US Territorial Citizenship Today: Four Interpretations

Charles R. Venator-Santiago, *University of Connecticut*

Questions about the citizenship status of people born in the US territories continue to be discussed in public debates. In 2007, Gabriel Chin (2008) questioned whether Senator John McCain, the Republican Party's presidential nominee, was a natural-born citizen, which is a constitutional requirement for eligibility to serve as the US president. Senator McCain was born on a US military base in the Panama Canal Zone, a leased *and* unincorporated territory located outside of the United States for purposes of the Fourteenth Amendment. More recently, in *Tuaua* v. *United States*, a group of American Samoans unsuccessfully sued the United States, petitioning the courts to declare the Citizenship Clause of the Fourteenth Amendment operative in American Samoa (We the People Project). Furthermore, *The Economist*/*YouGov Poll* (2016) of mainland US citizens found that 56% of respondents either did not know or were unsure whether people born in Puerto Rico were US citizens—notwithstanding the fact that 2017 commemorates the centennial of the collective naturalization of inhabitants of Puerto Rico under terms of the Jones Act of 1917. Central to these public debates is whether the territories are located in the United States for the purposes of acquiring US citizenship at birth.

Before 1898, annexed territories were governed as a part of the United States for the purposes of citizenship, and birth in a territory was tantamount to birth in the United States. Since 1898, however, the inhabited territories annexed by the United States have been governed as unincorporated territories and selectively ruled as foreign localities in a domestic or constitutional sense. Congress can make new territorial law and thereby choose when to extend or apply a citizenship statute to an unincorporated territory. Birth in an unincorporated territory is not tantamount to birth in the United States.

At least four interpretations of the status of people born in unincorporated territories are subject to debate. Each debate, in turn, provokes serious questions and poses important challenges to students and faculty in courses in several political science subfields, notably political theory (Bosniak 2011), constitutional law and civil rights, and American politics (e.g., race, gender, and ethnicity) (Smith 1997).

UNINCORPORATED TERRITORIAL CITIZENSHIP

Despite the fragmented development of nineteenth-century US territorial law and policy, the federal government treated the territories as a part of the United States for constitutional purposes. All of the inhabited territories annexed before 1898 were governed as states-in-the-making and then admitted as states. Since 1898, however, none of the inhabited territories annexed by the United States has been granted statehood (Congressional Research Service 1985).

In the late eighteenth and nineteenth centuries, Congress used several types of laws to grant citizenship to (eligible) inhabitants of the US territories. In most instances, the initial annexation treaty either granted citizenship to them or promised to do so.

Congress also used organic acts, which created the territories, to naturalize territory residents (e.g., the Oregon Territory). Otherwise, Congress included territorial residents in broader federal legislation (e.g., the Civil Rights Act of 1866). Furthermore, the US Supreme Court, in *The Slaughterhouse Cases* (1873), established that to be born in a US territory was tantamount to being born in the United States (Bickel 1973). The Court subsequently determined that the statehood-admission process was tantamount to collective naturalization (*Boyd* v. *Thayer* 1892) and that all eligible residents became US citizens when a territory became a state. Whatever the legal mechanism, to be born in a territory for the purposes of US citizenship was effectively the same as to be born in the United States.

After the Spanish–American War of 1898, the United States developed new territorial policy. Officials in the War Department and the military governors of the newly annexed (i.e., Puerto Rico, Guam, and the Philippines) and occupied (i.e., Cuba) territories began to draw up blueprints for the nascent territorial policy. Through its territorial organic acts, Congress began to normalize the military's territorial policies in 1900. The US Supreme Court soon affirmed these new laws in a series of decisions known as the *Insular Cases* and developed the "territorial-incorporation" doctrine for governing the new offshore territories (Sparrow 2006; Torruella 1988). All of the US territories acquired after 1898 have been ruled by the terms of this doctrine.

Justice Edward D. White established the core elements of the territorial-incorporation doctrine in his concurring opinion in *Downes* v. *Bidwell* (1901). He made three arguments central to understanding the contemporary debates about the citizenship status of people born in the unincorporated US territories. First, he argued that although the Constitution was operative in the newly acquired US territories, Congress had the plenary authority to enact legislation that—whether explicitly or implicitly—applied or extended its provisions to the territories. Justice White emphasized that this authority was derived either expressly or implicitly from the Constitution's Territories Clause (182 US 244, 288-289). Neuman (2008) labeled this power of Congress and the Court

doi:10.1017/S1049096516003103

to selectively determine which parts of the Constitution are operative in an unincorporated territory as a "functional approach" to territorial governance.

