issue presented there, could not—consider or decide whether the Citizenship Clause applies to the territories.

Second, the five Justices in the *Downes* majority agreed only on the judgment, not on a rationale. They issued multiple, splintered opinions, which arrived at the judgment by different paths. *See* 182 U.S. at 244 n.1 (opinion syllabus) (Justice Brown delivered an opinion "announcing the conclusion and judgment of the court in this case," but in light of Justice White's and Justice Gray's separate opinions concurring in the judgment, "it is seen that there is no opinion in which a majority of the court concurred"); BARTHOLOMEW H. SPARROW, THE *INSULAR CASES* AND THE EMERGENCE OF AMERICAN EMPIRE 87 (2006) ("[N]o single opinion among the five opinions in *Downes* attracted a majority on the bench.").

Justice Brown, who announced the Court's judgment, posited that the phrase "throughout the United States" in the Uniformity Clause included only "the *states* whose people *united* to form the Constitution, and such as have since been admitted to the Union upon an equality with them," along with those very few territories, like the District of Columbia, that were once part of the States. 182 U.S. at 277, 260-261 (solo opinion of Brown, J.). That position commanded only one vote: Justice Brown's. *Id.* at 247; *id.* at 244 n.1 (syllabus).[6] As one amicus has explained, "The other eight [J]ustices [in *Downes*] rejected Brown's radical view[.]" Andrew Kent, Boumediene, Munaf*, and the Supreme Court's Misreading of the Insular Cases*, 97 Iowa L. Rev. 101, 157 (2011).

Justice White, joined by two other Justices, took a drastically different tack. He led by acknowledging that because "[e]very function of the government" is "derived from the Constitution, it follows that that instrument is everywhere and at all times potential in so far as its provisions are applicable." *Downes*, 182 U.S. at 289 (White, J., concurring in judgment). In his view, "the determination of what particular provision of the Constitution is applicable … involves an inquiry into the

[6] The Ninth Circuit decision upon which the other court of appeals decisions rely, *see supra* note 3, misperceives Justice Brown's opinion as having commanded a majority. *Rabang v. INS*, 35 F.3d at 1452-1453 (stating that "[i]n the *Insular Cases* the *Supreme Court* decided" that the constitutional phrase "the United States" was "limited to the *states* of the Union" (latter two emphases added) (footnote omitted), and citing only pages from Justice Brown's *Downes* opinion).

situation of the territory and its relations to the United States." *Id.* at 293. He noted, however, that such an inquiry is not necessary for every constitutional provision. *Id.* at 294.

Conducting that inquiry for Puerto Rico, Justice White concluded that the Uniformity Clause's applicability there turned on a novel distinction: whether "that island ha[d] been *incorporated* into the United States." *Id.* at 288 (emphasis added). Justice White reasoned from a premise imputed from the law of nations in that era (which, in his view, sanctioned colonial expansion) but ungrounded in our Constitution: that "wherever a government acquires territory"—whether by discovery, treaty, or conquest—"the relation of the territory to the new government is to be determined by the acquiring power." *Id.* at 300. Because, in Justice White's view, neither the treaty of cession nor any subsequent congressional action had expressed an intent to "incorporate" Puerto Rico into the United States, he reasoned that Puerto Rico remained a mere "possession" of the United States, and that the Uniformity Clause therefore "was not applicable to Congress in legislating for Porto Rico." *Id.* at 340.

Justice Gray agreed in substance with Justice White, but wrote separately to emphasize the necessity of military governance of newly conquered territories. *Id.* at 345-346 (Gray, J., concurring in judgment); *see* Kent, *supra*, at 158.

Thus, the five Justices in the *Downes* majority reached their shared judgment by way of divergent theories of the Constitution. *See* Christina Duffy Burnett & Burke Marshall, *Between the Foreign and the Domestic: The Doctrine of Territorial Incorporation, Invented and Reinvented*, *in* FOREIGN IN A DOMESTIC SENSE, *supra*, at 1, 7 ("[N]ot one [of the *Downes* opinions] garnered a majority in its *reasoning*." (emphasis added)). Such a decision, lacking a majority rationale, is precedential only as to the case's precise facts. *See Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247, 2258 n.8 (2013); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 66 (1996); *Nichols v. United States*, 511 U.S. 738, 745-746 (1994). Those facts—concerning tariffs, the Uniformity Clause, and Puerto Rico—are absent in this case concerning birthright citizenship, the Citizenship Clause, and American Samoa.

