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This dissertation examines U.S. citizenship legislation in the U.S. Pacific unincorporated territories through Critical Race Theory’s interest-convergence thesis. I employ Derrick Bell’s theory of interest-convergence to argue that it is only when economic, cultural, political, and social interests converge to benefit the United States that U.S. lawmakers have enacted legislation to extend citizenship to the Pacific unincorporated territories (Guam, American Samoa and the Commonwealth of the Northern Mariana Islands). I also rely on Mary Dudziak’s use of interest-convergence, which she used to explain the implementation of key social reforms of the Civil Rights Movement, such as desegregation, as a model setting up my research design. Bell and Dudziak used interest-convergence to explain how advances for Black Americans and other oppressed races during the Civil Rights Movement (e.g. the Court’s decision in Brown v. Board of Education) were used as propaganda by the United States in its struggle against the Soviet Union and communist political philosophy during the Cold War. The passage of civil rights legislation allowed the United States to project an image of the moral superiority of its democratic, capitalist system of government on the global stage, in response to foreign (especially Soviet) criticism of American racial discrimination and White supremacy. In my dissertation, I demonstrate that changes in citizenship status for the Pacific unincorporated territories were meant to benefit the United States’ interest in being perceived as the world leader of democracy, equality and fairness, and not for a genuine concern and sympathy of the well-being and desires of the inhabitants of the territories. Instead, I argue that the normative
valuations associated with citizenship were “weaponized” by U.S. lawmakers as propaganda against the Soviet Union to promote the United States’ image throughout the world. Furthermore, when the interests of the United States and the Pacific unincorporated territories diverge, I contend that “progressive” citizenship legislation will not be enacted, which explains why Samoans are still non-citizen nationals while still owing their allegiance to the United States and existing under its authority.

By applying interest-convergence to the legal histories of the Pacific unincorporated territories, I hope to accomplish three primary goals with this dissertation: (1) demonstrate a sophisticated understanding of how to apply interest-convergence as a research methodology; (2) expand the use of interest-convergence to outside the context of how Black Americans were treated during the Civil Rights Movement by analyzing how “Polynesians” were governed in the Pacific unincorporated territories through U.S. citizenship legislation; and (3) to offer a counter-narrative to romanticized theories that promote the idea that citizenship in the United States developed in a linear, increasingly progressive, manner, in which it is argued that the United States has managed to fully overcome its past history of exclusionary practices regarding eligibility for equal citizenship. The extension, or lack thereof, of U.S. citizenship to the Pacific unincorporated territories challenges progressive, mythologized understandings of the development of citizenship in the United States.

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A History of the *Insular Cases*, U.S. Empire, and the Big Picture Debates over Citizenship

In 1898, in the aftermath of the Spanish-American War, U.S. policymakers and legal actors faced a choice: whether constitutional provisions, protections and guarantees would be extended to the newly acquired territories of Puerto Rico, Guam and the Philippines. The question that presented itself to U.S. policymakers was one of empire: could the Constitution be interpreted in a manner that permitted the United States to acquire and govern a territory, maintaining sovereign authority over it indefinitely, with no intention of making that territory a full state or extending the same rights and privileges (e.g. voting rights, political representation, citizenship) and protections (e.g. the Bill of Rights, equal protection, due process) that residents of states have. Or, more succinctly, as newspapers at the time explained the situation: Does the Constitution follow the flag? The Supreme Court would constitutionally legitimize U.S. empire in a series of rulings beginning in 1901, collectively known as the *Insular Cases*, arguing that the Constitution would only apply to these territories only when Congress decided to explicitly extend specific constitutional provisions. This new policy would affirm the policies of U.S. imperialism, based on the indefinite occupation of a territory, as constitutional, allowing the United States to maintain authority over newly acquired territory while not fully incorporating these places fully into the nation. The *Insular Cases* thus allowed for Congress to selectively decide which parts of the Constitution would operate in newly acquired territories, to maximize the flexibility of U.S. rule over distant lands.

While the initial decisions of the *Insular Cases* were decided in 1901 and the values and premises that pervade the entire group of opinions that make up this set of rulings, which
materialized in a White-dominated, openly racist society, have been universally denounced by scholars, judges and lawyers, they remain the seminal decisions guiding U.S. governance in the unincorporated areas (Puerto Rico, Guam, American Samoa, The Commonwealth of the Northern Mariana Islands [CNMI]) and influencing U.S. territorial law more broadly. The residents of these areas were deemed to be of inferior races and cultures, ineligible for inclusion in the U.S. polity and unfit to govern themselves with a republican form of government without proper tutelage. These cases continue to remain “good” law, preserving Congress’ plenary authority over the insular territories, which are still considered to be unincorporated and able to be treated differently than a state.

This is a result of the doctrine of incorporation, which established a functionalist approach to how the U.S. was able to govern its newly acquired territories after the Spanish-American War. The Court ruled that the insular territories were “unincorporated,” a status never used before in U.S. territorial history, and would remain so until, or if, Congress decided to alter their status. And while the Court ruled that the Constitution and U.S. citizenship did not automatically extend to the unincorporated territories, the Insular Cases established that Congress could selectively apply specific provisions or parts of the Constitution to individual unincorporated territories when it deemed it was appropriate to do so, citizenship included, which is known as the doctrine of territorial functionalism. This meant that the unincorporated territories were neither fully foreign to the United States nor fully included within it, but were instead “foreign in a domestic sense,” with each existing in a permanent state of abeyance between incorporation/statehood and being considered a foreign territory.

While the Constitution and its full array of rights, liberties and protections would not automatically extend to the unincorporated territories, certain “fundamental rights” would. The
Court did not explicitly define what these rights were or provide an outline of their scope, however. As Gerald Neuman explains:

The Court had held [previously before the Insular Cases] that the Constitution applied of its own force in the…territories, but had taken into account the disruptive effect of immediately imposing a new legal culture on a society previously accustomed to a different legal system (and possibly for a temporary period, if the territory would later be granted independence). As a compromise, the Insular Cases doctrine extended only a subset of “fundamental” constitutional rights to so-called “unincorporated territories” not expected to become states of the Union. (264)

Despite these ambiguous fundamental rights automatically extending to the unincorporated territories, the Court established a framework that enabled Congress to have vast and flexible authority while deciding on how it wanted to govern each individual territory. This functionalist approach instituted Congress’ plenary power over the unincorporated territories, creating an imperialistic relationship in which Congress maintained ultimate sovereignty over the unincorporated territories, and was able to govern each one individually in the manner it determined most appropriate for each territory, including the power to extend or withhold U.S. citizenship to a specific territory. Congress did not have to abide by an overall governing formulation that would force itself to develop a uniform policy for all the unincorporated territories. Congress was constrained in its governance only by those rights unclearly categorized as “fundamental.” It was assumed that the unincorporated territories would never be permitted to join the United States as states, based on racist justifications about the inferiority and incapability of the inhabitants to govern themselves with an Anglo-Saxon legal system.

As I will highlight, the doctrine of territorial incorporation that was created in the Insular Cases was a fundamental shift from previous U.S. territorial policy, which was premised on White-settler colonialism and eventual statehood for newly acquired territories (Leibowitz, 6; Ramos, 73). Furthermore, as I will make clear, by 1898 there existed constitutional precedent
that established that the Constitution, including the Fourteenth Amendment’s Citizenship Clause, applied to U.S. territories before they were granted statehood. Before 1898, then, territories were considered to be within the meaning of the United States, subject to full U.S. jurisdiction and sovereignty, and U.S. citizenship extended to the residents living and born in them.

After providing a context of the shift in U.S. territorial policy that occurred in 1898 and was affirmed by the Supreme Court in the *Insular Cases*, the focus of this dissertation will be on how citizenship legislation developed in each of the Pacific unincorporated territories: American Samoa, Guam and the CNMI. While the *Insular Cases* allowed for particular governing policies to be developed in each territory, I will explore whether there is a general U.S. Pacific island policy that provides a nexus between how citizenship legislation developed in each area. The Court ruled that because of each territory’s unincorporated status, as not existing fully within the United States for citizenship purposes, residents were not entitled to U.S. citizenship unless Congress decided to explicitly extend it. This set up a framework in which Congress could selectively decide whether to grant or withhold citizenship to each individual U.S. Pacific unincorporated territory. While residents of Guam and the Northern Mariana Islands were eventually granted U.S. citizenship, through different types of citizenship legislation, Congress has never extended citizenship to American Samoa, as Samoans exist as nebulous “non-citizen nationals.” Thus, the main endeavor of this dissertation seeks to examine whether a fundamental U.S. policy or trend can be discerned from analyzing the legal histories of citizenship legislation in the U.S. Pacific unincorporated territories. Put differently, despite Congress’ ability to develop a policy regarding U.S. citizenship in the Pacific unincorporated territories individually, in the manner it deems most appropriate for each specific territory, is there something that unifies how the United States has decided to extend or withhold citizenship to the Pacific unincorporated
territories? What are the types of citizenship that exist in the Pacific unincorporated territories and why do they vary? Through what means, legislative or other, has the United States attempted to extend citizenship? How can the uneven and varied development of citizenship in these territories best be understood?

**Methodology: Critical Race Theory and Interest-Convergence**

To pursue these questions, I employ a critical race theory approach to U.S. citizenship legislation in the Pacific island territories; more specifically, I use Derrick Bell’s theory of interest-convergence to argue that it is only when economic, cultural, political, and social interests converge to benefit the United States that it has conferred citizenship to the Pacific island territories. I also rely heavily on Mary Dudziak’s use of interest-convergence to help explain the implementation of key social reforms of the civil rights movement, such as desegregation, as a model setting up my research design. Bell and Dudziak used interest-convergence to explain how advances for Blacks\(^1\) and other oppressed races coincide with changing economic conditions and the self-interest of elite Whites, and to promote the United States’ interest in improving its image on the global stage during the Cold War, not because of moral concerns about equality, dignity, or due to altruism. As legal scholar Michael Klarman describes the idea of interest-convergence, the history of race relations in the United States and remedial legislation to account for the state institutions of slavery and Jim Crow are more complicated than the commonly accepted narrative of the United States

becom[ing] [progressively] more racially egalitarian when forced to confront the tension between the national creed of universal equality and practices of racial discrimination.

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\(^1\) I capitalize any mention of race in this dissertation. As Lori Tharps explains, “[w]hen speaking of a culture, ethnicity or group of people, the name should be capitalized. Black with a capital B refers to people of the African diaspora. Lowercase black is simply a color” (2014). I believe that the proper names of all nationalities, peoples, races, and tribes should be capitalized.
This view is naïve: Americans have rarely reformed racially oppressive practices simply because it was the right thing to do. (5)

I seek to extend interest-convergence outside of the Civil Rights Movement, beyond Black-White race relations, to a new area with different racial considerations: the Pacific unincorporated territories with brown bodies categorized by the United States as “Polynesian.” I contend this is another realm of race relations in U.S. history in which the United States is not simply “doing the right thing” when its policymakers decide to enact “progressive” legislation.

I believe that an interest-convergence methodology is both useful and appropriate to use when examining the development of citizenship legislation in the Pacific unincorporated territories for various reasons. Since the Insular Cases granted Congress broad, plenary authority over the unincorporated territories, it allows for the United States to govern each specific territory in a strategic manner. If Congress decides it is in the interests of the United States to extend citizenship to a particular unincorporated territory, it has the power to do so; if not, citizenship can continue to be withheld. Thus, by using interest-convergence, I search for evidence in the legal histories of citizenship legislation for the Pacific unincorporated territories that the primary motivation for why the United States determined to extend or withhold citizenship to a particular territory was based on strategic motivations, to promote or protect U.S. interests in some manner. The Insular Cases establish a framework for Congress to use this type of decision-making when deciding whether to extend citizenship to the unincorporated territories. I ultimately argue that interest-convergence explains why the U.S. policymakers decided to extend citizenship to Guam and the CNMI.

Furthermore, interest-convergence could also be helpful in understanding why citizenship was not extended, or continued to be withheld from particular unincorporated territories. The other central tenant of Bell’s thesis is that when interests diverge, “progressive” legislation will
not be enacted. I will thus also be looking for evidence in the legal histories of citizenship legislation for the Pacific unincorporated territories of examples of Congress deeming it not within the interests of the United States to extend citizenship, and for moments when the residents of these territories did not want U.S. citizenship. Bell’s thesis could be used to explain moments like these as examples of interests diverging, meaning legislation will not be generated. I contend that interest-convergence allows us to understand why citizenship was and continues to be withheld from American Samoa, as the interests of the United States and Samoans continually diverged to prevent legislation from being enacted.

A last reason why I believe interest-convergence to be a fruitful methodology when examining citizenship legislation in the Pacific unincorporated territories is because although extending citizenship can be portrayed as a form of progressive legislation that affirms the United States’ commitment to egalitarian and democratic principles, it does not alter the existing structural relationship between Congress and these areas. This fits with Bell’s thesis, since it argues that occasionally progressive action will occur as long as such action does not fundamentally “harm societal interests deemed important by…whites (1980, 523). Extending citizenship to the residents of the unincorporated territories is an example of such “progressive” legislation that does not alter, question or challenge existing power structures (Longazel, 80), e.g. the subordinate status that the unincorporated territories occupy in relation to the United States, while still allowing the United States to portray itself as egalitarian, nonracist and the global leader of democracy and freedom. As I will highlight, the legal histories of citizenship legislation for the Pacific unincorporated territories demonstrate that citizenship can be extended while not altering the structural relationship between the United States and its territories, in which
Congress maintains plenary authority over each territory, which I believe also supports a central component of Bell’s interest-convergence thesis.

In sum, by applying interest-convergence to the legal histories of the Pacific island territories, I contend that the United States has only extended citizenship when it is convenient, even if the citizenship available to residents of the Pacific unincorporated territories is of a “second-class” nature. Using an interest-convergence methodology, I offer evidence that it is only when it is in the best interests of the United States that citizenship has been extended to the Pacific unincorporated territories, and that this legislation did not alter the fundamental structural relationship that continues to exist between the federal government and the each territory, in which Congress maintain plenary authority. I believe that this provides a counter-narrative to progressive understandings of citizenship in the U.S. context, in which it is argued that the United States has overcome its past history of exclusionary practices regarding eligibility for equal citizenship. This second-class citizenship is based on empire building: the U.S. has sought to maintain sovereignty and influence over these territories, without their consent, for its own

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While not a central part of this dissertation project, in further research I hope to explore the ways in which the citizenship available to residents of the unincorporated territories is not “equal” to birthright citizenship for U.S. citizens living in states. For example, U.S. citizens living in the unincorporated territories are unable to vote in federal elections. The federal government has also treated citizenship in the unincorporated territories as statutory in nature, rather than as constitutional (rooted in the Fourteenth Amendment’s Citizenship Clause). For example, in 1998, Jennifer Efron, a Puerto-Rican born citizen, who lived in Florida, wanted to gain a constitutional citizenship by undergoing the process of naturalization. In *Efron ex rel. Efron v. U.S.* (1998), Efron explained that she feared that Congress could create legislation that would collectively denaturalize people born in Puerto Rico, but by going through the naturalization process, her citizenship would be protected from any potential denaturalize legislation enacted by Congress. The Supreme Court affirmed the lower federal court’s ruling, which prevented Efron from going through the naturalization process, thus denying her from obtaining a constitutional citizenship. Furthermore, in *Rogers v. Bellei* (1971), the Court ruled that the Fourteenth Amendment safeguarded citizenship only when a person was born or naturalized in the United States, and that Congress retained authority to regulate the citizenship status of a person who was born outside the United States to an American parent. *Rogers v. Bellei* does not provide clear guidance as to whether the Court would treat a birth in an unincorporated territory as a birth “in” the United States, since the *Insular Cases* establish that these territories exist neither entirely within nor outside the United States. It is therefore an open question as to whether Congress can revoke the birthright citizenship that exists in most of the unincorporated territories. While it is not clear if a statutory citizenship that Congress can extend and also potentially revoke is constitutional, the point is that there is a precedent to suggest that the United States government considers citizenship in the unincorporated territories to be statutory in nature, and therefore as a second-class form of citizenship.
strategic interests, and never sought to include its residents as full and equal citizens and members in the U.S. polity. I thus contend that the legal histories of citizenship legislation in the Pacific island territories demonstrate that any changes in the type of citizenship that exists in these territories were meant to be beneficial for the United States in general and White elites more specifically, and not for a genuine concern and sympathy of the well-being, desires and/or autonomy of the inhabitants of the territories.

**Derrick Bell’s Interest-Convergence Explained Further**

Since I use interest-convergence as a methodological approach to examine the development of citizenship in the Pacific unincorporated territories, I here provide a more detailed explanation of its main tenets. In his highly influential articles, “Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation” and “Brown v. Board of Education and the Interest Convergence Dilemma,” Bell offered a revisionist narrative of civil rights reform in America, which he argued advanced in a manner that “coincide[d] with changing economic conditions and the self-interest of elite whites. Sympathy, mercy, and evolving standards of social decency and conscience amounted to little, if anything” (Delgado and Stefancic, 22). Bell’s main thesis argued that the Supreme Court’s decision in *Brown v. Board of Education* “cannot be understood without some consideration of the decision’s value to whites, not simply those concerned about the immorality of racial inequality” (524). Bell contended that *Brown* helped the United States’ standing in the world in its ideological struggle with the Soviet Union and Communism. For Bell, the decision in *Brown* provided the United States with much needed credibility in its normative claims regarding the superiority of the American capitalist system and its core of equality, democracy and freedom. Bell also points out that certain Whites realized that
the South could only become fully industrialized, and hence its full potential for profits be realized, if state-sponsored segregation ended.

Bell’s historical revisionist account of the *Brown* decision outlined three main components to explain how the Court’s ruling benefited the United States. The first part of Bell’s argument involved improving the image of the United States and its capitalist system in the international arena against the Soviet Union and communism. Government officials could now use the *Brown* ruling to counter negative international media coverage of segregation and apartheid by asserting that the United States ultimately stood for the equality and freedom of all people. Secondly, on the domestic front, the *Brown* ruling reassured returning disillusioned Black soldiers who had fought in WWII only to encounter the racism and state-sponsored institutionalized segregation of Jim Crow in the South and de facto forms of discrimination in housing, education and employment in the North. Third, *Brown* created new economic opportunities for White businessmen, as some Whites identified new financial possibilities in a post-segregationist South. The South could make the transition from a rural, plantation society to the sunbelt with its potential and profit only when it ended its struggle to remain divided by state-sponsored segregation.

Mary Dudziak would use Bell’s theory of interest convergence in her influential work, *Cold War Civil Rights: Race and the Image of American Democracy*, to further explain how U.S. legal actors believed civil rights reform was necessary to protect the United States’ image in the international realm. Dudziak examined thousands of documents from the State Department to demonstrate how U.S. lega policymakers were concerned with the effects the Civil Rights Movement and its protests against Jim Crow segregation would have on the United States’ global image in its struggle with the Soviet Union during the Cold War. How could the United States
claim to stand for egalitarian and democratic principles when segregation was legal in the South, with Black Americans discriminated against systemically, while being denied full inclusion and participation in the U.S. polity? Furthermore, the Soviet Union actively promoted images and videos of Southern law enforcement actors brutally repressing peaceful protests by Black activists in the South, a powerful propaganda tool to use against the United States while trying to influence developing nations and spread communism throughout the world. Thus, for Dudziak, in the context of the Cold War, “efforts to promote civil rights within the United States were consistent with and important to the more central U.S. mission of fighting world communism” (Dudziak, 12). The Soviet Union had been able to create anti-American propaganda based on the conspicuous contradictions between American political ideology and practice when it came to race relations. The United States risked losing its legitimacy in terms of being able to claim to be a bastion of democracy and equality with its unequal treatment of Blacks, either in the form of Jim Crow laws in the South or de facto discrimination, in the North. Dudziak chronicles, through newspaper articles and internal government documents, including files from the U.S. Department of State, the Department of Justice, and letters from U.S. ambassadors abroad, how various U.S. officials realized their ability to promote democracy throughout the world was hindered by domestic racial injustice. Thus, Dudziak convincingly argues that international criticism of the United States’ treatment of Blacks, (e.g. systemic discrimination in voting rights, education, housing, employment, segregation) provided U.S. policymakers and legal actors with an incentive to pursue and enact civil rights reform.

Also of particular importance for this dissertation are other components of Critical Race Theory’s core tenets, including: 1) belief in the centrality of history and context in any attempt to theorize the relationship between race and legal discourse and the social construction thesis, or
the idea that race and races are products of historically specific social thoughts and relations (Delgado and Stefancic 2012, Crenshaw et al. 1995); and 2) theory of differential racialization (a key to understanding the Insular Cases and how citizenship developed in each of these territories), or the idea that society racializes different minority groups at different times in particular, nuanced ways (Haney Lopez 1996; Delgado and Stefancic 2012, Crenshaw et al. 1995, Ngai 2004; Thompson 2010, Saada 2012). Since I will be tracing the development of citizenship legislation in the Pacific unincorporated territories, I expect race to remain a dynamic, historically contingent concept, with the laws I examine both reflecting and influencing new understandings and constructions of race.

In sum, I believe that interest-convergence will help to understand why citizenship is or is not extended at a particular moment, and why citizenship has never been extended in the case of American Samoa, since the political, cultural, or strategic interests of the United States and American Samoa never properly aligned, i.e. their interests diverged, to pressure the United States into enacting such legislation. Thus, while both the type of citizenship legislation created by Congress and the actual citizenship available varies for each particular territory, interest-convergence offers a nexus between an overall U.S. policy regarding citizenship in the Pacific unincorporated territories and the unique trajectory of the development of citizenship in each of these areas.

3 For a particularly excellent work on the historically contingent nature of race and how it is constructed and understood differently at different time periods, see Matthew Frye Jacobson’s *Whiteness of a Different Color: European Immigrants and the Alchemy of Race*. Jacobson describes how whiteness is a fluid and shifting concept and construction, as at various points in U.S. history certain groups of immigrants and nationalities have been perceived as non-White only later to be viewed as White. He deems these transitions as creating probationary periods of whiteness, in which immigrant groups such as Italians, Greeks and Irish have eventually come to be thought of as White. The classic study of the social construction of race and Whiteness as a legal concept is Ian Haney Lopez’s *White by Law: The Legal Construction of Race*, which details the how the Supreme Court struggled to come up with a definition of whiteness in the Prerequisite Cases, relying on popular and cultural conceptions of race to determine which nationalities and ethnicities qualified as White.
Research Design

I provide a detailed legal history of the citizenship legislation for each of the Pacific unincorporated territories through the lens of interest-convergence. This includes all bills that attempted to extend citizenship through various Congressional means: organic acts, citizenship statutes, constitutional conventions, status legislation, amendments to the Immigration and Nationality Act, policy plebiscites, compacts of free association, or the creation of a commonwealth. I also analyzed any documents that are attached or connected to these bills, including congressional reports and hearings, court rulings, and any secondary literature, such as government reports or recommendations, since these are key aspects of any legal history to find evidence in support of an interest-convergence methodology.

I also searched for newspaper and magazine articles that provide coverage of events and developments in the Pacific unincorporated territories, as it was important to determine when there were moments or time periods when the United States faced external and/or internal pressures to alter its policy in these areas. I believe that examining these congressional documents, government reports and newspaper/magazine articles allow for a different understanding of the history of the extension of citizenship to Pacific unincorporated territories when viewed through the lens of interest-convergence. Previous works that have examined the development of citizenship in the unincorporated territories (Smith 1997, 2016; Leibowitz 2013; Roman 2006, 2010) have not included complete legal histories for each territory, but focus more on court rulings.
Literature Review

In this dissertation, I outline various areas of scholarship that are essential in understanding how citizenship has been linked to race throughout U.S. history, including how the Insular Cases represented a drastic break from previous U.S. territorial policy and how the U.S. as an empire mediates differentiated forms of citizenship in the insular territories, and then hope to provide evidence to demonstrate how interest-convergence offers a compelling perspective to analyze the development of citizenship in the Pacific unincorporated territories. Here, I briefly discuss some of the major theorists who have written about how citizenship functions in a liberal democracy like the United States, and why I think interest-convergence will offer a more rigorous understanding of how citizenship legislation has actually developed in the Pacific unincorporated territories.

There have been numerous theorists and legal scholars who have grappled with the relationship between citizenship, empire and territory, including Rogers Smith (2007, 2015), Elizabeth Cohen (2009), Linda Bosniak (2006), Alexander Aleinikoff (2002) and Ayelet Shachar (2009). While each offers important contributions to how citizenship functions generally and in the U.S. context, the legal histories of citizenship legislation in the Pacific unincorporated territories demonstrate shortcomings of these theoretical frameworks. I believe that using interest-convergence to these territories helps to provide a fuller picture of how citizenship functions in the context of empire.

At its most abstract level, citizenship “is membership in a nation or state, and it is, moreover, regulated primarily by municipal law, each nation deciding for itself, who its citizens, or subjects, shall be” (Gettys, 2).\(^4\) This membership creates certain obligations, duties, and

\(^4\) For some of the foundational and classic works that examine the contours, rights, obligations, duties and responsibilities that are associated with citizenship, see Aristotle (1996), Arendt (2004), Baubock (1994) and Pocock...
allegiances that the individual is expected to uphold, as well as protections, such as rights and freedoms, she is then entitled to. According to Smith,

> most of the intertwined versions of “liberalism,”” democracy,” and republicanism” that became predominant in academia during the last half of the twentieth century, and to a lesser degree in mainstream political discourses, presumed that citizenship should, in principle and in practice, be a nearly or wholly universal status, and a nearly and or wholly uniform status, for the residents of any and all liberal democracies or republics (104).

Cohen delineates how this liberal myth of universal citizenship, which Smith is referring to in the above quote and Shachar believes arbitrarily privileges certain people born in certain countries, clouds the variations that any society must make when making decisions about the rights that a person is entitled to through citizenship. In most conceptions of citizenship (See Shachar 2009 as an example), the rights that citizenship guarantees are usually “bundled,” meaning it is assumed that each citizen considered a member of a particular society is entitled and has access to the same array of right, in a unitary form of citizenship. In her theory of semi-citizenship, Cohen offers a compelling argument for the idea of the rights conferred through citizenship as inherently “unbundled,” or disaggregated from each other. This means that certain groups and individuals will have some, but not all of the protections within various categories of rights. The various types of citizenship that exist in the insular territories are an example of how liberal conceptions of equal citizenship fail to recognize differentiated, unequal citizenships.

Cohen argues that these various forms of semi-citizenships are inevitable in any system of governance, due to the compromises between conflicting logics of membership…Democracy, liberalism, and the various sorts of administrative rationality each generate distinct rationales for

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(1998). Aristotle argued that citizenship required active participation in the democratic institutions of a city-state (polis), including the Athenian assembly (eclesia) and court system. Thus, for Aristotle, a citizen in the strictest sense is someone who shares in the administration of justice through a city-state’s governing offices. Arendt described citizenship as the “right to have rights.”
membership that in turn assign different relative and autonomous rights of citizenship to different people (96).

Democratic logic refers to the idea that there should be certain expectations surrounding eligibility for citizenship, such as a certain level of intelligence, and that popular will should be able to prohibit some dimensions of citizenship to certain members. An example of this in the U.S. context is the right to marry, which can be considered a relative right of citizenship. Democratic logic would thus argue that a majority of society’s members should be able to bar gay citizens from having access to state-recognized same-sex marriage. Liberal logic is the belief that all members of a society should be granted full rights and would argue that gay couples should have the same array of rights as straight couples. Administrative rationality logic covers the inevitable distinctions that must be made regarding citizenship under any system of governance. Children and those convicted of crimes, for example, are universal parts of any society, and require distinctions made between the citizenship available to these members compared to adult members who have not committed a crime.

For Cohen, forms of semi-citizenship are both inevitable and essential to the functioning of democratic states as they are required for any ordering of a population, since not all citizens in a diverse population can be governed according to the expectations of full citizenship (132). Thus, theoretical conceptions of citizenship in a liberal, democratic setting such as the U.S., focus on these three logics in explaining how citizenship functions.

Cohen also distinguishes between autonomous and relative rights, which is useful when examining the dimensions of citizenship. Autonomous rights “have force on their own, regardless of context” (66). These would include rights such as one’s bodily integrity, freedom from fear, free speech and a basic education that allows skills associated with communication and self-care. In contrast, “[r]elative rights of citizenship assert a relationship of rights to goods
that are specified by the political constitution of the democracy in question” (67). Some examples would include “[t]he rights to hold office, to be represented, and to participate in politics” (67), which all require a political system for citizens to be able to have them.

Ultimately, Cohen concludes that citizenship exists on a gradient scale, with differently situated members of society having various combinations of rights. Cohen writes:

As stated earlier, acting like a citizen cannot on its own make one a citizen...Nor is it the case that passive citizens will have their citizenship revoked. In turn, understandings that treat it as a relationship elide the fact that it is really the rights of citizenship that are relational, and not citizenship itself. If rights are relationships, then citizenship refers to a set of relationships, but is not itself a relationship. Gradience has now been reasserted and further specified as referring to relationships. Citizenship is the formal category that denotes and constructs those relationships. (48)

Some of the examples Cohen provides are the type of semi-citizenship available to children, felons, guest-workers, cultural minorities, enemy combatants, refugees and residents of the U.S. territories, with members of each group having a different combination of relative and autonomous rights (72).

While I find Cohen’s theory and categorization useful, I think it is important to remember that there is a difference between the natural or inevitable types of semi-citizenship that any society will have to make decisions about regarding the array of rights persons in these groups should be entitled to (e.g. felons, children, members of the military) and those types of semi-citizenship that are neither natural nor inevitable for a society to have to make decisions on, and for my purposes, I focus on the residents of the insular territories.

The citizenship that exists for this group of people is complex, varied and does not easily fit into Cohen’s conception of semi-citizenship. The residents of the insular territories do not have equal citizenship compared to residents in the states, and liberal logic would dictate they should since their type of semi-citizenship cannot be explained by administrative rationality (the
residents of the territories are not comparable to a groups like children and felons, which are a part of any society) nor by democratic logic, since it seems unjust for a majority of citizens to deny the residents of the insular territories the most fundamental aspects of citizenship (e.g. 14th Amendment protections and voting rights) because they do not reside in states. Sparrow refers to this as “discrimination on the basis of physical geography” (57). Thus, while I find Cohen’s theory of semi-citizenship compelling when thinking about the decisions any society will have to make regarding the combination of rights certain groups should have, I argue that it fails to adequately explain the type of citizenship available to residents of the insular territories. Cohen’s theory does not account for the entrenched racism of empire that led to the differentiated citizenship that exists throughout the insular territories, as there was nothing inevitable nor natural to cause the U.S. to acquire these areas without consent and then create an unequal type of citizenship unique for the inhabitants. Furthermore, Cohen’s theory neglects to think about how citizenship legislation for the insular territories could have developed with a primary concern of benefitting the U.S. once they were acquired.

I view Rogers Smith’s theory of “civic differentiation” as better able to explain the types of citizenship residents in the insular territories have access to, but that ultimately interest convergence provides the best lens for examination. The conundrum of citizenship in the territories is that “there are...developments that provide legal support for the aspirations of many territorial residents to maintain distinct cultural identities while simultaneously being full American citizens” (Smith, 104). There is thus a tension between liberal aspirations for universal citizenship and a desire to respect cultural identities in the territories with defensibly “different but equal” statuses. Smith outlines what he believes to be the types of civic differentiation in modern territorial forms of political membership, in an attempt to parse out
citizenship differentiations that support a “different but equal” status and others that are not justified.

The first type of civic differentiation Smith outlines are “remedial differentiations,” which are “policies aimed at overcoming inegalitarian consequences of past unjust differentiations and at combating current forms of invidious discrimination often by providing temporary special aid to long-disadvantaged groups” (105). Closely linked to these remedial differentiations are “accommodationist differentiations,” which are policies structured to give enduring legal recognition to various persons’ and groups’ distinctive senses of their identities, values, and interests by modifying legal regulations and public services so that these people can flourish in their own ways, yet equally with other citizens (105).

An example of this type of civic differentiation can be found in American Samoa, in which it is generally thought that if the U.S. was to grant 14th Amendment citizenship to Samoans, residents would still legally be able to discriminate on the basis of race in determining who can own land in Samoa. The reasoning behind this policy would be to protect Samoans cultural identity, which centers on their matai system and could be threatened if outsiders were allowed to own land on the island. This would qualify as a “different but equal” type of citizenship since there is a genuine concern of recognizing and protecting Samoans’ identity, values and interests by permitting them to discriminate by race, something the Constitution would normally not allow.

The third types are “preservationist differentiations,” which are policies reflecting the desires of powerful political actors to distinguish – usually by limiting – the civic status of some who they see, or economic, national security, cultural, or ideological reasons, as threats to current arrangements that these powerful actors value (105).
The final types are “legacy differentiations,” which are “inherited policies created for reasons that today have lost force, so that these policies actually have few strong supporters.” Smith contends that these persist when no clear consensus exists on altering the civic differentiation policies that currently exist, and uses the example of Puerto Rico’s commonwealth status (106).

I would argue that these types of differentiations can best be explained by interest-convergence, in which the United States seeks to maintain a status quo that benefits White elites. This would explain why sometimes the U.S. pursues preservationist differentiations while other times it would be in the interest of white elites to advocate for and implement accommodationist differentiations. Smith suggests that the U.S. “has primarily stressed its ‘preservationist’ interests in American national security, economic welfare, and law enforcement” when determining territorial citizenship policies, but relies fundamentally on court decisions to reach this conclusion and not on congressional legislation, debates, hearings and reports dealing with citizenship in the insular territories. At times, Smith also speculates on the interests the United States is attempting to protect, such as when he discusses the rejection by the State Department and courts of expatriation by Puerto Ricans:

The rejection of [Alberto Colon and Juan Maria Bras’] claims by the State Department and U.S. courts probably expressed, at least in part, worries that if these expatriations were upheld, increasing numbers of Puerto Ricans would profess loyalty to the commonwealth but not the United States, thereby threatening American civic unity and sovereignty (119) (emphasis added)

This passage from Smith demonstrates how the United States has been able to use citizenship strategically in the unincorporated territories, to ensure residents of these areas remain under U.S. sovereignty as citizens, existing in a subordinate position while having access to citizenship.
Since Congress maintains plenary power in the unincorporated territories, it is essential to examine the debates, hearings and reports that legislators engaged with to demonstrate how and when “preservationist” interests tied to the U.S.’ history of racial inequalities shaped the development of citizenship in these areas and when genuine accommodationist attempts were made to protect ways of life that are essential to the identities of the inhabitants of the insular territories. It is only by presenting the evidence that will emerge after a thorough examination of the legal histories of the citizenship legislation for the insular territories that these determinations can be made, which this dissertation will provide. This is the best method to determine which types of “differentiated forms of territorial citizenship…are and are not truly equal” (Smith, 128). Interest-convergence will also allow for an analysis to determine if citizenship legislation in the U.S. unincorporated territories developed in ways that were meant to benefit the United States and White elites, illuminating types of differentiated citizenship that are unequal in nature. Furthermore, I test whether interest-convergence illuminates an overall U.S. trend or policy regarding citizenship legislation in the Pacific unincorporated territories, despite each type of citizenship in each territory being varied and created through different legislative means.

**Critical Race Theory and the Limits of Liberal Democracy**

It is important to emphasize the fundamental divide between liberal theorists such as Cohen and Smith and some Critical Race Theory scholars, however, over the possibilities and limitations of Enlightenment thought in general and the American liberal democratic project more specifically. Cohen and Smith maintain normative beliefs about the overall goodness, fairness and superiority of liberal frameworks in governing a society. Cohen is not offering a repudiation of liberal democracy, but is simply noting that various types of semi-citizenships will exist in any given
society that operates in this framework, which explains why not every citizen will have the same
"bundle" of equal rights despite liberalism's claim of universality. Smith contends that "white
supremacy and patriarchy are logically inconsistent with consensual liberal democratic
principles" (1997, 28), which is why he "believes that there are powerful if not self-evident
reasons to decide in favor of what I take to be the basic commitment of liberal democratic
thought: to protect and enhance all persons' capacities for personal and collective self-
governance" (1997, 489). He continues:

With all their limitations, liberal democratic policies promoting personal and collective
freedom still offer more potential than any alternative to provide paths to greater human
material prosperity, personal security and happiness, domestic and international peace,
and intellectual and spiritual progress. (489)

While Smith does not necessarily think that liberalism is hegemonic in the U.S., he does think
that its "finest commitments remain deeply enough embedded in the traditions and institutions of
the U.S. to make feasible the project of crafting national identities in fuller accord with it" (1997,
489). Smith desires to "reconceive" the historic strengths of egalitarian liberalism (e.g. a
commitment to neutrality by the government on conceptions of the good life, providing
opportunities for material prosperity, considerable freedom of individual conscience and
expression, a measure of political self-governance) with a more robust sense of an American
national identity, which he believes can overcome the ascriptive inequalities of race and gender
historically linked to U.S. citizenship and foster a polity that truly lives up to liberal democratic
ideals for all citizens. Thus, Smith thinks that inclusive forms of equal citizenship, despite being
"differentiated," can be achieved in the U.S. in a liberal democratic framework grounded in
Enlightenment thought.