Second, Justice White created a distinction between incorporated and unincorporated territories. Whereas the former were meant to become states, the latter were not destined for statehood. His third argument was that the United States could selectively rule unincorporated territories as foreign locations in a domestic or constitutional sense. The US government could selectively locate the unincorporated territories as outside of the United States for purposes of the Citizenship Clause of the Fourteenth Amendment—at least until Congress enacted legislation that applied or extended this clause to the territory in question. Birth in an unincorporated territory was not tantamount to birth in the United States until Congress made it so by changing the territory's status.

Whatever the legal mechanism, to be born in a territory for the purposes of US citizenship was effectively the same as to be born in the United States.

The granting of US citizenship in the new unincorporated territories departed from the nineteenth-century precedents in several important ways. First, previous annexation treaties provided for or promised the collective naturalization of inhabitants of the annexed territories, but the post-1898 annexation treaties were not bound by this provision. For example, the Treaty of Paris of 1898 contained a citizenship provision authorizing the creation of a local nationality rather than providing for the collective naturalization of the territories' inhabitants. The resolutions used to annex the Samoan Islands and Trust Territories of the Pacific Islands (TTPI) also did not include citizenship provisions.

Some constitutional scholars argued that the United States was justified in governing the newly acquired islands as unincorporated territories because the annexation treaties did not contain a collective-naturalization provision (Lowell 1899). The exclusion of a citizenship provision set a precedent for the United States to annex territories without incorporating their inhabitants into the Union. The US Virgin Islands were the only exception, given that the Annexation Treaty of the Danish West Indies (1916) contained a collective-naturalization provision for inhabitants of the newly ceded territories.

The second way that the post-1898 US territorial policy historically departed was that the federal government selectively ascribed a local or noncitizen nationality to territorial inhabitants. In Puerto Rico, for example, the Foraker Act of 1900—the organic act that established the island's civil government—created "Puerto Rican" citizenship for people born on the island. Four years later, in *Gonzalez* v. *Williams* (1904), the US Supreme Court held that this local citizenship was tantamount to a noncitizen nationality, a status located between that of an alien and a US citizen. This status applied to people born in Puerto Rico between 1899 and 1917. Guamanians likewise acquired a separate nationality status between 1899 and 1950, and people born in the TTPI/CNMI (Commonwealth of the Northern Mariana Islands) acquired a nationality between 1947 and 1976/1986. Since 1900, all people born in American Samoa acquired a US noncitizen nationality at birth.

The use of individual rather than collective naturalization laws constituted a third departure from previous territorial policy. In 1906, Congress began to enact federal immigration legislation that included special naturalization provisions for the inhabitants of unincorporated territories. For example, Section 30 of the Bureau of Immigration and Naturalization Act of 1906 (BINA) enabled inhabitants of an unincorporated territory to establish residency in a state or incorporated territory and subsequently undergo a special naturalization process to acquire US citizenship (39 Stat. 596, 606-607). Congress subsequently amended the BINA and expanded its scope to enable noncitizen nationals born in the unincorporated territories to acquire naturalized citizenship as "special aliens" for naturalization purposes. Congress began to curtail the use of individual naturalization laws with the enactment of federal laws and territorial organic acts to extend *jus soli* (i.e., birthright citizenship) to individual territories. Only noncitizen nationals born in American Samoa are currently required to undergo a special naturalization process to acquire US citizenship.

Congress's enactment of collective-naturalization statutes for individual territories represents a fourth departure from past territorial law and policy. Congress passed these statutes for Puerto Rico (i.e., the Jones Act of 1917), Guam (i.e., the Organic Act of Guam of 1950), and the CNMI (i.e., the CNMI Covenant of 1976), which allowed most inhabitants of the islands to acquire US citizenship through mere residence in the territory. Congress included a collective-naturalization provision in the Annexation Treaty or the Danish West Indies for the US Virgin Islands. However, in no instance did Congress explicitly incorporate the territories or change their status. Birth in the unincorporated territories therefore amounted to birth "somewhere" outside of the United States for the purposes of the Citizenship Clause of the Fourteenth Amendment. As a result, children born in the unincorporated territories could acquire a derivative form of parental or *jus sanguinis* (i.e., blood-right) US citizenship.