The *Downes* opinions' various references to citizenship (on which the district court relied (JA48)) are therefore pure dicta and—as Section II.B further explains—are not even persuasive. In particular, the majority Justices' dim views of territorial inhabitants as potential citizens rested on repudiated notions of racial inferiority that ought not be perpetuated. *See infra* Section II.B.3 (discussing these underpinnings of the *Insular Cases*).

2. Other *Insular Cases* decisions

None of the other *Insular Cases* addressed the Citizenship Clause. The other decisions handed down the same day as *Downes* concerned statutory interpretation of tariff laws then in force. *De Lima v. Bidwell*, 182 U.S. 1 (1901); *Goetze v. United States*, 182 U.S. 221 (1901); *Dooley v. United States*, 182 U.S. 222 (1901); *Armstrong v. United States*, 182 U.S. 243 (1901); *Huus v. New York & P.R. S.S. Co.*, 182 U.S. 392 (1901); *see also Dooley v. United States*, 183 U.S. 151 (1901) (concerning a tariff law's constitutionality under U.S. Const. art. I, § 9); *Fourteen Diamond Rings v. United States*, 183 U.S. 176 (1901) (applying *De Lima*). Later decisions commonly grouped under the *Insular Cases* rubric also resolved issues unrelated to Fourteenth Amendment birthright citizenship. *E.g.*, *Hawaii v. Mankichi*, 190 U.S. 197 (1903) (holding grand- and petit-jury requirements inapplicable in the then-territory of Hawaii); *Dorr v. United States*, 195 U.S. 138 (1904) (holding jury-trial right inapplicable in Philippines); *Rassmussen v. United States*, 197 U.S. 516 (1905) (holding jury-trial right applicable in Alaska); *Ocampo v. United States*, 234 U.S. 91 (1905) (holding grand-jury right inapplicable in Philippines); *Balzac v. Porto Rico*, 258 U.S. 298 (1922) (holding jury-trial right inapplicable in Puerto Rico); *Kepner v. United States*, 195 U.S. 100 (1904) (construing statutory double-jeopardy prohibition in Philippines); *Trono v. United States*, 199 U.S. 521 (1905) (same); *Weems v. United States*, 217 U.S. 349 (1910)

(construing statutory cruel-and-unusual-punishment prohibition in Philippines); *Porto Rico v. Rosaly y Castillo*, 227 U.S. 270 (1913) (holding Puerto Rico government immune from suit).[7]

The district court, citing *Dorr* and *Balzac*, stated that "the Insular Cases held that only certain 'fundamental' constitutional rights are extended to [an unincorporated territory's] inhabitants." JA47. That overstates the holdings of *Dorr* and *Balzac*. The Supreme Court in those cases noted that congressional power to make laws for unincorporated territories is "subject to such constitutional restrictions upon the powers of that body *as are applicable to the situation*," *Dorr*, 195 U.S. at 143 (emphasis added); offered the example of "certain fundamental personal rights," like due process, as among those restrictions that must apply even in unincorporated territories, *Balzac*, 258 U.S. at 312-313; and ruled that the jury-trial right was *not* among those applicable restrictions, *Dorr*, 195 U.S. at 149; *Balzac*, 258 U.S. at 304-305. But beyond that, the Court "still left open *which* constitutional provisions and *which* individual protections applied to the residents of the unincorporated territories." SPARROW, *supra*, at 149, 190.

Moreover, neither *Dorr* nor *Balzac* holds that a constitutional provision that applies to the territories by its plain terms—as Plaintiffs-Appellants assert for the

[7] Moreover, these cases were not resolved based on the citizenship status of the individuals involved. *E.g.*, *Balzac*, 258 U.S. at 307-308 & n.1; *see also Neely v. Henkel*, 180 U.S. 109, 122 (1901); Kent, *supra*, at 113 n.48 (on *Neely*).

Citizenship Clause (Br. 17-29)—is inapplicable because it does not rank among a judicially discerned subset of "fundamental" rights. As the Supreme Court stated in *Examining Board of Engineers, Architects & Surveyors v. Flores de Otero*, 426 U.S. 572, 589 n.21 (1976), *Dorr* decided only "that the Constitution, *except insofar as required by its own terms*, did not extend to the Philippines" (emphasis added).