Critical Race Theorists such as Bell and Delgado, however, reject the notion that an equal
form of citizenship can exist in a liberal framework for all people underneath it, as they view
certain racial and gender inequalities and hierarchies as inherent and embedded to any liberal project based in Enlightenment philosophy. This means that for Critical Race Theory scholars, the "social and economic institutions that are still said to form the core of American life" (Smith 1997, 28) will always be exploitative in nature for certain populations and people. As Delgado argues in "Rodrigo's Seventh Chronicle: Race, Democracy and the State," racism is connected to Enlightenment theories of democracy and free market economics, and not just unique to U.S. ideologies of ascriptive inequalities that have led to exclusionary forms of citizenship. He writes: "I think enlightenment-style Western democracy is...the source of black people's subordination. Not just in a causal sense. Rather, racism and enlightenment are the same thing. They go together; they are opposite sides of the same coin" (729). Delgado also highlights how Enlightenment thought, which undergirds the core guiding of the liberal democratic project, is hierarchical exclusionary regarding race and gender. He explains:

Another component of Enlightenment thought is the idea of hierarchy--of one culture or mode of thought being always and forever better than another. Light over dark. Enlightened over savage. We over they. Think of all the light-type words with favorable connotations--'enlightened,' 'brilliant,' 'insightful.' Enlightenment implies a progression, with ourselves--which originally meant Western white male aristocrats in lace shirts--at the top. Our class, you see, knows mathematics, physics, the laws of motion and philosophy, while they are benighted, ignorant, superstitious, mired in darkness. Naturally, it should fall our lot to develop theories of government, and to run things. We have sanitation and they don't. (732)

Delgado concludes that he finds the thought that "liberal democracy and racial subordination go hand in hand, like the sun, moon, and stars" (734) to be "powerful" and "plausible," and calls for a radical departure to a system of governance based on "touch," not "sight."

Similarly, in "Racial Realism," Bell argues that "[B]lack people will never gain full equality in [the U.S.]" (306). Instead, he believes that the best that can be hoped for are "short-lived victories that slide into irrelevance as racial patterns adapt in ways that maintain white
dominance" (306). This is why he proposes an adoption of the philosophical mindset of "Racial Realism," which he defines as the acknowledgement of Black's subordinate status. He believes that acknowledgement will enable Blacks to avoid discouragement and anguish, and instead focus on strategies of "[c]ontinued struggle that can bring about unexpected benefits and gains that in themselves justify continued endeavor. The fight itself has meaning and should give us hope for the future" (308). Thus, Bell, Delgado and other Critical Race Theory scholars place substantial limitations on the ability of any liberal democracy rooted in Enlightenment thought to achieve a truly equal and inclusive society, while Smith and Cohen maintain a normative commitment to liberalism's values, which they believe are progressive and can lead to defensible forms of citizenship free from "subjugating forms of ascriptive inequality" (Smith 1997, 489). As highlighted in this last section, these fundamental divides between Critical Race Theorists and proponents of liberal democracy create normative tensions and ultimately limitations of possible agreements over proper policies governing places like the unincorporated territory, established because of racist, ascriptive ideologies and policies, and how they should continue to exist in a system designed to enable U.S. imperialism. The entire liberal system is inherently flawed and cannot be recovered, for Critical Race Theorists such as Bell and Delgado, while liberal theorists such as Smith and Cohen find the failings of liberalism as a governing philosophy to be curable. I engage further in this debate in the conclusion, focusing on the *Tuaua* case and exploring whether the *Insular Cases*, now guiding U.S. territorial policy in a new century, offer a framework of governance for the United States that enables a level of autonomy for each unincorporated territory that makes these rulings, rooted in racism, redeemable.
Chapter Summaries:

Chapter 1:
The first chapter of this dissertation will offer an overview of how U.S. territorial policy fundamentally changed in 1898 and was affirmed in the *Insular Cases*. I provide the context for this shift in territorial policy by focusing on the academic debates from the 1890s that influenced the Court’s rulings in the *Insular Cases* and through an overview of how racism and the logic of empire was a constant aspect of legislation involving U.S. citizenship, leading to exclusionary measures for most non-White males from the United States’ origins onwards. In the first chapter, I thus provide historical context from legal debates that took place in leading law journals in the 1890s to demonstrate how U.S. territorial policy starkly shifted in 1898 with the rulings in the *Insular Cases*, which offered a fundamental break with the way areas were traditionally incorporated into the U.S.

Chapter 2:
The second chapter offers a brief overview of how the laws of birthright territorial citizenship have developed in the history of the United States from 1790 through the *Insular Cases*. The chapter is divided into three sections, which capture the three major time periods of how birthright citizenship was understood and functioned in U.S. territories: from 1790-1868, from 1868-1898 and from 1898-present. One of the key divides between these time periods, 1868, is based on the ratification of the Fourteenth Amendment and its Citizenship Clause, which confers birthright citizenship to all people born within the United States and under its jurisdiction. I will outline how while birthright citizenship was understood to apply in U.S. territories leading up to the *Insular Cases*, this policy would shift with the annexation of the territories annexed in 1898,
as birthright citizenship did not automatically extend to residents born in the unincorporated territories.

Thus, in this chapter I offer an overview of the major developments shaping U.S. territorial citizenship to provide a short outline of the central precedents and landmark decisions that influenced the debates over the citizenship status of the residents of the territories the United States acquired in 1898. The final sections will provide a summary of the extension of citizenship and nationality in the unincorporated territories. I will highlight how the Anti-Imperialist/Colonialist view, the Imperialist territorial view and the Third View from the academic debates in the 1890s each conceptualized citizenship and how each view thought it would operate in the newly acquired territories the United States gained from the Spanish American War in 1898. The final section will then explain how citizenship functioned with the rulings of the Insular Cases, which was heavily influenced by the Third View in the academic debates. The final section of this chapter also sets up the subsequent chapters in which I engage in a textual analysis of the legal histories of citizenship legislation in the Pacific unincorporated territories through an interest-convergence lens.

Textual Analysis Chapters

I will provide descriptive overviews of the development of citizenship in each of the Pacific unincorporated territories and offer an analysis through the perspective of interest-convergence. Each chapter (three in total) will focus on one of the Pacific unincorporated territories and outline its history of citizenship legislation, and analyze the factors that influenced the creation and introduction of a bill, providing evidence of interest-convergence to explain why a bill ultimately became law or failed to be enacted. The evidence of interest-convergence I
present comes from the legal histories of each piece of citizenship legislation: its congressional hearings, debates and government reports.

The first chapter that uses textual analysis will trace the development of citizenship legislation in Guam to demonstrate an example of interest-convergence that leads to the passage of citizenship legislation (i.e. an example of interests converging). I divide the development of citizenship legislation into two main periods, from 1900-1950, and post-1950, to highlight the changes in the United States’ stance on citizenship in the territories, which I believe can be explained by interest-convergence, especially due to international pressure during the Cold War. As an example, I highlight evidence of U.S. policymakers focusing on the benefits the extension of citizenship to Guam would have on the United States’ standing and image domestically and abroad. I also highlight stories and coverage from newspaper and other media sources that contained critical coverage of U.S. policy in its territories, as other examples of influences that caused the United States to alter citizenship legislation based on a belief that it would have a positive effect on its preferred image and credibility as the world’s leading democratic, egalitarian nation.

The second chapter will trace the development of citizenship legislation in American Samoa as an example of interests-divergence, to explain why citizenship was and continues to be withheld for Samoan residents. As I highlight through passages of the legal histories of citizenship legislation for American Samoa, the interests of Samoans and the United States continually diverged, so citizenship was never extended by Congress. While Samoans clearly desired citizenship (and even thought they were entitled to it when the United States initially annexed the island) throughout the 1920s and 1930s, they met clear opposition to the extension of citizenship by the U.S. Navy (interests diverged). During this time period, there also were not
the same pressures that would be acting on the United States as there were during the Cold War. After WWII, however, the interests of Samoans and the United States continued to diverge, as a substantial number of Samoans no longer sought citizenship. I will give a more detailed explanation as to the causes of this change, but the main reason is because Samoans feared that their land tenure system, which is central to their culture, would be eradicated since it depends on the ability of the Samoan government to make racial classifications and qualifications for land ownership. The Samoan government became convinced that the extension of U.S. citizenship would make the policy of race-based rules for land ownership prohibited, creating a situation in which the interests of Samoans and the United States have yet to converge to enact citizenship legislation. I discuss recent developments regarding the possible effects of the extension of citizenship to American Samoa in the concluding chapter, which focuses on the Tuaua case.

The third chapter will follow the same research design for the CNMI, using interest-convergence to explain why the United States decided to extend citizenship in the 1970s during the negotiations to establish a covenant to govern the Mariana Islands. Using Guam as model, U.S. policymakers knew they would be able to extend citizenship the CNMI and promote the United States’ desired image as democratic nation rooted in equality and freedom without altering the fundamental structural relationship between the federal government and the unincorporated territories, a system that grants Congress plenary authority over each territory.

Concluding Chapter: The Significance of Using Interest-Convergence to Analyze the Development of Citizenship Legislation in the Pacific Unincorporated Territories

In the concluding chapter, I take a detailed look at the Tuaua case and its recent developments as it made its way through the federal D.C. court system in 2015. While the Supreme Court ultimately decided not to grant certiorari to the Tuaua case, it still raised
important questions regarding how citizenship functions in the unincorporated territories. For example, should Samoans be entitled to birthright citizenship despite Congress not yet extending it to American Samoa? Can citizenship be extended while still allowing Samoans to maintain racial classifications and qualifications to enable the continuation of their land tenure system? Is the type of citizenship that exists for residents of the unincorporated territories statutory or constitutional in nature? If it is statutory, is this constitutional? If it is constitutional and rooted in the Citizenship Clause of the Fourteenth Amendment, does this mean the Equal Protection Clause would also apply to Samoans, meaning Samoans’ race-based designations for land ownership would be in jeopardy? The last section of the concluding chapter also focuses on a debate that occurred in a recent special edition of the *Harvard Law Review* from 2017, which poses the provocative question of whether the *Insular Cases* are redeemable. I thus explore the argument that these rulings may have established a governing framework, that while rooted in racist and imperialist ideologies, now allow for a system that maximizes the amount of autonomy that is possible for the unincorporated territories to have while continuing to exist in a subordinate, oppressed position and provide protections for local cultural rights and traditions.

Lastly, I believe that some of the real significance of this project comes from the data collection itself, as a thorough collection of all of the legislation related to citizenship in the Pacific unincorporated territories has yet to be compiled. This collection and systematic organizing of this data, coupled with my argument that these legal histories establish that an interest-convergence methodology establishes an overall trend in the United States’ policy regarding the extension of citizenship to the Pacific unincorporated territories, provides a significant addition to Critical Race Theory scholarship and on scholarship that thinks about the
relationship and contradictions between citizenship, empire and race in general and in the U.S. context.
Chapter 1 - U.S. Territorial Law

This chapter will provide a summary of how U.S. legal actors and policymakers helped to influence the creation of an unprecedented U.S. territorial policy that emerged at the end of the 19th Century with the United States acquiring the territories of Puerto Rico, Guam and the Philippines in the aftermath of the Spanish American War in 1898. In the Insular Cases, the Supreme Court established a previously nonexistent differentiation between incorporated and unincorporated territories\(^5\) to allow Congress to have maximum flexibility when deciding on how to best govern any newly acquired territory during the period of United States global expansionism at the turn of the 20th Century (Ramos, 141). I outline how this new policy of territorial incorporation was a fundamental break from previous U.S. territorial expansion by examining the three-main academic and legal debates that influenced the rulings in the Insular Cases: the anti-imperial, imperial and hybrid views of U.S. territorial law. These philosophies on territorial expansion would be published in prominent law reviews in the 1890s, with various legal scholars offering differing justifications as to what policies are constitutionally authorized when the United States acquires sovereign authority over new territory. After explaining the basic tenets of each viewpoint on territorial expansion, I will then provide a summary of the crucial rulings from the Insular Cases, in which the Supreme Court adopted a hybrid view of territorial policy that allowed for Congress to govern acquired territories in whatever manner it

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\(^5\) Ramos notes the “performative power” of the law, or the idea that the Court has the “capacity to create the realities that it names” (141). In this case, while the unincorporated territory previously had never existed in U.S. territorial law or policy, the Court had the power to help construct a policy that constitutionally permitted U.S. imperialism through a newly created category that would now be accepted as legitimate and influence any future debate over the scope and power of U.S. territorial law and congressional authority over territories. For a more thorough discussion of the constitutive effects of the law, Court and the Insular Cases, or how these institutions and rulings shape, influence, frame, and are shaped, framed and influenced by, public discourse, see Ramos, Chapter 6. For a more general overview of the constitutive effects of Supreme Court decisions and the role they play in framing public discourse over social issues, see Chapters 6 and 7 in John Brigham’s classic work, The Cult of the Court. The real authority that the Court has is the power of reason or persuasion, which was Alexander Hamilton’s central argument in Federalist #78; this can and does take the form of framing public discourse over important social issues.
deemed most appropriate, with constitutional provisions and restrictions only extending to these areas if U.S. lawmakers explicitly decided they would.

The overarching aim of this chapter is to highlight how in 1898 and with the decisions in the *Insular Cases*, the United States created a new form of territorial law that infused elements of its previous colonial and imperial territorial policies by governing the territories of Puerto Rico, Guam and the Philippines as unincorporated territories, allowing for these areas to be treated as both foreign and domestic contingent on which category was more convenient and strategically beneficial to the United States depending on the issue.

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6 Venator-Santiago provides a summary of the differences between U.S. colonialism and imperialism:

In 1898, U.S. colonialism could be differentiated from imperialism in five important ways. First, whereas the colonialist tradition was premised on the annexation of territories, the imperialist tradition sought to acquire new territories through mere occupation. Second, whereas the colonialist tradition governed annexed territories as a constitutional part of the definition of the U.S., the imperialist tradition selectively treated occupied territories as locations situated outside of the jurisdiction of the U.S. Third, while U.S. colonialism was anchored on interpretations of the Territories (U.S. Constitution, Art. IV, §3, cl. 2) and Admissions (U.S. Constitution, Art. IV, §3, cl. 1) Clauses of the Constitution, U.S. imperialism was grounded on other constitutional provisions that granted Congress and the President more expansive powers. Fourth, while the bill of rights extended to territories subject to colonial annexation, the imperialist tradition recognized the power of the administrative state apparatus to determine which rights could be withheld or extended to an occupied territory. Finally, whereas the colonialist tradition recognized that birth in a colonial territory was tantamount to birth in the U.S., the imperialist tradition equated birth in an occupied territory to birth outside of the country. Stated differently, in 1898, whereas eligible persons born in a colonial territory acquired a Fourteenth Amendment or constitutional citizenship at birth, persons born in an occupied territory could only acquire a U.S. citizenship through naturalization.

The main differences between U.S. colonialism and imperialism, then, is the intent the United States has for the territory in question. U.S. colonialism is premised on acquiring territory that was understood to be on a path toward statehood, while U.S. imperialism is based on indefinite occupation of a territory, which establishes U.S. sovereignty over an area, with no intention of having that territory become a state. The *Insular Cases* combined elements of both of these traditions, creating a new form of territorial policy that I will outline in the last section of this chapter.

7 For a historical overview of U.S. territorial laws and policies from 1787 leading up to 1898, see Leibowitz, Raustilia, Sparrow, Smurr, and Farrand. Prior to the Spanish-American War in 1898, the United States developed a consistent process of acquiring new territory that was considered within the definition of the “United States” with the goal of eventually admitting a territory as a state (Leibowitz, Chapter 1; Ramos 73-74), which I will refer to as U.S. colonialism. This colonial policy of annexation and admittance was established in the Northwest Ordinance of 1787, which applied only to the Northwest Territory, but was implicitly accepted as the governing statute and model for newly acquired territory outside the original Northwest region (Leibowitz, 6; Smurr). The overall framework Congress established in the Northwest Ordinance for newly annexed territory was settlement, the creation of a republican form of government, and statehood. While an imperialist tradition based on temporary occupation of a territory also emerged in U.S. territorial law and set important precedents for the *Insular Cases*, the dominant model of U.S. territorial policy was white-settler colonialism. While this is a simplification, an -depth historical overview of the history of U.S. territorial policy leading up to 1898 and the *Insular Cases* is beyond the scope of this
The Academic Debates and the Insular Cases

The United States was influenced by the ascendance of formal empire by European powers in the middle of the 19th Century: empire was viewed as morally good, as “the West would Christianize the heathens, introduce commerce, and improve their lives” (Raustiala, 73). The academic debates, then, were prompted by the United States’ desire to emulate European powers on the global stage during the age of New Imperialism and the “Scramble for Africa.” As Ramos describes, after the Civil War the United States had a renewed interest in global expansion based on economic/commercial reasons (e.g. the search for new markets to exploit and benefit from), the increase in competition for imperial dominance between European nations, Japan and Russia and for military/strategic interests (29-32). Attempting to emulate the European empires, the United States eventually acquired overseas territories, Puerto Rico, Guam and the Philippines, with its victory in the Spanish-American War of 1898. Neuman outlines this era of imperial dissertation, which is why I have provided excellent resources that go into far more detail than I do here. I merely emphasize that the territorial policy that emerged in 1898 was a fundamental break from previous U.S. territorial policy, which can be understood through an examination of the academic debates that influenced the rulings of the Insular Cases. These debates highlight and summarize the main areas of precedent that guided U.S. territorial policy in the 20th Century, thus providing important context for the reader without having to provide a full historical overview of U.S. territorial law.

8 This was during the time after Reconstruction, the Gilded Age, when the United States experienced the immense growth of corporate power and was focused on transitioning to a global industrial power, and had largely moved on from egalitarian federal policies that had attempted to secure civil rights for Black U.S. citizens. For example, the Civil Rights Cases had returned the issue of racial equality to the state and local levels, with the federal government emphasizing industrial development and establishing the United States as a global power. See Smith 1997, Chapter 11 for a good historical overview of this era.

9 For a thorough discussion of the causes and influences of the rise of U.S. imperialism and global expansion in the 19th Century, including the ideology that undergirded it, see Ramos (29-39), Torruella (287-291), Sparrow (57-79), Raustilia (73-79) and McCarthy (1) Perea (140-166) and Roman (2010, 15-47). For example, besides military and naval interests, Ramos discusses elite U.S. policymakers who viewed global expansion into new markets as new opportunities for economic gain. Ramos also describes the dominant ideology of the time for the United States, which viewed itself as having an inherent “right to expand” based on notions of the superiority of the Anglo-Saxon race, evidenced by ideas such as “Manifest Destiny,” coined by John L. O. Sullivan, which argued it was the United States’ destiny to conquer the North American continent and become a great power, “The White Man’s Burden,” and the civilizing mission of the modern world. I would argue that while the dominant cause of the United States’ global expansionism of the late 19th Century was economic and also based on the thought that strategic military and naval bases were needed across the globe, these are mutually constitutive with the racist ideologies that underpinned empire that were also prominent at the time, i.e. the idea of the White man’s civilizing mission and the belief in the racial superiority of the Anglo-Saxon race (see also the Teutonic Origin Thesis in Footnote 6). Thus, I think that the
expansion as the third phase in his delineation of U.S. territorial policy, which involved “the acquisition of distant insular territories, and the determination of the United States to become a great colonial power on the European model” (187).

The main aim of this new U.S. global expansionist tradition that emerged in the late 19th Century was the annexation of strategically situated territories that could enable the U.S. military to build coaling stations and bases. As Venator-Santiago explains, “[t]he new form of global expansionism was premised upon the permanent annexation of land that could house strategically situated military bases and naval coaling stations throughout the world without binding Congress to admit new states” (9-10). The importance of having a robust navy became a dominant idea during this time period, based on the by the work of A.T. Mahan\footnote{See, e.g., A. T. Mahan, The Influence of Sea Power Upon History, 1660-1783, at 83 (13th ed. 1897) (“Colonies... afford ... the surest means of supporting abroad the sea power of a country.”).} and other

This “right to expand” was in turn predicated on a very strong belief in the principle of the inequality of peoples. Many thought that this belief was buttressed by History itself. After all, was not the world replete with contemporary examples of peoples living in patent conditions of inequality, and were not the Anglo-Saxon Americans one of the few privileged groups who, through hard work, dedication, special “natural” endowments and, above all, divine design, were enjoying the blessings of the most advanced economic and political institutions? The dominant view was articulated in a series of binary oppositions: the civilized and the barbarous, the prosperous and the stagnant, the rational and the irrational, the hard-working and the indolent, the self-disciplined and the disorderly, the meritorious and the undeserving. The categories were constructed in direct reference to race: the White, Anglo-Saxon race was the privileged pole in the discourse of power; the “others,” the non-White peoples and non-Europeans, as well as those of mixed race, were to be on the receiving end of the exercise of that power. Those “others” were the barbarous, the stagnant, the irrational, the indolent, the disorderly, and the undeserving, more fit to be governed than to govern. There was also a geography of power. Whereas the temperate zones were thought to be more conducive to hard work, self-discipline, and therefore capacity for self-government and economic and scientific progress, the “tropics” were considered breeders of lazy, ignorant, and inferior populations incapable of self-government and condemned to be governed from outside for progress and civilization to ever flourish in their midst...”the Teutonic nations” were “intrusted, in the general economy of history, with the mission of conducting the political civilization of the modern world” by taking that civilization “into those parts of the world inhabited by unpolitical and barbaric races; i.e., they must have a colonial policy.” “Right,” “duty,” “mission” – those were the key concepts in the ideology of Manifest Destiny, that special calling of the “superior Anglo-Saxon race” to spread the gospel and practices of civilization throughout the world. (37-38)
global expansionists. This influenced various U.S. policymakers, especially in the administration of President William McKinley, to develop a new territorial policy that was premised on the permanent acquisition of territories that could be used to build military and naval bases across the globe that would be strategically beneficial to U.S. military and naval interests, economic interests and overall U.S. hegemony and influence throughout the world. These bases would allow the United States to expand its sphere of influence to challenge the European empires on a global scale, protect its military borders, and also allow for safer routes for commerce with various Asian nations (Venator-Santiago 2016). Torruella also explains the rise of U.S. global expansion at the end of the 19th Century based on economic and military reasoning, as he argues that there were “two significant but unannounced reasons for the carrying out of these territorial expansions: the contemplated economic exploitation of these new territories by the ruling metropolises, and the establishment of strategic coaling and naval bases therein” (290).

Based on this new global expansionist ideology, the main aim of U.S. territorial policy was not to acquire territory for eventual statehood (i.e. traditional U.S. White-settler colonial territorial policy), but to instead maintain indefinite sovereignty over a territory that was viewed as beneficial to U.S. military and naval interests without having U.S. governance in the territory constrained by constitutional protections or provisions. There was also no intention to fully include the people living in these newly acquired territories within the American polity, as the non-White inhabitants of these areas were never meant to become U.S. citizens with constitutional protections and guarantees. This led to the need for U.S. imperialists and policymakers to create a new form of territorial status that would allow for the permanent occupation of a territory for military and naval purposes, while ensuring that Congress would
have the maximum flexibility the Constitution allowed while governing these strategically valuable areas.

In this chapter, I will give an overview of the debates that occurred leading up to the Court’s ruling in *Downes v. Bidwell*, the most influential of which are found in an academic exchange in the *Harvard Law Review* from the late 1890s. This series of articles provides the central constitutional issues and arguments in support of and against the new form of territorial policy the United States pursued at the turn of the 20th Century, based on global expansionism and the need for permanent colonies that could be exploited economically and would provide valuable strategic military and naval bases across the globe. Torruella describes these academic debates as providing the “ideological underpinnings of the *Insular Cases,*” and they are vital to a full understanding of how the new territorial status and policy that emerged from them, i.e. the creation of the unincorporated territory and the doctrine of territorial incorporation, combines elements and precedents of the colonial and imperial territorial policies and traditions that were the core of U.S. expansion before 1898.

**Overview of the Academic Debates**

In the 1890s, prominent legal journals, including the *Harvard Law Review* and the *Chicago Law Review*, published a series of debates in an attempt to establish the scope and nature of what the Constitution permits regarding U.S. territorial policy. For example, could the United States occupy a distant territory, maintaining sovereignty over it, without ever granting it statehood? If so, how could the Constitution be interpreted to justify such a policy? These debates would be discussing the central issues the Court would later rule on in the *Insular Cases*, of “when a place remains foreign regardless of a U.S. presence there, when it ceases to be foreign and becomes
domestic territory, when it becomes a part of the ‘United States,’ and what relationship these different stages have to the exercise of U.S. sovereignty” (Burnett, 390).

The law review articles develop three views on U.S. territorial expansion and can be categorized as imperial, anti-imperial and a third hybrid view that would combine elements of the first two. Most legal scholars agreed that the United States, like any sovereign nation, had the right to expand and acquire new territory, whether through treaty, war or discovery. The United States had been constantly expanding since the Northwest Ordinance of 1787, after all. Disagreement arose as to whether the United States could pursue an exploitative imperialist policy like that of the European powers, based on occupation of land, establishment of sovereignty over it, and permanent subjugation, with the territory not placed on a trajectory toward eventual statehood, or if the ethos of the Constitution only allowed for territorial expansion with the intent to admit any acquired territory into a full member state, i.e. if the Constitution only permitted forms of White-settler colonialism based on annexation into the nation upon the establishment of a republican form of government and congressional approval.

The issue at the core of the academic debates from the 1890s regarding U.S. territorial policy was the geographic scope of the Constitution and whether it applied equally and in full force in the territories in comparison to the states. Some of the central questions posed in these legal debates included: what is the legal and territorial status of any acquired island possessions the United States may gain, especially in relation to states? How should they be governed and what is there place in the American political system? Does the Constitution permit the United States to permanently occupy a territory with no intention of admitting it as a state? Would any new territories acquired by the United States be within it for constitutional purposes? Does the Constitution apply to these territories, and if so, to what extent?
The main constitutional provision that would be at the core of these debates is Article IV, Section 3, Clause 2 of the Constitution, known as the Property or Territorial Clause, which states that “…Congress shall have power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.” The imperialist viewpoint in the academic debates would use an expansive interpretation of the Territorial Clause to argue that Congress had plenary authority when governing territories, could operate without being restricted by the Constitution, and could do so for an indefinite, extended period of time. The anti-imperial view would contend that the Constitution and all of its protections, rights and liberties applied in a territory even if Congress maintained ultimate authority over it and regardless of whether that territory was intended to become a state. The third view, which would then be affirmed by in the Insular Cases, settled somewhere in the middle of these debates, establishing a system that enabled Congress to have plenary authority while deciding on policy in each particular territory, but also ruling that certain fundamental rights did apply, and theoretically restrict, to congressional rule in the territories.11

In the following sections, I highlight the intent of the territorial acquisition, the legal status and the constitutional anchor for each view in the academic debates regarding the place the territories acquired in 1898 had in the U.S. political system and how the territories should be governed, which can be categorized as anti-imperialist, imperialist, a third hybrid view that prevailed.

11 Another argument, which is expounded by Leibowitz, is that while the Territorial Clause accords broad authority to Congress to govern the territories, this was premised on the idea that a territorial status was meant to be transitory, and not an indefinite permanent one, since statehood was to be the aim (8). Thus, for Leibowitz, the Territorial Clause was not meant to provide Congress or the federal government with broad, plenary power over the territories for an extended period of time. Lawson and Seidman (2004) make a similar argument in their book, insisting that the Territorial Clause was based on the assumption that any new territory would be set on a trajectory to statehood.
Anti-Imperialist/Colonialist Territorial View

Anti-Imperial View: Intent

It is important to remember that theories of race of the era, emphasizing a hierarchical scale of human development that placed White Anglo-Saxons at the top, influenced the reasoning used in all three views on U.S. territorial policy in the academic debates. For example, even scholars taking an anti-imperialist position did so based on racist ideologies, as they viewed the inhabitants of the Caribbean and Pacific territories as constituting innately inferior races and cultures, and therefore not being capable of reaching (at least any time in the near future) the advanced state of governance and law that these individuals believed the Anglo-Saxon republican citizens of the United States had achieved after hundreds of years of development and refinement. The anti-imperialist scholars recognized that because the inhabitants of the noncontiguous territories were racially ineligible for full inclusion in the U.S. polity, the United States would desire to occupy these spaces with no intention of admitting them as states, which proponents of the anti-imperial camp viewed as unconstitutional based on their understanding and interpretation of U.S. territorial law.

For the anti-imperialists, then, if the United States was to have sovereignty over the territories it would require an imperial system of indefinite occupation, since the people in the

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12 The prominent anti-imperialists were Elmer Adams, Selden Bacon, Simeon Baldwin, Paul Fuller, Carman Randolph, Paul Shipman, Edwin Smith, William Sumner and Edward Whitney.

13 Each territory had a specific type of “othering” applied to it, however, concerning its race and culture. A good exploration of this is Lanny Thompson’s Imperial Archipelago, which describes how the inhabitants of Cuba, Guam, Hawaii, the Philippines and Puerto Rico were depicted and represented through texts and images published in the United States. Thompson offers a critique of the tendency to view the residents in the insular territories as a single, homogenous other, which misses key insights into understanding why different types of governing systems were established in each of these territories.

14 This mode of thought is known as the “Teutonic origins thesis.” As Mark Weiner explains: Proponents of this thesis claimed that the greatest American legal achievements found their spiritual origin in the free and strong warrior peoples of ancient Germany described by Tacitus in the Germania. In making this claim, Teutonic origins scholars characterized Anglo-Saxons as a people with a special genius for law and for state-building; they described the state and legal order itself as Anglo-Saxon in character; and they portrayed dark-skinned peoples as incapable of legality and thus essentially criminal. (49)
territories should never be included as equal citizens in the American polity due to their inferior race and cultures. This meant that the territories would not become states, which would grant full citizenship to the territorial inhabitants, something the anti-imperialists did not believe the Constitution permitted. As Isaac explains the racism that influenced each view from the academic debates,

[n]either the anti-imperialists nor the imperialists were against U.S. economic expansion. They disagreed on the process of political expansion as both sides wrestled with the nature of the “American character” and its tenuous unity. During the height of scientific racism, both sides based their arguments on racial difference. Anti-imperialists feared that the incorporation of alien peoples into U.S. borders and the U.S Constitution would destroy the delicate nature of the American government…In the unincorporated territories, tropical peoples, anti-imperialists claimed, lacked the cultural and historical conditioning in Anglo-Saxon principles of government as had their counterparts in the more temperate climes. On the other hand, the imperialist camp did not disagree on the basis of the alien character of tropical peoples, but believed that part of the American destiny was to lead ‘inferior races’ around the globe toward civilization. (27)

Many of the imperialist scholars genuinely believed in the idea of the “white man’s burden,” thinking that the United States had an “exceptional” role to play in guiding inferior people toward more advanced republican forms of government.

An example of the racist ideology that undergirded the anti-imperial viewpoint comes from prominent legal scholar Simeon Baldwin. Baldwin argued that the Constitution and all of its provisions would apply in the newly acquired territories, a central tenet of the anti-imperialist viewpoint, the United States should think about the difficultcs that would materialize based on the primitive state of the inhabitants and their lack of familiarity with Anglo-Saxon law. He writes:

Our Constitution was made by a-civilized and educated people. It provides guaranties of personal security which seem ill adapted to the conditions of society that prevail in many parts of our new possessions. To give the half-civilized Moros of the Philippines, or the ignorant and lawless brigands that infest Puerto Rico, or even the ordinary Filipino of Manila, the benefit of such immunities from the sharp and sudden justice—or injustice—which they have been hitherto accustomed to expect, would, of course, be a serious
obstacle to the maintenance there of an efficient government. Every people under a written Constitution must experience difficulties of administration that are unknown to nations like Great Britain, which are unfettered by legal restraints imposed by former generations. It is part of the price it pays for liberty, that new conditions must be dealt with, in fundamentals, under old laws.

For many scholars located in the anti-imperialist view, then, there were certain inferior races and cultures that would prevent their territory from ever being suitable for statehood. Randolph discussed how the U.S. should not acquire the Philippines, because

[t]he Philippine islanders are, and are likely to remain, unfit for statehood. Indeed, their inferior estate is admitted by the plea that we should embrace them because they are not fit even to govern themselves. (305)

Randolph advised that

[t]he United States…ought not to annex a country evidently and to all appearances irredeemably unfit for statehood because of the character of its people and where the climatic conditions forbid the hope that Americans will migrate to it in sufficient numbers to elevate its social conditions and ultimately justify its admission as a State. And when a project for annexing territory is coupled with a disclaimer of any intention of admitting it as a State now or hereafter, when this disclaimer is necessary in order to secure a favorable consideration, the project is opposed to the spirit of the Constitution. (304)

Thus, the anti-imperialist viewpoint asserted that the U.S. should acquire a new territory only if it intended for the territory to become a state, which meant that either its people would be capable of implementing a governing system in accordance with Anglo-Saxon republican principles or Whites would be likely to settle there, become a majority and form a republican form of government to be eligible for statehood. The anti-imperialist scholars thought neither of these options for statehood applied in the insular territories due to racist scientific philosophies of the era, which viewed people from tropical climates as inherently incapable of republican self-government.

For the proponents of the anti-imperialist position, the problem with acquiring these noncontiguous territories was their belief that the Constitution and precedent in U.S. territorial
policy only allowed for the annexation of territories that were meant to become states. The general trend in U.S. territorial policy was for previously annexed territories to be settled and populated by Whites, but that was clearly not the intention with these noncontiguous possessions.

Lastly, anti-imperialists were also concerned with the self-image of the United States, and questioned “[h]ow...it would be possible for a nation founded on the political self-determination of a people to hold colonial possessions like its European counterparts” (Isaac, 27). There was a strong tension between a powerful desire to pursue the United States’ economic interest while not violating what the anti-imperialists thought were the founding liberal principles of democratic collective participation of all citizens within a political system and equality before the law. Thus, a tension arose between “U.S. mainland economic interests in foreign expansion,” which “had to be reconciled with the domestic reform agenda” (Isaac, 27).

Another prominent anti-imperialist, Carl Schurz, worried how annexing noncontiguous island territories would impact the character of the United States, which he believed up until the global expansionist drive had been defined by the idea of democratic governance. Schurz recognized the United States had two options when annexing territory that was populated by races he believed were incapable of republican self-governance: admit them as states or govern them as colonial dependencies. Schurz was vehemently opposed to allowing “Spanish creoles and the negroes of West India islands and of the Malays and Tagals of the Philippines” to participate in U.S. government, an idea that he described as an “alarming” prospect. Schurz felt that the second option, governing these noncontiguous territories as colonial dependencies, was antithetical to the fundamental values of U.S. government and threatened to undermine fundamental U.S. democratic and egalitarian principles (77-84). Either option was unacceptable.
to Schurz, who, like others in the anti-imperialist camp, believed that the United States could expand without adopting a policy of imperialism, through “the penetration of new markets …by an increase in the efficiency of production and trade methods…based principally on the modernizing effects of the penetration of capital and geared more toward the eliciting of consent than subjection through coercion” (Ramos, 41). Thus, it wasn’t that the anti-imperialists were against U.S. global expansion or weren’t just as explicitly racist as imperialist legal scholars, but they thought there were ways of achieving a global form of hegemony in ways that did not require direct imperial policies.

Randolph did argue that despotic control over a territory may be allowed on a temporary basis, but only during a period of “belligerent occupation.” After this transitional period ended and a normal government could be established, however, the Constitution would have to extend. Sparrow notes that this is how Randolph explained the decision in Fleming (49-50). The Port of Tampico was under a temporary U.S. occupation, which could be considered a “transitory condition” “advisable by the results of war,” but could not last permanently. Had the occupation lasted longer, Randolph argued, the Constitution would have extended to the port.

In sum, the main intention for the anti-imperialists was to prevent U.S. global expansionism during the latter half of the 19th Century from becoming what they viewed as an unconstitutional form of imperialism, in which the United States would annex noncontiguous island territories with no plan to ever admit them as states. The anti-imperialists asserted that “the territories of the United States could not be treated as foreign – as least not on a lasting basis – without violating the Constitution” (Sparrow, 49). This meant that if the United States annexed a territory, its residents would eventually become U.S. citizens even if it was thought that their character and race made them irredeemably unfit for statehood. The anti-imperialists thus
asserted that the Constitution prohibited the United States from annexing an area if there was no intention of admitting that territory as a state, but also argued that U.S. global expansion could succeed through policies that were not formally imperialist.

Anti-Imperial View: Status

The anti-imperialist scholars argued that these noncontiguous territories would be part of the United States for definitional and constitutional purposes; they would be fully within the United States and the Constitution and all its provisions, including the Bill of Rights, would apply automatically once U.S. sovereignty was established over the territory. Randolph did argue that the United States could occupy a territory in a despotic fashion, but only as a “temporary arrangement made advisable by the results of war.” This explains why anti-imperial scholars were fundamentally against the expansion of the United States to noncontiguous island territories, as they believed that the Constitution and all of its provisions would have to be extended, making distant lands with “inferior” peoples and cultures included within the U.S. polity. For the anti-imperialists, the federal government was not permitted to expand its sovereignty to other territories while keeping them excluded from the United States in a constitutional and political sense.

Anti-Imperial View: Constitutional Anchor

Anti-imperialist scholars relied on Chief Justice John Marshall’s decision in Loughborough, who issued a ruling regarding the applicability of the Uniformity Clause of the Constitution. Marshall wrote that

\[ \text{the power then to lay and collect duties, imposts, and excises, may be exercised, and must be exercised throughout the United States. Does this term designate the whole, or} \]
any particular portion of the American empire? Certainly this question can admit of but one answer. It is the name given to our great republic, which is composed of States and territories. The district of Columbia, or the territory west of the Missouri, is not less within the United States, than Maryland or Pennsylvania; and it is not less necessary, on the principles of our constitution, that uniformity in the imposition of imposts, duties, and excises, should be observed in the one, than in the other.

Thus, the anti-imperialist argument viewed the United States as including both its territories and the states, grounded in Marshall’s opinion in *Loughborough*. According to Marshall in *Loughborough*, the United States consisted of states and territories, meaning that territories were within the definition of the United States and could not be treated differently than the states. This meant that any constitutional provisions or protections that applied to the states would also apply in the same manner to the territories, i.e. through the entire “American empire.”