In 1927, Congress began a piecemeal extension of the rule of *jus soli* to residents of four of the five unincorporated territories. Congress enacted an organic or territorial act—the Virgin Islands Citizenship Act of 1927—which extended the rule of *jus soli* US citizenship to Virgin Islands residents (US Senate Committee on Immigration 1926). In 1940, Congress invoked the US Virgin Islands precedent to extend *jus soli* citizenship to Puerto Rico. The Nationality Act of 1940 treated Puerto Rico and the US Virgin Islands as incorporated territories—like Hawaii and Alaska—and as part of the United States for the purpose of extending birthright citizenship.

https://doi.org/10.1017/S1049096517003103 Published online by Cambridge University Press

Both Puerto Rico and the US Virgin Islands were explicitly differentiated from Guam and American Samoa.

Drawing on the Puerto Rico Nationality Act, the Immigration and Nationality Act of 1952 extended birthright citizenship to Guam. By contrast, the 1976 Covenant establishing the CNMI also contained a birthright citizenship provision that treated residents of the new Commonwealth as being in the United States for citizenship purposes. Birth in four of the five US unincorporated territories, therefore, is tantamount to birth in the United States for citizenship purposes; American Samoa, however, remains an outlying or unincorporated territory located outside of the United States for citizenship purposes.

In 1906, Congress began to enact federal immigration legislation that included special naturalization provisions for the inhabitants of unincorporated territories.

At different times, law makers and policy makers arguing in favor of enacting birthright-citizenship statutes to replace the collective-naturalization laws operative in unincorporated territories invoked an array of reasons. However, debates about the administrative problems caused by the anomalous status of territorial citizens were a constant source of concern. For example, because unincorporated territories were selectively located outside of the United States, territorial-naturalization statutes were consistently incompatible with national immigration and naturalization laws. Congress was forced not only to enact corrective amendments to address the ensuing problems. Agencies such as the State Department also were routinely asked to clarify or address problems concerning the denaturalization of people who were born in territories but who were residing in other countries. Notwithstanding, scholars, law makers, and policy makers continue to debate whether territorial-birthright-citizenship statutes changed the constitutional status of territorial citizens.

TERRITORIAL CITIZENSHIP TODAY: FOUR INTERPRETATIONS

The preceding historical and legal background leads to the four current and controversial interpretations of the citizenship status of people born in the unincorporated US territories. Central to the debates is the legal or constitutional *source* of citizenship. In three of the interpretations, Congress used statutes to confer various types of citizenship on the inhabitants of unincorporated territories—even as the interpretations disagree on the constitutional source of the statutes. A fourth interpretation maintains that the Citizenship Clause of the Fourteenth Amendment is the only legitimate legal source of all territorial citizenship. These several interpretations and the ensuing debates persist, however, because of the US Supreme Court's aversion to clarifying the constitutional source of territorial birthright citizenship.

The prevailing interpretation contends that people born in an unincorporated territory are statutory citizens, without a right to constitutional citizenship. This interpretation is grounded in a 1989 Congressional Research Service (CRS) memorandum that addressed the question of whether Congress possesses the power to unilaterally enact expatriation legislation for the inhabitants of Puerto Rico if the territory were to opt to become a sovereign nation (Congressional Research Service 1995). The CRS memorandum argued, first, that people born in Puerto Rico acquired a US citizenship under the terms of the Jones Act of 1917. Second, the memorandum argued that *Downes* v. *Bidwell* (1901) established that unincorporated territories were not *in* or *part* of the United States for constitutional purposes. Third, drawing on a generous reading of *Rogers* v. *Bellei* (1971)—which addressed the citizenship status of a child of a US citizen [or a US citizen's child] born in Italy—the CRS memorandum reasoned that because unincorporated territories were not *in* the United States, people born or naturalized in these locations could not claim constitutional citizenship and protection against unilateral expatriation. That is, territorial citizens were conferred with statutory status only, without all of the rights and protections available to constitutional citizens (Puerto Rico Federal Affairs Administration 1992).