Despite the district court's suggestion (JA47), *United States v. Verdugo-Urquidez*, 494 U.S. 259, 268 (1990), is not to the contrary. True, the Court in *Verdugo-Urquidez* cited *Dorr*, *Balzac*, and *Flores de Otero* for the proposition that "[o]nly 'fundamental' constitutional rights are guaranteed to inhabitants of [unincorporated] territories." *Id.* In context, however, that statement is best read as assuming the proposition only *arguendo*. The Court went on to reason that "*[i]f* that is true with respect to territories ultimately governed by Congress, respondent's claim that the protections of the Fourth Amendment extend to aliens in foreign nations is *even weaker*." *Id.* (emphases added). Tellingly, the Court's next sentence more precisely stated the *Insular Cases*' import, but only to support a much narrower proposition established by *Dorr*'s and *Balzac*'s actual *holdings*, clarifying that the *Verdugo-Urquidez* majority did not intend to resolve definitively the *Insular Cases*' meaning: "And *certainly*, it is not open to us in light of the *Insular Cases* to endorse the view that every constitutional provision applies wherever the United States Government exercises its power." *Id.* at 268-269

(emphasis added). The concurring opinion of Justice Kennedy, whose vote was crucial to the *Verdugo-Urquidez* majority, also mentioned and approved of only this narrower proposition. *Id.* at 277-278 (Kennedy, J., concurring). And Justice Kennedy's later opinion for the Court in *Boumediene v. Bush*, 553 U.S. 723, 758-759 (2008), further cabined the *Insular Cases*' application. *See infra* p. 15.

In any event, the territorial incorporation doctrine was unnecessary to the Court's decision in *Verdugo-Urquidez*.

First, *Verdugo-Urquidez* did not involve any U.S. territory, incorporated or unincorporated. Rather, it concerned the Fourth Amendment's applicability in Mexico, a foreign country. 494 U.S. at 261-262. Indeed, *Verdugo-Urquidez* emphasized the distinction between presence outside U.S. territory and presence within it, noting that "aliens receive constitutional protections *when they have come within the territory of the United States* and developed substantial connections with *this country*." *Id.* at 271 (emphases added).

Second, *Verdugo-Urquidez*, like *Dorr* and *Balzac*, involved a constitutional provision whose text does not prescribe its geographic scope. Whatever atextual territoriality doctrines might be appropriately applied to such provisions, they cannot apply to the Citizenship Clause, as Section II.B.1 explains. The Citizenship Clause's "own terms," not any atextual territoriality doctrine from the *Insular Cases*, determine the Clause's applicability to those born in American Samoa.

II. THE *INSULAR CASES* SHOULD NOT BE EXTENDED BEYOND THEIR HOLDINGS

A. The Supreme Court Is Hesitant To Extend The *Insular Cases*

The Supreme Court in recent decades has declined to rely on an expansive reading of the *Insular Cases*. *See* GARY LAWSON & GUY SEIDMAN, THE CONSTITUTION OF EMPIRE: TERRITORIAL EXPANSION & AMERICAN LEGAL HISTORY 196 (2004) ("[T]he incorporation doctrine [of the *Insular Cases*] has seemed on shaky ground in the [Supreme] Court on several recent occasions.").

In *Reid v. Covert*, 354 U.S. 1, 14 (1957) (plurality opinion), for example, four Justices of the Supreme Court expressed their "judgment that neither the [*Insular Cases*] nor their reasoning should be given any further expansion." And in *Torres v. Puerto Rico*, 442 U.S. 465, 475 (1979), Justice Brennan wrote, concurring in the judgment, that "[w]hatever the validity of the old cases such as *Downes v. Bidwell*; *Dorr v. United States*; and *Balzac v. Puerto Rico* in the particular historical context in which they were decided, those cases are clearly not authority for questioning the application of [the Bill of Rights] to the Commonwealth of Puerto Rico in the 1970's" (citations omitted). Moreover, as Section I.A.2 explained, although the Court in *Verdugo-Urquidez* briefly discussed the *Insular Cases* and the territorial incorporation doctrine, it did not *rely upon* that doctrine to decide the claim, which involved events in Mexico, not in any U.S. territory. 494 U.S. at 268-269, 261-262.

The most recent Supreme Court opinion to discuss the *Insular Cases*—*Boumediene*, in 2008—acknowledged those decisions but emphasized that their holdings must be examined with precision. "'[T]he real issue in the *Insular Cases*,'" *Boumediene* explained, "'was not whether the Constitution extended to the Philippines or Porto Rico when we went there, but which of its provisions were applicable by way of limitation upon the exercise of executive and legislative power in dealing with new conditions and requirements.'" 553 U.S. at 758 (quoting *Balzac*, 258 U.S. at 312). The Court then cautioned that the United States' relationship to putatively "unincorporated" territories may over time "strengthen in ways that are of constitutional significance," *id.*, and quoted Justice Brennan's earlier skepticism about the *Insular Cases*' continued vitality, *see id.* (quoting *Torres*, 442 U.S. at 475-476 (Brennan, J., concurring in judgment)). The Court concluded by describing "[t]his century-old doctrine" not as dispositive, but as merely "inform[ing] our analysis in the present matter." *Id.* at 759. Because the Court held that the Suspension Clause's habeas-corpus guarantee extends to Guantanamo Bay—a location *outside* U.S. de jure sovereignty—any broad reading of the *Insular Cases* as limiting the Constitution's application to a *subset* of U.S. sovereign territory cannot be sustained.[8]