Roger Taney would later take the same position in the Court’s infamous *Dred Scott* decision, in which the Chief Justice ruled that the Constitution was applicable in the territories in the same way it was in the states, meaning Congress could not regulate slavery in any territory acquired after the ratification of the Constitution. Importantly for the anti-imperialist scholars, Taney also argued that all provisions of the Constitution, including the Bill of Rights, functioned in the territories in the same way as they did in the states. This meant that inhabitants in the territories were entitled to property and due process rights just as citizens of the states were. Taney explicitly stated that the Constitution does not permit the U.S. to maintain colonies to be ruled permanently by Congress with absolute power over them:

There is certainly no power given by the Constitution to the Federal government to establish or maintain colonies bordering on the United States or at a distance, to be ruled and governed at its own pleasure…no power is given to acquire a territory to be held and governed permanently in that character.

While Taney’s opinion in *Dred Scott* would come to be condemned by scholars for various (and I would add legitimate) reasons, I focus only on his understanding of the Constitution’s
automatic extension to any territory the United States may come to acquire. This theory would influence anti-imperialist scholars debating the status of the insular territories acquired after the Spanish-American War, as many agreed with Marshall and Taney’s more expansive understanding of the United States. These scholars would claim that it was unnecessary for Congress to extend the Constitution to the territories, since it automatically (it extends *ex proprio vigore*) goes with the land to which it becomes supreme law. The United States, proponents of the anti-imperial viewpoint argued, could not claim to have sovereignty over a territory unless the provisions of the Constitution and the laws of Congress applied to and governed over it. It made no sense to those taking an anti-imperialist position that Congress could act outside the Constitution, since they argued that Congress’ power originates and is rooted in the Constitution, as they asserted that Congress could “not infringe, directly or indirectly, any provision of the Constitution, express or implied” (Shipman, 204). Thus, if the United States expanded its territory, all of the provisions of the Constitution were to automatically extend and apply without any explicit legislation from Congress.

Simeon Baldwin, a proponent of the anti-imperialist view, explained that “[a] power to rule [a territory] without restriction, as a colony or dependent province, would be inconsistent with the nature of our government” (401), but based his argument on the notion that the privileges and immunities guaranteed by the Constitution were available even to foreigners, or non-citizens, who were residing with the states or territories. For Baldwin, this proved that the Constitution must apply in full force within a territory.

To use the earlier example of the Uniformity Clause, the anti-imperialist scholars argued that any good shipped into or exported out of a territory could not be taxed at a different rate than that which applied to the states. Only a constitutional amendment could allow for territories to be
taxed in a manner that differed from the states. Allowing territories to be taxed differently, according to anti-imperial scholars, would be treating them as foreign and would violate the Uniformity Clause, which automatically applied once U.S. sovereignty over a territory was established.

It is important to remember that these anti-imperial scholars did not think that the United States had no sovereign right to expand its territory, but argued that if it did the Constitution must apply to any new land in full effect. This provides an explanation as to why the proponents of the anti-imperial viewpoint were against the expansion of the United States to noncontiguous island territories, since they argued these lands, peoples and cultures would automatically become parts of the United States even if they were to remain as territories, something anti-imperial scholars did not desire.

**Imperialist Territorial View**

*Imperial View: Intent*

The proponents of the imperialist viewpoint, which argued the United States consisted of only the states, included Christopher Langdell, Charles Gardiner, James Thayer, John Beach and John Richards. The intention for the noncontiguous territories the United States had acquired, according to the imperialist viewpoint, is to occupy and/or annex the territory indefinitely, but not to grant it statehood. If the United States was able to possess colonies, the imperialists argued, this would mean that any territory the United States may acquire would not have to proceed along a process that would eventually lead to statehood, as a territory could be kept in a permanent state of occupation in which Congress maintained plenary power over it with no constitutional restrictions.
Imperial View: Status

The legal imperial scholars argued that the United States consisted strictly of the states and did not include any territory it may possess. The imperial viewpoint thus situated the territories outside the United States for strategic and racial reasons. Justice Daniel Webster’s argument in American Insurance Company v. Canter (1828) provided precedent for this theory, which set a precedent for broad congressional authority in determining governing structures in the territories, including their court systems. According to the Court’s ruling in Canter, a local territorial court established by Congress in Florida, in which the justices lacked lifetime tenure but instead served four-year terms, was permitted despite not being a “constitutional” court, since it is a “legislative court,”

created in virtue of the general right of sovereignty which exists in the government or in virtue of that clause which enables Congress to make all needful rules and regulations respecting the territory belonging to the United States. The jurisdiction with which they are invested is not a part of that judicial power which is defined in the Third Article of the Constitution, but is conferred by Congress in the execution of those general powers which that body possesses over the territories of the United States.

American Insurance thus granted Congress broad power in regulating and governing the territories, rooted in the government’s general right of sovereignty and in the Territorial Clause. The territorial courts that were established by Congress in Florida at issue in American Insurance would not have been constitutionally allowed had they been created in a state, since the judges lacked lifetime tenure, but since Florida was still a territory at the time Congress did not have to follow Article Three provisions when establishing judicial institutions. Instead, the “general powers” which Congress possesses over the territories allows for the creation of territorial courts that do not have to follow Article Three regulations, such as justices have life tenure.

The imperialist view also made it clear that there was a difference between the United States in an international and colloquial understanding (a wider sense) and a meaning of the U.S.
for constitutional purposes (a narrower sense). The international and colloquial sense of the United States included its territories, while in the constitutional sense only member states were considered unified by the federal government and governed by the Constitution. This belief enabled proponents of the imperialist viewpoint to maintain that territories were under/within U.S. sovereignty in the international sense, but were outside of the United States for constitutional/domestic purposes. This allowed for U.S. territories to be under the authority of the federal government, while not being fully included within the U.S. polity and having constitutional provisions and protections extend there.

There was also an important distinction between organized and unorganized territories for advocates of the imperial viewpoint. According to Charles Gardiner,

“[o]rganized territories” are portions of the public domain over which Congress has extended our constitution and laws, and has established a system of organized local government; such are Arizona, New Mexico and Oklahoma. Unorganized territories” possess no organized local government, are usually not subject to our constitution and laws, and are ruled directly by Congress. Such are Alaska and Indian Territory. Territories, dependencies and provinces are in our jurisprudence practically synonymous terms. Territories in legal contemplation are organized or unorganized dependencies or provinces. (170)

For Gardiner, it was entirely up to Congress to decide whether to organize an acquired territory and thus extend the Constitution to the region, since territories acquire no rights under the Constitution and federal statutes ex proprio vigore.

The only political and civil rights, laws or constitutional provisions, including those in the Bill of Rights, that apply in an unorganized territory, according to the imperial viewpoint argued by Gardiner, were those guaranteed by the treaty that established the area under U.S. control and those that Congress explicitly extended (176). An example of this, which would be the focus of the initial of the Insular Cases, is the Constitution’s Uniformity Clause, which states that “all duties, imposts and excises shall be uniform throughout the United States” (Article 1,
Section 8, Clause 1). For the imperialists, the Uniformity Clause did not apply in the territories unless Congress decided otherwise (Congress could decide that it applied in one but not the other, in all, etc.), which meant taxes and excises could be imposed on territories in a differentiated manner compared to the states, as Congress deemed appropriate.

The imperialist view did insist that a “higher law” did place some constraints on Congressional authority over the territories. Gardiner believed that certain “inalienable rights,” not guaranteed by the Constitution, nonetheless applied to the inhabitants of the territories. He writes:

The "inalienable rights" of the inhabitants of conquered territory, even if not guaranteed by the constitution, are secured by those fundamental, unwritten laws, characterized in the Declaration of Independence as "the laws of nature and of nature's God." They are synonymous with the" general spirit of the constitution," referred to in the Mormon Church case; they are but another name for the enlightened moral sentiment of the nation; they constitute the higher laws of American civilization, superior to the constitution, more potent than written precepts, pervading all our institutions and vitalizing not only our statutes but the constitution itself. (179)

These “inalienable rights” were based on theories of natural law, which it was believed all people simply existing as human beings possess, meaning these did not have to be explicitly extended to inhabitants of the territories. Public opinion was to provide the necessary enforcement mechanism on the federal government to ensure the inalienable rights of the residents of the territories were not violated. So, while the imperialists asserted that Congress had plenary authority over unorganized territories, they did believe that this plenary power was not entirely “absolute,” as certain fundamental rights placed limits on the legislature’s governing power in the territories. This is a nebulous area, in determining what the exact constraints are that proponents of the imperial viewpoint believed automatically are placed on Congress’ ability to govern in the territories. This issue would be a major aspect of the opinion in the Insular Cases, as Justice White would argue that certain “fundamental” rights automatically apply once a
territory is acquired. What these rights were and are, however, is unclear. There is a long line of jurisprudence that has extended certain parts of the Bill of Rights to the insular territories, but it was never made explicit what rights were “fundamental.” For the imperialists, it seems that they were basing these fundamental rights on a theory of natural rights, but again, what these rights are remain ambiguous.

*Imperial View: Constitutional Anchor*

Proponents of the imperial view believed the plenary power of Congress over the territories stemmed from theories of the sovereign rights of all nation-states, which “included the right to acquire, hold and govern territory” (Sparrow, 42). This meant that the U.S. government, or more specifically Congress, due to the vast plenary power the imperial viewpoint believed it was granted by the Territorial Clause had sovereign authority over the territories to govern them each whatever manner the legislative branch deemed appropriate. At least one of the scholars arguing for an imperial understanding of the Constitution believed that the history of U.S. territorial policy provided precedent for the ability of the federal government to have permanent colonies. According to James Bradley Thayer

> the record of U.S. territorial administration was “exactly the process of governing a colony.” The territories of the United States “are, and always have been colonies, dependencies…” The Unites States had “been a colonial power without suspecting it” for more than a century, “only we choose to call them ‘territories.’” (Sparrow, 42)

Thayer further argued that "there is no lack of power in our nation, of legal, constitutional power, to govern these islands as colonies, substantially as England might govern them” (467). Thayer also “dismissed Marshall's and Taney's opinions from *Loughborough* and *Dred Scott* as mere dicta, and concluded that not only did the Constitution not cover the territories, but also that, ‘except as to one or two particulars, [the power of Congress to govern the territories was] to
be measured only by the terms of the cessions which it has accepted, or of the treaty under which a territory may have come in,’ but beyond these restraints the territories were ‘subject to the absolute power of Congress’” (Torruela, 295-296).

Imperial proponents also argued that the President has power to govern territories from “the Commander-in-Chief Clause (U.S. Constitution, Article 2, §2, cl. 1) or the constitutional provision authorizing the President to command the armed forces to occupy internal (e.g., the Civil War South) or external (e.g., Mexico)” and that for territories occupied for commercial/economic purposes, the Commerce Clause provides a source of authority (U.S. Constitution, Article 1, §8, cl. 3) (Venator-Santiago, 8-9).

In sum, those advocating an imperialist viewpoint wanted to allow for Congress to rule each territory in the manner it deemed most appropriate, to further the United States’ interest in the most effective manner possible. The imperialist rationale held that the U.S. could extend its Constitution, laws and citizenship by treaty and legislation, but unless such an extension was made explicit, Congress and/or the President could govern territories as it judged appropriately. The imperialist scholars did think, however, that certain “inalienable,” fundamental rights did apply to the inhabitants of U.S. territories, such as freedom of speech and religion. This would be an important aspect of the rulings of the Insular Cases.

Third View/Insular Cases
Third View/Insular Cases: Intent

The third view desired maximum flexibility in territorial policy: a territory could be “within” the United States for some purposes and “outside” or “foreign” to the United States for others, with Congress having plenary authority over a territory to decide when and for what. The third view/Insular Cases sought to allow such flexibility in how the territories could be governed in
order to allow “Congress and the executive the maximum leeway possible to develop and
implement the policies that the new phase of overseas expansionism required” (Ramos, 141). Its
major proponent was Abbott Lawrence Lowell,\(^\text{15}\) who argued that territory could be acquired for
strategic purposes, and can be treated as independent/foreign state, like an occupied territory, or
like a state, depending on the relevant treaty of cession for the territory. Lowell declared that the
United States was not just the states nor the states and territories, but rather “depended on the
texts of congressional legislation and the phrasing of the nation’s treaties” (Sparrow, 41). Lowell
suggested that the United States had two options available when it expanded: to annex a territory
and make it a part of the United States, which meant all the provisions of the Constitution then
apply, or acquire territory “as not to form part of the United States, and in that case constitutional
limitations, such as those requiring uniformity of taxation and trial by jury, do not apply” (176).
What would determine which option was taken, according to Lowell, depended on the wording
of the treaty for the acquisition of the territory. While Lowell recognized that the United States’
history of territorial acquisition followed the first option, providing that the people in the
territories gained through expansion “should be incorporated into the Union, or admitted to the
rights of citizens” (171), it all depended on the provisions of the treaty controlling in the
territory. This would be determined by the President, with a supermajority approval by the
Senate required for ratification. It would make sense for proponents of American imperialism to
argue that the language of the treaty that acquired a territory determines whether it is annexed
and thus constitutional limits apply, or not actually a part of the United States, since William
McKinley, a staunch imperialist, was President at the time. If a treaty did not state that a certain

\(^{15}\) Others who expounded this third view included Carl Becker, John Burgess, George Costigan, James Fernald and Alexander Porter Morse
territory was meant to be incorporated into the United States, not only was this constitutionally permitted but most constitutional provisions did not then apply in the territory.

Lowell did believe that

[i]t may well be that some provisions have a universal bearing because they are in form restrictions upon the power of Congress rather than reservations of rights. Such are the provisions that no bill of attainder or ex post facto law shall be passed, that no title of nobility shall be granted, and that a regular statement and account of all public moneys shall be published from time to time. These rules stand upon a different footing from the rights guaranteed to the citizens, many of which are inapplicable except among a people whose social and political evolution has been consonant with our own. (176)

From this passage, seems that Lowell thinks there are certain provisions of the Constitution that are universal in nature due to the restrictions that they place on Congress, and would thus function in any territory the U.S. acquired, even if were not incorporated. There is definitely a tension here, similar to what ultimately developed with the idea of fundamental rights applying to the insular territories, between universal restrictions that always apply to any U.S. territory, and the desire of Lowell to grant Congress the ability to govern in whatever manner it deems appropriate in each particular territory. There is clearly a racial/cultural logic to this tension, as some scholars viewed certain legal protections and limitations as unsuitable for inhabitants of the insular territories, who were viewed as not having progressed enough to be governed by the same set of regulations as White, Anglo-Saxon Europeans. However, there was still a desire to place certain limitations on Congress’ power in the insular territories, for various reasons, including a fear of tyranny and a belief in certain universal, natural rights that apply to all people. Lowell contrasts these provisions with the rights the Constitution guarantees to citizens, which he views are only applicable to people who share an Anglo-Saxon history. In sum, “Lowell made the novel argument that some territories are part of the United States and others not…[which] would become the doctrine of territorial incorporation” created in the Insular Cases (Burnett, 5-6).
Third View/Insular Cases: Status

According to the third view, the status of territory depends on whether Congress has annexed the territory to become fully within the United States for constitutional purposes, which is dependent on the relevant treaty of cession for the territory. There is an important difference between Thayer’s imperial view of U.S. territorial law and Lowell’s hybrid view that I would like to emphasize, since this difference would be highly influential and important in the rulings of the Insular Cases. Thayer believed that the treaty of cession that transferred sovereignty to the governing nation determined the rights of the people living in the territory, while Lowell argued that the treaties determined the relationship of the territory to the United States itself – for Lowell, this relationship would determine the rights the inhabitants of the territory would have (Torruella, 296). Lowell concluded that the Constitution only applies in territory that has been incorporated into the United States, meaning a territory’s status is determined by the treaty of cession: if a treaty incorporates a territory into the United States, the Constitution applies, but if a treaty does not incorporate a territory, the Constitution does not apply, leaving the United States to govern without constitutional restrictions. This language and divide, between incorporated and unincorporated territory, would be the central theory used in the Insular Cases. Other advocates of this “middle ground” position agreed with Lowell that the U.S. may acquire territories without incorporating them into the U.S., which enabled U.S. imperialism to flourish without having to include the inhabitants of any of the territories as equal members of the polity. Thus, the status of a territory in the third view of U.S. territorial law was either incorporated and, within the United States for constitutional purposes, or unincorporated, and could be both outside and within the
United States for constitutional purposes, depending on what policy Congress deemed most appropriate for a particular unincorporated territory.

**Third View/Insular Cases: Constitutional Anchor**

The third view and *Insular Cases* relied on an expansive reading of the Territorial Clause, granting plenary authority to Congress to govern each territory in whatever manner it deemed appropriate, being limited only by the “fundamental” rights that apply even in an unincorporated territory. The Court was asked to rule on whether the Constitution allowed for the United States to indefinitely occupy territories that were in a subordinate position to the states, and which would not be on a trajectory for statehood. *Downes v. Bidwell* initially focused on whether territorial tariffs would have to follow the uniformity clause of the Constitution, which states that “all Duties, Imports and Excises shall be uniform throughout the United States” (Article I, section 8, clause 1). If Puerto Rico was considered a foreign country, then any tariffs applied to it would be able to vary from any tariffs that existed in the states for similar goods. At a broader level, the issue in *Downes* was whether the Constitution provided Congressional authority with the same restrictions in the territories that it did in relation to the states. The *Insular Cases* centered on what, if any, constitutional provisions limited Congress in its sovereignty over territories, or put more simply from a common phrase at the time, “whether the Constitution follows the flag?” As Burnett notes, the novelty of the *Insular Cases*, and why I believe they should be viewed as blending elements of the U.S. colonial and imperial tradition, is that they established that a territory can be “domestic,” or under U.S. sovereignty, without being a “part” of the United States in a constitutional sense (390). Thus, the central issue of the *Insular Cases*
was whether the term “United States” included the territories or if it was a compact between just the states.

Congress began to normalize the territorial policies of the third view from the academic debates with the Foraker Act of 1900, which established a civilian government for Puerto Rico. Soon after, the Supreme Court began to affirm these new territorial laws and policies in the *Insular Cases*. The ensuing constitutional interpretation, also known as the doctrine of territorial incorporation, has since been used to rule all territories acquired (annexed, occupied, and/or leased) after 1898, including Puerto Rico, the Virgin Islands, and the Pacific Island territories of Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands (CNMI). On April 2, 1900, during the debates over the Foraker Act, Senator John C. Spooner (R-WI) summarized the new logic informing the new territorial policy in the following passage:

> I will not quibble about words. Territory belonging to the United States, as I think Puerto Rico and the Philippine Archipelago do, becomes a part of the United States in the international sense, while not being at all a part of the United States in the constitutional sense.¹⁷

This argument, which would ultimately be adopted as the ruling in the *Insular Cases*, meant that the federal government could selectively enact legislation or create policies that treated unincorporated territories as foreign spaces permanently situated outside of the United States for domestic and constitutional purposes, but still under its sovereignty for international purposes, as U.S. policymakers never had any intention of placing these areas on a trajectory to become a state and making them fully within the United States.

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¹⁶ Foraker Act of 1900, Chapter 191, 31 Stat. 77 (1900)
Justice Henry Billings Brown wrote the lead opinion in *Downes*, expressing the imperial view from the academic debates, but the Court was split 5-4 over Congress’ power to impose tariffs on goods from Puerto Rico (the issue was whether the Constitution’s Uniformity Clause applied to Puerto Rico) to the states and issued five separate opinions overall. No other justice joined Brown’s decision. While a slight majority of the justices supported the U.S.’ right to tax goods from the territories, no one opinion had the support of a majority – there were three different majority and two dissenting opinions. Thus, the decision was highly divisive, and yet still remains “good” law.

Justice Brown argued that the issue in *Downes* encompassed more than whether the Uniformity Clause applied to Puerto Rico, but involved “the broader question of whether the revenue clauses of the Constitution of their own force extend to our newly acquired territories” (182 U.S. 249). Brown asserted that Congress had plenary power over the territories, based on the sovereign right of the U.S. to expand and acquire new land. The Constitution only applied in new territory if Congress explicitly extended it, and only those provisions that Congress specifically designated.

Brown did claim that certain fundamental rights meant as limitations to protect individuals from the government did apply without any explicit Congressional extension of them. He maintained that “[t]here are certain principles of natural justice, or natural rights, inherent in the Anglo-Saxon character which need no expression in constitutions or statutes to give them effect or to secure dependencies against legislation manifestly hostile to their real interests” (182 U.S. 249). He listed natural rights as: religious expression and worship, the right to personal liberty/property, freedom of speech and the press, access to courts, due process, equal protection, immunities from unreasonable search and seizures, and freedom from cruel and
unusual punishments. These natural rights contrasted with artificial or remedial rights, or “rights
to citizenship, suffrage, and to the particular methods of procedures pointed out in the
Constitution, which are peculiar to Anglo-Saxon jurisprudence.” Some of these, Brown
suggested, were unnecessary for the protection of the individual and must be extended by
Congress to the territories if they are to apply.

Justice Edward Douglas White’s concurring opinion in *Downes*, which represents the
“middle-ground or third view” argument in the academic debates, “is still cited in territorial
matters as the authoritative answer to the question of the Constitutional status of the territories”
(Leibowitz, 23). White rejected the premise that the Constitution does not apply in the territories,
since every function of the government stems from the Constitution itself. For White, then, the
issue was “what particular provisions of the Constitution are applicable in a given situation to
restrain the Congress even if…Congress had very wide discretion in establishing governmental
organizations in a newly acquired territory” (Leibowitz, 23). This led White to take the “third
view” in the academic debates, arguing for the distinction between incorporated and
unincorporated territories. An incorporated territory is “in all respects a part of the United
States,” while the unincorporated territory is not “an integral part.” White believed that linked
with the United States’ power to expand its territory was Congress’ ability to determine the
status of these annexed areas. Thus, incorporation was not assumed or automatic, but a decision
left for Congress to make, according to White. He believed that “incorporation does not arise
until in the wisdom of Congress it is deemed that the acquired territory has reached that state
where it is proper that it should enter into ad form a part of the American family” (Leibowitz, 23).
As with Justice Brown, White also subscribed to the theory that certain fundamental rights and prohibitions automatically applied even in the unincorporated territories, restricting federal power there with no need for Congressional extension. This argument was meant to assuage fears of unrestricted Congressional power in the territories that annexationists had expressed during the academic debates. He wrote that “there are certain principles of natural justice inherent in the Anglo-Saxon character, which need no expression in constitutions or statutes to give them effect or to secure dependencies against legislations manifestly hostile to their real interests” (Sparrow, 92).

In sum, the *Insular Cases* established that “[a]bsent Congressional action, none of the Articles of the Constitution had to be applicable to the territories” (Leibowitz, 22). As Leibowitz notes, one of the major themes of Brown’s opinion that still governs today is “the idea that the islands may be part of the United States for certain purposes but not for others” (22). This explains how U.S. unincorporated territories can be considered “foreign in a domestic sense” since they had not been incorporated into the United States, but [were] merely appurtenant thereto as a possession” (182 U.S. 244).

This result hinges on the theory of the incorporated/unincorporated territories, which was by no means an inevitable or obvious outcome, since it created an entirely new category of territory subject to U.S. rule. So strange was this new categorization that subjected unincorporated territories to U.S. sovereignty but excluded them from equal membership as states that Justice John Harlan referred to this novel dichotomy as “occult” (Leibowitz, 25)\(^\text{18}\).

“[T]he [unincorporated] territories would be foreign relative to the states and incorporated

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\(^{18}\)“Great stress is thrown upon the word ‘incorporation,’ as if possessed of some occult meaning, but I take it that the act under consideration made Porto Rico, whatever its situation before, an organized territory of the United States… (from Harlan dissent in *Downes*)
territories, and domestic relative to foreign countries” (Burnett, 13). In *De Lima v. Bidwell* (1901), the Court ruled that Puerto Rico was not a foreign country for the purposes of the Dingley Act, which created duties on goods shipped to the United States from “foreign” countries. The Uniformity Clause should also not apply to the unincorporated territories, however, since that was only for the “United States.” Thus, Puerto Rico was foreign when compared to how states were treated, but domestic relative to other countries in the international realm. Justice Brown would explain this distinction by emphasizing that the unincorporated territories were within the United States’ sphere of sovereignty but not within the United States, and instead was located somewhere “between the extremes” (Burnett and Marshall, 14-15). This meant that the Court would have to determine in a case-by-case basis which constitutional provisions applied to the unincorporated territories, since they were not simply foreign or domestic, but an entirely new category of territory under U.S. control. Congress was able to treat unincorporated territories as foreign and domestic, legislating specifically for each one, depending on whichever was more convenient.

Shifting back to *Downes*, Harlan and Chief Justice Fuller argued that the Constitution applied to the United States, which could only mean both “State and territories” (Leibowitz, 24), based on the rulings in *Loughborough* and *Dred Scott*. This argument was just as plausible as the theory of incorporation/unincorporation that five of the justices adopted and “were rapidly accepted” (Leibowitz, 26), while Harlan’s dissent was largely forgotten. I end this section quoting Harlan’s dissent at length, which I believe still resonates:

Still less is it true that Congress can deal with new territories just as other nations have done or may do with their new territories.... Monarchical and despotic governments, unrestrained by written constitutions, may do with newly acquired territories what this Government may not do consistently with our fundamental law. To say otherwise is to concede that Congress may, by action taken outside of the Constitution, engraft upon our republican institutions a colonial system such as exists under monarchical governments.
Surely such a result was never contemplated by the fathers of the Constitution.... The idea that this country may acquire territories anywhere upon the earth, by conquest or treaty, and hold them as mere colonies or provinces - the people inhabiting them to enjoy only such rights as Congress chooses to accord to them - is wholly inconsistent with the spirit and genius as well as with the words of the Constitution. (182 U.S. 244)

Summary and Transition to the Context of the Pacific Insular Territories

The Insular Cases established that the Constitution did not automatically apply to the unincorporated territories. Instead, Congress could decide when it would be appropriate and convenient for a particular territory to be governed as if it were within the United States for constitutional purposes, and when it would be beneficial for an unincorporated territory to be ruled as foreign to the United States for constitutional purposes. The unincorporated territories were subjected to the plenary powers of Congress, with the exception of certain fundamental rights that were ruled to apply there even if the Constitution did not. The rulings in the Insular Cases allowed for the maximization of U.S. interests by ruling that the Constitution did not apply in full effect in the insular territories, as they would be considered unincorporated and not fully “within” or a part of the United States, but still a part of it, or “foreign in a domestic sense.” Congress would have the authority to decide if an unincorporated territory was ready for admission to statehood, and explicitly made incorporated. The Insular Cases thus allowed for the creation and maintenance of an ambiguous status, the unincorporated territory, that served as the constitutional legitimation of the U.S. imperial project and U.S. global expansionism at the turn

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19 By constitutional legitimation, I refer to the significance the Supreme Court has as the “final arbiter in struggles about constitutional meaning…the Supreme Court has been able to elucidate and ‘settle’ important questions of state and social life in the course of adjudicating highly particularized disputes…[t]he pronouncements of the Court, invested with that practically legitimated authority, have a force lacking in the proclamations of other agents” (Ramos, 122-123). The point that Ramos is emphasizing here is that the Supreme Court and its ruling have a powerful significance and authority in the American political system, i.e., Court opinions command a high level of legitimacy and offer an “explicit justification” for a specific policy or the use of power to further an agenda. In the Insular Cases, the Court constitutionally permitted the United States to pursue an imperialist agenda in the newly
of the 20\textsuperscript{th} Century. Thus, the doctrine of incorporation allowed Congress to govern territories as permanent colonies by not being forced to place them on a trajectory consisting of more self-governance ending with eventual statehood. Instead, the fate of the unincorporated territories remained ambiguous; Congress could postpone any decision on statehood indefinitely. As Chief Justice Fuller wrote in his dissent in \textit{Downes}:

\begin{quote}
[T]he contention seems to be that, if an organized and settled province of another sovereignty is acquired by the United States, Congress has the power to keep it, like a disembodied shade, in an indeterminate state of ambiguous existence for an indefinite period… (182 U.S. 372).
\end{quote}

In my textual analysis chapters, I argue that since the rulings in the \textit{Insular Cases}, Congressional legislation regarding the type of citizenship available to inhabitants of the Pacific insular territories can best be understood through an interest-convergence lens, as opposed to progressive narratives that surround the development of U.S. citizenship generally, viewed as benefitting the interests and power of White elites in the United States. The plenary authority that the Court granted to Congress over the insular territories has allowed U.S. legal actors and policymakers to adopt convenient policies that do just enough to appease any external pressure – whether from the territories themselves or from domestic actors and organizations in the states (also pressure from world actors, like the U.N.) – that demanded equality for the residents of the territories while still maintaining ultimate sovereignty over them, i.e. not altering the fundamental structural relationship that exists between the United States and each unincorporated territory.

\footnote{acquired territories from the Spanish American War. This meant that the U.S. imperial project was backed by the force of law, giving it the legitimacy and authority that comes from a Supreme Court ruling. For a fuller discussion of what constitutional legitimacy entails and how it is deeply connected with the Supreme Court, see Chapter 6 in Ramos’ work.}
Chapter 2 - U.S. Territorial Citizenship

In this chapter, I will first offer an overview of how the laws of citizenship have developed in the history of the United States in relation to territory from 1790 through the Insular Cases. I offer an overview of the major developments shaping U.S. territorial citizenship to provide a short outline of the central precedents and landmark decisions that influenced the debates over the status of the residents of the territories the United States acquired in 1898. The chapter is divided up into three sections, representing the major eras of how citizenship in the territories functioned and was understood to exist in U.S. history: 1) From 1790 until 1868 and the passage of the Fourteenth Amendment; 2) From 1868 until 1898 and the Insular Cases; 3) After 1898. The last section, which focuses on how citizenship in the territories entered into a new phase after 1898 through the Insular Cases, will provide a summary of the extension of citizenship and nationality in the insular territories. I will emphasize that after 1898, a new precedent was established that made birth in a U.S. territory not qualify as a birth “within” the United States for the purposes of birthright citizenship. This meant that residents born in U.S. territories after 1898 were not automatically entitled to a birthright U.S. citizenship, marking a departure from previous precedent, which established that birth in a territory did entitle a person to birthright U.S. citizenship. I will highlight how the Anti-Imperialist/Colonialist view, the Imperialist territorial view and the Third View each determined citizenship and how it would operate in the newly acquired territories the United States gained from the Spanish American War in 1898. I will then explain how citizenship functioned with the rulings of the Insular Cases, which was heavily influenced by the Third View in the academic debates. The final section of this chapter will provide a summary and set up the chapters that use textual analyses of legal histories to explore
the development of citizenship legislation in the Pacific Insular territories through the lens of an interest-convergence methodology.

The central question raised by the *Insular Cases* regarding U.S. citizenship amounts to this: how is it that a person can be born in a territory under the jurisdiction and sovereignty of the United States and not be entitled to birthright citizenship? A brief review of the history of citizenship and its relationship to territory in the United States is essential for examining this question and establishing the full context of the *Insular Cases* and the subsequent development of citizenship legislation in the Pacific insular territories, to comprehend the contradictory nature of how a birth in a U.S. territory can be considered “foreign in a domestic sense,” both excluded and included as a birth within the United States.

**Overview of U.S. Citizenship from 1790 to 1868**

Citizenship legislation in the United States has always been linked to race, class and gender hierarchies. As Allan Isaac explains, “the predominating qualifying term for U.S. citizenship” from 1790 until 1952 has been race, and not “allegiance as belonging” (36). Similarly, Ian Haney Lopez explains that “[f]rom this country’s inception, the laws regulating who was or could become a citizen were tainted by racial prejudice” (Haney Lopez, 39). More fundamentally, citizenship in the U.S. has always been intricately linked to race, beginning with Congress restricting naturalization to “white persons” in 1790.\(^{20}\) Birthright citizenship remained linked to race until 1940, while naturalized citizenship was until 1952.\(^{21}\) This chapter will focus on a

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\(^{20}\) From the Naturalization Act of 1790. As Haney Lopez opens *White By Law*, these were the first words on U.S. citizenship, since the Constitution is silent on its definition.

\(^{21}\) See the 1940 Nationality Act and the 1952 Immigration and Nationality Act. I hope to examine how citizenship legislation in the Pacific insular territories is linked to changes in these acts. For the purposes of this chapter, however, I focus on birthright citizenship, or *jus soli* citizenship, since I am primarily concerned with territorial
narrower strand of the development of citizenship legislation in the United States, highlighting how citizenship functioned and was understood to operate in U.S. territories. Like all aspects of citizenship in the United States, race has a central influence in how citizenship developed in U.S. territories.

When the United States Constitution was ratified, however, it contained no definition of citizenship, although it made use of the term “citizens.” There was a recognition of citizens of each state and citizens at the federal level, but it generally understood that U.S. citizenship was “subordinate to and derived from state citizenship (Gettys, 3). Thus, an individual who was a citizen of a state was considered a citizen of the United States, ipso facto. There was precedent, based on English Common Law and U.S. court cases from the early 19th Century, however, which established that U.S. citizenship could also be derived from territorial citizenship, meaning state citizenship and territorial citizenship both automatically granted a person a national U.S. citizenship up until the passage of the Fourteenth Amendment in 1868 (them major shifts in citizenship legislation after the Fourteenth Amendment was ratified will be discussed below in the second section). Put another way, the doctrine of *jus soli* ("right of the soil," or more commonly referred to as birthright citizenship), a tradition that establishes that all persons born within a nation’s jurisdiction or land automatically acquire citizenship, operated in U.S. states and territories leading up to the passage of the Fourteenth Amendment in 1868. This meant that a person born in a U.S. territory acquired a federal U.S. citizenship through *jus soli* or birthright citizenship just as a person born in a state did. Haney Lopez explains, “The U.S.

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citizenship. For excellent discussions on the racist history of naturalization law and how U.S. citizenship has been historically linked to “whiteness,” see *White by Law* by Haney-Lopez and *Whiteness of a Different Color: European Immigrants and the Alchemy of Race*, by Matthew Frye Jacobson.
Constitution as ratified did not define the citizenry, probably because it was assumed that the English common law rule of jus soli would continue” (39). 22

The precedent for the doctrine of jus soli, as Haney-Lopez thought, was first established in pre-revolutionary English common law and by U.S. courts in the 18th and 19th Century, based on Calvlin’s Case (77 E. R. 377, 409 [1608]), which ruled that

\[\text{at common law, the English right-of-the-soil rule \textit{jus soli} was straightforward: those born within the dominion of the English monarch and who owed allegiance at birth were English subjects. (Citizenship Scholars Amicus Brief, 3)}\]

This meant that people born in territories that were under British control, and thus owed allegiance to Britain, (e.g. Ireland, Normandy, Wales) automatically became British subjects. Based on William Blackstone’s Commentaries on the Laws of England, the same rule applied to people born in the American colonies before the Revolution, as Blackstone explained that “\text{natural-born subjects are such as are born within the dominions of the crown of England, that is, within the ligeance, or, as it is generally called, the allegiance of the king” (106-109).}

After the American Revolution, U.S. courts had to deal with the status of people born in the colonies before the war when they were still under British sovereignty. The courts relied on English Common Law, based on the doctrine of jus soli, to determine that the colonists were citizens of the United States because the authority of the British monarchy had transferred to the United States at the end of the Revolutionary War. For example, in Kilham v. Ward (1806) it was determined that “[a]ll persons, therefore, who were then within the United States, and were parties to that declaration, must be considered as agreeing to the new political compact, and by virtue of it became citizens of the established government.”

22 It is important to note that “all” actually referred to White, land-owning males (Haney Lopez 1996; Smith 1997). The main focus of this chapter is not the ascriptive hierarchies (race, gender and class) that remained attached to U.S. citizenship from the founding up through the middle of the 20th Century in the states, however, as I am concerned with how citizenship in the territories was viewed.
Other cases from the 19th Century and before 1868 further confirmed that those people born in a U.S. territory became U.S. citizens through the doctrine of *jus soli*. In *Gardner v. Ward* (1805), it was held that a man born within the jurisdiction of the common law, is a citizen of the country wherein he is born. By this circumstance of his birth, he is subjected to the duty of allegiance which is claimed and enforced by the sovereign of his native land and becomes reciprocally entitled to the protection of that sovereign, and to the other rights and advantages which are included in the term “citizenship.”

The emphasis here for citizenship is on “jurisdiction,” establishing that a person automatically becomes a citizen of the country that has sovereignty over the territory a person is born in. Since the United States maintained sovereignty over its territories, this argument would mean that a person born in a territory would gain U.S. citizenship since they would be born within the jurisdiction of the United States.23 The Fourteenth Amendment would make this argument explicit in 1868, but leading up to its passage it was still implied that this how and why residents born in U.S. territories were granted birthright citizenship. The Fourteenth Amendment, as I will explain below, was mainly focused on removing racial classifications attached to birthright citizenship to ensure that newly freed slaves would become full citizens, and was not fundamentally establishing a new form of *jus soli* citizenship.

More evidence for precedent that birth in a territory generated U.S. citizenship between 1790 and 1868 comes from *Picquet v. Swan* (1828), which held that a “citizen of one of our territories is [also] a citizen of the United States.” Furthermore, in *Leake v. Gilchrist* (1829) it was stated that [n]o matter “how accidental soever his birth in that place may have been, and although his parents belong to another country,” the country of one’s birth “is that to which he owes allegiance,” which also emphasizes the centrality of what nation has jurisdiction and

23 Again, it is important to note that it was understood that this applied only to Whites living in the territories, as it was a general rule that Blacks were excluded from gaining birthright citizenship in the territories.
sovereignty of a territory when determining birthright citizenship. Moreover, in *Inglis v. Sailor’s Snug Harbor* (1830) the Court ruled that “[n]othing [was] better settled at the common law than the doctrine that the children even of aliens born in a country . . . are subjects by birth” and that birth “does of itself constitute citizenship” from *Lynch v. Clarke* (1844). Lastly, in *United States v. Rhodes* (1866) the Court wrote that “all persons born in the allegiance of the United States are natural born citizens.”