An alternative interpretation suggested by Álvarez González (1990) is that Puerto Rico's territorial citizenship laws, at a minimum, confer a naturalized status on Puerto Ricans that consists of constitutional protection against unilateral expatriation. Although *Downes* v. *Bidwell* (1901) allows Congress to treat Puerto Rico as a foreign territory in a *domestic* sense, it continues to treat Puerto Rico as part of the United States in an *international* sense, according to Álvarez González (1990). For international purposes, people born or naturalized in Puerto Rico are born or naturalized *in* the United States—especially according to the Nationality Act of 1940—thereby establishing Puerto Rico as being located within the United States for citizenship purposes. For Álvarez González, rather than *Rogers* v. *Bellei* (1971), the relevant precedent is *Afroyim* v. *Rusk* (1967), in which the US Supreme Court held that the Citizenship Clause of the Fourteenth Amendment protected naturalized citizens from most forms of unilateral expatriation.

This author's interpretation of the citizenship status of people born in the unincorporated territories *after* the extension of territorial *jus soli* or birthright-citizenship laws—that is, at present—has five prongs (Venator-Santiago 2013; 2015). First, the legislative histories of the territorial-birthright-citizenship laws indicate that the Fourteenth Amendment is the constitutional source of these types of laws. Second, whereas individual and collective naturalization laws confer a *naturalized* status on people born in a territory selectively deemed as foreign in a domestic sense, the legislative histories of the territorial *jus soli* citizenship laws unequivocally

https://doi.org/10.1017/S1049096516003103 Published online by Cambridge University Press

establish that the US Virgin Islands, Puerto Rico, Guam, and the CNMI became a *part* of the United States—albeit for the sole purpose of conferring a native-or natural-born citizenship status on people born in these territories.

Third, the prevailing statutory argument relies on a reading of the effects of naturalization laws (e.g., the Jones Act of 1917) and do not examine legislative history and intent or consider the language of the territorial-birthright-citizenship laws. Fourth, although lawmakers use the Territories Clause to legitimate the establishment of a hierarchy of territorial statuses (e.g., mainland and territory), neither the Citizenship Clause nor the US Constitution more generally contemplate a hierarchy of birthright citizenship. Fifth, and consistent with a functionalist approach to territorial governance, the extension of birthright citizenship to the unincorporated territories is yet another example of how Congress has decided whether to extend or apply constitutional provisions (e.g., the Fourteenth Amendment) to unincorporated territories—an interpretation consistent with Justice White's original argument in *Downes* v. *Bidwell* (1901). In summary, over time, Congress has enacted legislation that selectively incorporates the US Virgin Islands, Puerto Rico, Guam, and the CNMI for the sole purpose of extending the rule of *jus soli*.

A fourth interpretation was offered by the plaintiffs in *Tuaua* v. *United States* (2015) and recently rejected by the US Supreme Court. They argued that the doctrine of territorial incorporation is unconstitutional by virtue of the fact that the Constitution extends *ex propio vigore* (i.e., by its own force) to all territories under US sovereignty. The Samoan plaintiffs asserted that people born in American Samoa should have US citizenship at birth rather than noncitizen nationality. Drawing on the Court's decisions in *The Slaughterhouse Cases* (1873) and *United States* v. *Wong Kim Ark* (1898), the plaintiffs in *Tuaua* v. *United States* (2015) argued that the Citizenship Clause of the Fourteenth Amendment extends to all territories. Because the language of the Constitution does not contemplate a difference or distinction between incorporated and unincorporated territories, *Downes* v. *Bidwell* (1901 was ultimately unconstitutional (We the People Project).

Mere congressional statutes—the prevailing interpretation contends—determine the status of territorial citizens. Congress—a creature of the Constitution—possesses a plenary power to create territorial citizenships that are not anchored in either the naturalization or the citizenship clauses of the Constitution. More important, Congress's plenary power authorizes the creation of a hierarchy of soils (i.e., mainland and territorial) that confers two different types of birthright citizenship. The challenges of this article are to offer an alternative interpretation grounded in a more comprehensive analysis of the legislative histories of the extension of citizenship to US territories and more democratic interpretations of the status of territorial citizens. ■

For international purposes, people born or naturalized in Puerto Rico are born or naturalized in *the United States—especially according to the Nationality Act of 1940—thereby establishing Puerto Rico as being located within the United States for citizenship purposes.*

REFERENCES

Afroyim v. *Rusk*. 1967. 387 US 253.

Álvarez González, José Julián. 1990. "The Empire Strikes Out: Congressional Ruminations on the Citizenship Status of Puerto Ricans." *Harvard Journal on Legislation* 27: 309.