[8] Although *Rabang v. Boyd*, 353 U.S. 427, 432 (1957), cited *Downes* on congressional power, its treatment of *Downes* conflicts with the Supreme Court's recent, narrower understandings of the *Insular Cases* and of congressional power

As these later decisions illustrate, the Supreme Court has expressed considerable skepticism about the *Insular Cases* and their continued utility for analyzing the application of constitutional provisions to U.S. territories. Lower courts should therefore be hesitant to extend the *Insular Cases*, particularly to this situation, which is not covered by those decisions' holdings or reasoning.

B. The *Insular Cases* Ought Not Be Extended Here

Hesitance to expand the *Insular Cases*' application is entirely appropriate, both in general and for this case. The district court, however, erroneously extended territoriality doctrines of the *Insular Cases* to the Citizenship Clause. JA47-51 & n.14. Those territoriality doctrines are irrelevant to the Citizenship Clause, are generally unpersuasive as a matter of constitutional analysis, and rest on assumptions that have no place in modern jurisprudence.

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in *Boumediene*, 553 U.S. at 758, 764-766. *Rabang* is also not instructive: It did not concern the Citizenship Clause; instead, the "sole issue for decision" was *statutory*—"whether the petitioner [was] deportable as an alien *within the meaning of the 1931 Act*." 353 U.S. at 429, 431-432 (emphasis added). Moreover, *Rabang*, like the other courts that rely on *Downes*, misdescribed Justice Brown's solo opinion as the Court's opinion. *Id.* at 432; *see supra* note 6. And *Rabang*, 353 U.S. at 432 & n.12, relied upon a questionable 1902 legal analysis, which was driven by the same constitutionally ungrounded "felt needs" as the *Insular Cases* themselves, *see infra* Section II.B.3: The author of that legal analysis was compelled by political superiors to abandon his initial, "diametrically opposite" view that the Constitution applied automatically to Puerto Rico. *Porto Rican Bill Passed By House*, Chi. Daily Trib., Apr. 12, 1900, at 1; *Problem of War Tax*, Chi. Daily Trib., Apr. 2, 1900, at 7.

1. The *Insular Cases*' territoriality analysis is irrelevant to the Citizenship Clause, which defines its own geographic scope

The Citizenship Clause states, "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." U.S. Const. amend. XIV, § 1, cl. 1. As its text illustrates, the Citizenship Clause defines its own geographic scope—those born "in the United States" (and subject to its jurisdiction) are citizens. If that geographic phrase includes the U.S. territory of American Samoa, Plaintiffs-Appellants' birthright citizenship cannot be negated on the atextual ground that American Samoa is "unincorporated." And if that geographic phrase does not include American Samoa, nothing is added to that conclusion by the *Insular Cases* or any territoriality analysis therein.

Thus, while amici take no position on whether the Citizenship Clause encompasses American Samoa, they do submit that the *Insular Cases* provide no persuasive guidance on that issue.

The district court correctly recognized that the question is "whether American Samoa qualifies as a part of the 'United States' as that is used within the Citizenship Clause." JA46. Unfortunately, instead of considering appropriate indicia of constitutional meaning—for example, how the phrase "United States" was understood when the Fourteenth Amendment was ratified—the district court

relied heavily on the *Insular Cases*, even though it had to acknowledge that those cases did not concern the Citizenship Clause. JA47.

That reliance was mistaken. The *Insular Cases* have nothing useful to say about the scope of the Citizenship Clause. *Dorr*, *Balzac*, and the other post-*Downes* cases considering the application of constitutional rights in the territories considered constitutional provisions, such as the Sixth Amendment Jury Trial Clause, that—unlike the Citizenship Clause—do not textually specify their own geographic scope. And the Supreme Court has recognized that the Constitution's "own terms" may "require[]" that a particular provision apply to a territory despite its putatively "unincorporated" status. *Flores de Otero*, 426 U.S. at 589 n.21. Whatever atextual doctrines might be needed to determine the geographic scope of the Jury Trial Clause, they are not needed here.