Thus, “from the earliest days, the inhabitants of the territories considered themselves as citizens of the United States, yet residing in a ‘territory’” (Roman, 2010, 22).

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24 There were exceptions to this rule, however, as

"Courts also recognized that the right-of-the-soil [jus soli] doctrine did not apply to persons who, while born on a nation’s soil, owed allegiance to a foreign sovereign. Accordingly, although those born on United States lands owing allegiance to the United States were citizens, the children of diplomats and persons born under hostile occupations were not citizens by right of the soil. (Citizenship Scholars Amicus Brief, 6)."

The other exception was Native Americans – despite being born within the territorial limits of the United States, they were not included in the jus soli doctrine because they were “members of, and ow[ed] immediate allegiance to, one of the Indian tribes” (*Elks v. Wilkins* (1884)). Native American tribes were viewed as “domestic dependent nations,” which were understood to be separate from, and thus not entirely within, the United States, as established in *Cherokee Nation v. Georgia* (1831). In *Ex parte Reynolds* (1879), it was held that “not being subject to the jurisdiction of the United States, [Native Americans] are not citizens thereof.” These exceptions are based on the idea that the people who owe their allegiance to a sovereign other than the United States are not covered by the jus soli doctrine of citizenship. Without going into too much complexity, there was a fundamental tension between the aim of the Fourteenth Amendment to grant birthright citizenship to all people born “within” the United States, which I would argue included any annexed U.S. territory before 1898, and the desire to maintain Native Americans as excluded from the U.S. polity. The framers of the Fourteenth Amendment wanted to include Black Americans as citizens, but not tribal members. The way the Supreme Court was able to sustain this intention was by focusing on the jurisdiction clause of the amendment. The Court ruled in *Elk v. Wilkins* (1884) that the tribes’ special status meant that they were persons who were not fully subject to the complete jurisdiction of the United States, because they have a separate allegiance to a tribe. The "Indian tribes, being within the territorial limits of the United States, were not, strictly speaking, foreign states"; but "they were alien nations, distinct political communities", with whom the United States dealt with through treaties and acts of Congress (*Elk v. Wilkins*). The members of those tribes owed immediate allegiance to their several tribes, and were not part of the people of the United States, as the Court explained that ""The evident meaning of [jurisdiction] is, not merely subject in some respect or degree to the jurisdiction of the United States, but completely subject to their political jurisdiction, and owing them direct and immediate allegiance" (*Elk v. Wilkins*). Native Americans and tribal lands are the exception to the general rule of how birthright citizenship functioned in the United States before 1898, however. This was because the framers of the Fourteenth Amendment wanted to ensure that the United States maintained ultimate sovereignty over the tribes and tribal lands, while maintaining they existed outside the U.S. polity. For a controversial discussion of the inconsistencies and overall incoherency regarding birthright citizenship that emerge from the decision in *Elk v. Wilkins*, see Smith, 308-310.

25 The Court used the term “settler citizens” to describe residents in the territories in *Scott v. Sanford* (1856) and *Mills Co. Iowa v. Burlington & M.R.R. Co.* (1883).
Overview of U.S. Citizenship from 1868-1898

The Fourteenth Amendment to the U.S. Constitution, passed in 1868, marks a key moment in the development of territorial citizenship in the United States. The key part of the text for the purposes of this chapter comes from Section 1, known as the Citizenship Clause, which states that “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.” Regarding citizenship in the U.S. territories, the Fourteenth Amendment affirmed the precedents highlighted in the first section of this chapter, establishing that the central components of determining whether birthright citizenship applies are whether the United States has jurisdiction and sovereignty over an area, and whether a person has allegiance to the United States. Thus, the Fourteenth Amendment was not a fundamental break from how birthright citizenship operated in the U.S. territories from 1790 up until its passage in one sense, as it followed previous precedent that a birth in a U.S. territory constituted a birth within the jurisdiction of the United States. It would be a major shift in how citizenship previously functioned regarding the relationship between state and national citizenship, as national citizenship would come to supplant state citizenship in importance, and also provided a crucial change regarding race and eligibility for birthright citizenship.

The Fourteenth Amendment’s main focus was to overturn certain aspects of the Supreme Court’s infamous Dred Scott decision, in which Chief Justice Roger Taney asserted that all Blacks, whether free or enslaved, were not and could never be citizens, because they were a “subordinate and inferior class of beings who had been subjugated by the dominant race, and, whether emancipated or not, yet 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” (60 U.S. 393). Taney also argued that “the acquiring of...state citizenship did not confer United States citizenship” (Gettys, 4), disrupting the theory that state citizenship automatically conferred federal citizenship. The ruling in Dred Scott was thus meant to prevent any Blacks who had gained a state citizenship from obtaining a federal U.S. citizenship, since Justice Curtis, in his dissent, noted that several states had recognized free African Americans as citizens. Dred Scott thus made “African Americans the only persons who, despite being born within the territorial limits of the United States and owing undivided allegiance to the United States, were denied citizenship” (Citizenship Scholars Brief, 9).

The opinion in Dred Scott was the major impetus for the creation of Fourteenth Amendment’s Citizenship Clause, with the aim of making birth within the United States automatically confer citizenship with no racial exclusions. This was also the first constitutional provision that included a definition of citizenship, and marked a fundamental shift in how citizenship functioned in the United States by making “national citizenship primary and paramount to state citizenship and to grant both national and state citizenship to [blacks]” (Gettys, 4). The Citizenship Clause of the Fourteenth Amendment was thus meant to “overrule” Dred Scott, reaffirm the right of the jus soli doctrine, including in the territories, which were considered to be within the jurisdiction of the United States, and reject any race-based exceptions from it, placing determinations of citizenship beyond the legislature (Citizenship Scholars Brief, 10). Put simply, the Fourteenth Amendment established that a birth within the United States, its territories included, granted a person birthright U.S. citizenship, and made explicit that this would apply to Black persons.

However, Haney Lopez notes that some racial minorities remained ineligible for birthright citizenship after the passage of the Fourteenth Amendment, as “questions persisted
about the citizenship status of children born in the United States to noncitizen parents, and about
the status of Native Americans” (40). *United States. v. Wong Kim Ark* (1898) established that
native-born children of aliens, even those ineligible for naturalized citizenship by race,26 were
birthrights citizens. The Court ruled that

> there is no authority, legislative, executive, or judicial [which] superseded or restricted, in
> any respect, the established rule of citizenship by birth within the dominion…
> The Fourteenth Amendment follows the “established” and “ancient rule of citizenship by
> birth within the dominion” and allegiance of the nation—that “[e]very
> person born in the United States, and subject to the jurisdiction thereof, becomes at once
> a citizen of the United States, and needs no naturalization. (Citizenship Scholars Brief, 12)

Isaac notes that “because Wong Kim Ark removed the racial bar to citizenship through jus soli, it
became even more important to reconstitute the soli (territories) and divorce its inhabitants from
automatic citizenship in the doctrine of incorporation” (36). This line of thought influenced the
need to make the territories acquired after the Spanish American War distinct from previous
territory that had been incorporated into the United States, to ensure that the brown inhabitants of
Puerto Rico, Guam and the Philippines did not confer U.S. citizenship automatically once the
United States was granted sovereignty over these areas. Ultimately, it was not until the 1940
Nationality Act that established that any person born in the United States, regardless of race, was
automatically a citizen, but as Venator-Santiago explains, “[w]hat is important to note is that by
1898 it was well established that persons born in the U.S. acquired a right to a constitutional
form of jus soli or birthright citizenship” (5), grounded in *Wong Kim Ark*. The dominant
interpretations of the Citizenship Clause, however, did exclude Native Americans and the
children of ambassadors and foreign sovereigns from the possibility of acquiring a U.S.

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26 See Ian Haney-Lopez *White by Law* for a detailed discussion of the history of U.S. citizenship and racial eligibility for naturalization. Again, the emphasis of this dissertation is the relationship between territory and citizenship, so I focus on *jus soli* citizenship and not naturalization.
citizenship at birth, also based on Wong Kim Ark, but, Congress possessed the power to enact legislation enabling the individual or collective naturalization of Native Americans (Venator-Santiago, 4). All of these precedents, then “confirm the rule that [by 1898] any person born on United States soil, whether in a state or a territory, who owes allegiance to the United States is a citizen entitled to the privileges and immunities of citizenship” (Citizenship Scholars Amicus Brief, 7). While this is generally true, however, there were other precedents set between 1868 and 1898 that complicate birthright citizenship in the territories. The main divide, which I discuss in the next section, involves the difference between colonial and occupied territories: whereas birth in the former constituted a birth within the United States for citizenship purposes, birth in the latter was understood to be outside.

Complications of Territorial Citizenship Between 1868-1898

According to Gettys, one of the main aims of the Citizenship Clause, other than to grant citizenship to freed Blacks, was to make federal citizenship “primary and paramount” to state citizenship. However, while it was clear that the language of the Fourteenth Amendment’s Citizenship Clause was meant to guarantee citizenship to all Blacks born in the United States, explicitly overruling the decision in Dred Scott, controversy arose over the meaning of the phrase “in the United States” and “subject to the jurisdiction thereof.” These issues are especially germane to the development of citizenship legislation in the territories as the Insular Cases were being decided. Even though the insular territories were ruled to be “unincorporated,”

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27 While there are various interpretations regarding the scope and meaning of the Fourteenth Amendment’s Citizenship Clause, for my purposes I only focus on its purpose of establishing the principle of jus soli and not jus sanguinis since this is the relevant aspect in examining the development of citizenship legislation in the insular territories.
it was never judicially decided that they were not “a part of the United States within the meaning…of the Fourteenth Amendment” (Gettys, 14).

Furthermore, as Gettys explains, “[w]henever territories have been incorporated into the United States by act of Congress, birth in those territories has been considered as birth ‘in the United States’ within the meaning of the Fourteenth Amendment (14). The two examples of this type of incorporation that extended the Constitution in its entirety, including the Fourteenth Amendment’s Citizenship Clause, are Alaska and Hawaii, with the cases of Rasmussen v. United States (1905) and Hawaii v. Mankichi (1903). These two cases established the precedent that an unincorporated territory becomes incorporated when Congress extends citizenship to it, but this would later be complicated in Balzac v. Porto Rico (1922) (discussed below).

Besides birthright citizenship, the other relevant mode of extending U.S. citizenship is through collective naturalization which is critical to understand when examining citizenship in the insular territories. Collective naturalization allows, for example, all the residents of a territory who were before considered not to be U.S. citizens, to be admitted into the political body as U.S. citizens, even if that territory is occupied and not recognized as within the United States. As Gettys writes,

Since the formation of the Union, the acquisition of United States citizenship by collective naturalization has occurred 1) on the admission of a sovereign state to statehood, 2) on the admission of territory to statehood, 3) as a consequence of collective incorporation by a special act of Congress, and 4) on the annexation of territory by treaty (143).

However, as Venator-Santiago notes, “in 1898, whereas eligible persons born in a colonial territory acquired a Fourteenth Amendment or constitutional citizenship at birth, persons born in an occupied territory could only acquire a U.S. citizenship through naturalization” (6). This divide between colonial and occupied territory, one of the core differences between U.S.
colonialism and imperialism, captures the important precedents from U.S. territorial citizenship that influenced the Insular Cases. The key distinction between colonial and occupied territories was that the former was understood to be on a trajectory to statehood, with U.S. sovereignty over the area meant to be permanent, whereas an occupied territory was designed to be a temporary status with the United States eventually ceding authority over the territory once the crisis or conflict that triggered the occupation had concluded. For the purposes of citizenship, it was understood that residents of colonial territories maintained allegiance to the United States, while residents of occupied territories, while temporarily under U.S. jurisdiction, did not maintain such an allegiance. When the Insular Cases created the previously nonexistent category of the unincorporated territory, an important component of that status was that while it was clear these areas were not on a path to statehood, unlike previous colonial territories, they were meant to remain under U.S. sovereignty for an indefinite, essentially permanent period of time and its residents would maintain an allegiance to the United States, unlike in occupied territories. Thus, past precedent would suggest that the insular territories should be treated as colonial, rather than occupied territories, since U.S. sovereignty over them was not intended to be temporary; rather, the Insular Cases established a framework that allowed the United States to maintain authority over these territories indefinitely.

By 1874 a person living in a colonial territory was guaranteed a birthright Fourteenth Amendment citizenship (Revised Statues, 1874), as Congress had extended the Constitution to these areas, including the Fourteenth Amendment’s Citizenship Clause and the right to jus soli or birthright citizenship, in contrast to birth in an occupied territory, which did not confer citizenship (Venator-Santiago, 6). Evidence of this comes from the Slaughterhouse Cases, in which Justice Miller ruled that one of the central purposes of the Fourteenth Amendment was the
establish that a person born in a territory or the District of Columbia was entitled to birthright citizenship (Bickel, 376). A last relevant precedent is that in 1892, in *Boyd v. Thayer*, the Court ruled that eligible “alien” residents of a colonial territory were collectively naturalized when a territory was admitted into the Union as a new state (143 U.S. 135).

In contrast to birth in a colonial territory, however, by 1898 the Court had established that birth in an occupied territory was equivalent to birth outside of the United States (*Inglis v. Sailor’s Snug Harbor, Slaughterhouse Cases; Wong Kim*). This meant that those people born in colonial territories were automatically granted a Fourteenth Amendment Citizenship that was equal to people born in the states, while those born in occupied territories were treated as being born outside the United States, and were thus ineligible for birthright citizenship. As Neuman writes, from the middle to the end of the 19th Century “[b]irth in the territories also conferred U.S. citizenship,” based on the decisions in *Loughborough* and *Dred Scott* (Neuman, 187). The only avenue of citizenship for people born in an occupied territory was through naturalization, which was controlled by Congress. After 1898 and the *Insular Cases*, however, birth in the newly created “unincorporated territory” was equivalent to being born outside of the United States for the purposes of birthright citizenship, meaning citizenship could only be obtained there through Congressional legislation in the form of collective or individual naturalization.

Another complication regarding the development of territorial citizenship between 1868 and 1898 is that before the *Insular Cases* citizenship also seemed to be linked to a person’s

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28 “Notwithstanding all the pomp and display of eloquence on the occasion, every citizen is a citizen of some State or Territory, and, as such, under an express provision of the Constitution, is entitled to all privileges and immunities of citizens in the several States; and it is in this and no other sense that we are citizens of the United States” (Miller opinion).

29 However, only certain people born in an occupied territory would be racially eligible for naturalization between 1789 and 1952, as U.S. immigration laws limited the naturalization of “aliens” to persons deemed to be either white or of African heritage (Gettys, 1934: 36–37; Haney Lopez, 1996). It wasn’t until the Immigration and Nationality Act of 1952 that race was barred from being a criterion of eligibility for citizenship.
physical body as opposed to being determined by the territory a person was residing in. In *Talbot v. Jansen*, it was established that a person born in Virginia who later moves to France was still a citizen of the United States. In *Murray v. Schooner Charming Betsy* (1894), it was held that

Even a person “born within the United States” who later emigrated, “not being proved to have expatriated himself according to any form prescribed by law, is said to remain a citizen, entitled to the benefit and subject to the disabilities imposed upon American citizens.

The *Insular Cases*, as I discuss below, broke from this tradition of linking citizenship and all its rights and privileges to a person’s body, and established a new legal doctrine that connected citizenship to the land a person was residing in.

A last important precedent in U.S. territorial citizenship is the theory that when territory is ceded from one authority to another, a treaty usually “provides that the inhabitants of the ceded territory automatically acquire the citizenship of the state to which the territory has been ceded (Gettys, 150). What had been important in U.S. territorial citizenship, then was not who the land is ceded from, but instead whether the language of the treaty explicitly conferred citizenship. This was not the case in the Treaty of Paris of 1898, in which Spain ceded the Philippine Islands, Puerto Rico and Guam to the United States, which stated that the for the “native inhabitants of the territories,” their “civil rights and political status…shall be determined by the Congress.” What makes this situation unique and a break from precedent in U.S. territorial citizenship is that the language of the treaty was purposely vague, and did not automatically make the inhabitants of these territories U.S. citizens once Spain ceded them.

This vagueness is what allowed Congress to establish plenary power over the insular territories, since the guarantees of U.S. citizenship did not automatically extend to people living in the territories acquired by the United States in 1898. More fundamentally, it was this this vagueness that led to the Court ruling in the *Insular Cases* that the territories acquired in 1898
had not been incorporated into the U.S. and while they were not wholly foreign, the residents in the territories were not U.S. citizens since the Treaty of Paris did not include language that extended citizenship to them, but were instead nationals\(^{30}\), “entitled to the protection of the United States” (Gettys,151) but not guaranteed the basic rights, liberties and privileges that are attached to citizenship.

In sum, by 1898 precedent in U.S. territorial citizenship had established that birth in a colonial territory was equivalent to being born in a state, meaning any person born in a colonial territory was automatically granted a Fourteenth Amendment birthright citizenship.\(^{31}\) In contrast, birth in an occupied territory was equivalent to being born outside of the United States, meaning any person\(^{32}\) born in an occupied territory was ineligible for birthright citizenship and could only obtain U.S. citizenship through Congressional legislation in the form of collective or individual naturalization. In the next section, I will outline the citizenship policy found in the three main views found in the academic debates leading up to the rulings in the *Insular Cases*.

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\(^{30}\) Also see *Gonzalez v. Williams* (1904), in which the Court ruled that Puerto Ricans were not “aliens,” but declined to address whether they were U.S. citizens. It has been difficult to determine when the category of national first emerged, but it is explicitly defined in the Immigration Act of 1924 (the Johnson–Reed Act) and the Immigration and Nationality Act of 1952 (McCarran–Walter Act). Isaac has a great passage on the category itself:

> Many inhabitants of U.S. insular possessions, including the Philippines, Guam, Puerto Rico, the Virgin Islands, and American Samoa, currently or in the past inhabited this ghostly other legal fiction under the U.S. imperium: the U.S. national. Such designation embodies in law and in person the contradiction and ambiguity of the U.S. republic’s relationship to these insular territories and their inhabitants. Indefinite governance of a subordinate location underwrote the logic of the U.S. noncitizen national designation (38).

\(^{31}\) The exception being Native Americans, who were excluded from U.S. citizenship even if they were born in a colonial territory until the passage of the Indian Citizenship Act of 1924.
Territorial Citizenship After 1898: The Academic Debates and the *Insular Cases*
Anti-Imperialist/Colonialist Territorial Citizenship Literature

*Anti-Imperialist/Colonialist Territorial Citizenship View: Intent and Status*

The anti-imperial viewpoint, which argued that the Constitution and the Bill of Rights extended to the territories *ex proprio vigore,* also believed that citizenship extended automatically when the United States annexed new territory. The anti-imperial/colonialist territorial citizenship view was against the constitutional legitimation of U.S. imperialism, as they argued that it was unconstitutional to annex a territory and maintain sovereignty over it without also extending birthright citizenship to its residents. They did not think that the Constitution permitted the United States to occupy and maintain sovereignty over a territory for an indefinite, seemingly permanent amount of time, without granting citizenship to the residents of the people living there, as this would mean that the Constitution supported a tyrannical form of government that ran counter to the democratic-republican principles anti-imperialists believed were the foundation of U.S. governance.

One of the anti-imperialist scholars from the academic debates, Carman Randolph, for example, argued that “not only did the Constitution apply to these territories with regard to the personal rights of their inhabitants, but furthermore, because these peoples upon annexation owed allegiance to the United States, they automatically became citizens of this nation” (Torruela, 291-292). Randolph, feared that the residents of the insular territories, because they would gain U.S. citizenship, would leave the islands and move to the contiguous United States, as they would have the right to move freely throughout the territories and states as citizens. He ponders that

[after many of the islanders had been relegated to the condition of undesirable, troublesome, and expensive "wards," there would remain probably several millions whose claims to citizenship by allegiance might not be rejected, and whose children would be *unquestionably* citizens of the United States. Among the rights incident to
citizenship is that of moving freely throughout the length and breadth of the United States. Whether Malays would be induced to come here in sufficient numbers to lower the rate of wages in any part of the country, I do not discuss. (309-310) [emphasis added]

For the anti-imperialists who maintained that the Constitution would automatically extend to any newly acquired territory, it was essential to understand the consequences that this could lead to. This included inhabitants of the territories possessing the full bundle of rights that are attached to U.S. citizenship, which would mean they could travel to and settle in the contiguous United States, gain residence and, Randolph made sure to point out, be able to vote.

Indeed, while the anti-imperialists denied that the United States could acquire and hold territory for a purpose other than statehood, it was not necessarily based on a genuine concern for the well-being and rights of the inhabitants of the territories. These anti-imperialist scholars asserted that the Constitution and all its provisions would extend automatically to any newly acquired territory, but were also concerned of the potential developments that this would cause. There was some trepidation that the inhabitants of the territories, from inferior races and cultures, would automatically become U.S. citizens without any Congressional action, capable of moving to the mainland, establishing residency and voting, posing a subversive threat to the U.S. White national identity.

*Anti-Imperialist/Colonialist Territorial Citizenship View: Constitutional Anchor*

With the passage of the Fourteenth Amendment and its Citizenship Clause, the anti-imperial view argued that birth in a territory generates the same citizenship that exists for those born in the states.
The imperialist argument held that citizenship did not automatically extend to inhabitants born in the territories, since these scholars did not believe that a territory was fully within the United States for constitutional, and Citizenship Clause, purposes. This was based on a desire to foster U.S. global expansionism by making sure residents of the territories did not have the rights and liberties attached to citizenship, which could have potentially constrained Congress in governing these areas. Instead, the imperialists wanted Congress to have broad, plenary authority to occupy these territories indefinitely without having to worry about constitutional challenges to its power. Imperialists would assert that since the residents of the territories were not U.S. citizens, they were not entitled to the protections of the Constitution or the Bill of Rights.

The imperialist view thus argued that a birth in a territory was equivalent to a birth outside of the United States for citizenship purposes. As Gardiner argues:

[t]he only other source of American citizenship [besides naturalization] is birth, and that must be within American territory, over which the constitution and laws shall have been specifically extended. No constitution, no Fourteenth Amendment; hence no citizenship by birth. Therefore, if Congress ratifies the treaty and does no more, neither present nor future native inhabitants [of acquired territories] will be citizens; but if Congress extends our constitution and laws over the annexed domain, all present and future native inhabitants will be endowed with Federal citizenship. (182)

Gardiner emphasizes that only a specific act of Congress could extend birthright citizenship to residents of the territories. Since the newly acquired territories from the Spanish American War were not “within” the United States, despite the United States maintaining sovereignty over them according to the imperialist viewpoint the Citizenship Clause did not apply to their residents. It is important to note that the past precedents I have highlighted in previous sections in this chapter demonstrate that colonial territory was understood to be within the United States for citizenship
purposes, however, even if the Constitution had not been explicitly extended to a territory.

Gardiner and the imperialists argue that even if the United States maintain sovereignty over a territory, citizenship does not apply there unless Congress has enacted legislation to have citizenship apply there through the extension of the Constitution; this would make a territory within the United States for the purposes of citizenship.

Racist thinking undergirded the imperialist argument, as scholars argued that the American system of government was not suited for certain peoples and that some races and cultures were incapable of becoming U.S. citizens. This was the reason why the imperialists asserted that Congress had plenary authority over the territories, since it must determine which form of government fit the condition of the territory and the character of its inhabitants, “whether they be savages, barbarians, or civilized persons” (Sparrow, 51). Thayer stated that “[a] cannibal island and the Northwest Territory would require different treatment; and restraints beneficial in the one case would be harmful in the other” (481). Gardiner claimed that

Malays, constituting a considerable proportion of the Filipinos, being neither black nor yellow, but brown, the fifth subdivision of the human race, can be excluded as absolutely as the Chinese. It has been repeatedly suggested by the Supreme Court that the Thirteenth, Fourteenth and Fifteenth Amendments apply only to whites and blacks and not to Chinese, and hence Malays. (182)

In sum, the imperialist rationale held that the United States could extend citizenship to the territories by treaty and legislation, but unless such an extension was made explicit, residents of the territories were not to be considered U.S. citizens. The imperialist scholars did think, however, that certain “inalienable,” fundamental rights did apply to the inhabitants of the territories, such as freedom of speech and religion, even if they were not U.S. citizens.

While the imperial viewpoint was clear about how citizenship did not automatically extend to the territories, it did not provide a clear category for residents of the territories if
Congress did not grant citizenship. If not citizens, what would they be considered, since they would ultimately be under U.S. sovereignty? This issue was addressed in *Gonzalez v. Williams* (1904), when the Court ruled that Puerto Ricans were "noncitizen nationals," something between an “alien” and a citizen.

**Imperial Territorial Citizenship View: Constitutional Anchor**

The central Supreme Court precedents of U.S. territorial imperialism were used to constitutionally legitimize the imperial viewpoint’s defense that birthright citizenship does not extend to the United States’ territorial possessions, including *American Insurance Company v. Canter* (discussed in the first chapter), *Fleming v. Page*, and *Cross v. Harrison*. These cases provide precedent for treating territories as outside the United States for constitutional purposes, by allowing territories to be governed in ways that would not be allowed in states or as allowing for the United States to temporarily occupy territories in which citizenship does not apply.

U.S. policy toward Mexican territory, for example, provides the important precedent to support the imperialist viewpoint on citizenship. During the Mexican War of 1846-1848, U.S. troops occupied and governed certain parts of Mexico, and the issue became whether military occupation of Mexican territory meant that it was now within, or a part of, the United States for constitutional purposes. In *Fleming v. Page* (1850), goods were shipped from the Mexican Port of Tampico, which was occupied by the U.S. military, to Philadelphia. The issue was whether the Constitution’s Uniformity Clause (which would later be the central issue in the major ruling of the *Insular Cases, Downes v. Bidwell*), which requires all duties “be uniform within the United States,” meant that customs duties were being properly assessed on this shipment of goods. *Fleming* relied on the precedent set in *American Insurance Co. v. Canter* (1828), in which the
Court had to determine whether the territory of Florida was fully within the laws of the United States after the treaty of cession from Spain based on whether Article III of the Constitution applied to territorial courts. The Court determined that explicit action from Congress was necessary for the laws of the United States to apply in the territory, arguing that “the government and laws of the United States do not extend to such territory by the mere act of cession (26 U.S. 511). Instead, Congress must actively choose to make the laws operative in territory acquired through an act of cession, even if the United States maintains sovereignty over the territory (Raustiala, 47-48). This is why Congress was able to create territorial legislatures that could then create territorial courts that do not conform to and are not limited by Article III of the Constitution, meaning Congress did not have to follow generally applicable constitutional provisions in the territories, according to Chief Justice John Marshall.

The ruling in Fleming, drawing on Canter, allowed the United States to treat an occupied territory as under U.S. control, while not being fully a part of the nation, or as “foreign localities

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33 The full details of the case are discussed in Lawson and Seidman (pp. 146-150). The main issue was whether admiralty jurisdiction could be exercised in Florida only by federal congressionally created courts, as outlined in Article III of the Constitution, or if territorial legislatures could also create courts with admiralty jurisdiction. By ruling that territorial legislatures were able to create courts with admiralty jurisdiction, the Court set a precedent that Congress can create federal territorial courts that do not have to conform to Article III.

34 Raustilia notes that in Canter the Court made a distinction between territory annexed through cessation from other Westphalian states, such as Florida was from Spain, and Native American territory gained through conquest based on racist ideology. The basis for this distinction between previously Indian territory and previously Spanish territory was grounded in respect for other territorial sovereigns and drew on principles of international law. International law established that states had some discretion in retaining the laws of a prior sovereign after conquest or accession. This principle is reflected in the law of occupation, which directs conquering states to retain as much of prior sovereign’s law as is feasible. The rules were different for land taken from “savages,” who were thought to have primitive, barbaric legal systems whose rules would never be retained. (48)

35 An argument against Canter having much influence can be found in McAllister v. United States (1891), in which the Court explained that lack of tenure of territorial court judges, a clear violation of Article III, was allowed because the territorial status was meant to be temporary. This supports the policy of White-settler colonialism stemming from the Northwest Ordinance and would suggest that the Court never thought that the territories would places where the Constitution did not apply permanently, as they should eventually become states. It is not clear how the justices in McAllister would have justified violations on Article III in the territories knowing they would not be temporary.
in a domestic or constitutional sense” (Venator-Santiago, 8). Thus, the Court ruled that U.S. occupation of a territory was not enough to make it fully domestic territory for constitutional or citizenship purposes. As Chief Justice Taney explained:

As regarded by all other nations, it [the port of Tampico, Mexico] was a part of the United States, and belonged to them exclusively as the territory included in our established boundaries…. But yet it was not a part of this Union. For every nation which acquires territory by treaty or conquest holds it according to its own institutions and laws (50 U.S. 603, at 615).

What was needed to extend the full breadth of constitutional protections and guarantees to a territory, according to the ruling in Fleming, was an explicit act of Congress; cession alone does not establish constitutional governance of an occupied territory. Thus, Fleming set an imperial constitutional precedent, in which an occupied territory could be under U.S. sovereignty from the perspective of other sovereign nations, but remain outside the United States domestically for constitutional and citizenship purposes.

A last important constitutional precedent to support the imperialist viewpoint comes from Cross v. Harrison (1853), which involved the territory of California. On May 12, 1846, the United States declared war on Mexico, and two years later, on May 30, 1848, the Treaty of Guadalupe Hidalgo was ratified, which transferred sovereignty over California from Mexico to the United States.36 The issue in Cross involved the constitutionality of the wartime military government that was created and governed in the territory throughout the war and in the immediate years after the treaty was signed and peace was reached. There was no uncertainty regarding the constitutionality of the military government while the war was ongoing, i.e. between when war was declared and when the peace treaty was signed. The military government in California collected tariffs during the war, but continued doing so after the treaty was ratified.

36 Territory encompassing California, Nevada, Utah and portions of Wyoming, Colorado, Arizona and New Mexico were transferred, but Cross focuses on the constitutionality of the governing structure of California.
since Congress failed to enact legislation establishing a new governing structure after the war’s conclusion. Thus, it would seem that authority justifying the military tariffs ended on May 30, 1848, when the treaty was ratified.\(^{37}\) Despite the end of the military tariffs, tariffs remained in place after May 30, 1848, despite no congressional action until March 3, 1849, when Congress designated San Francisco as a collection district. Cross, Hobson & Co. argued that the tariffs they were forced to pay between May 30, 1848 and March 3, 1849, should be returned, because during that time there was no federal authority to collect any tariffs, as the war was over and the military government could no longer be considered legitimate during a time of peace. In *Cross*, the Court legitimized the actions of the military government throughout the entirety of its operation, including after the treaty with Mexico was signed formally ending hostilities, writing

> The territory [California] had been ceded as a conquest, and was to be preserved and governed as such until the sovereignty to which it had passed had legislated for it. That sovereignty was the United States, under the Constitution, by which power had been given to Congress to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States, with the power also to admit new States into this Union, with only such limitations as are expressed in the section in which this power is given. The government, of which Colonel Mason [the military governor of California] was the executive, had its origin in the lawful exercise of a belligerent right over a conquered territory. It had been instituted during the war by the command of the President of the United States. It was the government when the territory was ceded as a conquest, and it did not cease, as a matter of course, or as a necessary consequence of the restoration of peace. The President might have dissolved it by withdrawing the army and navy officers who administered it, but he did not do so. Congress could have put an end to it, but that was not done. The right inference from the inaction of both is, that it was meant to be continued until it had been legislatively changed.

I believe this passage provides the central underpinning of the *Insular Cases*, establishing that the United States can potentially occupy a territory indefinitely through rule by a military

\(^{37}\) You could make the case that the military tariffs could be justified until a later date, August 9, 1848, when Secretary of State Halleck instructed the San Francisco customs collector to end the military tariff, i.e. when the government provided official notification of the peace treaty to the officers collecting the military tariff. The point is that it was clear that by August 9, 1848, the military tariffs had ended.
government even after the cessations of hostilities and the formal ending of a war, as long as Congress does not act to alter the military rule and establish a civil form of government. The Court explicitly ruled that until Congress legislated for the territory of California, the military government established during the war with Mexico would remain in place indefinitely. As Lawson and Seidman explain: “At its narrowest, the Court’s reasoning [in Cross] is that wartime powers carry into peacetime as long as the President and Congress do not affirmatively end them” (179). This is a precedent that would be influential in the initial rulings of the Insular Cases, since it established that a territory could be under U.S. sovereignty, within the definition of the United States, but remain occupied by a military government until Congress decided to act.  

A key distinction between Cross and the Insular Cases, however, is the territories at issue in each. In Cross, while it took two years between when the territory of California was ceded to the United States to when it became a state, there was never any doubt that it would eventually become a state, even while governed as an occupied territory; it was understood that the military occupation was temporary. While citizenship would not apply during this period of occupation, in between cessation and statehood, it was known that this would not be a permanent status. With the Insular Cases, there was never the same intention regarding eventual statehood for Puerto Rico, Guam and the Philippines, and the territorial status was designed to last indefinitely, not temporarily. Cross does at least provide a constitutional precedent for the imperialist viewpoint, however, in that the Constitution and the Citizenship Clause do not apply to occupied territory.

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38 I would note that while I view Cross as an influential precedent for the Insular Cases, I certainly do not view it as constitutionally legitimate. I would agree with Lawson and Seidman’s critique and conclusion that a military government occupying and governing a territory in peacetime is unconstitutional, as Congress was required to enact legislation creating a territorial government through its authority based in the Territorial Clause. The reason Congress did not act until 1850 was most likely due to controversy over slavery, as it would take the Compromise of 1850 to settle the status of slavery in the territories acquired by the Mexican-American War. As part of the compromise, California was admitted as a free state.
Third View/Insular Cases Territorial Citizenship

Third View/Insular Cases Territorial Citizenship View: Intent and Status

The third view/Insular cases argued that citizenship did not automatically extend once the United States annexed a territory, but did once a territory was incorporated into the United States. If a territory was deemed to be unincorporated, birth in this area was considered to be a birth outside the United States for the purposes of citizenship, unless Congress, which maintained plenary authority over the territories, decided to explicitly extend citizenship. This policy allowed for maximum flexibility in deciding whether inhabitants of unincorporated territories were U.S. citizens: Congress had the power to withhold or extend citizenship based on what policy it deemed most appropriate for a specific policy.

One reason such flexibility was desirable for the United States was expressed by Justice Brown, who was worried about the potential consequences for U.S. empire if inhabitants of newly acquired territories, of starkly different “habits, traditions and modes of life” would automatically become U.S. citizens (182 U.S. 244). This would be a “false step” for the U.S. empire, if “alien races, differing form us in religion, customs, laws, methods of taxation and modes of thought” were given the full array of rights and privileges available to U.S. citizens (182 U.S. 244). By not automatically extended citizenship to the territories, the third view/Insular Cases viewpoint was able to support the U.S. empire and its expansionist drive at the turn of the 20th Century.

The third view that prevailed in the Insular Case established that citizenship does not automatically extend to unincorporated territories, but Congress can pass legislation to explicitly grant citizenship to the residents of the territories, similar to the view espoused by the imperialists. A resident in an unincorporated territory obtains citizenship only if Congress explicitly extends it.
Third View/Insular Cases Territorial Citizenship View: Constitutional Anchor

The constitutionality of how citizenship functions in the unincorporated territories is dubious and tenuous, since the Constitution only provides for a Fourteenth Amendment Citizenship. I would argue that the Insular Cases created an unconstitutional form of statutory citizenship that is not grounded anywhere in the Constitution. There is no mention in any of the Constitution’s text of a type of citizenship that is less than a full Fourteenth Amendment one. Thus, I would argue further that once a person becomes a citizen, the only type of citizenship that is possible for that person to have is the one found in the Fourteenth Amendment, which guarantees the full bundle of rights that all U.S. citizens living in the states possess. There have been Supreme Court cases, however, that have affirmed the existence of a territorial citizenship that differs from the type of citizenship that exists for people born in states or for citizens living in a state, especially regarding the rights that are connected to citizenship.

In *Balzac v. Porto Rico* (258 U.S. 298 (1922), for example, the Court ruled that while Congress had collectively naturalized Puerto Ricans in 1917 with the passage of the Jones Act, making Puerto Ricans U.S. citizens, they were not entitled to the full protection and rights of the U.S constitution until they came to reside within a state. *Balzac* is a very problematic case, which held that because Puerto Rico had not been incorporated into the United States, a U.S. citizen living in Puerto Rico did not have the right to trial by jury. Another major constitutional issue with *Balzac* is how the Court ruled that even though the Jones Act granted U.S. citizenship to Puerto Ricans, this did not mean that Puerto Rico was incorporated. This was in stark contrast to the rulings in *Rassmussen v. United States* and (1905) and *Hawaii v. Mankichi*. In Rassmussen, the Court held that
[t]he treaty with Russia concerning Alaska, instead of exhibiting, as did the treaty with Spain regarding the Philippine Islands, the determination to reserve the question of the status of the acquired territory for ulterior action by Congress, manifested a contrary intention to admit the inhabitants of the ceded territory to the enjoyment of citizenship, and expressed the purpose to incorporate the territory into the United States.

The ruling *Rasmussen* thus established that a territorial incorporation is closely linked to whether citizenship has been extended to it. In *Mankichi*, the Court determined that Hawaii was incorporated into the United States in 1900, when U.S. citizenship was granted to its inhabitants.

As Torruella notes,

> [t]he crucial holding of *Mankichi* was that it was the granting of citizenship that was the determinative factor in deciding whether a territory had been incorporated into the United States. This criterion not only made logical sense, but was in keeping with our national history as demonstrated by the practice that had been uninterruptedly followed since the days of the Northwest Ordinance of 1787 upon the acquisition of new territories. (314).