Annexation Treaty of the Danish West Indies (USVI). 1916. 39 Stat. 1706.

Bickel, A. M. 1973. "Citizenship in the American Constitution." *Arizona Law Review* 15: 369.

Bosniak, L. 2011. "Citizenship in an Unequal World: A Discussion of the Birthright Lottery: Citizenship and Global Inequality." *Perspectives on Politics* 9 (3): 621–4.

Boyd v. *Thayer*. 1892. 143 US 135.

Bureau of Immigration and Naturalization Act of 1906. Pub. L. No. 59-338, 34 Stat. 596 (1906).

Chin, Gabriel J. 2008. "Why Senator John McCain Cannot Be President: Eleven Months and A Hundred Yards Short of Citizenship". *Immigration and Nationality Law Review* (29): 571.

Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (1866).

Congressional Research Service. 1995. "Admission of States into the Union after the Original Thirteen: A Brief History and Analysis of the Statehood Process." Prepared by Sheridan, P.B. 85–765 Gov. Washington, DC: US Government Printing Office.

Downes v. *Bidwell*. 1901. 182 US 244.

The Economist/YouGov Poll. 2016. Available at https://d25d2506sfb94s.cloudfront.net/cumulus_uploads/document/wlcyvv3fks/econTabReport.pdf. May 2–9. (Accessed June 10, 2016.)

Foraker Act of 1900, ch. 191, 31 Stat. 77 (1900).

Gonzalez v. *Williams*. 1904. 192 US 1.

Immigration and Nationality Act of 1952. Pub. L. No. 82-414, 66 Stat. 163 (1952).

Joint Resolution to approve "Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America." Pub. L. No. 94-241, 90 Stat. 263 (1976).

Jones Act of 1917. Pub. L. No. 64-368, 39 Stat. 951 (1917).

Lowell, Abbott L. 1899. "The Status of Our New Possessions: A Third View." *Harvard Law Review* 13: 155.

Nationality Act of 1940. Pub. L. No. 76-853, 54 Stat. 1137 (1940).

Neuman, Gerald L. 2008. "The Extraterritorial Constitution after *Boumediene* v. *Bush*." *Southern California Law Review* 82: 259.

Organic Act of Guam of 1950. Pub. L. No. 81-630, ch. 512, 64 Stat. 384 (1950).

Puerto Rico Federal Affairs Administration. 1992. Puerto Rico Political Status Referendum. "Discretion of Congress Respecting Citizenship of Puerto Ricans, March 9, 1989." Vol. 2.

Rogers v. *Bellei*. 1971. 401 US 815.

The Slaughterhouse Cases. 1873. 83 US (16 Wall.) 36.

Smith, Rogers M. 2011. *Civic Ideals: Conflicting Visions of Citizenship in U.S. History*. New Haven, CT: Yale University Press.

Sparrow, Bartholomew H. 2006. *The Insular Cases and the Emergence of the American Empire*. Lawrence: University Press of Kansas.

https://doi.org/10.1017/S1049096516003103 Published online by Cambridge University Press

Torruella, Juan R. 1988. *The Supreme Court and Puerto Rico: The Doctrine of Separate and Unequal*. Río Piedras: Editorial de la Universidad de Puerto Rico.

Treaty of Paris of 1898. 30 Stat. 1754 (1899).

Tuaua v. *United States*. 2015. 788 F.3d 300. DC Circuit.

United States v. *Wong Kim Ark*. 1898. 169 US 649.

US Senate Committee on Immigration. 1926. "Citizenship for the Inhabitants of the Virgin Islands, S. Rept. No. 69–650 (first Session).

Venator-Santiago, Charles R. 2013. "Are Puerto Ricans Native-Born U.S. Citizens? The 1948 Pagán/Fernós-Isern Amendment." *Ámbito de Encuentros* 6 (2): 9–30.

———. 2015. *Puerto Rico and the Origins of U.S. Global Empire: The Disembodied Shade*. London: Routledge.

Virgin Islands Citizenship Act of 1927. Pub. L. No. 69-640, ch. 192, 44 Stat. 1235 (1927).

We the People Project. *Tuaua* v. *United States*. Available at www.equalrightsnow.org/tuaua. (Accessed May 31, 2016.)

https://doi.org/10.1017/S1049096516003103 Published online by Cambridge University Press