Downes, it is true, held that a similar geographic phrase in the Uniformity Clause—"throughout the United States"—excluded Puerto Rico. But neither that result nor the various *Downes* opinions' reasoning ought be transposed to the Citizenship Clause. *Downes*, as Section I.A explained, lacked a majority rationale and is precedential only as to its precise facts. Moreover, the Uniformity Clause and the Citizenship Clause might be construed differently for several reasons.

As an initial matter, the provisions were enacted nearly a century apart, in distinct historical contexts that may correspond to different original meaning.

Historical evidence shows that at the time of the Founding, when the Uniformity Clause was enacted, the phrase "United States" was generally understood as a collective of individual States, whereas after the Civil War, when the Citizenship Clause was enacted, the phrase tended to be used to denote the nation as a unitary entity—including "territories subject to its sovereignty." *See* Christina Duffy Burnett, *The Constitution and Deconstitution of the United States*, *in* THE LOUISIANA PURCHASE AND AMERICAN EXPANSION, 1803–1898, at 181, 181-182 (Levinson & Sparrow eds., 2005) (citing Civil War historian James M. McPherson's work for this proposition, and explaining that just before the *Insular Cases*, the Founding-era conception "reemerged" among expansionists). Therefore, even one were to accept Justice Brown's dubious conclusion that "United States" in the Uniformity Clause applies only to States, *Downes*, 182 U.S. at 251 (solo opinion of Brown, J.), it would not follow that the same limitation inheres in the term "United States" in the Citizenship Clause.

In addition, the Uniformity Clause and the Citizenship Clause were adopted in distinct legal contexts. The Citizenship Clause was adopted in response to the infamous decision in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 403-405 (1856), which held that the descendants of African slaves could not become U.S. citizens because they were considered "a subordinate and inferior class of beings." Scholars explain that the Citizenship Clause was designed to repudiate *Dred*

Scott's narrow and racist vision of U.S. citizenship, and instead to guarantee U.S. citizenship to all those born on U.S. soil (and within U.S. jurisdiction). *See* Christina Duffy Burnett, *Empire and the Transformation of Citizenship*, *in* COLONIAL CRUCIBLE: EMPIRE IN THE MAKING OF THE MODERN AMERICAN STATE 332, 338-340 (McCoy & Scarano eds., 2009).

Finally, the Citizenship Clause and the Uniformity Clause have distinct functions that may imply different interpretations. This Court has said that the Uniformity Clause's "purpose has been divined from the Framers' concern that Congress 'would use its power over commerce to the disadvantage of particular *States*.'" *Banner v. United States*, 428 F.3d 303, 310 (D.C. Cir. 2005) (per curiam) (emphasis added). Other provisions of the original Constitution similarly shield *States* from export taxes and duties laid by the federal government or other States. U.S. Const. art. I, §§ 9, 10; *see Downes*, 182 U.S. at 278 (solo opinion of Brown, J.). By contrast, the Citizenship Clause guarantees birthright citizenship to *individuals*. The Supreme Court has explained that the Clause mentions "State[s]" only to clarify that U.S. citizenship exists "without regard to … citizenship of a particular State." *Slaughter-House Cases*, 83 U.S. 36, 73 (1872). Thus, a doctrine that favors States over territories (or "incorporated" territories destined for statehood over "unincorporated" territories) makes less sense for the Citizenship Clause.

The district court did not grapple with these potentially meaningful distinctions. Instead, like other courts of appeals, the district court simply invoked an observation in Justice Brown's *Downes* opinion that a comparison of the Thirteenth and Fourteenth Amendment's language indicates that "there may be places within the jurisdiction of the United States that are no part of the Union"—places to which the Fourteenth Amendment Citizenship Clause does not apply. *Rabang v. INS*, 35 F.3d at 1453 (quoting *Downes*, 182 U.S. at 251 (solo opinion of Brown, J.)); *see* JA47-49. But even if that were true, it does not follow that *U.S. territories* are among those places. Instead, that set of places could include sites over which the United States exercises control that are not within U.S. sovereign territory, such as overseas military bases,[9] American embassies abroad,[10] and foreign territory under temporary military occupation.[11] In sum, this dictum from *Downes* does not answer the question presented here.

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[9] Examples may include Guantanamo Bay Naval Station, *see Boumediene*, 553 U.S. at 765 ("Cuba retain[s] 'ultimate sovereignty' over Guantanamo" but the United States controls it), and former military bases in the Philippines, *see Amendments to the Military Base Agreement*, Jan. 7, 1979, United States-Philippines, 30 U.S.T. 863, 863-864, T.I.A.S. No. 9224 (mentioning bases under "Philippine sovereignty," but U.S. "command and control").