In *Balzac*, however, the Court ruled that “[i]t is locality that is determinative of the application of the Constitution... not the [citizenship] status of the people who live in it,” which demonstrates how the Court viewed citizenship as connected to territory, not the individual citizen, and explains how a U.S. citizen from Puerto Rico acquires rights when they physically move to a state and leave an unincorporated territory.

The ruling in *Balzac* was rooted in racism, as Chief Justice Taft’s opinion declares that the ruling in *Rasmussen* does not apply since

> Alaska was a very different case from that of Porto Rico. It was an enormous territory, very sparsely settled and offering opportunity for immigration and settlement by American citizens. It was on the American Continent and within easy reach of the then United States. It involved none of the difficulties which incorporation of the Philippines and Porto Rico presents, and one of them is in the very matter of trial by jury. (258 U.S. 298).

For Taft, the connection between the extension of citizenship and territorial incorporation that was established in *Rasmussen* was not applicable to Puerto Rico, since it would not fit the White-settler colonial model that Alaska was able to follow. Taft further explained that
The jury system needs citizens trained to the exercise of the responsibilities of jurors. In common-law countries centuries of tradition have prepared a conception of the impartial attitude jurors must assume. The jury system postulates a conscious duty of participation in the machinery of justice which it is hard for people not brought up in fundamentally popular government at once to acquire. Congress has thought that a people like the Filipinos or the Porto Ricans, trained to a complete judicial system which knows no juries, living in compact and ancient communities, with definitely formed customs and political conceptions, should be permitted themselves to determine how far they wish to adopt this institution of Anglo-Saxon origin, and when...We can not find any intention to depart from this policy in making Porto Ricans American citizens, explained as this is by the desire to put them as individuals on an exact equality with citizens from the American homeland, to secure them more certain protection against the world, and to give them an opportunity, should they desire, to move into the United States proper and there without naturalization to enjoy all political and other rights.

Torruella captures the nuance of this situation, in which U.S. citizens living in an unincorporated territory gain certain rights by moving to the states, succinctly when he notes that the Insular Cases established a precedent in which “the constitutional rights of U.S. citizens are determined by the status of the land on which the citizens are located, rather than by their status as citizens” (310). This was a clear break from U.S. territorial citizenship before 1898, in which birth in a colonial territory was equivalent to birth in a state and generated an equal form of citizenship that included the full bundle of constitutional rights attached to U.S. citizenship. This connection between citizenship and territory has often been ignored by scholars.

In sum, when the ruling in Downes created a situation in which the insular territories were considered “unincorporated,” it “muddied the issue of what is the ‘United States’ not only for the purpose of the tariff laws but for citizenship as well” (Leibowitz, 28). Since the Court ruled that the insular territories were not considered to be incorporated into the United States, it allowed the United States to institute a policy in which the residents of the territories were not automatically U.S. citizens because they were considered to be in territory that was not fully within the United States for the purposes of citizenship, despite 1) residents of these territories owing allegiance to the United States; 2) U.S. sovereignty over these areas being unquestioned;
3) residents of these territories clearly being under the jurisdiction of the United States; 4) U.S. authority over the unincorporated territories being indefinite (not temporary). The broad plenary authority granted to Congress over the territories, however, allowed for the possibility of the creation of legislation that would explicitly extend U.S. citizenship to the residents of the territories. It also allowed for the possibility, as demonstrated by later rulings, that even if the residents of the territories were granted citizenship by Congress, it could be an unequal form of citizenship compared to the Fourteenth Amendment Citizenship available to people born in or residing in the United States. This helps to explain why Puerto Ricans, who became U.S. citizens in 1917 with the Jones Act, acquired certain rights when they moved to states.

Concluding Thoughts on Territorial Citizenship in the Insular Cases

The Insular Cases established a new precedent in U.S territorial law: insular territories were considered to be unincorporated, a previously nonexistent category. This led to another new precedent in U.S. territorial citizenship jurisprudence, as the Insular Cases established that citizenship did not automatically extend to the people living in the unincorporated insular territories, a break from U.S. territorial law before 1898 in which a person born in a territory automatically obtained U.S. citizenship based on the doctrine of jus soli. And, even if the residents were deemed to be U.S. citizens through congressional legislation that collectively naturalized residents of an unincorporated territory, Congress’ plenary power of the territories and Balzac created a situation in which U.S. citizens living in an unincorporated territory may not have access to certain rights attached to citizenship, but gain these rights when they physically move to a state. Thus, with the creation of the unincorporated territory, the Insular Cases “paved the way for the creation of a category within the postslavery Constitution for an
American subject who is not a citizen. In this way, the U.S. republic secured power over another people who are treated as ‘property’” (Isaac, 31).

The key point is that the Insular Cases did not make it clear, and certainly did not mandate, that residents of the insular territories were indeed U.S. citizens. The Fourteenth Amendment’s Citizenship Clause was thus understood to not apply ipso facto in the insular territories, as residents of a territory that are considered “subject to the jurisdiction” of but not in the United States, such as the insular territories, were not automatically granted U.S. citizenship, and even if they were, such as Puerto Ricans were with the Jones Act, they may still not have access to the full bundle of rights associated with citizenship in the states.

Initially, citizens of the unincorporated territories were assumed to be non-citizen nationals of the United States. However, “the people of all the territories have obtained citizenship by Congressional action” (Leibowitz, 28). There is still substantial argument and disagreement over whether persons born in the territories are U.S. citizens through the Fourteenth Amendment or have a statutory citizenship as a result of federal action. This explains why citizenship legislation has developed in a varied manner in American Samoa, Guam and the Northern Mariana Islands, as “[t]he Insular Cases framework has led to not only increased discretion by Congress but also increased discretion for the courts and increased uncertainty” (Leibowitz, 28).

In sum, the extension of U.S. citizenship, or lack thereof, to the Pacific insular territories has been heterogeneous and inconsistent, due to the plenary power granted to Congress over the territories in the Insular Cases, the uncertainty of whether residents in an unincorporated territory are U.S. citizens through the Fourteenth Amendment, through federal statute, or otherwise and
because of the connection between the rights attached to citizenship and the status of the territory where a citizen resides.
Chapter 3 - The U.S.S. Guam

“Guam may be aptly compared to a ship where the narrowness of the quarters and the object to be attained can only be accommodated by a single director.”


Introduction

Perhaps more than any of the other territories acquired after 1898, Guam was always viewed instrumentally by the United States.\(^3^9\) The various reports filed by military personnel to the U.S. Navy in the immediate years after Guam was annexed\(^4^0\) demonstrate how the United States thought the Pacific island would serve a singular purpose: to provide a strategic naval station for the U.S. military.\(^4^1\) This instrumental reasoning was revealed through the ship metaphor the Navy would use when thinking about Guam. For the United States government and military, Guam was best thought of as a ship, the U.S.S. Guam, meaning only one person, i.e. a ship captain, could govern the island effectively and legitimately. Thus, military rule was always understood to be the form of government that would operate in Guam, which it did for 52 years

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\(^{39}\) Guam’s size and location has made it historically “an area of prime military importance” (Leibowitz, 303). In the next section of this chapter I chronicle the long history of colonialism and imperialism in Guam, as the United States was not the first Western state to view Guam as an area of strategic military importance.


\(^{41}\) The United States’ belief in Guam’s strategic value as a naval station demonstrate the powerful influence the military writings of A.T. Mahan had on the strategies that underpinned the development of U.S. imperialism in the late 20\(^{th}\) Century, as discussed in the first chapter of this dissertation. This passage from the Annual Report of the Governor captures how the United States viewed Guam solely as a valuable strategic military asset:

The location of Guam in the center of the Western Pacific, about equally distant from Manila to Yokohama on the direct route from Hawaii to the Philippines and the fact of its possessing a fine harbor make it of great and recognized strategic value to the U.S., as a point to be occupied and held for naval purposes alone. It has neither present nor prospective economic value and should not, then, excite the interest of other than scientific and military men. (emphasis added)
(1898-1950). There was no intention for Guam to develop its own form of civil government, since it was not considered to be anything other than a strategically valuable land for the U.S. military to exploit. As an unincorporated territory, Guam remained under the authority of the President, who appointed the military governor (the ship’s captain), and Congress, which maintained plenary authority to legislate for the island, or ship, as it deemed appropriate. Even the tutelage the inhabitants of Guam were to receive was different from other U.S. territories, rooted in the logic of governing the island as a ship: it was designed to train Guamanians to be sanitary, productive and disciplined workers for the naval base, and not political in nature.\textsuperscript{42} Guamanians were thus viewed as primitive, dutiful and willing ship workers, meaning they were ideal for the physically demanding and tedious work of a ship. This is why, according to U.S. policymakers, Guamanians only required vocational, technical and hygienic training, so they could provide the necessary labor for the U.S.S. Guam to function efficiently. It was further argued that Guamanians had no desire for political tutelage or self-governance, and happily accepted their role as “mess attendants” (Thompson, 237-245). The United States thus thought Guamanians and the military base were interdependent, as

\begin{quote}
the Naval Station is entirely dependent upon the natives for mechanics, machinists, artisans of all kinds, laborers, and for some food supplies. The native population is entirely dependent on the Naval Station for medical assistance and medicine. Their protection against contagious diseases, and maintenance in proper physical condition, are necessary for the preservation of the health of the Americans and the consequent effectiveness of the Naval Station …No Americans can be induced to live here permanently, therefore, the continuing employees of the Naval Station must be natives. Under intelligent direction they make efficient laborers and excellent artisans, and fill subordinate positions faithfully and well. In fact, we have here a sober, intelligent, virile, and docile population of sufficient size to equip a Naval Station, at all times, and still leave enough to produce food for all. (George Dwyer, Annual Report of Naval Station, Island of Guam. Typewritten letter to the Navy Department, Washington, 30 June 1905, 2-3)
\end{quote}

\textsuperscript{42} The tutelage for the other territories the United States acquired after the Spanish American War, i.e. the Philippines and Puerto Rico, was a form of political education that the United States thought could eventually lead to forms of self-government.
This passage captures how the United States military believed that its ability to maintain a strategically valuable naval station on Guam was dependent on properly training Guamanians for the subordinate role they were naturally suited for: providing the supplemental physical labor needed for a ship to operate.43

In this chapter, I will first offer a brief historical overview of western colonialism and imperialism in Guam. Next, I will apply Critical Race Theory’s interest convergence methodology 44 to U.S. citizenship for Guam. I will examine the initial forms of legislation that created a Guamanian citizenship in 1902 (the legislation created the category “citizens of Guam”, i.e. it made Guamanians “wards” of the United States), attempts to extend U.S. citizenship in 1937 and the conferral of U.S. citizenship in 1950 through an interest convergence lens. I argue that the United States based its decisions to withhold or extend citizenship to Guamanians on whether it was strategically beneficial to U.S. political, social and/or economic interests. Unlike in the case of American Samoa, where the strategic interests of Samoans and the United States diverged at particular moments, preventing the enactment of legislation that would have extended citizenship, there was such a moment of interest convergence for Guam, which generated the 1950 Organic Act. I will thus argue that interest convergence can offer an explanation for the different outcomes in citizenship legislation between American Samoa and Guam, as Samoans remain non-citizen U.S. nationals while Guamanians have been U.S. citizens since 1950.

43 U.S. policymakers also viewed Guamanians as “like children, easily controlled and readily influenced by examples, good or bad” (Annual Report from the Governor). This fits with the ideology of Western colonialism and imperialism I discuss in the introduction, in which certain races were infantilized and viewed as less developed from an evolutionary prospective when compared to Anglo-Saxons.

44 For a summary of interest convergence, see the introduction. I rely on Derrick Bell’s “Brown v. Board of Education and the Interest-Convergence Dilemma” and Mary Dudziak’s Cold War Civil Rights: Race and the Image of American Democracy as models for applying interest convergence to citizenship legislation in American Samoa, Guam and the Commonwealth of the Northern Mariana Islands.
Historical Overview of Western Colonialism and Imperialism in Guam

Similar to the islands of Samoa, Guam has suffered through a long history of Western encroachment and imperialism based on its size and location, which have historically made it “an area of prime military importance” (Leibowitz, 303). Guam was originally inhabited by the Chamorros, descendants of Austronesian people originating from Southeast Asia, who developed a complex class-based society. While there was no centralized government in Chamorro society, Guam was divided up into districts that were organized around matrilineal clans led by a high chief and assistant.

The initial contact and colonization of Guam occurred in 1521, when Ferdinand Magellan landed in while making his journey around the globe. This initial encounter was ominous, as seven Chamorros were killed and various houses were destroyed (Leibowitz, 303). Spain would claim Guam as a possession in 1565, but earnest colonization did not begin until 1668, when Jesuit missionaries led by Father Diego Luis de Sanvitores, working for the Spanish monarchy, arrived. The Chamorros rebelled against Spanish colonization, however, as “[f]ierce battles, coupled with typhoons and European diseases, reduced the Chamorro population from the 50,000-100,000 figure put forth by Father Sanvitores to 3,678 persons in 1710 when the official census of Guam was taken by the Spanish government” (Leibowitz, 304). By 1783, only 1,500 Chamorros remained on the island, as many who were not systematically killed left to settle on the Northern Mariana Islands.

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45 Guam is the largest island in the Northern Pacific, “and the largest in a broad expanse of ocean stretching from Hawaii to the Philippines and from Japan to Papa New Guinea” (Leibowitz, 303). It is roughly 3,000 miles from the West Coast of the United States.
46 Some works that offer examinations of pre-Contact Chamorro society:
47 Leibowitz notes that these figures and sizes are disputed and debated in various works on this history of Guam, but it is clear that Spanish colonization had a devastating effect on the Chamorro population.
The overall impact of Spanish colonization on the Chamorro population and culture was catastrophic. Those who survived the initial colonization were forced to convert to Catholicism, which was done in a systemic manner through the removal of the Chamorro population from their lands into centralized locations on the island. As Leibowitz notes: “These displacements and the decimation of the population destroyed the traditional Chamorro world” (305). The Chamorro communal land system based on caste, central to their society, was destroyed and never replaced. “Chamorro influence would continue through the years by language, by custom and by example; but the wars had taken their toll. Whatever vigor the Chamorro culture had would have to be recreated rather than retained” (Leibowitz, 305).

From 1783 to 1898 the population of Guam increased due to colonization but remained small compared to other Spanish colonial possessions, i.e. Puerto Rico and Cuba, as settlers from the Philippines and Mexico arrived on Spanish ships. Members of Chamorro society married with Spanish, Mexican and Philippine soldiers, creating a new culture that fused elements of Chamorro society with those of the colonizers. Keesing writes that:

The original Chamorro population was first decimated by vain struggles against Spanish troops, and then intermarried extensively with Filipino, white, and, to some extent, Japanese strains…Obviously, all local family lines are now woven in complex fashion out of the Chamorro, Filipino, and other strains. This, indeed, represents the extreme instance within the South Seas of how, out of a mixing process, a neo-native population is compounded. (503)

Thus, while there was some increase in Guam’s population between 1783 and 1898, it remained small enough where Spain could govern in an autocratic manner, with little thought about granting any form of political autonomy or self-government to the Guamanian people.48

In 1898, Spain would cede sovereignty over Guam to the United States through the Treaty of Paris, which ended the Spanish-American War. The United States military would

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48 When the United States annexed Guam in 1898, there were around 10,000 people living on the island.
govern the island until 1950, when the Guam Organic Act would transfer authority over Guam from the Department of Defense to the Department of the Interior, where federal control remains. The Treaty of Paris granted broad authority to Congress in its ability to govern the territories acquired from Spain, as it stated: “The civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by Congress” (Article IX, 30 Stat. 1754, Dec. 10, 1898). From 1898 to 1950, however, Congress did not create legislation to govern Guam (it did create a Guamanian citizenship in 1902 that I will examine later on in the chapter), which placed it in an “anomalous status.” Based on the opinions of the Attorney General immediately following annexation in 1898, the authority of the United States to rule Guam was rooted in the powers of the President as Commander-in-Chief of the Army and Navy of the United States. The importance of these opinions was that the U.S. military was granted broad authority to govern Guam as it deemed appropriate with seemingly no constitutional restrictions. The intention of U.S. rule in Guam is captured by President McKinley, who issued instructions to the first Governor of Guam on January 12, 1899:

Finally it should be the earnest and paramount aim of the naval administration to win the confidence, respect and affection of the inhabitants of the island of Guam by assuring them in every possible way that full measure of individual rights and liberties which is the heritage of free peoples, and by proving to them that the mission of the United States is one of benevolent assimilation, substituting the mild way of justice and right for arbitrary rule.

This would be official U.S. policy in Guam until the creation of the Guam Organic Act in 1950.

49 “His power [the military governor appointed by the President] as a military governor was intended to be plenary. He had authority to do what the exigencies of military government required, and held the supreme legislative, executive and judicial authority of the island. At that time, in that distant and little known island, the President could not do otherwise than leave him a large discretion, and his acts should not be held void strictly upon technical reasoning” (Op. Atty. Gen. 61, 1903).
50 “The political status of [Guam] is anomalous. Neither the Constitution nor the laws of the United States have been extended to them and the only administrative authority existing in them is that derived immediately or immediately from the President as Commander-in-Chief of the Army and Navy of the United States.” (Op. Atty. Gen 292, 1904).
The Cottman Report, drafted in 1904, provided the first outline of U.S. military policy in Guam. The report delineated U.S. desire to change the language from Spanish to English, to educate the local population, to rid the island of Catholic influence and foster U.S. Protestantism, to sanitize the population and to impose a work ethic, as Guamanians were viewed as inherently lazy.\textsuperscript{51} As discussed earlier in the chapter, the educational emphasis was on vocational training, to ensure that the Navy would be able to maintain its base efficiently; the Navy viewed its role as one of beneficent paternalism to Guamanians.\textsuperscript{52} The Navy also banned certain activities, such as cohabitation and concubinage, made laws preventing male nudity in public, and outlawed gambling, cockfighting and implemented prohibition through various general orders (Leibowitz, 310).

The U.S. military would govern Guam instrumentally based off of the paternalistic recommendations of the Cottman Report until World War II, when Japan invaded Guam and occupied it from December 1941 to July 1944. Japanese rule over Guam during WWII would be brutal.\textsuperscript{53}

Guamanians were beaten in order to force them to bow and petty offenses were punished with death. The Japanese immediately established schools for teaching the Japanese language and culture, utilizing in many cases as intermediaries Chamorros from Saipan, resulting in a resentment among some Guamanians against their northern island.

\textsuperscript{51} Excerpts from the Cottman Report: “Compel all children to go to school and teach them English…make American the business as well as the official language…Establish Public Schools and compel all children to go to school…send the Spanish priests to Spain and the native priest to one of the other islands….Let the doctors look into sanitary requirements. All the towns need services…Compel all males above 18 to do a days work six in the week until they become accustomed to work. This will prevent their laying around the homes idle and drinking La Tuba. Make them build a good carriage road all around the island” (Paragraphs 1, 2, 3, 5, 6, 7, and 9).

\textsuperscript{52} The Navy’s report from 1950, \textit{U.S. Navy Report on Guam 1899-1950}, described its goal “to enlighten the minds of the people…and to stimulate their development through training and self-discipline…Of greatest importance, however, is the progress made, which cannot be statistically computed, in the broader horizons and awakened ambitions of the Guamanians, who have used every opportunity the American educational methods offered them to escape from the apathetic peonage of two generations ago” (10-11).

neighbors…the Japanese built and began to utilize a number of concentration camps, their ultimate purpose obscure but ominous. (Leibowitz, 311-312)

Guam was liberated from Japanese control on July 21, 1944, but there was immense physical destruction from the U.S. military action carried out to retake the island. Once released from the Japanese concentration camps, over 18,000 Chamorros were relocated, as the massive amount of destruction caused by WWII meant that most homes had been destroyed.

After the United States gained control of Guam in July 1944, a large area was taken over for military purposes, as “[f]armlands were turned into airfields. Villages which escaped destruction during the actual fighting were utilized as supply depots and barracks” (Leibowitz, 312). The post-WWII policy of the United States was to strengthen Guam as a naval base to support military action in the Pacific, i.e. to continue to use Guam instrumentally as a strategically valuable military holding. During the time period, the military also began a process of trying to make the population majority White by increasing the military presence on the island: “In 1940, of the total population of 22,240, 91% was Chamorran. By 1949, although the total population had grown a third to 27,124, Whites on the island had increased from 3.5% in 1940 to 38.5%” (Leibowitz, 313). Furthermore, from 1950 to 1962 any person attempting to travel to Guam had to gain permission from the U.S. military, even though an Organic Act was passed in 1950, which transferred authority over Guam from the military to civilian control (from the Department of Defense to the Department of the Interior). The military thus continued to use wartime powers to exert power of Guam and promote U.S. strategic interests, increasing the presence of its personnel even in peacetime.

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54 Guam was bombed for six months leading up to the U.S. invasion, and that was followed by three weeks of fighting. “Of the 3,286 dwellings in Guam, more than 2,500 were destroyed” (Leibowitz, 312).
The Organic Act of 1950 defined Guam as an unincorporated territory\(^{55}\), with no promise of eventual statehood, but created a territorial government for the island and transferred federal authority over Guam from the Department of State to the Department of the Interior. The Organic Act of 1950 continues to guide the status relationship between Guam and the United States, in which Guam remains in a subordinate position to the federal without having the same protections and entitlements of “incorporated” U.S. states. Congress has the power to act on purely local Guamanian matters that would be unconstitutional if attempted on states. The Organic Act of 1950, being a congressional creation, declares that “the government of Guam shall have the powers set forth in this Act” (Guam Organic Act of 1950, Ch. 512, sec. 3). This means that Guam only has the power to act from specific congressional authorizations, and possesses no local authority to govern itself through self-determination. In 1968, the Guam Elective Governor Act was passed, which included an amendment that extended various provisions of the U.S. Constitution to the island, but this legislation did not fundamentally alter the relationship between Guam and the United States, which continued to govern Guam instrumentally. While the second sentence of Section 1 of the Fourteenth Amendment was explicitly extended to apply to Guamanians,\(^{56}\) the first sentence\(^{57}\) was omitted (but was included on the initial draft of the legislation) to prevent residents of Guam from having access to a Fourteenth Amendment birthright citizenship.

\(^{55}\) Guam as an unincorporated territory means that it “is appurtenant to the United States and belongs to the United States but is not a part of the United States…Unincorporated areas are not integral parts of the United States and no promise of statehood or a status approaching statehood is held out to them” (H.R. Rep. 1365, 81\(^{st}\) Cong. 1srr Sess. 8, 1949).

\(^{56}\) “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws,” i.e. The Due Process Clause and the Equal Protection Clause.

\(^{57}\) “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.”
More evidence of Guam’s subordinate position to the United States and being treated instrumentally is demonstrated in *Guam v. Olsen* (1978), when Guam attempted to establish its own supreme court by transferring appellate jurisdiction from the District Court of Guam. The Court, emphasizing Congress’ plenary authority to govern Guam, wrote

[We] should be reluctant without a clear signal from Congress to conclude that it intended to allow the Guam Legislature to foreclose appellate review by Art. III courts, including this Court, of decisions of territorial courts in cases that may turn on questions of federal law (444 U.S. 1016).

Thus, Guam would only be permitted to create its own supreme court with a right to appeal from that court to the U.S. Supreme Court or another federal court established under Article III unless Congress decided to create such a court. Furthermore, in *Sakamoto v. Duty Free Shoppers, Ltd.* (1983), decided by the Ninth Circuit Court of Appeals, Congress’ vast plenary authority over Guam, despite the passage of the Organic Act of 1950, was also confirmed. The court explained that

[in the territories, Congress has the entire dominion and sovereignty, national and local, and has full legislative power over all subjects upon which a state legislature might act…Since Guam is an unincorporated territory enjoying only such powers as may be delegated to it by the Congress in the Organic Act of Guam…the Government of Guam is in essence an instrumentality of the federal government…Plenary control by Congress over the Guamanian government is illustrated by the provision that Congress may annul any act of Guam’s Legislature…the Guamanian government…is a creation of Congress itself.” (613 F. Supp. 381).

In *Guam v. Okada* (1982), also decided by the Ninth Circuit, the court argued that “[e]xcept as Congress may determine, Guam has no inherent right to govern itself” (694 F. 2d 565). Thus, one of the main issues for any potential form of Guamanian sovereignty is that the Organic Act turns local issues into federal ones that require congressional oversight (Leibowitz, 353).58 Another problem is that Congress maintains the power to veto any legislation enacted by the

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58 Education is probably the best example.
Guamanian legislature (Leibowitz, 357). In sum, “[e]ven after establishing an island government on Guam [through the Organic Act of 1950], Congress retains sufficient reserve power over territorial processes…to act directly on local legislative issues” (Leibowitz, 350). The overall relationship between the federal government and Guam is one of subjugation and broad oversight through Congress’ plenary authority to govern the unincorporated territories. Guam, as an unincorporated territory and despite having its own government, does not have the same amount of sovereignty over its local affairs as states possess, and continues to be governed instrumentally and in strategically beneficial ways by the United States. I end this section with Justice Thurgood Marshall’s dissent from *Guam v. Olson*, which captures the underlying relationship of subordination that still exists between the United States and Guam:

> Although this case at first glance may seem unimportant to anyone but the residents of Guam, the result of the Court’s decision is perhaps unprecedented in our history. The Court today abolishes the Supreme Court of Guam, a significant part of the system of self-government established by some 85,000 American citizens through their freely elected legislature…[I]t is worth noting that Guam is a small and isolated possession that Congress might well have wished to give unusual autonomy in local affairs. No doubt, too, Congress’ sense of the proper way to govern far-distant citizens has changed considerably in recent decades from the expansionist ethic which prevailed when Hawaii was annexed, the Spanish possession (including Guam) ceded, and the Virgin Islands purchased. It is thus not surprising to find a broad authorization for self-government granted by the Organic Act passed in 1950.

Marshall recognized that the Court was affirming the United States’ plenary authority over the unincorporated territories by prohibiting Guam from establishing its own supreme court that could have the final ruling in cases involving federal law and its application to Guamanians.

In the next section, I will apply Critical Race Theory’s interest convergence methodology to the development and enactment of U.S. citizenship legislation for Guam. I will examine the initial forms of legislation that created a Guamanian citizenship in 190259 (the legislation created

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59 It is not clear what constituted Guamanian citizenship and whether it had any real significance. In 1929, the Annual Report of the Governor of Guam states that
the category “citizens of Guam”, i.e. it made Guamanians “wards” of the United States), attempts to extend U.S. citizenship in 1937 and the conferral of U.S. citizenship in 1950 through an interest convergence lens. I will argue that the United States based its decisions to withhold or extend citizenship to Guamanians on whether it was strategically beneficial to U.S. political, social and/or economic interests.

**Interest Convergence and U.S. Citizenship Legislation in Guam**

The extension of U.S. citizenship to Guam “was the product of a long determined campaign on the part of the Guam citizenry, sometimes with the support of the local Naval officials, against the Washington opposition of their Department of the Navy counterparts” (Leibowitz, 317). I

even the term “Citizens of Guam” being almost meaningless at the present time, since there is no established system of acquiring citizenship in Guam and no law stating that the exact requirements for such citizenship...Citizens of Guam do not possess the privilege of freedom on entry and residence in the United States, and the extension of citizenship, in the same manner as is done in Territories of the United States, would be a just and generous act.

It seems that this “Guamanian citizenship” was what emerged from the language of the Treaty of Paris, which granted broad, plenary authority over Guam to the President and subsequently the Navy. Since it was clear that the Constitution and U.S. citizenship did not apply to Guam unless Congress created legislation that explicitly extended both, this new category of citizenship that applied specifically to the residents of Guam materialized. The Department of State, in a report filed for hearings held in 1937 on legislation that would have extended citizenship to Guam, also demonstrates the confusion surrounding the status of Guamanians. The report explains

that since the acquisition of Guam by the United States…there has been no legislation concerning the civil rights and political status of the inhabitants of Guam, and that it would therefore seem highly desirable that legislation be enacted covering comprehensively the nationality status of certain classes of persons residing in the island at the time of its cession to the United States and now residing in the island or in other American territory and the status of persons born in the island since its acquisition” (United States Congress. Senate. Citizenship for Residents of Guam, Hearings Before a Subcommittee of the Committee on Territories and Insular Affairs on S. 1450, 75th Cong., 1st sess., [1937], p. 7-8).

Thus, from 1898 to 1950 an ambiguous form of citizenship and nationality existed for inhabitants of Guam, “Guamanian Citizenship,” which had unclear requirements and protections - this is why most of the “Citizens of Guam” viewed it as a meaningless form of citizenship that still expected Guamanians to pledge allegiance to the United States (see testimony of Margarito Palting from the 1937 hearings, who argues that Guamanian citizenship does not exist and is a legally dubious category of citizenship (p. 92-93). A report filed in 1950 by the Committee on Public Lands, however, states that Guamanians are nationals of the United States (United States Congress. House of Representatives. Providing a Civil Government for Guam, and for Other Purposes, 81st Cong., 2nd sess., 1950, p. 2).
argue that citizenship legislation for Guam demonstrates another example of interest-convergence: Congress was only willing to extend citizenship when the political, economic, social and/or military interests of the United States would benefit and aligned with those of Guamanians, and not because of any moral imperatives.  

The first of the three moments involving U.S. citizenship legislation in Guam viewed through the lens of interest convergence is legislation in 1901 that would not have extended U.S. citizenship to Guam, but would have created a government with some constitutional protections for Guamanians rooted in the Bill of Rights. As I will argue, it was strategically beneficial for the United States Navy for Congress not to extend U.S. citizenship. The Treaty of Paris granted Congress wide authority over Guam, stating that: “The civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by Congress.” The broad, plenary authority of Congress over the unincorporated territories would be affirmed in the *Insular Cases*. Since Congress decided to withhold any official action until it created an organic act for the island in 1950, this meant Guam existed in an anomalous state from 1898-1950, with power over it residing in the President and U.S. military. In essence, Guam’s status was that of a “conquered” territory: the military maintained authority over it, with Guamanians treated as “foreign” inhabitants. The U.S. Attorney General described the contours

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60 While U.S. citizenship was not extended to Guam until 1950, there are examples of Guamanians who were able to obtain citizenship after serving in the U.S. Army or Navy. From hearings held in 1950 over legislation that would collectively naturalize Guamanians, Leon Guerrero, a member of the Guam Congress, explains “[t]hat while it is commonly considered that we are not entitled to become citizens of our country, those who joined the Regular Army and the Navy or Marines, of course, are entitled by national statutes. One hundred and fifty-seven of those people are in Guam and only 60 have obtained citizenship papers. The others are only too willing to do the same thing but it is financially prohibitive for them to appear before Federal court as required by law” (United States Congress. Senate. Citizenship for Residents of Guam, Hearings Before a Subcommittee of the Committee on Territories and Insular Affairs on S. 1450, 75th Cong., 1st sess., (1937), p. 59). So, there were some exceptions to Guamanians having access to U.S. citizenship before 1950, but it involved military service.

of Guam’s status and existence to the United States in a series of opinions in the years immediately following the Treaty of Paris, explaining:

The political status of these islands [Guam and Tutuila] is anomalous. Neither the Constitution nor the laws of the United States have been extended to them and the only administrative authority existing in them is that derived immediately or immediately from the President as Commander-in-Chief of the Army and Navy of the United States.\(^{62}\)

Another opinion outlines that:

[The governor of Guam’s] power as a military governor was intended to be plenary. He had authority to do what the exigencies of military government required, and held the supreme legislative, executive, and judicial authority of the island. At that time, in that distant and little known island, the President could not do otherwise than leave him a large discretion, and his acts should not be held void strictly upon technical reasoning.\(^{63}\)

In 1902, Guamanians petitioned the United States for citizenship, which was thought of as (1) a method to constrain plenary Naval authority over the island by protecting certain civil rights and liberties; (2) a way to provide the inhabitants of Guam with a sense of dignity and equality; (3) a way to for the United States to demonstrate its acceptance of Guamanians’ loyalty and willingness to share in the obligations of the U.S. national polity (Leibowitz 318). While the Senate voted to pass legislation\(^{64}\) that would have established a government for Guam in 1903, the bill was then sent to the House Committee on Insular Affairs, but was never voted on. There was also no mention of citizenship in the bill and the government that would have been installed would have been similar to the one created by the Treaty of Paris and outlined in the opinions of the Attorney General.\(^{65}\) There are some striking exchanges from the congressional record

\(^{64}\) S. 6599 (1903)
\(^{65}\) S. 6599 states That until Congress shall otherwise provide all military, civil, and judicial power necessary for the government of the inhabitants of the island of Guam shall be, and hereby is, vested in such person or persons as the President shall select; and they shall exercise said power in such manner as he shall direct.
regarding S. 6599, however, that highlight the alarm many senators had with the United States
Navy occupying Guam with no constitutional restraints.

Mr. Bacon: I will state to the Senator very frankly. The bill is one which imposes upon
the President the duty and gives him the power of unlimited legislation and all the powers
of government similar to the amendment the Senator from Wisconsin [Mr. Spooner]
offered to the bill which was passed in reference to the Philippine Islands.
I recognize the fact, as stated by the Senator from Ohio [Mr. Foraker], that these are very
small pieces of territory and that it is impossible at this time, or at any time perhaps, to
frame a civil government for them which will be satisfactory, or which will be justified
by the number of people there. At the same time I dislike to see upon the statute books an
indefinite and unlimited power of the Executive to perform all three functions of
government.

In this passage, Senator Bacon is justifying an amendment to S. 6599 that would have limited the
force and effect of the government created through this legislation to March 3, 1905. This was to
prevent the Executive from having plenary authority over the government of Guam for an
indefinite, seemingly permanent period of time, forcing Congress to review whether it would
want to change Guam’s government after three years.

Another passage from the congressional record further emphasizes the apprehension
some senators had regarding the relationship between the United States and Guam, which was
governed by the Navy through the orders of the Executive branch:

Mr. Hoar: I ask why it is that these insular possessions of ours, as they are called, are
now continued under the War Department?
Mr. Foraker: They have been continued under the Navy Department, if the Senator will
allow me to correct him…As to the two islands of Tutuila and Guam, they are both under
the Navy Department; and they are there because Congress has never legislated with
respect to them; and we are embarrassed all the time because there has been no act of
Congress relating to them.

The bill would have added certain protections for Guamanians against the military government, including due
process, equal protection, rights for those accused of crimes, the right of habeas corpus, search and seizure, free
speech, freedom of the press, freedom of religion, and that “the statutory laws of the United States not locally
inapplicable shall have the same force and effect in said island as in the United States.” Thus, while S. 6599 would
not have created a civilian government, it would have extended certain constitutional protections to Guamanians,
providing some constraints on military rule.
Mr. Hoar: Why are they kept under the Navy Department? Why is it that we are legislating over a community of about nine or ten thousand people, as I understand? Why is it that such a people is kept under a belligerent department of the Government?

Mr. Foraker: They have been kept under that Department simply because Congress has chosen to take no action. I have been trying ever since I have had any right to initiate legislation for those islands to get Congress to legislate. Now I am about to get some legislation, the best, I think, that can be provided under the circumstances, and I think it is the highest importance that we provide this legislation now.

Mr. Hoar: Mr. President, I do not rise at this time to make criticisms of the Senator’s plan of government…but I want to take occasion to say what I have thought and intended to say for some time – that if anything could show the utter unfitness of this country, as we are constituted to transact business, to govern dependencies thousands and thousands of miles off, it is the fact that they have to wait for their legislation. Not only these 9,000 people in Guam, but the 9,000,000 people in the Philippine Islands, have to wait in the first place for such information as is filtered through the War Department and the Navy Department to Congress, and then, in time peace, years after we have established our claim to rule over them, they are kept under the Departments of War and of the Navy, whose law is secrecy and arbitrary power – the rule of one man.

A last passage from the congressional record further highlights the alarm some senators had of unregulated and unrestrained Naval rule over Guam:

Mr. Hoar: A very interesting instance of [secret and arbitrary Naval power] has come up during the present session. Mabini is one of the ablest men of this generation. Nobody will question that. He is the author of Aguinaldo’s constitution, which was an admirable constitution. He is the author of many great state papers; he is the author of the reply to President McKinley; and when he replied to President McKinley, President McKinley was answered by a foeman worthy of his intellectual steel. That man was a paralytic; his lower limbs had withered; his flesh had shrunk away until he weighed no more than 90 pounds; and he was kept in prison in Guam because he would not take the oath of allegiance to the United States in Guam. He said that other men had been allowed to take the oath in the Philippine Islands, and that he did not know, and could not know until he went to his home, what the condition of things was in the Philippine Islands, and that as the grave was just opening for him he would not make the last important act of his life an act of dishonor.

If you had read that in Plutarch, you would have thought that it was one of the great heroes of antiquity who had assumed that attitude; if you had read it in our Revolutionary times as an utterance of Ethan Allen or Sam Adams or Laurens it would have been one of the proudest facts in American history, and would have been the theme that would have stirred the blood and quickened the pulse of great gatherings anywhere on American soil. That man was kept, under those circumstances, a prisoner in the island of Guam. I offered a resolution of inquiry here as to why that man was kept a prisoner, and the answer came from the Executive that, of course, he was not a prisoner; that he had been at liberty to go anywhere on the face of the earth he wanted since about the middle of July, when an order to that effect had gone out; a copy of the order was sent in here; and yet such is the
impossibility of a fitting rule of such possessions that it turned out that, although that order went on the 15th of July, it had not been obeyed until the last few days in October. At least when General Miles, traveling there, stopped at Guam he found Mabini in prison under the charge of a company of marines, and a marine marching backward and forward before his door with a loaded musket.

Of course nobody questions the absolute good faith of the President; nobody questions the absolute good faith of the Secretary of War, who was the means of transmitting that order; but it is so impossible for to govern men who are dependent, who are not heard themselves, and who have no votes and no rights, at a distance of thousands of miles off, that the foremost man in the Eastern Hemisphere at this moment in character, in intellect and fame was kept in prison – I will not say a dungeon – was kept in a prison several months after the order had gone out there to set him free.

That is the kind of rule we are going to have so long as we claim the right to govern and to tax men who have no votes and who have no representation, and to deal with me whose constitutional rights have got in the final resort to be determined by a court 8,000 miles away, and by a Congress who can not find time – while they are filibustering about this, that or the other measure here – even to listen to their complaints, and a President who does not know for three months after he has given an order to release an illustrious patriot whether the order has been disobeyed or not.

In sum, these passages from the congressional record in 1903 demonstrate that there were some senators who were wary of unchecked Naval rule over Guam. The Senate attempted to enact legislation that would have extended certain constitutional protections for Guamanians, but did not consider granting citizenship to Guam in 1903. From 1898-1950, while there was clear desire for Guamanians to be granted U.S. citizenship (see Leibowitz 318-319), Congress did not enact legislation that would have extended citizenship during this time period. As will become clear in the next section, in which I discuss hearings that were held in 1937 regarding the extension of U.S. citizenship to Guam, the reason for the refusal of Congress to pass legislation that would have made Guamanians U.S. citizens was because of Naval opposition. Thus, the interests of the United States, based on strategic considerations from the U.S. Navy, diverged from the interests of Guamanians, preventing the enactment of legislation that would have extended citizenship to Guam.
The next moment of U.S. citizenship legislation for Guam I examine is from 1937, which would have extended U.S. citizenship to Guamanians but was opposed by the Navy and not enacted. This moment offers an example of interest-divergence, since the U.S. military thought such legislation would hurt U.S. interests. There is evidence of Guamanians desiring U.S. citizenship as early as 1902. As Leibowitz explains, “[t]o the Guamanians, citizenship would bring not only some limitation on untrammeled Naval authority but also a sense of dignity and equality with the rest of the United States…and finally an acceptance by the national government of their political loyalty and willingness to share the obligations of the U.S. Federal system” (318). In the mid-1920’s, a petition created by a small group of representatives in the House called for all Chamorros living in Guam to become U.S. citizens or have the ability to become naturalized citizens of the United States. An article from 1925 in the Guam Recorder, “Chamorros Make Plea for Citizenship,” noted that several former governors of the island had endorsed extending citizenship to Guamanians, and explained that “the Guam Congress takes the present opportunity, which in its judgment seems most appropriate for the attainment of a right so momentous and inestimable, to gain plead with the sincere hope that at his time their efforts will not have been in vain.” In the same year, the Guam Recorder reported on a speech given by the Governor of Guam, Henry Bertram Price, in which he said:

These people of Guam through their representatives present today, July 1, 1925, have on main desire in which they are very earnest, and that is to be accorded the right of naturalization as citizens of the United States. Under the laws they are neither aliens nor citizens, yet owe perpetual allegiance to the United States. Over one hundred men of Guam, most of them in the Naval Service, have been denied naturalization. There is no

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66 There is also evidence that Guamanians did not seek independence from the United States, but believed that the extension of citizenship “will not only being about the fulfillment of our aspirations to become citizens but will also cement firmly and permanently our internal relations with the mother country [the United States]” (United States Congress. Senate. Citizenship for Residents of Guam, Hearings Before a Subcommittee of the Committee on Territories and Insular Affairs on S. 1450, 75th Cong., 1st sess., (1937), p. 13).

67 “Be it resolved: That the Congress of the United States of America be petitioned to enact a law making all native Chamorros of Guam citizens of the United States, or granting them the privilege to become naturalized citizens of the United States” (Leibowitz, 318).
uniformity of the system. He laws appear to be ambiguous and the court’s interpretations are different.\textsuperscript{68}

There was increased Guamanian desire for citizenship after Guam was not included in the 1927 law that extended citizenship to residents of the Virgin Islands, as demonstrated in the following dialogue from congressional hearings in 1937 over legislation that would have extended citizenship to Guam:\textsuperscript{69}

\textbf{Senator Reynolds:} In other words, you [speaking to the Chairman of the Guam Congress, on behalf of Guamanians] and your people feel that since the people of the Virgin Islands have been accorded citizenship you are likewise entitled to the same privilege and consideration?

\textbf{Mr. Bordallo:} Yes, sir, at least the same privileges.

\textbf{Senator Reynolds:} And more so as a matter of fact, since you have been under the administration of the United States Government since the ending of the Spanish-American War in 1898, which is a period of approximately 38 years?

\textbf{Mr. Bordallo:} Yes, sir; and the status of the inhabitants of the other territories whereby Guam was acquired have been determined.\textsuperscript{70}

More evidence of Guamanian actions that demonstrate a desire for citizenship during this time period can be found in the 1929 \textit{Annual Report of the Governor Guam}. Governor Willis W. Bradley explained that

\begin{quote}
[t]he greatest aspiration of the people of Guam is to become full-fledged citizens of the United States. Their present status is quite unsatisfactory, even the term “Citizens of Guam” being almost meaningless at the present time, since there is no established system of acquiring citizenship in Guam and no law stating the exact requirements for such citizenship…Citizens of Guam do not possess the privilege of freedom on entry and
\end{quote}

\begin{flushright}
\textsuperscript{68} \textit{Guam Recorder}, July 1925.
\textsuperscript{69} \textit{Guam Recorder} \textit{(1926)} and United States Congress. \textit{House of Representatives. Hearings Before the House Committee on Insular Affairs}, 69th Cong., 2nd sess., 1927. B.J. Bordallo, in a letter he wrote in response to the Navy’s letter arguing against the extension of citizenship to Guam, mentions how the political status of the inhabitants of the Philippines, Cuba Puerto Rico and the Virgin Islands had been determined while the status of Guamanians had not (Ibid, p. 12.) It is interesting that the status of the inhabitants of American Samoa is not mentioned, since Samoans had also been demanding legislation that would have granted them citizenship during this time, as they were, and still are, considered non-citizen nationals. Bardallo explains that Guamanians “are only concerned to the extent that our people be granted citizenship rights as have the people of Hawaii, Alaska, Puerto Rico and the Virgin Islands” (Ibid, 12).
\textsuperscript{70} United States Congress. Senate. \textit{Citizenship for Residents of Guam, Hearings Before a Subcommittee of the Committee on Territories and Insular Affairs on S. 1450}, 75th Cong., 1st sess., \textit{(1937)}, p. 34.
\end{flushright}
residence in the United States, and the extension of citizenship, in the same manner as is done in Territories of the United States, would be a just and generous act.\textsuperscript{71}

In 1933, a petition signed by a quarter of Guamanians and presented to Congress stated

[that the natives of the island of Guam have no other flag than that of the United States. That the natives of the island of Guam are not looking forward to separation from the protection and support of the motherland. That the natives of the island of Guam fervently aspire to become citizens of the United States.\textsuperscript{72}]

In sum, from at least 1902 there had been a strong desire for Guamanians to be granted U.S. citizenship, from Guam citizens and from the U.S. Governors of the island. What was the reason, however, that legislation was not enacted to make the residents of Guam U.S. citizens? The answer would become clear in congressional hearings held in 1937,\textsuperscript{73,74} when there was an effort to extend citizenship to Guam through legislation that was drafted and introduced in both the Senate and the House.\textsuperscript{75} The Department of the Navy was adamantly opposed to extending U.S. citizenship to Guam and explicitly argued to Congress that it believed Naval rule would be threatened by allowing Guamanians to become U.S. citizens. The report filed by the Navy for the hearings stated that

The Navy Department is of the opinion that the enactment of this measure [S. 1450] would be prejudicial to the best interest of both the United States and the native population of Guam. The complicated international situation in the Far East, the questionable status of treaties, and the fact that the United States is withdrawing from the Philippines all contribute to the undesirability of any change in the status of the people of Guam or in the method of administration of that island during the present unstable conditions. The geographical location of Guam in the midst of foreign territory, with

\textsuperscript{71} United States Congress. House of Representatives. \textit{Annual Report of the Governor of Guam}. 71\textsuperscript{st} Cong., 1\textsuperscript{st} sess., 1929, p. 4.

\textsuperscript{72} “Petition for American Citizenship,” Dec. 19, 1933.

\textsuperscript{73} United States Congress. Senate. \textit{Citizenship for Residents of Guam, Hearings Before a Subcommittee of the Committee on Territories and Insular Affairs on S. 1450, 75\textsuperscript{th} Cong., 1\textsuperscript{st} sess., (1937).

\textsuperscript{74} The proposed legislation that would have extended U.S. citizenship to Guam were in response to a joint resolution passed by the Guam’s Congress in 1936, which called for Guamanians to become U.S. citizens.

\textsuperscript{75} A bill “To confer United States citizenship upon certain inhabitants of the Island of Guam and extend the naturalization laws thereto” (United States Congress. House of Representatives. 75\textsuperscript{th} Cong., 1\textsuperscript{st} sess., 1937, H.R. 4747.

A bill “To confer United States citizenship upon certain inhabitants of the Island of Guam and extend the naturalization laws thereto” (United States Congress. Senate. 75\textsuperscript{th} Cong., 1\textsuperscript{st} sess., 1937, S. 1450.
foreign commercial and colonizing interests to be considered, together with the racial problems of that locality, combine to provide for a fertile field for international disputes. It is believed that the change provided for in the proposed legislation would aggravate the danger to peaceful international relations.\textsuperscript{76}

The report filed by the Navy Department is thus explicit in its argument against extending U.S. citizenship to Guam, which it viewed was not in the strategic interests of the United States.\textsuperscript{77} The State Department was also opposed to the extension of citizenship to Guam, but only after meeting with representatives from the Navy, as explained by R.W. Flournoy, a State Department representative:

\begin{quote}
As to whether [Guamanians] should be citizens of the United States, the [State] Department in its first letter said that it would not express an opinion. In its second letter, after a consultation with representatives of the Navy Department, and careful consideration by officials of the State Department, especially those having to do with matters relating to the outlying possessions in general, the Department came to the conclusions and said in the letter that it did not favor the proposal to make the inhabitants of Guam citizens of the United States, although it would be desirable or at least there would be no objection to declaring the inhabitants of Guam to be citizens of Guam owing allegiance to the United States.\textsuperscript{78}
\end{quote}

The Navy also believed that Guamanians already enjoyed many of the privileges of U.S. citizenship without having the same obligations normally attached to it:

\begin{quote}
At the present time, as citizens of Guam,\textsuperscript{79} the people of that possession enjoy the privileges of United States citizenship and have few, if any, of the obligations connected therewith. They are accorded passport privileges, have no Federal taxes or tariffs to pay, receive free medical and educational services, and are, in general, a particularly privileged people.\textsuperscript{80}
\end{quote}

\textsuperscript{76} United States Congress. Senate. \textit{Citizenship for Residents of Guam, Hearings Before a Subcommittee of the Committee on Territories and Insular Affairs on S. 1450, 75th Cong., 1st sess., (1937), p. 6.}
\textsuperscript{77} The Department of Labor also filed a report in response to S. 1450, and argued that island of Guam “is potentially strategic importance to the United States defenses in the Pacific Ocean” (United States Congress. Senate. \textit{Citizenship for Residents of Guam, Hearings Before a Subcommittee of the Committee on Territories and Insular Affairs on S. 1450, 75th Cong., 1st sess., (1937), p. 7.}
\textsuperscript{79} Here is a mention of the nebulous form of citizenship that existed for residents of Guam between 1898 and 1950: Guamanian citizenship.
\textsuperscript{80} United States Congress. Senate. \textit{Citizenship for Residents of Guam, Hearings Before a Subcommittee of the Committee on Territories and Insular Affairs on S. 1450, 75th Cong., 1st sess., (1937), p. 6.}
While Guamanians has been expressing a clear desire for U.S. citizenship, the Navy dismissed their wishes by claiming that the citizens of Guam already benefitted from the privileges of citizenship. Why then did Guamanians view the extension of citizenship as important? I believe the debate in these hearings between the citizens of Guam and the Department of the Navy highlight notions of dignity and equality that are also attached to full citizenship, ideas that the Navy dismisses and ignores.\footnote{For example, in one exchange Senator Gibson asks Leon Guerrero, a member of the Guam Congress, was asked if he objected to Naval rule. He responded that Guamanians were “neutral” as far as which federal department maintained authority over Guam, but implored senators that Guamanians did not want to be considered aliens, but citizens, “[t]o have a sense of security and to have something to transmit to our posterity to live up to in accordance with what we have learned and not to be this [indicating book entitled ‘A Man Without a Country’]” \cite{United States Congress. Senate. Citizenship for Residents of Guam, Hearings Before a Subcommittee of the Committee on Territories and Insular Affairs on S. 1450, 75th Cong., 1st sess., (1937), p. 57-58}. Thus, there was something deeply meaningful regarding notions of dignity and equality attached to U.S. citizenship for Guamanians.}

There is also evidence of beneficent paternalism in the Navy’s report, found in the following passage:

The naval island government carefully guards [the citizens of Guam] from exploitation by outsiders and protects their lands. The general policy of the naval government with reference to educational activities has been to enlighten the minds of the people and to stimulate their development through training and self-discipline. Emphasis is placed on industrial and agricultural training in order to improve the capacity of the native population for self-maintenance and economic independence. However, as attested by the fact that they are not self-supporting and require not only Federal economic assistance but careful training and supervision from the paternal island government, there is every indication that these people have not yet reached a state of development commensurate with the personal independence, obligations and responsibilities of United States citizenship. It is believed that such a change of status at this time would be harmful to the native people.

It was not just that the Navy contended that it would be against the strategic interests of the United States to extend citizenship to Guam, but it also believed that it was in the best interests of Guamanians as well, rooted in racist, imperial Anglo-Saxon paternalistic ideology. For the
Navy, Guamanians had not had the proper tutelage necessary for republican self-governance, and were not yet ready for the responsibilities of U.S. citizenship.

Members of the Congress of Guam who attended the hearings for S. 1450 attempted to persuade senators to pass the legislation against Naval opposition. For example, B.J. Bordallo, the Chairman of the House Council of the Guam Congress and was elected to represent the people of Guam in their petition for U.S. citizenship at the hearings, wrote a reply to the report filed by the Department of the Navy in opposition to the passage of S. 1450. Bordallo argued that enacting S. 1450 “would not only elevate to the highest degree that spirit of friendship, understanding, and helpfulness that came with the American flag in Guam, but would also materialize the message of President McKinley in his letter of instructions to the first Governor of Guam,” 82 (which I reference and quote from earlier in this chapter). Bordallo believed that it was a “moral and binding obligation” for the United States to execute the terms of the Treaty of Paris and make explicit the political status of Guamanians. 83 He also refuted the idea that Guamanians enjoyed the privileges of U.S. citizenship, asserting that

[t]he civil population of Guam has been under military rule since American occupation in 1898 without any justification. We were, as we still are, a peace-loving and law-abiding people…We have taxation without representation, a naval officer, as Governor of Guam, has the power to make or break laws, to provide the moneys of the people in any way or manner he desires without giving accountability to the people who are the taxpayers; the Governor appoints all high government officials including the court judges and the island treasurer, island attorney and district commissioners to serve during his pleasure… 84

83 Ibid, p. 12.
Bordallo goes on to dispute the Navy Department’s claims that Guamanians receive free medical services, free education and gives examples of how the Navy has acted in way that is detrimental to the economic development of Guam. Bordallo ends his letter with the following passage:

For 39 years past our people have treated the military authorities in Guam in the spirit of friendship and understanding as proclaimed in President McKinley’s message…we have extended them our spontaneous hospitality, inherent in our race; and we have wholeheartedly cooperated in the Americanization program for the assimilation of American culture, ideals and relations of our mother country; we have proven our loyalty to the country and our allegiance to the American flag in time of peace and in time of war…There can be no change in status, since we have none; we are neither aliens nor citizens, and we are not recommending for a change in administration in the island nor are we asking Uncle Same for Federal appropriations. We are only petitioning the Congress to give citizenship rights accorded the inhabitants of the Territories and other possessions of the United States; which we feel we are justly entitled to, and have been waiting for for 39 years.

Bordallo’s letter and testimony during the hearings highlight how Guamanians had repeatedly demonstrated their desire for citizenship, but due to the strategic interests and influence of the Navy, Congress failed to enact citizenship for Guam. Put simply, Guamanians wanted U.S. citizenship but their interests diverged from those of Naval rule, which explains why Congress did not enact legislation that would have made Guamanians U.S. citizens.

Some senators argued that Naval rule and the extension of citizenship were not compatible, as demonstrated by the following exchange:

**Senator Clark:** Now, would the people of Guam rather have this bill passed and the benefits of paternalism withdrawn, or vice versa, or would they prefer to continue to receive the benefits without this bill of citizenship?

**Mr. Bordallo:** Our only petition is to be given citizenship.

**Senator Clark:** I understand, but the other question is naturally tied up with it. There is an old saying that “You cannot eat your cake and have it, too.” Would you desire to have this government abolished? I may say I am always opposed to government by military establishments of the United States or any other kind. But would you prefer to have the material benefits in the way of bonuses and grants, paternal grants, extended by the United States Government on the theory this was a particular part of the military system.

or naval system of the United States, using “military” in its broad term, or would you prefer to continue as you are?

Mr. Bordallo: Mr. Senator, that is a question that I think my people are the only ones qualified to answer.

Senator Clark: I think it is very important, though, or at least I think there should be a plebiscite on the question, or some method of determination set up.

Mr. Bordallo: There were no indications when I left Guam but what our people are satisfied under the Navy Department, but we just figure that since we have been under it 39 years that we are now ready and willing to assume the responsibilities of American citizenship.

Senator Gibson: Is it not your attitude or your position that you feel you can have citizenship and still be under the Navy Department?

Mr. Bordallo: Yes; I believe so. That is the way "we understand it in Guam.

Senator Gibson: All you are asking now is to be treated the same as the people of Puerto Rico and the Virgin Islands and other people who have been granted citizenship?

Mr. Bordallo: That is correct, Senator.

As highlighted in this exchange, some senators threatened to withdraw “paternalistic” funding for Guam if citizenship was extended to island, while others appeared to be more sympathetic to Guamanians’ desire for citizenship while still existing under Naval rule.87

The legislation that would have conferred citizenship to Guamanians was eventually abandoned “on security grounds…and off the record” (Leibowitz, 321). Testimony provided by

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87 One issue that will come up later in the hearings is whether extending citizenship to Guam would automatically undermine, threaten or make impossible Naval rule over the island. I am not sure why the Navy was adamant against extending citizenship to Guam, since it is not immediately clear how doing so would endanger Naval governance. The Insular Cases allow for Congress to maintain plenary authority over unincorporated territories, which would seem to allow for Congress to refuse to act and have the Navy maintain rule over a territory if that is what Congress wanted (i.e. Congress could continue to defer power over Guam to the Navy and Executive branch). My speculation is that the Navy was worried that Congress would assert its plenary authority over the island through the enactment of citizenship legislation, which would be a shift from the status quo of congressional deference to Naval rule. This reasoning could be considered paranoid, however, since there were already clear precedents in other unincorporated territories that the extension of citizenship did not fundamentally threaten the plenary power of the United States in these areas. The Navy probably preferred that Congress continue to not act in regard to Guam, however, and keep the status quo of congressional deference in governing authority over the island. Bordallo explains that Guamanians are not seeking to alter or change Naval rule, making an argument against the Navy’s anxiety:

I think I have made the statement that the people of Guam are only asking for American citizenship. They have not sent this commission here with the object of changing the administration that is now administering the Island of Guam. We are contented. As a whole, the Navy Department has made much progress and our people have been happy and contented and we are grateful for what they have done and for what Uncle Sam has done for us. We have no regrets…

Senator Gibson: In other words, you would prefer to be under the Navy with American citizenship?

Mr. Bordallo: Certainly. (p. 35)
R.O. Davis, of the United States Navy, Office of Island Governments, illuminates how the Navy asked for a secret, executive session to explain to congressional committee running the hearings that it was in the Navy best interest to not extend citizenship to Guam:

Senator Gibson: Isn’t it possible that the attitude of the Navy Department may beget a feeling of antagonism on the part of the people of Guam? They have looked to the Navy Department with a great deal of satisfaction and contentment under Naval rule, but they have been thirty-odd years without the carrying out of the terms of the Treaty of Paris.

Commander Davis: Not if the attitude of the Navy Department is understood, Mr. Chairman.

Senator Gibson: I hope you will make it entirely clear.

Commander Davis: The objection of the Navy Department to the present legislation is based on, first, the best interests of the United States, and second, the best interests of the people of Guam. To elaborate on the first necessitates an executive session. In regard to the second, I may mention that in the event of United States citizenship, which may be expected to be a forerunner of an organic act and a change of government, it is quite possible that the Navy may leave Guam as it did in the Virgin Islands.

Senator Gibson: How does the passage of this bill increase our responsibility to Guam, to the people of Guam?

Commander Davis: The passage of a bill making them United States citizens would appear to affect their administration immediately, inasmuch as United States citizens have a part in their Government, which extends far beyond the present provisions for the administration of Guam.

Senator Gibson: Would you call the status of the Guam people at present time nationals of the United States?

Commander Davis: I would, sir. The island government and the Navy Department...consider them citizens of Guam, and as such nationals of the United States entitled to protection and passport privileges and so forth.

Senator Gibson: The same protection they would be entitled to if they were citizens?

Commander Davis: Yes, sir...

Senator Gibson: But I cannot quite see why we should withhold citizenship from the people of Guam and grant it to every other island [unincorporated territory].

88 “Senator Gibson: I don’t want [members of the Guamanian delegation] to have any misapprehension in regard to an executive session. Even if we arrived at the conclusion that only members of the committee should be present [which they did], that would not be any criticism of the people or the representatives of Guam, because there are some things that come up before committees where the most prominent citizen of the United States could not sit in”

Commander Davis: I think that ought to be explained, because he [Leon Guerrero] is under an entire misapprehension. The mayor of a large city in the United States might not be permitted to be there, because on confidential matters he would not be allowed to remain. The fact that you are not a United States citizen has nothing to do with it.” (United States Congress. Senate. Citizenship for Residents of Guam, Hearings Before a Subcommittee of the Committee on Territories and Insular Affairs on S. 1450, 75th Cong., 1st sess., (1937), p. 92).”

89 The State Department also asked for an executive session to discuss the meeting it had with the Navy Department, which resulted in the State Department coming out in opposition to legislation that would extend citizens to Guam (United States Congress. Senate. Citizenship for Residents of Guam, Hearings Before a Subcommittee of the Committee on Territories and Insular Affairs on S. 1450, 75th Cong., 1st sess., (1937), p. 82-83).
**Commander Davis:** Citizenship to the people of Samoa would be objected to by the Navy Department for the same reasons as given for the people of Guam.

It is not clear why the Navy believed it was in the best interests of the United States to not confer citizenship to Guamanians, but from this passage it seems that the Navy was concerned with residents of Guam securing voting rights. This is speculation, however, since the executive session that occurred between Naval officers and members of the congressional committee was off the record and not recorded.  

For this chapter, the key insight is that the Navy made their opposition to the extension of citizenship to Guam explicit, which supports my argument using interest-convergence to explain why Guamanians were not granted citizenship in 1937. After the executive session held off the record, in which congressional committee decided to not attempt to pass the citizenship legislation for Guam, Senator Gibson told the member of the Guam Congress that the legislation was a “perfectly meritorious proposal” and that they shouldn’t be “discouraged” by Congress’ failure to confer citizenship because of Naval opposition.

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**90 Bordallo offered this statement in response to the secret executive session:**

Are the people of Guam to assume at this executive session the representatives of 21,000 inhabitants of Guam are to be denied participation in a secret discussion that will perhaps determine their fate; that is, either extend them the rights and privileges of American citizenship or deny and make it impossible for them to fulfill their aspirations to join their mother country and enjoy her rights and privileges? Is it within the sense of American justice and fair play to hold a secret council in which to decide the fate of 21,000 souls, without so much as to give them their human right to defend themselves? The Constitution of this country protects the rights of each and every one of its citizens. Every citizen is entitled to receive a trial by jury. Are the 21,000 inhabitants of Guam not entitled to this protection, their rights to have counsel at their “trial”, after respecting, honoring and protecting the American flag for 38 years? The Treaty of Paris stipulates that our civil rights and political status shall be determined by Congress. Not the Navy Department nor the State Department has anything to do with the determination of our status. This is a vital question which Congress is bound by international treaty to answer. If this august body should decide against us, it means that the people of Guam shall remain subjects of America, a country whose Constitution gives no rights and privileges to its subjects. The founders of this great Republic made no provision, because they never intended that this country should maintain two forms of government, one for its citizens, and another, a different form, for its subjects. It is their purpose, it is their conviction, that only so long as this Government respects the rights and privileges which the Constitution guarantees its citizens can it survive. (United States Congress. Senate. Citizenship for Residents of Guam, Hearings Before a Subcommittee of the Committee on Territories and Insular Affairs on S. 1450, 75th Cong., 1st sess., (1937), p. 96-97)

**91 Senator Gibson:** I hope you people will not be discouraged if you fail the first time, because we people of this country on the mainland come to Congress with perfectly meritorious proposals and have to wait and wait and wait.
rulings in the *Insular Cases* allow for Congress to govern unincorporated territories in the manner they deem most appropriate, which allows for a system that substitutes congressional rule for military rule. This is what happened in Guam, as demonstrated through Congress’ willingness to decide on citizenship legislation for Guamanians based on the commands of the Navy.

The last moment of citizenship legislation for Guam I examine is the Organic Act of 1950 that extended U.S. citizenship to Guamanians, which provides an example of interest-convergence. After WWII, domestic and international pressure, especially from the United Nations, that threatened U.S. interests during the Cold War led to Congress enact legislation that extended citizenship to Guam.92 In this section, I offer evidence from hearings93 held in the 1950s that contain the same type of language and reasoning Derrick Bell and Mary Dudziak use in their works supporting Critical Race Theory’s methodology of interest-convergence to demonstrate the true motivation for “progressive” civil rights legislation: the protection and promotion of U.S. interests.

Based on the testimony of the Hopkins Committee in 1947, which offered an apology94 to Guam for the United States’ failure to extend citizenship to residents of the island and

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92 In this chapter I focus on hearings held in 1950 to discuss legislation drafted by Congress that would extend citizenship to Guamanians. Hearings held in 1947, in which members of the Hopkins Committee, a special committee appointed by the Secretary of Defense to examine the civil governments of Guam and American Samoa, endorsed citizenship for American Samoa and Guam, also provide evidence in support of interest-convergence. I offer passages, exchanges and reports related to the Hopkins Committee in the previous chapter on American Samoa.


94 “In our opinion citizenship is long overdue and should be granted forthwith. Indeed an apology is due the Guamanians for the long delay and they are also entitled to the Nation’s thanks and recognition for their heroic service rendered during the recent war. The people are in all respects worthy of being welcomed into full brotherhood of the United States, with all rights and privileges, and the Nation will be the gainer for it.” (Department of the Navy. Hopkins, Tibin, and Ryerson, *Hopkins Committee Report for the Secretary on the Civil Governments of Guam and American Samoa*, 1947).
recommended Guamanians be made U.S. citizens at the earliest possible date.\footnote{The people of both Guam and American Samoa are entitled to full American citizenship and should be made citizens at the earliest possible date by an Act of Congress” (Department of the Navy. Hopkins, Tibin, and Ryerson, Hopkins Committee Report for the Secretary on the Civil Governments of Guam and American Samoa, 1947).} Congress drafted an organic act for Guam in 1950. From the hearings for S. 185,\footnote{United States Congress. Senate. A Bill to Provide a Civil Government for the Island of Guam, and for Other Purposes, 81st Cong., 2nd sess., 1950. Section 4 of the Guam Organic Act of 1950 amended Chapter II of the Nationality Act of 1940 to collectively naturalize Guamanians, making them and anyone subsequently born in Guam U.S. citizens.} S. 1892\footnote{United States Congress. Senate. A Bill to Provide a Civil Government for Guam, and for Other Purposes, 81st Cong., 2nd sess., 1950.} and H.R. 7273,\footnote{United States Congress. Senate. An Act to Provide a Civil Government for Guam, and for Other Purposes, 81st Cong., 2nd sess., 1950.} it is clear that the central impetus for Congress in drafting and ultimately passing an organic act for Guam that extended U.S. citizenship to residents of the island was to promote the United States’ interest in improving its moral standing on the global stage, and not because of genuine concerns about equality, dignity and inherent injustice of racial inequality. The benefits and interests the United States believed it would be advancing in extending citizenship to Guam and Guamanians’ long-held desire to be U.S. citizens aligned in 1950 to explain why an organic act for Guam was enacted. Thus, Congress did not pass an organic act that extended citizenship to Guam with a genuine concern and sympathy of the well-being and desires of the inhabitants of the territory, but wanted to preserve, protect and promote the democratic image of United States (a strategic interest) in its propaganda battle with the Soviet Union during the Cold War. Carlton Skinner, the Governor of Guam, testified at the hearings and stated that “unfortunately…for the reputation of the United States as a democratic country with a republican form of government” (39) Guamanians had continued to be denied citizenship since 1898, but that “[p]assage of this bill will meet with universal acclaim” (40). He continued to emphasize that

the granting of citizenship and self-government, in itself, will be a powerful psychological and political weapon in our dealings with the independent peoples of the Far East. They are watching closely to see if Uncle Sam’s professions of democratic ideals are borne out in his treatment of a people who have been under the American flag
for over half a century and have demonstrated their intense devotion to that flag in war and peace. (41)

The United States also believed it could benefit economically by enacting an organic act for Guam, similar to the benefits Bell discusses related to the benefits of industrialization of the South. Governor Skinner argues

[The organic act] will stimulate commercial, agricultural and industrial growth. With a responsible legislature, with an executive branch with clear but limited powers, and with a Federal and local court system officially established as part of the great system of American courts which protect private rights and private property as well as the public interest, the island can become an economic asset to the United States as well as a strategic base of great value. With the best harbor in the western Pacific and with fine airfields and a trans-Pacific cable station, Guam is already a commercial, transportation, and communications center. With the foundation provided by an organic act, it can become a vital link in our economic life line to southeast Asia and Japan. A substantial growth of business can be expected if this act is passed to provide political stability to the community. (40)

Another important aspect of interest-convergence is that it allows for legislation that does not fundamentally alter or threaten the existing power structure of a relationship; it does just enough to appease criticism and protect U.S. interest. Extending citizenship to Guam did not force the United States to abdicate its ultimate authority over Guam, but was enough to assuage domestic and international criticism of its treatment of Guamanians. By enacting an organic act for Guam, the United States allowed for its democratic image to be protected while not having its sovereign authority over Guam questioned or altered. William Lemke, a representative from North Dakota, explains that he “can see no danger of abuse [in S. 185], because the President, by appointing the Governor, who also has veto power, and then also by appointing the judiciary, fully protects and interests that the United States, the mainland, may have” (40).

**Senator Anderson:** Representative Lemke, there was a question I raised earlier. I was anxious to get to the meaning of it…There is a statement that I would like to get clarified as to the meaning: “The government of Guam shall consist of three branches, executive, legislative and judicial, and shall be under the supervision of the head of such civilian
department or agency of the Government of the United States as the President may
direct.”
Do you understand by that that the Department of the Interior shall have supervision over
the legislative, executive and judicial branches of the Guamanian government?
Mr. Lemke: I would say yes, in a general way. The President can change that if he wants
to. It rests more with the President than under the Department of the Interior.
Senator Anderson: Of course, we do not have that in this country, do we? He does not
have supervision over the legislative and judicial branch?
Mr. Lemke: I will state that personally I am perfectly willing for you to eliminate that
part, but it was put in because we found that there might be some opposition in the House
if we did not. There are always people who are afraid that some of these islands may run
away with us, which I know is not the case after I have been over there. (41-42)

This exchange highlights how Congress made certain that U.S. sovereignty over Guam would
not be altered despite the creation of a civil government for Guam and the extension of
citizenship to Guamanians.

It was also made clear that the enactment of an organic act for Guam would not mean it
was to become a state, but was to remain as an unincorporated territory, which further
demonstrates how the fundamental imperial relationship between the United States and Guam
would not be challenged. As Governor Skinner explained:

At this point, I wish to state unequivocally that the people of Guam do not envision or
desire statehood at any future time. The legislation under consideration contains no
promise, direct or implied, of statehood. With citizenship and the addition of Guam to the
United States as an unincorporated Territory with powers of government defined by the
United States Congress, they will be happy and contended as to their political ambitions.
They will have the foundation for fulfilling their own destinies economically, politically,
and socially. (40)

A last example from the Organic Act of 1950 that demonstrates how the United States was able
to extend citizenship to Guam while not threatening its ultimate authority over Guamanians is
Congress’ refusal to include the first sentence of the 14th Amendment’s Citizenship Clause\(^99\) in
the legislation. Thus, members of Guam have a form of statutory citizenship, and not a

\(^99\) “All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the
United States… (Amendment XIV, Sec. 1).
“constitutional” one. While people born in a state are granted a 14th Amendment Citizenship, people born in Guam, an unincorporated territory, are citizens based on a citizenship created through Congressional legislation. This allows the United States to claim that Guamanians are U.S. citizens while still denying them certain rights, liberties and protections that U.S. citizens living in states have, especially political participation in the federal government, since it is a “different” form of citizenship. Whether this form of statutory citizenship is constitutional is ambiguous and something I hope to explore in future work.

Lastly, unlike in 1937, the Department of the Navy had altered its position by 1950, and strongly endorsed extending U.S. citizenship to Guam.

100 John L. Sullivan, the Under Secretary of the Navy, explained why the Navy changed its policy regarding the conferral of citizenship to Guam in hearings from 1947:

In providing an Organic Act for Guam, the United States will carry on the high principles it has demonstrated in its administration of dependent areas. Such a step will add further to the world prestige that came to the United States when it fulfilled its pledge of independence to the Philippines. It will show that we practice, as well as preach, representative democracy, by permitting the inhabitants of Guam to participate in local government. It will bind them more closely to us, and will strengthen our hand in the strategically important Pacific area.101 (emphasis added)

This passage captures how the United States believed that it could protect its moral standing and provide a counternarrative to foreign criticism of American democracy. The United States viewed the extension of citizenship to Guam as a powerful propaganda tool in its struggle against communism, to demonstrate the moral superiority of American democracy and to promote the

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image of the United States on the global stage as standing for progress, equality, justice and fairness.
Chapter 4 - American Samoa and U.S. Citizenship: A Case of Continual Interest-Divergence

Introduction
While the previous chapter on Guam offers an example of how interest-convergence works, I now examine the legal histories of legislation dealing with U.S. citizenship for American Samoa to demonstrate the contours of a continual case of interest-divergence. Why is it that Samoans are still non-citizen nationals and not citizens, as residents of the other insular areas are? In this chapter, I apply my main thesis, that Congress has decided to enact legislation that would extend citizenship to the insular territories only when doing so would benefit the United States’ political, economic, social or strategic interests, to the case of American Samoa. I contend that in the early 1930s, Congress neglected to grant full U.S. citizenship American Samoa despite clear evidence demonstrating Samoans’ widespread desire for it. I will use transcripts from congressional hearings, the congressional record and newspaper articles to show that the United States faced little, if any, pressure to alter its policy toward American Samoa in the late 1920s and early 1930s, since U.S. Naval rule was viewed as a form of positive, beneficent paternalistic despotism, even by the residents of Samoa. This meant that the United States stood to gain no substantial benefit from enacting legislation that would have extended citizenship to Samoans. The formula changed, however, in the immediate aftermath of WWII, as the United States faced increasing domestic and international pressure to alter its relationship to American Samoa, which came to be understood as an unjustifiable imperial relationship, anathema to American ideals of democracy and freedom. By this time, however, a substantial amount of Samoans became resistant to a full Equal Protection Clause status for a variety of reasons, which explains why Congress ultimately did not pass legislation extending citizenship.\(^{102}\) This has remained the

\(^{102}\) The cause of this shift is controversial and ambiguous. I will discuss this later in the chapter, but there are some people who argue that the reason Samoans changed their desires regarding the creation of an organic act and the
status quo since, and, as interest convergence also emphasizes, when the interests of the White
elites and non-Whites diverge, as they have throughout the history of the relationship between
the United States and American Samoa, “progressive” legislation will not be enacted.\(^\text{103}\)

**History of U.S. Imperialism in Samoa**

The United States was initially interested in Samoa beginning in the middle of the 19th Century
due to strategic and logistical value of the harbor at Pago Pago. Samoans had an interest in U.S.
annexation for protection from German and British expansionism in the area. Samoans hoped for
the establishment of stable local governments with the help of the United States to prevent their
land from being exploited foreign commercial interests.

In 1878, with Germany considering establishing a protectorate over the island, a treaty of
friendship and commerce was signed between the United States and Samoa, in which the United
States gained the exclusive right to establish a trading station at Pago Pago and freedom of
commerce at all other Samoan ports. The Samoans hoped for U.S. protection of Samoan
sovereignty against other nations with interest in Samoa, particularly Germany and Britain. This
treaty would provide the basis for all future U.S. intervention in Samoa against perceived threats
to Samoan sovereignty.

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extension of citizenship is due to unethical interference by Naval officers stationed in Samoa, who informed
residents of the territory that such legislation would destroy Samoan culture and end various forms of public welfare
the Navy had provided on the island. The point is that whatever the reason for the shift in policy preference was, a
significant amount of Samoans made it clear that by 1947 they no longer wished for U.S. citizenship, a remarkable
change from just a decade previously.