[10] *See* 1 OPPENHEIM'S INTERNATIONAL LAW § 499 & n.4 (Jennings & Watts eds., 9th ed. 1996); *McKeel v. Islamic Republic of Iran*, 722 F.2d 582, 588 (9th Cir. 1983) (a U.S. embassy "remains the territory of the receiving state").

[11] Examples may include Cuba during U.S. military occupation following the Spanish-American War, *see* Treaty of Peace Between the United States and Spain, arts. 1-3 (Dec. 10, 1898); and Germany just after World War II, *see Boumediene*,

2. The territorial incorporation doctrine attributed to the *Insular Cases* is unpersuasive as a matter of constitutional analysis and ought not be expanded

In analyzing the Constitution more generally, there are broader reasons not to expand the application of the "territorial incorporation" doctrine attributed to Justice White's *Downes* opinion.

As an initial matter, the distinction between "incorporated" and "unincorporated territories" was "unprecedented" in American constitutional law when *Downes* was decided. Burnett, *Convenient Constitution*, *supra*, at 982. The territorial incorporation doctrine departed substantially from the Supreme Court's precedent, which had evinced a broad conception of the Constitution's application to and in the territories. Juan R. Torruella, *The* Insular Cases*: The Establishment of a Regime of Political Apartheid*, 29 U. Pa. J. Int'l L. 283, 286 (2007) ("[T]he *Insular Cases* … squarely contradicted long-standing constitutional precedent."); *see Downes*, 182 U.S. at 353-369, 359 (Fuller, J., dissenting) (citing numerous Supreme Court decisions "[f]rom *Marbury* v. *Madison* to the present day" establishing that constitutional limits apply with respect to the territories); *e.g.*, *Loughborough v. Blake*, 18 U.S. 317, 319 (1820) ("[The United States] is the name

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553 U.S. at 762 (German nationals, whom a U.S. military commission convicted, were never "'within any territory over which the United States is sovereign'"). *See also Fleming v. Page*, 50 U.S. (9 How.) 603, 614 (1850) (port of Tampico conquered during war with Mexico remained a "foreign country," not "part of the United States," although "undoubtedly" under U.S. dominion).

given to our great republic, which is composed of States and territories."); *Slaughter-House Cases*, 83 U.S. at 72 (explaining that the Citizenship Clause repudiated the proposition that those born "in the District of Columbia or in the Territories, though *within the United States*, were not citizens" (emphasis added)).

Moreover, the territorial incorporation doctrine finds no justification in the Constitution's text or structure. As one amicus has explained, "[T]here is nothing in the Constitution that even intimates that express constitutional limitations on national power apply differently to different territories once that territory is properly acquired." LAWSON & SEIDMAN, *supra*, at 196-197.

The territorial incorporation doctrine, which empowered Congress to rule certain territories differently as a constitutional matter, is in tension with a system of constitutional government that vests Congress only with limited, enumerated powers. Justice Harlan's *Downes* dissent contended that the territorial incorporation doctrine "produce[s] the same results as those which flow from the theory that Congress may go outside of the Constitution in dealing with newly acquired territories, and give[s] [those territories] the benefit of that instrument only when and as [Congress] shall direct." 182 U.S. at 389 (Harlan, J., dissenting). Under that view, the territorial incorporation doctrine in essence permits "the political branches … the power to switch the Constitution on or off at will," *Boumediene*, 553 U.S. at 765, by affording them sole discretion to decide whether

or not to "incorporate" a territory. That is inconsistent with the notion that "the National Government is one of enumerated powers to be exerted only for the limited objects defined in the Constitution." *Downes*, 182 U.S. at 389 (Harlan, J., dissenting). "The Constitution grants Congress and the President the power to acquire, dispose of, and govern territory, not the power to decide when and where its terms apply." *Boumediene*, 553 U.S. at 765.

The territorial incorporation doctrine has been the target of withering criticism since it was announced. Justice Harlan, dissenting in *Downes*, wrote that "this idea of 'incorporation' has some occult meaning which my mind does not apprehend." 182 U.S. at 391 (Harlan, J., dissenting). And in recent years, "no current scholar, from any methodological perspective, [has] defend[ed] *The Insular Cases*." Gary Lawson & Robert D. Sloane, *The Constitutionality of Decolonization by Associated Statehood: Puerto Rico's Legal Status Reconsidered*, 50 B.C. L. Rev. 1123, 1146 (2009). This Court ought to follow the Supreme Court's and modern scholars' lead by declining to extend this "occult" and constitutionally unfounded doctrine.