\(^\text{103}\) In a later chapter I will discuss how after 1947, the United States could use the ambiguity surrounding Samoans’
desire for citizenship to justify not extending it, even though other models developed in Guam and the Northern
Mariana Islands that would seem to allow for Samoans to be granted a full 14th Amendment Equal Protection
Citizenship with certain racial exceptions to allow for their land tenure system, and overall social and cultural
structure, to remain protected. The essential point is that the United States could take advantage of the uncertainty
regarding Samoans’ desire for citizenship by simply choosing not to act, instead of creating legislation that would
provide residents of American Samo a full citizenship with a guaranteed right to maintain the racial classifications
and exclusions required for their land tenure system to continue to exist. This is the central debate of the *Tuaua* case.
In 1890, legislation was created that guaranteed Samoan independence and U.S. willingness to protect its interests in Samoa. This led to an appropriation for protection of U.S. interests in Samoa that passed in 1889, which called for Samoan independence and showed a willingness of Congress to grant a substantial amount of autonomy for the President to use military action to defend Samoa’s sovereignty.

The Washington Convention of 1899 had Germany and Great Britain renounce any rights and claims to the Island of Tutuila and all other islands of the Samoan groups east of Longitude 171 degrees west of Greenwich, while the United States renounced all claims in Western Samoa (under German control). On February 19, 1900, President McKinley officially acquired the territory, which placed Eastern Samoa under the authority of the Navy with broad authority.

On April 7, 1900, Samoan high chiefs cede the islands of Tutuila and Annu’u to the United States., and in July 1904, King Tui Manua cedes Manua Islands of Ta’u, Olosega, Ofu and Rose to the United States. It is important to remember that these cessions by the Samoan chiefs were the result of external pressures, as

> [o]ver a period of three quarters of a century, Samoan society had been subjected to: new religions and standards of morality; new legal systems (to ensure that Samoans were punished for offenses against whites and to ensure that whites were able to deal with their own expatriates); modern weapons; threats to their lands by speculators; and Great Power politics which tended to promote Samoan leaders favorable to them, provoking or intensifying the frequent civil wars. (Leibowitz, 399)

These cessions were not viewed as important by President McKinley, however, as he claimed that Samoan territory was already under control of the Navy before the Deed of Cession was signed.\textsuperscript{104} This explains why, despite Congress having plenary authority to implement whatever

\textsuperscript{104} Senator Bingham offers a different example as to why the United States never officially accepted the cessions until 1929. He argues:

> The Congress was not very willing to accept this cession because it had not been the policy of the United States to take any islands in the South Pacific. We thought that perhaps the chiefs of Tutuila and Manua
policy it deemed appropriate for Samoa after the cessions, there was no major legislation aimed at establishing a government or overall policy for Samoa for another 30 years. As I argue, it is only in moments of crisis, when the United States feels its empire is threatened, or when it thinks there is an opportunity for strategic benefit, that the United States has decided to implement legislation for its unincorporated territories. This explains why Congress did not accept, ratify and confirm the cessions of the Samoan chiefs until 1929. The reason why Congress finally decided to officially recognize the cessions was largely due to the Mau Rebellion in Samoa (its slogan was “citizenship and civil government for the Samoans”) during the 1920s, which led to the Navy wanting to officially establish its sovereignty over the territory by doing just enough to appease Samoans who were supportive of the Mau Rebellion.

Moments of Interest-Convergence for U.S. Citizenship Legislation in American Samoa

Having previously established how the Insular Cases created a broad, plenary authority for Congress to govern over unincorporated territories, I now apply Critical Race Theory’s interest-convergence to explain the development of citizenship legislation for American Samoa. The first “moment” for U.S. citizenship legislation in American Samoa that I examine through an interest-convergence lens is in the 1920s and 1930s, when the United States drafted organic acts for American Samoa that were debated in the 1930s, after the Mau Rebellion of the 1920s. I argue that the United States felt its sovereignty over American Samoa threatened, and decided to make an attempt to appease Samoans who were rebelling for more autonomy by drafting organic acts

would prefer to have their own government and that we should not interfere, and that when there was no longer any danger of Germany taking their islands they would prefer to be independent; but after 25 years it still appeared that the chiefs of Tutuila and Manua were earnest in their desire that their country should belong permanently to the United States (225-226).

What Bingham fails to mention, conveniently, is the strategic benefit the United States gained through establishing a naval base at Pago Pago while not having to include Samoans in the U.S. polity as citizens.

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which would have extended U.S. citizenship. The reason these organic acts were never ratified, however, was because the economic, cultural, political, and social interests of the United States did not converge with Samoans’ desire for the extension of U.S. citizenship, which I believe becomes apparent through examining the legal histories of these organic acts that were drafted in the 1930s.

In response to the Mau Movement, the United States created a commission\textsuperscript{105} made up of members of Congress and Samoan chiefs\textsuperscript{106} to travel throughout American Samoa, research the rebellion and offer recommendations for how to best proceed with governing the territory\textsuperscript{107}. As Chairman Bingham notes, the commission was meant “to investigate conditions in Samoa and to make recommendations for legislation to be passed by the Congress of the United States” (3). The main concern of the hearings\textsuperscript{108} focused on how the Navy has governed the Samoan people and whether there was a genuine desire by Samoans to change the governmental arrangement. Here is how Chairman Bingham described the purpose of the commission, mainly to investigate whether Samoans wanted to make any changes in the Naval government that ruled over Samoa:

\textit{Finally, it should be clearly understood that we have no authority in the commission to change the form of government or change the laws; we can only recommend changes to the Congress and President. The high chiefs and chiefs of Manua made a cession of their islands – Tau, Olosega, and Ofu – to the United States in 1904. The President instructed the Navy Department to take charge of the islands and give them such a government as seemed best to the governor appointed by the Secretary of the Navy. For nearly 30 years the Nay ruled the islands under the direction of the President without the Congress of the}\textit{132}

\textsuperscript{105} Public Resolution No. 89, 70\textsuperscript{th} Congress
\textsuperscript{106} The members of the Samoan commission were Hiram Bingham (Senator-CT, Chair), Joe Robinson (Senator-AK), Carroll Beedy (Rep.-ME), Guinn Williams (Rep., TX), High Chief Mauga (District Governor, Eastern District, American Samoa), High Chief Tufele (District Governor, Manua District, American Samoa) and Chief Magalei (Tutuila, American Samoa)
\textsuperscript{107} The commission embarked on the U.S.S. Omaha from San Pedro, California on September 11, 1930, and held hearings in Honolulu, Hawaii on September 18, 19 and 20, and then traveled to Pago Pago, Tutuila, American Samoa, on September 26, 1930, where it held meetings on September 26, 27, 30, and October 1 and 4. The commission also held hearings in Leone, Tutuila on September 29, in Tau, Manua where hearings were held on October 2 and in Nuu’uli, Tutuila on October 3.
\textsuperscript{108} United States Congress. Senate. \textit{American Samoa: Hearings Before the Commission Appointed by the President of the United States in Accordance with Public Resolution No. 89, 70\textsuperscript{th} Congress, 71st Cong., 3rd sess., (1931).}
United States, the law-making body, taking any notice of the kind of offer from the chiefs. It has not been the custom or the practice of the United States to annex or secure groups of islands as has been the practice of Great Britain and Germany, and it has only been done in two or three cases. By act of Congress we annexed the Hawaiian Islands, the Philippine Islands, the Virgin Islands and Porto Rico. After the war with Spain we secured Guam, the Philippines, and Porto Rico as a result of that war; however, although we have possessed as a result of conquest, the Philippine Islands and annexed them for more than 30 years, we have never given to the natives of the Philippine Islands citizenship – they are not American citizens. We annexed Guam but we did not make the people of Guam, of whom there are twenty-five or twenty-six thousand, American citizens. Last year the Congress finally decided that they would accept Islands of Samoa and they passed an act agreeing to the cession and formally annexing the Islands of Samoa. In this act the President was authorized to continue to rule Samoa as he had done in the past, until such time as the Congress should pass an organic act. By this same act this commission was created to recommend to the Congress the necessary legislature for American Samoa. The act of Congress, however, did not change any of the laws and did not give American citizenship to any of the people. I have taken this much of the very limited time we have here in order that there may be no misunderstanding of the present situation, of why we are here (216).

This passage demonstrates the confusion that stemmed from the rulings in the Insular Cases, as questions remained regarding what the status of the relationship was between the United States and its newly acquired unincorporated territories, and whether U.S. citizenship automatically extended to these areas. This highlights how the Insular Cases combined elements of U.S. colonialism and imperialism, leaving Congress with plenary authority to act as it deemed fit to govern each of the unincorporated territories. Many of the Samoans who were questioned by the commission thought that they were U.S. citizens, which was one of the reasons why Bingham felt it was necessary to clarify that they were in fact non-citizen nationals. Bingham also wanted to be clear that the commission itself had no authority to alter the relationship between the United States and American Samoa or Samoans citizenship status, as only Congress had such power.
While there are numerous themes and concerns that emerge from reading the texts of these hearings, I will focus on the overwhelming consistency found in the Samoans who were questioned before the commission for their desire for an equal form of U.S. citizenship. Here is a statement from a Samoan, Napoleon Tuiteleleapaga, who expressed thoughts on U.S citizenship that were similar to many of the other Samoans who were interviewed:

I know the Samoan people are in favor of civil government. I am in favor of civil government, and I will vindicate the rights of my own people if I can do anything. To finish up with my statement, I appeal to the commission to give those people what they want. Give them American citizenship. Give them the privilege of other people of the United States. If they don’t get it after the investigation of this commission, if the people don’t get what they want, the government is going to be messed up. In fact, Washington doesn’t care about us. Here we are 10 years straight we try to do this and that and they don’t hear us. So I ask the commission to give a fair decision. Please ask the opinions of different people and try your best to give us American citizenship. Let us, the young

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109 For example, there are fascinating debates about racial classifications and guidelines created by the United States for land ownership based on percentage of “pure” Samoan blood, conspiracy theories regarding the Mau Rebellion, the natural inability for Samoans to participate in the jury system, “illegitimate” or “illegal” children from sailors “left behind” by the Navy (122) and descriptions of the Polynesian and Samoan race. A postmaster from Pago Pago, David John McMullin, had the following statement:

I would like to say that in my 24 years residence in Samoa, living amongst them, they are a good stock and a good race of people. I have been pretty much around the world and I have met in various countries of the world primitive people, and I have yet to find any superior to the Samoan. The Samoan needs help. They need the help of the United States government, there is no question about that. (256-257)

Another subject I hope to explore later is the differences between how the members of the commission from the United States conceptualize race compared to the residents of Samoa who were questioned. Members of the U.S. delegation seem bewildered that Samoans did not make racial distinctions between the children born of mixed parents (usually White members of the U.S. Navy and a Samoan, referred to as “half-castes”) and those of two Samoan parents (referred to as “natives”). Here is one example of this, from an exchange between Chairman Bingham and Napoleon Tuiteleleapaga:

**Chairman Bingham:** Would you make any distinction between the person of half Samoan blood and the person who has only one-fourth Samoan blood? Would you say if they are one-half Samoan the should be accorded the same privileges and rights as natives and a quarter Samoan should not?

**Mr. Tuiteleleapaga:** My opinion is founded on a very good foundation. I believe myself that no matter whether a Samoan is half or quarter, there should be no distinction for this reason: If Mr. Greene has no objection, I’ll take him as an example. Mr Greene’s wife is half-caste. Her father is a white man and her mother was a Samoan. Then we exclude the child from the rights of Samoan affairs. To my own understanding and my study, I think there should be no distinction. Even though she married a full-blooded white man, still the child is Samoan blood and he must be given the full rights and authorities and everything in the Samoan affairs. That is my own opinion. (82)
Samoans who are far away from here, let us share the privilege and the happiness of the great American people of the United States. (80)

Through an examination of the text of the hearings, it becomes clear that U.S. citizenship mattered to the Samoans who were questioned by the commission. Chief Nua offers an example of a Samoan who desired for the Navy to maintain authority, “[b]ut that the people of American Samoa should be true American citizens; receive American citizenship, to be equal with the true American” (221). A last example to demonstrate the desire Samoans had for U.S citizenship comes from Suega Suega, a Samoan who was in the U.S. naval reserve:

Mr. Suega: I wish to request to the honorable commission about Samoan people who enlisted here in the Navy to become a general enlistment instead of enlisting only in Samoa.
Chairman Bingham: Do you mean that you would like to see it made possible for Samoans to enlist in the Navy for general service in the Navy outside of Samoa?
Mr. Suega: Exactly.
Chairman Bingham: If the commission should secure from the Congress an act which would make all Samoans American citizens then they would then have the right to enlist if the Navy should desire them just like any other American citizens. (262)

Another one of the main themes of these hearings is the commission requesting for information on the Mau Rebellion. Here is a telling exchange:

Senator Robinson: The principal request of the mau is that citizenship be given to American Samoa, wasn’t it?
Mr. Galeai: Yes
Senator Robinson: If this commission should report to Congress and Congress pass the act granting citizenship to American Samoa and in case it should become law, does he think that the mau would then become disorganized and cease its activities?
Mr. Galeai: Yes. (242)

I would argue that this demonstrates that the United States’ main impetus for even thinking of extending citizenship to American Samoa is because it thinks it would be a way to appease Samoans while still maintaining ultimate sovereignty over the islands. The United States’ decision to formally recognize the cessions of the Samoan chiefs seemed to do enough to
appease the Mau Rebellion, however, meaning there was no strategic benefit to creating an organic act that would have extended U.S. citizenship to American Samoa.

Due the overwhelming number of Samoans who expressed their desire for U.S. citizenship, two of the recommendations made by the commission were the following:

2. That full American citizenship be granted to the inhabitants of Tutuila-Manua as of February 20, 1929, and to their children; and also to those inhabitants of Tutuila-Manua who were then residing on the mainland of the United States or in the Territory of Hawaii. This latter class of inhabitants of Tutuila-Manua shall, in order to record their citizenship, file an application in a district court of the United States to show their desire to become citizens.

3. That there be two kinds of citizenship: American citizenship and Samoan citizenship. In addition to the first recommendations, the commission will recommend that the legislative power in Tutuila-Manua, namely, the fono shall determine the qualifications necessary for Samoan citizenship, but that the fono, in exercising this power, shall not deny Samoan citizenship to any person of full or part Polynesian blood otherwise qualified. (268)

These recommendations for a dual U.S.-Samoan citizenship were included in the organic acts Congress drafted based on the finding of the commission, which were debated in early 1930s.110 These organic were never ratified, however, and it is my contention that this is because the interests of the United States never converged with the clear interests Samoans had for the extension of U.S. citizenship; Congress never felt compelled or that it was necessary to act to

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110 This is the language that was used for the organic acts that were drafted in the 1930s, which would have established a civil government for American Samoa:

The people of American Samoa through the legislative authority of that government shall determine from time to time the qualifications necessary for citizenship in American Samoa, but no person shall be qualified to become a citizen of American Samoa who is not a citizen of the United States, nor shall American Samoan citizenship be denied to any person of full or part Polynesian blood, otherwise qualified. (3-4)

These organic acts would have collectively naturalized all Samoans as U.S. citizens so that only U.S. citizens would then be eligible for Samoan citizenship. It is unclear as to the type of U.S. citizenship that Samoans would be entitled to, however. It is doubtful that it would have been a full 14th Amendment Citizenship that would have guaranteed voting rights in U.S. elections, for example, but would have most likely been a qualified form of U.S. citizenship that did not possess the full array of rights U.S. citizens living in a states have access to. For an examination of how citizenship exists as different types of arrays of rights for different groups in society, and does not simply exist in one equal form for every group, see Elizabeth Cohen’s *Semi-Citizenship in Democratic Politics*.
protect U.S. interests. Stated differently, the forces that Bell and Dudziak outlined that put pressure on the United States to act in regard to civil rights did not exist for the organic acts that Congress drafted that would have extended U.S. citizenship for Samoans, and I believe there is evidence to support this claim in the commission’s hearings and in the congressional record.

In the hearings, Senator Bingham discussed why he believed Congress had failed to pass any legislation related to Samoan, despite being conscious of Samoans’ desire for change of the Naval government. He says:

> In 1927 I made a journey to the Philippines and to China, and when I came back I stopped at my old home in Honolulu. In Honolulu I had a talk with my old friend Albert Judd [the translator of the hearings]...he told me that the people of Tutuila and Manua were dissatisfied because they had not been given any definitive form of government. It had merely been placed under Navy rule. He urged upon me that I introduce into the Congress of the United States legislation which would satisfy their desires and give them a permanent form of government. I told him that there were only 9,000 or 10,000 people in Samoa and that the Congress of the United States was very busy because it had to deal with the affairs of 120,000,000 people. I told him there would be hundreds of cities in the United States of 10,000 people and many more that could not possibly get the Congress to pay attention to their individual wishes and desires. (226)

This passage demonstrates how Congress did not have the same types of forces exerting pressure on it to act as it did during the Civil Rights Movement, as demonstrated by Bell and Dudziak.

While the United States may have initially felt its sovereignty potentially threatened with the Mau Rebellion in Samoa, this was not enough to cause the political, economic, and social interests of the United States to be imperiled, or cause them to converge with the desires of Samoans for a civil government and for full U.S. citizenship. There is no mention of the Mau Rebellion in the congressional record after the commission held its hearings, as the movement failed to materialize enough and gain the support of a majority of Samoans to jeopardize U.S. rule over American Samoa.
Furthermore, there was no international or domestic pressure on the United States to alter its relationship with Samoa in the 1930s. I believe that a report from 1933, filed by the Committee on Territories and Insular Affairs to argue for the passage of an organic act for American Samoa, captures the only force that was acting on the United States in deciding whether to extend U.S. citizenship to American Samoa: morality. Here is the text from the report:

Your committee would remind the Members of the House that the Samoans are Polynesians – a pure-blooded and proud race. They are devout Christians…The Samoans have made their request for citizenship and a measure of self-government relying, as they say, upon a profound faith in the will of a Christian Nation to do them justice. Your committee recommends the passage of the pending bill. It recommends its adoption for the purposes of keeping faith with the people of American Samoa, who, under all the facts, are deserving of American citizenship which Congress has already accorded the citizens of the Virgin Islands and Puerto Rico. (3)

While Senator Bingham first introduced the organic acts that would have established a civil government for American Samoa in 1931, they were never passed by the full Congress. Here is a transcript from the congressional record from 1935, after organic acts for Samoa had passed the Senate three times but failed to be ratified by the House:

Mr. Tydings: This [an organic act to provide a government for American Samoa] is not a very extensive bill. The Senate passed identical measures on three occasions. All it proposes to do is to give the small population which makes up American Samoa the right of local self-government, namely, to try their own petty offenders…This bill will give the 12,000 people who live American Samoa the right to regulate their own tribal matters. This bill comes before the Senate as the result of the investigation of the Commission which went out to the islands…This measure of local self-government has been promised to the people of American Samoa for a number of years…The bill has the unanimous backing of the Committee on Territories and Insular Affairs. Every angle of the question that I know of has been examined. The bill was originally prepared while former Senator Bingham was chairman of the committee, and passed while he was still a senator.

Mr. Copeland: …I became very interested in the method of acquisition for American Samoa. I have a number of doubts in my mind about it…I have no doubt the bill is meritorious. I have no doubt the bill is properly and comprehensively prepared, provided it be applied to our own territory. I should dislike to build a splendid house, a great palace, on land which did not belong to me. I do not know that I shall take that view when the time comes to consider the measure…
Mr. Tydings: No question at all of sovereignty is involved in the bill. As the matter now stands, the inhabitants of American Samoa have no voice in the government which they make up. There are about 12,000 of them in the islands. Matters pertaining to discipline are in the hands of the Naval governor…All the bill seeks to do is give to the people who compose American Samoa the right to have control over their own intertribal matters. Whether or not the bill becomes law is a matter of no concern to me, except that for 5 years, through representative sent out there, we have promised to the people of the islands its enactment. I am a little sorry that the Senator from New York desires further to deny those people the right of local self-government. It will be the only place beneath the American flag where that right has been denied.

Mr. Copeland: …I am not sure that these islands have a right to be under the American flag, and I wish to be sure that we are not building a government on islands to which we have no title. I may fully agree with the Senator from Maryland when I shall have reviewed the rather fragmentary recollections I have of the serious study I made of the subject a long time ago…I am not asking that the 12,000 persons in American Samoa be deprived of government. I assume they have some kind of government or they would not stay there. But in due time…I shall look into the matter…For the moment, however, I desire further information. I ask that the bill be passed over.

The Presiding Officer: The bill will be passed over. (4396-4397)

I think that this passage from the congressional record highlights how there was no sense of urgency for legal actors to pass legislation regarding the government of American Samoa or to extend U.S. citizenship to the Samoan people. There was no international or domestic outrage over the United States maintaining sovereignty over American Samoa, at least not enough to create a threat to its political, economic or social interests. This is demonstrated by Copeland asking for more time to review the drafted organic acts and the documents attached to them, even though they had initially been introduced by Senator Bingham four years earlier. Delaying action was no longer an option during the Civil Rights Movement, when international and domestic pressure forced the United States to further its interests by passing legislation designed to protect its image of democracy and equality when compared to the Soviet Union’s image of authoritarianism.
A similar exchange occurs in the congressional record two years later, in 1937, to further demonstrate how there was no pressure threatening the United States’ to create a strategic interest in passing an organic act or extending citizenship for American Samoa in the 1930s:

The bill (S. 1095) to provide for a government for American Samoa was announced as next in order.

**Mr. Vandenberg** and **Mr. Copeland**: Over.

**The Vice President**: The bill will be passed over.

**Mr. Tydings**: I ask what objection was raised to Senate bill 1095, to provide a government for American Samoa.

**Mr. Vandenberg**: Mr. President, I made an objection in the absence of the Senator from Maryland. I am awaiting some information respecting the bill, and I know he will give it to us.

**Mr. Tydings**: My purpose in rising was to bring on debate now, for I wished to find out from the Senator objecting what the objection was, in the hope that we could discuss the matter and clear up any obstacle there might be.

**Mr. Copeland**: So far as I am concerned, I think this is a very important measure, which ought to receive the attention of the Senate at some future time. The bill deals with a controversial question, at least so far as I am concerned, and I interpose now the same objection I raised last year. In due time, and on appropriate occasion, I am perfectly willing to go into the merits of the bill; but I wish to have a little time to reprepare myself regarding the objections I had last year.

**Mr. Tydings**: Mr. President, I will state that there are very ample and extensive hearings and information upon this bill, and a copy of the document embodying them has already been sent to each Member of the Senate… I may further say that on three occasions the Senate has passed similar bills which were the result of the labors of a commission which went to American Samoa… I have no personal interest in the measure, except that from reading the hearings I received the definite impression that the commission felt that a larger measure of self-government ought to be given to the natives of Samoa, and that this bill was the result of their visit… My whole purpose in speaking now is to inform Senators that the hearings are available, and I shall be delighted to supply a copy to them to anyone who desires it.

**Mr. Copeland**: Mr. President, I shall be very happy to receive any material the Senator has. I hope to approach the consideration of the matter with an open mind, but I do wish to be informed about it. (2105-2106)

Thus, from 1931-1937 an organic act for American Samoa was introduced in Congress only to be eventually passed over by the House. I argue that this is because there was no pressure on the United States to act to establish a civil government and to extend U.S. citizenship to American Samoa since its political, economic and social interests were not being seriously threatened by its
sovereignty over the territory or residents living there. Instead, the United States was in a position in which it could do nothing to alter its relationship with American Samoa and not have its interests endangered.\textsuperscript{111}

Newspaper coverage around the time these organic acts were being introduced in Congress provides further evidence that the United States did not face domestic or international pressure to alter its policy for American Samoa and extend citizenship to its residents, or risk hurting its image of democracy and freedom. An article\textsuperscript{112} from \textit{The New York Times} from 1929 refers to American Samoa as one of the United States’ “possessions,” demonstrating there was no need to use the “unincorporated territory” euphemism created in the rulings of the Insular Cases when describing the relationship the insular areas had with the United States.

There was some critical coverage of the Samoan Commission and subsequent hearings, however. Another article\textsuperscript{113} from \textit{The New York Times} in 1929 highlights an article written by L. A. Thurston for \textit{The Honolulu Advertiser} arguing in favor of Samoan independence. Thurston describes U.S. rule in Samoa as just and benevolent despotism, but writes that “experience shows, however, that a despot will never indefinitely continue to be benevolent.” Another article\textsuperscript{114} from \textit{The Times} in 1929 discusses the cry of “Samoan for Samoans,” and the “hazy”

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\item \textsuperscript{111} The U.S. Department of Justice recently filed a report related to the \textit{Tuaua} case, in which it claims that the U.S. Navy put pressure on Congress to not grant citizenship during this time period. I have not yet found evidence to support this, but think it would be more evidence of interest convergence…need to expand more on this. While it seems likely that the U.S. Navy was opposed to extending citizenship to American Samoans throughout the 1930’s, the hearings for the Hopkins Committee reveal how the Navy’s position shifted after WWII and supported legislation that would have granted civilian control and extended citizenship to American Samoa and Guam. I think the main reason for this shift in policy is due to the Navy’s belief that it thought the benefit to the United States’ image as a democratic nation in opposition to the Soviet Union would outweigh any potential negative impact such legislation may have.
\item "Trade Grows Large to Our Possessions," New York Times (1923-Current file); Feb 17, 1929; ProQuest Historical Newspapers: The New York Times, pg. 31
\item \textsuperscript{113} “American Demands Samoan Autonomy,” New York Times (1923-Current file); Feb 23, 1929; ProQuest Historical Newspapers: The New York Times, pg. 7
\item \textsuperscript{114} New York Times (1923-Current file); Mar 11, 1929; ProQuest Historical Newspapers: The New York Times, pg. 18
\end{itemize}
legal status of Samoans, who exist as non-citizens but “are under the American flag.” There is no
mention of any pressure or demand that the United States alter its policy regarding the territory
from people outside of Samoa, however, and concludes:

It is only fair to the [U.S.] Navy to state that with very few exceptions the men whom it
has stationed in Samoa have done their work well…The real grievance of Samoans is that
the progress of the modern world has made itself felt through Americans, and that
gradually the old customs are disappearing. This is the tragedy of the conflict of
civilizations. Even before our government stepped in, American missionaries throughout
the Pacific Islands had been ‘civilizing’ the natives. The change is now too far advanced
to be undone. Only the future can tell whether, in the long run, it will have helped or hurt
the Samoans.

This article and passage displays how the Navy’s rule over Samoa was generally thought to be
beneficent toward Samoans, and not problematic for the United States’ democratic image.
Instead, U.S. rule over Samoa is viewed as a natural development of modern civilization, and not
a despotic, colonial relationship, as would be the case after WWII. Another article, this one
from The Hartford Courant, titled “Uncle Sam Now Holds 9000 Isles” captures the imperial
ethos of the time, which details all of the islands that the United States now “owns,” describing
them as a “Milky Way of Islands,” and boasting that “American citizens who wish to be
marooned on an uninhabited island with ten selected books, the United States offers endless
opportunities.” It describes the harbor at Pago Pago as the “finest in all the South Seas.” Again,
there is no mention of any condemnation of how the U.S. maintains sovereignty over these
islands. A last article from The New York Times titled “Samoan Commission Faces Difficult
Task” highlights how the United States was not under enough distress to feel the need to
fundamentally alter its relationship to American Samoa or extend citizenship. The article
describes Samoans as “virtually aboriginal,” and explains that

115 The Hartford Courant (1923-1990); Mar 31, 1929; ProQuest Historical Newspapers: Hartford Courant, pg. B10
The manner in which self-government reached Hawaii cannot be taken as a criterion since these islands for many years prior to coming under protection of the United States, existed under monarchical rule based upon...European states. Hawaii was modern at the time it became a territory. Samoa, on the other hand, is markedly primitive...The problem is to formulate a wise system of civil administration which will confer all the benefits of civilization upon the Samoan people and at the same time will force upon them none of the defects of modern life.

The article goes on to explain that naval rule was, for the most part, beneficial for Samoans, since it increased the native population, held disease in check, built highways and schools, and supplied every village with water. Thus, U.S. rule over Samoa around the early 1930s was generally viewed positively, not as antithetical to democracy and freedom.

While it can be difficult to gauge the actual amount of pressure, I think that the passages from the Congressional Record and the newspaper articles I have highlighted show that there was not nearly the same amount of domestic and international demand for the United States to alter its policy toward Samoa as there was acting on it during the Civil Rights Movement, which coerced the United States to enact legislation that was meant to secure certain basic rights to Black citizens. In the immediate aftermath of WWII, however, by examining hearings attached to legislation and newspaper articles, I argue that the United States was impacted by a groundswell of criticism regarding its policy toward American Samoa and consider extending citizenship, which were similar to the forces that led to policy changes during the Civil Rights Movement.

After WWII, the Hopkins Commission\textsuperscript{117} was formed in 1947 to investigate and report on the status of Guam and American Samoa, and recommended a transfer to a federal civilian authority from the Navy and to extend U.S. citizenship to Samoans. By 1948, however, Samoans

\textsuperscript{117} Hopkins, Tibin and Ryerson, \textit{Hopkins Committee Report for the Secretary on the Civil Governments of Guam and American Samoa} (Department of the Navy, 1947).
had become worried about potential legislation Congress may implement once Naval rule over the territory was abdicated. As Leibowitz explains:

In February of that year [1948] approximately 90 chiefs asked that all bills before Congress dealing with American Samoa, which included Organic Act and citizenship legislation, be tabled for ten years. The chiefs were distrustful of the application of U.S. Constitutional protections to the social and cultural structure of the Samoan way of life noting, in addition to the Equal Protection Clause and the citizens’ right to travel, the constitutional prohibition of involuntary servitude which, they felt, might deprive them of their traditional authority over the extended family’s members (411-412).

The point I want emphasize is that regardless of how legitimate the Samoan chiefs’ concerns were, the motivation for the proposals by the Hopkins Committee were to further and promote the strategic interests of the United States. The members of the Committee, in hearings before Congress in 1947, offer a clear demonstration of interest convergence, as the rationale used by members of the Hopkins Committee to argue for extending citizenship to Samoans mirrors what Bell and Dudziak found to be the primary inducement for “progressive” Supreme Court decisions such as Brown v. Board of Education and for the passage of civil rights legislation. For example, Representative Robert H. Grant notes that the bills drafted by the Committee that would extend citizenship to Guam and American Samoa “were commented fully and favorably

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118 On February 17, 1948, the Samoan General Assembly voted unanimously to table for ten years any legislation that would establish an organic act or extend U.S. citizenship, and sought the continuation of Naval government According to John Collier, from the Institute of Ethnic Affairs, in a letter to the editor, Samoans were tricked by the U.S. Navy into thinking that the establishment of a civilian government and the extension of U.S. citizenship would lead to the destruction of Samoan culture and the discontinuation of medical aid, schooling and other public services provided by the Navy. Collier describes the implications and actions of Naval officers in Samoa as establishing “fictitious alternatives.” New York Times (1923-Current file); Apr 19, 1948; ProQuest Historical Newspapers: The New York Times, pg. 22)

119 Discussion of whether a 14th Amendment Citizenship would prevent Samoans from making racial distinctions for their land tenure system (Rice v. Cayetano). Some Samoans also felt that the U.S. constitutional prohibition of involuntary servitude might deprive them of their traditional authority over extended family members (Leibowitz, 410).

by the press, and by many individuals and organizations concerned with the extension of American democracy into all areas under the American flag” (7). He concludes that:

[…]considering this legislation…will be giving the world a clearcut [sic] example of the manner in which American democracy works with dependent people. It will show the world, and particularly the Communist-dominated world, that the American way is a way of fairness and decency, and that dependent peoples will receive considerate and just treatment at our hands. It will be a far more effective demonstration of the intrinsic worth of the American way than the squandering of millions of dollars in Communist-dominated areas. (12)

In this passage, it is clear that a fundamental incentive to extending U.S. citizenship to American Samoa in this particular moment is based on how such legislation would be viewed by international community. Members of the Hopkins Committee thought that granting U.S. citizenship to Guamanians and Samoans would advance the United States’ strategic interest in being perceived as the leader of democracy and human rights in contrast to the Soviet Union and its communist, totalitarian ideology, and in a much more efficient, cost-effective manner than other means of promoting American democracy in communist areas. Rep. Grant notes that he “cannot understand how we can propose to spread our wealth around the world, to finance the spread of Communism and to wave the flag for free government for free peoples, and at the same time deny it to those dependent peoples who look to us for some relief” (20-21), again demonstrating the motivation for the United States to extend citizenship to American Samoa to set an example to the rest of the world of its democratic nature. Another passage that highlights how a lens of interest convergence can best explain the creation of legislation that would extend citizenship to Samoa comes from Senator Butler, when he states:

I think…the eyes of the people all over the Pacific at least, if not elsewhere, are on America today to see how we treat the people who are immediately under our control. I may say also…that I think of late we appear more concerned about how certain people are to be settled with, in various European areas, and we are demanding more for those people than we are extending voluntarily to the people that are immediately under are control. (33-34)
The members of Congress questioning those who created the Hopkins Committee Report were also aware that the international community would be cognizant of how the United States’ treated its territories. Rep. Paulson notes

that what we do there [in the Pacific island territories] certainly can be used as a talking point, or a pattern for other countries when we discuss the idea of democracy. In other words, if we still hold restraints on them to the military, we are not in a position, then, are we, to criticize some of the totalitarian governments such a Russia and the like, if we do not practice what we preach? (33)

Besides aiding the United States’ democratic image abroad, another concern that comes up at various times throughout the hearings regarding the Hopkins Committee that demonstrates interest convergence is that any legislation passed should not negatively impact the ability of the U.S. military to respond to a threat. One member of Congress reminds Rep. Grant that

any legislation that the Congress might pass, giving some additional independence or freedom to Samoa or Guam, should be predicated upon any emergency which might develop, which would cause the military end to step in and take over as they did in Hawaii, or they might have to do in another area of defense. (18)

Thus, any legislation that may alter the status of American Samoa or extend citizenship to its residents must be sure to not interfere or endanger the U.S. military’s sovereignty over the territory.121 Senator Crawford stresses that he is only willing to consider extending U.S. citizenship to Guam and Samoa because the military has ensured him that such legislation would not ultimately interfere with its operations in the territories (19).

Newspaper articles from the immediate years after WWII also demonstrate the pressure influencing Congress to consider altering its policy toward Samoa and extending citizenship,

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121 Here is a humorous dialogue that occurred during the Hopkins Committee that demonstrates the strategic military importance of the Pacific island territories for the United States:

**Mr. Crawford:** Congressman Grant…Would you say that Guam is a greater military strategic point of operation of the Navy and Army in our own national defense than is Hawaii and Alaska?

**Mr. Grant:** I certainly would not dare say that with the very able delegate from Hawaii sitting here looking at me.
since Naval rule over the territory shifted to being viewed as imperial in nature and incompatible with the values of democracy and freedom the United States wanted attached to its image. The most influential development that caused a shift in U.S. thinking was the creation of the United Nations Organization in 1945. Newspaper articles in the years right after the UN was established discuss the pressure being exerted on the United States in regard to its territories in the Pacific. One article\textsuperscript{122}, titled “Trusteeship Again: U.S. and the Pacific Islands,” outlines the new guidelines for nations holding territories, and the increasing scrutiny the United States encountered in relation to its territorial possessions. The article highlights the “Declaration Regarding Non-Self-Governing Territories” of the U.N. charter, which established a trusteeship system. There was fear that the United States would be forced to place territories it previous held sovereignty over in the Pacific, including American Samoa, under the international trusteeship system. This would mean that a U.S. territory, such as Samoa, would be subject to interference by the U.N.’s security council. The article notes that

\begin{quote}
[a]lready, however, the government of New Zealand has formally offered to place its mandate over [Eastern] Samoa under UNO trusteeship, and Great Britain, France and Belgium are reported to have reached fairly complete agreement to do likewise with their mandates in Africa…Great Britain has also indicated her readiness to do the same with respect to Palestine and Trans-Jordan.
\end{quote}

The article makes it clear that United States made sure the language of the charter included a provision for “strategic areas,” which created a category in which no provisions regarding the administering of such an area be changed with U.S. consent. The conclusion nicely captures the pressure acting on the United States at this time:

\begin{quote}
The clamor for outright ownership of conquered islands…has certainly weakened our moral position…we let Russia take the leadership in this regard. But at the very least, we ought to accept UNO trusteeship for any territory we continue to occupy…At a time when the entire world is seething with great ferment there should be more emphasis on
\end{quote}

\textsuperscript{122} The Washington Post (1923-1954); Jan 17, 1946; ProQuest Historical Newspapers: The Washington Post, pg. 5
trusteeship and less of a disposition to pursue a course of strategic imperialism. The latter is neither in our long-run interest nor the world’s.

This passage captures the transformation in thought regarding territorial holdings after WWII, both on the international and domestic level. An anti-imperial movement created pressure on the United States to fundamentally rethink its status regarding American Samoa, which was no longer considered to be one of benevolent despotism, but an undemocratic, imperial relationship, no different from how the Soviet Union treated nations under its Soviet bloc.

Another article\textsuperscript{123}, titled “Trustee Solution Seen in British Idea,” notes that if the United States was to simply annex the territory it had conquered from Japan during WWII, and create the same type of relationship with these areas as it had with its Pacific insular territories, “after all its protestations about the necessity of establishing a system of international responsibility for backward areas, the United States will certainly be accused of hypocrisy in every corner of the world.” Another article\textsuperscript{124}, titled “Wanted – A Colonial Policy,” demands that Congress create a long-term policy regarding the United States’ colonial policy “that would be more in tune with our principles as a nation.” It argues that

if [the United States is] to live up to its ideals as a nation and to [its] responsibilities as a member of the United Nations, this Government should formulate without delay a policy that will express those ideals and responsibilities, and rescue our colonials from the neglect to which they have been so long subjected.