3. The *Insular Cases* rest on antiquated notions of racial inferiority of territorial residents and the "felt needs" of a bygone era of imperial expansion

The *Insular Cases* ought not be extended for yet another reason: They cannot be disentangled from anachronistic and extra-constitutional considerations

that are fundamentally at odds with present-day understandings. The *Insular Cases*' reasoning (particularly the territorial incorporation doctrine) reflected a turn-of-the-century enthusiasm for imperial expansion and a hesitation to admit supposedly "uncivilized" members of "alien races" except as colonial subjects. *See* Torruella, *supra*, at 286 ("[T]he *Insular Cases*' … skewed outcome was strongly influenced by racially motivated biases and by colonial governance theories that were contrary to American territorial practice and experience.").

The majority Justices' opinions in *Downes* illustrate this point. On the very same pages of Justice Brown's opinion that the district court cited (JA48 (citing *Downes*, 182 U.S. at 279-280, 282 (solo opinion of Brown, J.))), Justice Brown argued that "differences of race" raised "grave questions" about the rights that ought be afforded to territorial inhabitants. *See also* 182 U.S. at 287 (describing territorial inhabitants as "alien races, differing from us" in many ways). Similarly, in the passage the district court quoted (JA48) from Justice White's *Downes* opinion, 182 U.S. at 306 (White, J., concurring in judgment), Justice White described the situation of acquiring an island territory "peopled with an uncivilized race, yet rich in soil" whose inhabitants were "absolutely unfit to receive" citizenship. Justice White elsewhere quoted approvingly from treatise passages explaining that "if the conquered are a fierce, savage and restless people," the

conqueror may "govern them with a tighter rein, so as to curb their impetuosity, and to keep them under subjection." *Id.* at 302 (internal quotation marks omitted).

The quoted passage (JA48) from Justice White's *Downes* opinion further reveals that opinion's imperialist underpinnings. Justice White's concern was that the "right" of the United States to acquire territories "could not be practically exercised" if acquisition automatically extended the Constitution's protections to the new territory's inhabitants. *Downes*, 182 U.S. at 306 (White, J., concurring in judgment). He derived this national right not from our written Constitution, but from "principle[s] of the law of nations" that would permit colonial powers to conquer and rule territorial inhabitants as subjects. *Id.* His doctrine, therefore, facilitated American imperial expansion by allaying American anxieties about the constitutional consequences of their acquisitions. Burnett, *Constitution and Deconstitution*, *supra*, at 183.[12]

Scholars have explained that the *Insular Cases* generally, not just *Downes*, "reflected many of the attitudes that permeated the expansionist movement of the

[12] Imperial expansion in that era served economic and strategic purposes: The island territories offered new markets for American goods and coaling stations and bases for a larger U.S. Navy to protect the nation's expanding maritime commerce. *See* SPARROW, *supra*, at 64-65. Yet enthusiasm for territorial acquisition coexisted with anxieties about its potential constitutional consequences. *See, e.g.*, Simeon E. Baldwin, *The Constitutional Questions Incident to the Acquisition and Government by the United States of Island Territory*, 12 Harv. L. Rev. 393, 406, 408 (1899). The territorial incorporation doctrine served imperialist aims to obtain expansion's benefits while avoiding troublesome constitutional restraints.

United States during the nineteenth century." Efrén Rivera Ramos, *Puerto Rico's Political Status*, *in* LOUISIANA PURCHASE, *supra*, at 165, 165; *see* SPARROW, *supra*, at 10, 14, 57-63. That "ideological outlook" included "Manifest Destiny, Social Darwinism, the idea of the inequality of peoples, and a racially grounded theory of democracy that viewed it as a privilege of the 'Anglo-Saxon race.'" Rivera Ramos, *supra*, at 170.[13] These concepts of "inferior[ity] … justified not treating [territorial inhabitants] as equals," and the *Insular Cases*' classification of some territories as "unincorporated … owed much to racial and ethnic factors." *Id.* at 171, 174. The use of "racial schemes for classifying overseas colonial subjects"—from "Anglo-Saxons … at the top of the ladder, while beneath them were an array of 'lesser races' down to the darkest, and thereby the most savage, peoples"—"served to slide the new 'possessions' … into the category of 'unincorporated.'" Julian Go, *Modes of Rule in America's Overseas Empire: The Philippines, Puerto Rico, Guam, and Samoa*, *in* LOUISIANA PURCHASE, *supra*, at 209, 217.

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[13] Justice Harlan, dissenting in *Downes*, identified that outlook in Justice Brown's opinion, and decried the assumption that such "'principles of natural justice inherent in Anglo-Saxon character'" would mitigate the risks of denying constitutional protections in the territories. 182 U.S. at 381 (Harlan, J., dissenting) (quoting *id.* at 280 (solo opinion of Brown, J.)). The Framers, Justice Harlan noted, "well remembered that Anglo-Saxons across the ocean had attempted, in defiance of law and justice, to trample upon the rights of Anglo-Saxons on this continent, and had sought, by military force, to establish a government that could at will destroy the privileges that inhere in liberty." *Id.*

Indeed, American imperialist views of the era distinguished between territorial expansion on the continent, "where the likelihood of white migration" made the territories "seem plausible candidates for statehood," and expansion to "distant places densely populated by unfamiliar races," which were not seen as "candidates for admission" into the Union. Burnett, *Constitution and Deconstitution*, *supra*, at 183. In January 1900, one Senator, for example, described the people of the Philippines as "children" who were "not capable of self-government. How could they be? … Savage blood, oriental blood, Malay blood … are these the elements of self-government?" 33 Cong. Rec. 708 (1900). Another Senator wrote, "The idea of conferring American citizenship upon the half-civilized, piratical, muck-running inhabitants of [the Philippines] … and creating a State of the Union from such materials, is … absurd and indefensible[.]" Senator G.G. Vest, *Objections to Annexing the Philippines*, 168 N. Am. Rev. 112, 112 (1899), *quoted in* Kent, *supra*, at 119 n.68. The official Democratic Party platform of 1900 proclaimed, "The Filipinos cannot be citizens without endangering our civilization[.]" THOMAS HUDSON MCKEE, THE NATIONAL CONVENTIONS AND PLATFORMS OF ALL POLITICAL PARTIES, 1789 TO 1900, at 333 (3d rev. & enlarged ed. 1900), *quoted in* Kent, *supra*, at 128 n.110. These "prejudices toward the inhabitants of [the 'unincorporated'] territories" informed

the contemporaneous decision to deny them statutory citizenship. Burnett, *Empire and the Transformation of Citizenship*, *supra*, at 337.

The *Insular Cases* reflected this view of "the American nation as a divisible entity," with areas inhabited by non-white populations considered to be "unbearable burdens" or "problem regions." Burnett, *Constitution and Deconstitution*, *supra*, at 183. "[O]n the eve of the *Insular Cases*," Judge Torruella has explained, "the nation was divided …. [between] those of the view that the inhabitants of the new territories were unfit to become citizens …, a position that was largely racially motivated …. [and] those who adhered to the century-old tradition and practice that the Constitution automatically attached to all territories over which the United States gained sovereignty." Torruella, *supra*, at 299-300. Lamentably, the "racism and arrogance of the time" prevailed in the *Insular Cases*, as the Justices relied upon "widely held views about the supposed inability of non-Anglo-Saxon peoples to govern themselves without the guiding hand of white father." Burnett, *Convenient Constitution*, *supra*, at 992.

Thus, "[t]he doctrine of 'territorial incorporation' that emerged from *The Insular Cases* is transparently an invention designed to facilitate the felt needs of a particular moment in American history"—specifically, the impulse to compete with the powers of Europe in the worldwide scramble for colonies, unimpeded by

the strictures of our written Constitution. LAWSON & SEIDMAN, *supra*, at 197. "Felt needs generally make bad law, and *The Insular Cases* are no exception." *Id.*

In sum, much of the reasoning that informed the *Insular Cases* is "now recognize[d] as illegitimate," Burnett, *Convenient Constitution*, *supra*, at 992, and this Court ought not expand their application. This Court should be particularly hesitant to apply the *Insular Cases* to Fourteenth Amendment birthright citizenship, which (as discussed) concerns a constitutional provision designed to *repudiate* racist notions like those that the *Insular Cases* reflected.

CONCLUSION

Amici respectfully urge this Court to reconsider the district court's mistaken reliance on the *Insular Cases*, and to decide that they do not govern or persuade on the constitutional question in this case.

Respectfully submitted.

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I hereby certify that this brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 32(a)(7)(B)(i) and 29(d).

1. Exclusive of the exempted portions of the brief as provided in Federal Rule of Appellate Procedure 32(a)(7)(B)(iii), the brief contains 6,993 words.

2. Pursuant to Federal Rule of Appellate Procedure 32(a)(5)(A), the brief has been prepared in proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font. As permitted by Federal Rule of Appellate Procedure 32(a)(7)(C), I have relied upon the word count feature of this word processing system in preparing this certificate.

/s/ Paul R.Q. Wolfson
PAUL R.Q. WOLFSON

May 12, 2014

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of May, 2014, I electronically filed the foregoing Brief of Amici Curiae Scholars of Constitutional Law and Legal History in Support of Neither Party with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Paul R.Q. Wolfson
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