An article\textsuperscript{125} from \textit{The Chicago Tribune} insists that

[t]he colonial outlook and the imperialist methods alike are abhorrent to all republican principles. Our mission in the Pacific dependencies should be to let the natives meet their own problems and govern themselves with a minimum of interference…The last thing to be desired is a class of colonial rulers imitating the British model.

\textsuperscript{123} New York Times (1923-Current file); Jan 28, 1946; ProQuest Historical Newspapers: The New York Times, pg. 3
\textsuperscript{124} New York Times (1923-Current file); Jun 18, 1946; ProQuest Historical Newspapers: The New York Times, pg. 24
\textsuperscript{125} Chicago Daily Tribune (1923-1963); May 17, 1947; ProQuest Historical Newspapers: Chicago Tribune, pg. 10
All of these articles demonstrate that in the immediate aftermath of WWII, the United States was subject to international and domestic pressure to alter its relationship to American Samoa. While in the early 1930s U.S. rule over Samoa was viewed a positive, natural form of benevolent despotism, by 1947 U.S. sovereignty over its Pacific insular territories had come to be viewed as imperial, antithetical to American ideals of democracy and freedom. This created a motive for Congress to consider extending citizenship to American Samoa, since it would be in the United States’ benefit to do so by helping to appease criticism of its hypocrisy.

In sum, the congressional hearings held in 1947 related to the legislation created based on the recommendations by the Hopkins Committee can best be understood by interest convergence. Testimony by its members demonstrate that the central reason why the United States considered extending citizenship to American Samoa, but did not ultimately enact, was because it felt its image as a democratic, free nation was in peril and that doing so would provide meaningful propaganda material in its ideological struggle with the Soviet Union. After 1947, and even with the transfer of governance of Samoa from the Navy to the Department of the Interior of 1951, there would be no extension of citizenship due to the ambiguity of wishes of Samoans, which remains the policy status quo up until the present. I now turn to legislation after the Hopkins Committee hearings that dealt with U.S. citizenship and its rules, eligibility, and privileges for a select group of people residing in American Samoa for a temporary period of time, which I also believe can best be examined by interest convergence.

Another moment involving U.S. citizenship legislation for American Samoa that I examine through an interest-convergence lens occurred in 1956, with the passage of Private Law 762 (based on H.R. 4031). The act reads:

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126 I will discuss the debate/controversy regarding the reluctance of at least a substantial portion of the Samoan population in wanting a full 14th Amendment Citizenship in a later concluding chapter.
To consider residence in American Samoa or the Trust Territory of the Pacific Islands by certain employees of the governments thereof, and their dependents as residence in the United States for naturalization purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That for the purposes of the Immigration and Nationality Act, Emma Melnikoff shall be held and considered to have been lawfully admitted to the United States for permanent residence as of December 19, 1952. Sec. 2. Residence and physical presence in American Samoa or the Trust Territory of the Pacific Islands by the following-named individuals shall be regarded as residence and physical presence in the United States and a State of the United States for the purpose of fulfilling the residence and physical presence requirements for naturalization prescribed by chapter 2 of title III of the Immigration and Nationality Act (66 Stat. 163, 239): Ilse Berta Susanne Michels, David Lehine, Lidia Hinine, Janis Pone, Valentina Pone, Arnis Pone, Alexander Hagentoras, Ludmilla Hagentornas, Elfryda Hagentornas, Eugene Melnikoff, and Emma Menikoff: Provided, That each such individual continues to maintain the status of an alien lawfully admitted for permanent residence within the meaning of the Act. Approved July 11, 1956.

This piece of legislation enabled White European doctors working in American Samoa to have their residence there count for naturalization purposes for U.S. citizenship. I argue that this is an example where the United States used its sovereignty over American Samoa for strategic purposes, in order to benefit White elites. This legislation demonstrates how the Insular Cases allow the United States to treat an unincorporated territory such as American Samoa as being included within it when doing so is beneficial to its political, economic or social interests and/or it is advantageous for White elites. A report attached to the law provides its rationale:

Several years ago the Department of the Interior recruited doctors from among the displaced persons of Europe to meet an urgent need for medical services by the governments of Guam, American Samoa and the Trust Territory of the Pacific Islands. The need could not be filled by the recruitment of doctors who were United States citizens. These doctors, together with their families, were lawfully admitted to the United States for permanent residence, and, had they remained in the continental United States, they could have counted the time spent here toward the residence period required for naturalization purposes. Time spent in Guam, American Samoa, or the trust territory, however, could not be so counted under the then applicable law, and the doctors were so informed. Although these displaced persons were anxious to become citizens of the United States as soon as possible, they nevertheless agreed to accept employment in these outlying areas in the hope that subsequent legislation would enable them to count their period of residence in the territories in fulfillment of the residence requirements for

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naturalization...the present problem is therefore restricted to American Samoa and the trust territory, for the definition of the “United States” in the Immigration and Nationality Act does not include those areas...Enactment of the bill would take account of the service these people have performed in accepting government employment in American Samoa and the trust territory by providing that there should be no delay, by reason of that employment alone, in the fulfillment of their residence requirements for naturalization.

Thus, this law reveals how the broad plenary authority granted to the United States to govern unincorporated territories established in the Insular Cases allows the United States to create laws that are strategically beneficial to its political, economic and social interests. In this example, the United States created individual exceptions to naturalization requirements for White European elites, meaning that American Samoa can be included within or deemed outside of the United States depending on what status is advantageous to U.S. interests.

A last moment of U.S. citizenship legislation for American Samoa that can best be understood by interest convergence comes in the form of an amendment to the Immigration and Nationality Act of 1952. In 1962, Congress drafted H.R. 11667, which amend the Immigration and Nationality Act regarding the naturalization of persons residing in American Samoa who served in the military. The act allows for any person entitled to naturalization who served in the U.S. military to be naturalized while residing in American Samoa without having to appear before a naturalization court. This exception to the naturalization process for those Samoans who have served in the U.S. military demonstrates how citizenship policy is linked to what is in the strategic interest of the United States.

Conclusion
The Insular Cases, which combined elements of U.S. colonialism and imperialism to create the unincorporated territory, granted a broad, plenary authority to Congress to govern newly
acquired territories in whatever manner it deemed most appropriate for a particular area. This meant that the United States did not how to govern unincorporated territories in a consistent, equal manner, but could create unique policies to govern each territory distinctly and strategically. The plenary authority that the Court granted to Congress over the insular territories has allowed the United States to adopt convenient policies that do just enough to appease any pressure, whether from the territories themselves or from domestic actors and organizations in the states, that may have demanded equality for the residents of the territories, while maintaining sovereignty over them. This plenary authority, which grants Congress broad power to create unique policies over each of the insular territories, including American Samoa, is why I believe interest-convergence is useful when thinking about how U.S. citizenship legislation has developed in these areas. The Insular Cases set a precedent for Congress to be able to create policies in the unincorporated territories that are strategically beneficial to the United States, and to only act when the interests of the United States will be furthered.

In this chapter, I have argued why I believe U.S. citizenship legislation for American Samoa is best understood when viewed through a lens of interest convergence. By examining legal histories and newspaper articles, I hope to have demonstrated how the Insular Cases enabled Congress to develop legislation only when the political, economic and social interests of the United States converged with the interests of Samoans. This explains why the United States did not ratify an organic act for American Samoa, as international or domestic forces, nor Samoans themselves, seriously threatened U.S. interests and sovereignty in Samoa in the late 1920s and early 1930s, despite evidence of widespread desire by its residents to have citizenship extended. The Naval government was still viewed as being a positive force in American Samoa at this juncture, meaning the United States had little to gain politically, economically or socially
in altering its relationship and extending citizenship to Samoans. In the immediate aftermath of
WWII, however, the United States felt that its image as a democratic and free nation was
jeopardized by what was now considered to be an imperial relationship with American Samoa,
which explains why the Hopkins Committee recommended granting Samoans U.S. citizenship.
However, the interests of the United States and American Samoa diverged between the early
1930s and 1947, as a substantial amount of Samoans no longer sought citizenship despite an
apparent willingness by the U.S. government to grant it. Lastly, interest convergence can also be
used to understand how the United States created legislation that allowed for White European
elites to count their residency in Samoa for naturalization purposes and for Samoans who had
served in the military to have certain exceptions for naturalization requirements. The link that
undergirds all of these “moments” is that the legislation involved would be beneficial to the
political, economic, cultural and strategic interests of the United States.
Chapter 5 - The Commonwealth of the Northern Mariana Islands: Independence in Name Only

“We have here islands that in many instances are nothing but sandpits. Our *sole* interest in them is security.”

U.S. Representative to the United Nations Security Council [emphasis added]

Introduction:

The first main difference between the Northern Mariana Islands and the two other Pacific insular territories, American Samoa and Guam, is their official designation: commonwealth. This would perhaps suggest, at least nominally, that the Commonwealth of the Northern Mariana Islands (CNMI) possesses a higher degree of autonomy and independence than the two other U.S. Pacific territories. This chapter will argue, however, that the CNMI’s status as a commonwealth does not grant it a higher (or lesser) degree of autonomy when compared to American Samoa or Guam; the United States categorizes all three broadly as unincorporated territories that Congress maintains plenary authority over. Thus, while there are significant differences in U.S. governance over each of the Pacific insular territories, it is important to

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127 The Northern Marianas, located 120 miles north of Guam, is a chain of fourteen islands located in Micronesia, in the Pacific Ocean. The three most populated of the islands are Rota (population according to 2010 census: 2,477), Tinian (population 3,136), and Saipan (population 48,220).

128 One of the most significant differences is immigration policy. The Immigration and Nationality Act (INA) applies to Guam but does not apply to American or the CNMI. As a result, the CNMI maintains significant control over its immigration policies (see Leibowitz, 540-542 for a brief discussion of the implications of this), which was used to end a long period of economic stagnation by recruiting foreign laborers from surrounding Asian countries. However, in 2009 Congress revoked the CNMI’s control over its immigration policy, due to concerns over the status of long-term guest workers who had no path to citizenship despite working on the islands for years. There remains substantial controversy over the status of these long-term guest workers, as some citizens of the CNMI are against change in immigration policy that would allow these laborers to apply for lawful permanent residency and eventually U.S. citizenship (see Rose Cuison Villazor “Citizenship for the Guest Workers of the Commonwealth of the Northern Marianas.”) While not a focus of this chapter, the controversy stems from the rapid economic growth that occurred in the CNMI in the garment and tourist industries in the 1980s and 1990s, which was only possible through large influx of foreign guest workers that provided the necessary unskilled labor. The CNMI, able to regulate its own immigration policies as outlines in the Covenant with the United States, created its own immigration law in the 1980s, the Nonresident Workers Act (NWA), which created a guest worker program. This permitted the CNMI to attract thousands of non-citizen workers to be employed in the garment and tourist industries, significantly increasing the population and workforce of the CNMI: “Between 1970 and 1980, the population nearly doubled to 16,780.62 By 1990, the population more than doubled again to 43,345 with more than
remember that all three remain under the ultimate sovereignty of the United States, even if the CNMI’s “commonwealth” status suggests differently.

In this chapter, I will examine U.S. citizenship legislation in the CNMI, focusing on the negotiations for territorial status between the United States and the Northern Marianas that occurred in 1972. These negotiations created a covenant to establish a commonwealth of the Northern Marianas Islands that would be in political union with the United States, which was approved in a 1975 referendum. Through an examination of the legal histories of these negotiations, I will argue that the United States’ willingness to extend citizenship to the Northern Marianas can best be understood through the lens of Critical Race Theory’s interest-convergence methodology. The United States recognized that its desired image as the global leader of democracy, equality, and freedom, i.e. as the worldwide defender of social justice against Soviet authoritarianism and communism, had become threatened by the continuation of the Vietnam War, causing increasing criticism over U.S. militarism. The United States recognized it could push back against claims of imperialism by extending citizenship to the Northern Marianas, which would not fundamentally threaten its strategic interests in maintaining plenary authority over the islands. Thus, the United States identified that it could buttress its argument for the

half composed of contract workers” (Villazor, 535). Many of these non-citizens that came to work on the islands were “temporary” guest workers with contracts that were usually for one year, but could be renewed indefinitely. As a result, many of these temporary guest workers lived and worked on the islands for years (sometimes decades), with no opportunity to become lawful permanent residents of the CNMI or the United States (Villazor, 535). While Congress did pass the Consolidated Natural Resources Act of 2008 (CNRA) in 2008, to apply the INA to the CNMI, there was not a provision that was included that would have created a lawful path to permanent residency to guest workers on the islands (Villazor, 536-537). Since the INA now applied to the CNMI, guest workers would have to apply using the traditional path for obtaining a green card, through family or employment categories (Villazor, 536). Since most guest workers in the CNMI are low-skilled workers, however, under the INA they do not meet the criteria for permanent visas. The point is that the CNMI has taken advantage of its unique ability to control its own immigration policies to promote economic growth through the use of guest workers that remain unable to obtain a permanent residency status, and that even when the United States used its plenary authority over the CNMI and applied the INA to the islands, these long-exploited guest workers were still left without a meaningful path to a permanent status and have no political representation. For a more thorough history of guest workers and their role in the economic development of the CNMI, see: Marybeth Herald, “The Northern Mariana Islands: A Change in Course Under Its Covenant with the United States,”
moral superiority of American democracy over competing political systems and ideologies, under threat with U.S. policy in Vietnam, by extending citizenship to the CNMI while knowing that its strategic interests would still be protected by maintaining sovereignty over the Northern Marianas. This fits with Bell’s thesis, since it argues that occasionally progressive action will occur as long as such action does not fundamentally “harm societal interests deemed important by...whites (1980, 523). Extending citizenship to the residents of the CNMI is an example of such “progressive” legislation that does not alter, question or challenge existing power structures (Longazel, 80), i.e. the CNMI’s subordinate status to the United States, and allows the United States to portray itself as egalitarian, nonracist and the global leader of democracy and freedom.

In the first section of this chapter, I offer a brief overview of the history and cultural background of the Northern Marians islands to provide the context for the 1975 covenant that established the CNMI as an unincorporated U.S. territory. The next section provides a brief overview of Mary Dudziak’s argument regarding the shifting focus of the United States’ image abroad after the passage of the Civil Rights Act of 1964 and the Voting Rights Act of 1965. As Dudziak explains, after 1965 the United States believed that it had solved its racial “problem,” as international coverage portrayed the U.S. federal government as sympathetic to and fighting for racial equality. Any racial issues were now viewed as caused by the actions of incorrigible radicals, and not by state-sanctioned U.S. racism. Thus, racism in America became viewed as an individualized problem, anomalous, and deviating from official U.S. policy. Instead, international criticism focused on U.S. militarism and imperialism, with increasing focus on the Vietnam War. The final section of this chapter examines the transcripts and reports related to the congressional hearings leading up to the 1975 covenant, which I argue demonstrate how the United States recognized that by extending citizenship to the residents of the CNMI it could
promote its desired image as the global leader of democracy and equality, provide a counter-
narrative to increasing international criticism of U.S. militarism and imperialism, and still
maintain the existing power structure that granted the United States plenary authority over the
CNMI.

**Historical Overview of the Northern Mariana Islands**

As was the case with American Samoa and Guam, the Northern Mariana islands have suffered
through a long history of Western colonialism and imperialism, which can be divided into four
colonial regimes: from 1521 to 1899, the Islands were ruled by Spain; from 1899 to 1914 they
were ruled by Germany; then Japan until 1944; and then by the United States until 1986 as a trust
territory under a U.N. mandate (Rios-Martinez, 46-47). Magellan discovered Guam and the
Marianas in his voyage around the globe between 1519-1521, and Spanish colonization\(^\text{129}\) of the
islands began in 1668, when the Jesuit missionary Father Diego Sanvitores arrived to convert
Chamorro population. From 1680-1696, the Chamorro population on Guam and the Northern
Marianas would be decimated under the military rule of Don Jose Quiroga, who implemented
genocidal practices, reducing the Chamorro population from around 100,000 to roughly 1,500
(Leibowitz, 504). Spain then attempted to consolidate the Chamorro populations living on the
Islands by forcing them to settle in Guam, so by 1698 almost the entire population had been
removed from the Northern Marianas, “effectively obliterating traditional Chamorro society”\(^\text{130}\)

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\(^{129}\) Rios-Martinez notes that Spain had very limited intentions for the islands: using them for ports and converting
the residents to Catholicism. I would view this as imperialism rather than colonialism, with my understandings of
these systems discussed at length in the first chapter.

\(^{130}\) Chamorro society was based on matrilineal clan ownership of land, which was eventually transformed to a
patriarchal, individual system of land ownership. The matrilineal clan system was replaced by a social system rooted
in biological familial ties, influenced by Spanish patrilineal culture and the Catholic Church’s demand for the
subordination of women (Leibowitz, 504). The lasting influence of Spanish imperialism in the Northern Mariana
Islands is evidenced by the continuing predominance of Catholicism (Herald, 131). For a good examination of the
power of law to transform indigenous systems of social organization into Westernized societies rooted in individual
(Leibowitz, 504). As Leibowitz notes, “By hiding out in caves, some Chamorros in Rota mat have escaped extinction or relocation” (504).

After the Spanish nearly eliminated the entire Chamorro population on the Northern Mariana Islands through genocide and relocation, various waves of migration between 1815 and 1869 repopulated the islands. Spain, seeking to exploit the resources on the Northern Marianas, allowed groups of Carolinians, from Elato, Lamotrek, Satawal and Woleai, to resettle on the Northern Mariana Islands because the Spanish thought that the Carolinians “navigational and canoe-building skills” would help establish a reliable communication network with the islands (Leibowitz, 505). Chamorros were permitted to return to the islands in 1816, but they would be outnumbered by Carolinians for most of the 19th Century and were deeply influenced by the Catholic Church and doctrine.  

As a result of the Spanish-American War, Spain sold the Marianas to Germany in 1899. German colonization of the islands was from 1899-1914, who attempted to commercialize the islands’ fishing, copra and coconut production. Besides economic development, Germany also sought to create and implement a Western legal system. German rule, while relatively short, led to large-scale changes in the Marianas, as infrastructure projects were developed and a money economy was introduced despite strong opposition.

During the period of German colonization, the population of the Marianas began to shift to a Chamorro majority, as a homestead plan introduced by the Germans brought more private ownership of land and material resources, see Sally Engle Merry, Colonizing Hawai‘i: The Cultural Power of Law.

131 Spain never made much of an attempt to exploit the Islands’ resources, especially when compared to German attempts at the beginning of the 20th Century. Spain remained much more focused on converting the indigenous population to Catholicism, maintaining secure ports, and doing the bare minimum necessary to allow for an orderly government to function on the islands.

132 As late as 1886, Chamorros accounted for only one-third of the entire populace of the Northern Mariana Islands and every village had a missionary school (Leibowitz, 505).
Chamorros to the islands (Leibowitz, 506).133 This demographic change exacerbated feelings and forms of deep-seated discrimination and oppression of Carolinians’ by the now-majority Chamorron population and the colonial powers. Chamorros viewed Carolinians as “unsophisticated, backward natives,” and colonial powers thought of them as uninterested in “progress” (Leibowitz, 506).

Japanese forces would occupy the Marianas from 1914 until 1944, and would govern “the islands as an integral part of Japan, colonizing the islands to maximize the economic advantages to be gained” (Leibowitz, 507). As Rios-Martinez explains, “For thirty years, the indigenous population was at the mercy of the Japanese, who required them to speak only in Japanese and to labor in the sugarcane fields” (46). Japanese civilians would outnumber the indigenous population, and exceedingly so on certain islands. By 1930, there were 15,000 Japanese civilians living in the Marianas, and by 1937 this number would increase to 42,000, compared to the roughly combined 6,000 Chamorro and Carolinian residents living on the islands (Leibowitz, 508). Japan would continue the infrastructure and economic development that Germany (e.g. the coffee and copra industries) had started, and would create a sugar and molasses industry, emphasizing the economic benefits that sovereignty over the islands could provide (Rios-Martinez, 46-47).

The Second World War would ravage the islands, as the Marianas were strategic bases for Japanese attacks and conquests, serving as communication centers and airfields, providing stopping/refueling points (Leibowitz, 508). During the war, the United States military would determine that the Marianas provided crucial bases for communication and attacks on Japan. Saipan and Tinian were captured by the United States in 1944, and would serve as bases for B-29

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133 The Chamorro population now outnumbers Carolinians by roughly 4:1 (Leibowitz, 506).
bombers; the U.S. planes that dropped atomic weapons on Hiroshima and Nagasaki were launched from Tinian (Leibowitz, 508).  

After WWII, President Truman placed the Marianas in the process of the United Nations’ trusteeship system, which provided for the supervision of former territories (Rose-Martinez, 47). The Trust Territory of the Pacific Islands (TTPI), which was approved by the U.N. Security Council and the U.S. Congress, made the administration of the Marianas the responsibility of the United States and the U.N. Security Council (not the U.N. General Assembly), and which placed the Marianas under the authority of the U.S. Navy. Truman wanted the Micronesian Islands to be administered as a “strategic trust,” because of their important position in the Pacific (Rios-Martinez, 47; Leibowitz, 509-510). This proved advantageous to the United States for several reasons, as outlined by Rios-Martinez: the United States now had a permanent veto over any action regarding the Trust Territory, meaning it had control over how the Islands were governed; it allowed the United States to build/maintain bases on the Islands to preserve “peace and security;” and it could designate areas closed to U.N. oversight by deeming them closed for security purposes (48). While it is true that the TTPI imposed certain obligations on the United States in governing the islands of Micronesia, which included encouraging the inhabitants to establish political institutions, to participate in government, and to strive towards self-government or independence, the United States exercised absolute authority over the territory and did little to foster economic growth in the Islands (Rios-Martinez, 48, Leibowitz, 509-510).

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134 Saipan would be used as military base after WWII, from 1952-1963, and was used by the CIA in a canceled plan to take control away from China from Chinese Communists (Leibowitz, 508).
135 The Trusteeship Agreement for the Former Japanese Mandated Islands, which was approved by the U.N. Security Council and by the United States on July 18, 1947; 61 Stat. 3301, T.I.A.S. No. 1665, 8 U.N.T.S. 189. The TTPI created six districts, of which the Northern Marianas was one. The five other districts were Pohnpei, Truk, Yap, the Marshals, and Palau, which collectively made up the Micronesian Islands.
136 The U.S. Navy would administer the TTPI until 1962, when authority over the Marianas would be transferred to the Department of the interior.
Beginning in 1950, the Northern Marianas House of Council and House of Commissioners petitioned the United States to terminate the agreement and annex the Mariana District as a U.S. territory (Leibowitz, 509). Starting in the 1960s, Micronesians began demanding self-determination and desired to end the trusteeship agreement, forming the Congress of Micronesia to negotiate with the United States about increased autonomy, self-governance, including the desire to have their own constitutions for each district, and control over land (Rios-Martinez, 49; Leibowitz, 509-510).

In the early 1970s, the CNMI would separate themselves from these negotiations, and formed the Marianas Political Status Commission (MPSC) with the goals of achieving a greater degree of self-governance and securing permanent ties to the United States, using Guam as a model. On February 19, 1971, the Mariana Islands District Legislature declared that the Mariana district would secede from the Trust Territory agreement linking it with Micronesia by force, if necessary. The actions and desires of the Northern Marianas were strongly criticized by the Congress of Micronesia and the United Nations, however. According to Rios-Martinez, [t]he Congress of Micronesia was outraged at the negotiations between the United States and the Northern Marianas Islands, and did not endorse the separate talks. The United Nations accused the United States of encouraging a "separatist movement" in the Northern Marianas. Furthermore, they refused to endorse the Covenant

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137 The motives for why the CNMI decided to break away from Micronesia remain ambiguous, but Rios-Martinez and Leibowitz believe that residents of the Marianas were upset with the slow pace of change in the Trust Territory agreement regarding self-determination and greater autonomy, which they blamed on the “backwardness” and inferiority of other Micronesians. As Leibowitz explains: “Northern Marianas leaders believed that progress toward close political association with the United States was not only being delayed, but also thwarted by the others districts” (510). There were also potential financial considerations for why the CNMI decided to engage in separate talks with the United States, as a disproportionate share of territorial tax revenue was raised in the Marianas, who felt economic development policies were more favorable to other districts at their expense (Leibowitz, 510).

138 Guam, an unincorporated territory, had an Organic Act that established its own constitution in 1952. The Northern Marianas attempted to reintegrate with Guam in the 1960s, but were rejected by Guam in 1969 due to lingering feelings of hostility over events during WWII, as some Chamorros from Saipan served as police for the Japanese on Guam (Leibowitz, 510). It is important to note here that while it is clear the CNMI desired some form of permanent ties to the United States, it was not one where it would be under the plenary authority of the U.S. government, as will become clear when I discuss the hearings and reports for the covenant agreement in the next section of this chapter.

139 Resolution No, 30-1971
because it was an improper method to terminate the trusteeship and it was overly advantageous to the United States. (51)

Despite this criticism, the United States accepted a formal request from the Northern Marianas for separate status negotiations in 1972, which would last until 1975, leading to the creation of a covenant establishing the Commonwealth of the Northern Mariana Islands.

In the next section, I will use Critical Race Theory’s interest-convergence to offer an explanation as to why the United States agreed to enter into negotiations with the Northern Marianas and establish the Northern Marianas as a commonwealth. The United States knew it could extend citizenship to Mariana residents and designate the islands as a commonwealth, which suggests autonomy and self-determination, without fundamentally altering or challenging the existing power structure that granted the U.S. government plenary authority over the Northern Marianas. This would also allow the United States to sustain and promote its desired image as the global leader of democracy, equality and freedom despite foreign criticism over increasing U.S. militarism and imperialism. So, while the Northern Marianas entered into negotiations with the belief that they could create a covenant based on mutual consent, which would maintain its ties with the United States to allow for more robust economic growth but would still allow for a high degree of political development, autonomy and self-governance, “the United States chose to conduct the negotiations in an adversary manner rather than one consistent with its fiduciary relationship,” to maximize its strategic interests and maintain existing power relations, while still being able to shield itself from foreign criticism focused on U.S. militarism and imperialism by extending citizenship and using the commonwealth designation (Leibowitz, 512).
Cold War Civil Rights Post-1965

As Mary Dudziak explains, in regards to the United States’ strategy in promoting itself as the world leader of democracy, equality and fairness,

> [o]ver time, it seemed, the United States had become more immune to criticism. The idea of American racial progress had taken a hold [after the passage of the Voting Rights Act in 1965]…overall it appeared as if the tenor of international coverage of race in America had changed. Civil rights crises no longer threatened the nation’s international prestige. Instead, they had become moments to showcase and reinforce the lessons of the previous twenty years of U.S. propaganda: that the federal government was on the side of justice and equality, that racism was not characteristic of American society but was aberrational, and that democracy was a system of government that enabled social change” (235-236).

The United States could use the passage of civil rights legislation as a propaganda tool abroad, to claim that the Voting Rights Act, for example, demonstrated the United States had achieved racial equality and proved the value and superiority of American democracy. Despite continued forms of de facto, systemic racial discrimination, the United States could portray itself as committed to equality through law. Thus, civil rights legislation supplied the United States with a powerful symbol of the government’s commitment to racial equality.

While the United States “had come to believe that it had resolved the Cold War/civil rights dilemma, and that race in America no longer damaged the nation’s prestige abroad” (Dudziak, 241), this did not mean that criticism from abroad that threatened the United States’ democratic image suddenly ceased. The Vietnam War would raise concerns over U.S. militarism and imperialism, once again jeopardizing the United States’ desired status as the global leader of freedom and equality.

U.S. policy in Vietnam would eventually become the overriding issue determining foreign perceptions of the United States, undermining its desired image abroad. As Dudziak explains, “By 1966 Vietnam had replaced American race relations as an important matter of international concern…[a]ll other issues paled in significance” (242). Thus, when the
negotiations with the Marianas were occurring in the early 1970s, the United States had an interest and opportunity in buttressing a democratic image of itself through the creation of the Covenant. The United States could demonstrate to the world that it was dedicated to self-governance, independence, democracy and equality by establishing the Marianas as a commonwealth and extending U.S. citizenship to its residents, while still maintaining sovereignty and plenary authority over the islands. While the overriding focus of foreign criticism shifted from racism to militarism/imperialism, the point of interest-convergence is that the United States will act in a way to benefit its moral standing through the “ever-present international gaze” (Dudziak, 254). Despite foreign criticism emphasizing different U.S. policies in different time periods, the constant is the United States pursuing strategies that promote and protect its preferred image of the superiority of the American political system, based on notions of fairness and equality. The negotiations with the Marianas and the subsequent creation of the Commonwealth of the Northern Mariana Islands provided an opportunity for the United States to repair its moral stature and confirm its progressive credentials abroad, as I will demonstrate in the following section of this chapter.

**International Criticism of U.S. Imperialism**

In this section, I rely on archival research that examines various of issues of *International Organization*, a preeminent International Relations journal that published the Trusteeship Council proceedings and hearings throughout the 1960s, to demonstrate the criticism the Soviet Union used in its propaganda struggle with the United States during the Cold War. At a major international setting, and later published in an influential journal, the Soviet Union accused the United States of being an empire that sought to maintain a system of imperialism in the Northern
Marianas. This would put pressure on the United States, as it felt its desired image as the global leader of democracy, which was meant to demonstrate the inherent superiority and morality of its political system of governance, was threatened.

A passage from the 1964 U.N. Trusteeship Council meeting demonstrates the imperialist narrative the Soviet Union was attempting to use to frame U.S. policy in the Pacific:

Mr. Brykin (Soviet Union) accused the United States of a lack of interest in the situation of the indigenous inhabitants. His delegation felt that the political, social, and economic advancement of the population had been inadequate, that efforts toward filling higher-level administrative posts with natives had been insufficient, and that the administering authority had demonstrated its indifference in showing a lack of concern over the nuclear tests which the French government was planning to hold in the Pacific. (Trusteeship Council, 1964; 124)

The United States responded by denying that they were a colonial power:

Mr. Yates [the U.S. ambassador] remarked that the Soviet representative's position was in substance that the United States was a colonial power and that its actions were at variance with the Declaration on the Granting of Independence. The Declaration, however, had to be read in the context of the UN Charter; whereas the Declaration urged that non-self-governing territories should be granted independence as quickly as possible, the Charter provided that trust territories should be permitted to choose between independence and affiliation with an existing state. (Trusteeship Council, 1964; 124)

The United States also strived to frame its administration of the Marianas as a form of beneficent paternalism:

Mr. Yates (United States) emphasized that his government was not present in the territory as a colonial power and that it subscribed to the principle of self-determination. In order to give the people of the territory a free choice of the type of government they wished for themselves, the United States government intended first to raise the general level of health and education, to build a structure for a more productive economy, and to foster the sense of political unity. (Trusteeship Council, 1964; 123)

This passage from a 1966 U.N. Trusteeship Council captures the Cold War propaganda struggle between the United States and the Soviet Union:

Platon Morozov (Soviet Union) remarked that the colonial yoke had continued to weigh down the trust territory of the Pacific Islands whose development was being artificially hampered in all fields because the United States government was using the objectives of
the trusteeship system for imperialist ends. For eighteen years it had been trying to prevent the transfer of power to the Micronesian people who had continued to be administered by the United States. All key posts were held by United States citizens. Further evidence of the process of Americanization was that English was the language of instruction in the schools and of the administrative organs. In the economy all important positions were held by companies whose activities were controlled by United States monopolies. The Soviet representative urged the Council to consider the real situation in the territory. A development plan did not yet exist in the economic sphere; abundant stocks of fish were being inadequately used and were not even being explored; produce of the economy went to the United States at arbitrarily fixed prices; and an ever increasing place was being given to foreign capital. As for social conditions, over 50 percent of the population (Trusteeship Council, 1966; 143-144)

In the next section, I will use Critical Race Theory’s interest-convergence to offer an explanation as to why the United States agreed to enter into negotiations with the Northern Marianas and establish the Northern Marianas as a commonwealth. The United States knew it could extend citizenship to Mariana residents and designate the islands as a commonwealth, which suggests autonomy and self-determination, without fundamentally altering or challenging the existing power structure that granted the U.S. government plenary authority over the Northern Marianas. This would also allow the United States to sustain and promote its desired image as the global leader of democracy, equality and freedom despite foreign criticism over increasing U.S. militarism and imperialism. So, while the Northern Marianas entered into negotiations with the belief that they could create a covenant based on mutual consent, which would maintain its ties with the United States to allow for more robust economic growth but would still allow for a high degree of political development, autonomy and self-governance, “the United States chose to conduct the negotiations in an adversary manner rather than one consistent with its fiduciary relationship,” to maximize its strategic interests and maintain existing power relations, while still being able to shield itself from foreign criticism focused on
U.S. militarism and imperialism by extending citizenship and using the commonwealth designation (Leibowitz, 512).

**Using Interest-Convergence to Understand the Covenant Agreement**

In this section, I examine the legal histories of the covenant negotiations between the Northern Mariana Islands and the United States that took place between 1972 and 1975 to argue that the U.S. government recognized it could extend citizenship to the Marianas and designate the Islands as a commonwealth, both of which would help promote its image as the global leader of democracy and supportive of policies that enable self-determination, while still maintaining plenary authority over them, thus protecting its strategic interests.

The overall structural relationship between the United States and the Northern Mariana Islands demonstrates how despite the covenant agreement establishing a commonwealth, the United States would maintain plenary authority over the CNMI. A position paper from 1973 written by the Marianas Political Status Commission reveals how the Northern Marianas viewed the status of commonwealth, stating:

> [t]he Commission’s recommendation for a Commonwealth by Compact is based largely upon the examination of the Puerto Rico precedent. It is generally recognized – by the United Nations, the U.S. Congress, the U.S. Executive Branch and the courts – that the commonwealth status possessed by Puerto Rico is superior to the status of an unincorporated territory…the proposed Compact of Commonwealth will provide the fullest opportunity for self-government in the Marianas and create a political status which the people of the Marianas can accept with dignity through a solemn act of self-determination. (9)\(^{140}\)

While the Marianas Status Commission believed that a commonwealth status would be “superior” to that of unincorporated territory, the United States made its position clear in the

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negotiations leading up to the creation of the covenant and in the hearings to vote on it:

commonwealth status would still be territorial in nature, with plenary authority over the Northern Marianas resting with Congress. A passage from a position paper presented by U.S. Ambassador Franklin Haydn Williams from 1973 explains that

> [the United States] envision[s] a relationship which will clearly vest sovereignty over the Mariana Islands in the Government of the United States and authorize that Government to legislate for the Marianas under Article IV, section 3, clause 2 of the Constitution [the Territory Clause]. This relationship would be “territorial” as that term is used in the U.S. Constitution. However, the Marianas would become a commonwealth with the right to write its own constitution and would have the maximum possible control over its affairs subject, of course, to the supremacy of the Federal Government. (18)

While the Northern Marianas believed that a commonwealth status would offer a more robust form of self-determination and autonomy, the United States maintained its position throughout the negotiations that there were inconsequential differences between a commonwealth and an unincorporated territory. During the senate hearings to confirm the covenant agreement in 1975, a report from the Senate Committee on Interior and Insular Affairs stated that “[a]lthough described as a commonwealth, the relationship [between the Northern Marianas and the United States] is territorial in nature with full sovereignty vested in the United States, and plenary legislative authority vested in the United States Congress.”

Despite clear evidence from the legal histories of the United States’ stance that it understood there to be no fundamental difference between the status of commonwealth and unincorporated territory, at least concerning its relationship with Northern Mariana Islands, the United States promoted the commonwealth status in a progressive way. According to a report filed to the vote on the covenant, the United States offered the following explanation as a defense for commonwealth status:

141 Ibid.
The U.S. undertook a responsibility 30 years ago to enable the people of the northern
Mariana Islands to choose eventually their own future…the United States will be
fulfilling its responsibility and its commitment to the principle of self-determination [by
entering into this covenant agreement]…The Northern Marianas are not now a colony nor
will they be a colony under the commonwealth covenant…If the Congress approves the
covenant the people of the northern Mariana Islands will be self-governing under their
own constitution as are the States. (411-413)

One of the central aspects of interest-convergence is that it allows for “progressive”
legislation that does not fundamentally threaten structural forms of existing power relations. The
United States’ interpretation of the Northern Marianas’ commonwealth status is an example of a
seemingly progressive piece of legislation that ultimately maintains an existing status quo of
power relations. While a commonwealth status suggests a more robust form of autonomy and
self-determination, the United States argued that it had no meaningful difference between the
status of an unincorporated territory. As Leibowitz argues, “The United States…likened the
Marianas to a territory, permitting the exercise of Federal authority, and believed that the term
commonwealth was important in name and form only” (520).

Conclusion

Having viewed U.S. territorial law, U.S. citizenship, the Insular Cases and U.S. citizenship
legislation in the U.S. Pacific Insular Territories through Critical Race Theory’s interest-
convergence thesis, I conclude this dissertation by examining a case that was denied certiorari by
the Court in 2015, Tuaua v. United States, which involved a small group of American Samoans
claiming that they should be entitled to birthright citizenship. The Tuaua case is useful for the
purposes of this dissertation as another example of how legislation will fail to be enacted when
interests diverge, but also raises the possibility of the Insular Cases being redeemed in modern
times.
Chapter 6 – Conclusion

Summary of Dissertation
I have employed Derrick Bell’s theory of interest-convergence to argue that it is only when economic, cultural, political, and social interests converge to benefit the United States that U.S. lawmakers have enacted legislation to extend citizenship to the Pacific insular territories. I also relied heavily on Mary Dudziak’s use of interest-convergence, which she used to explain the implementation of key social reforms of the civil rights movement, such as desegregation, as a model setting up my research design. Bell and Dudziak used interest-convergence to explain how advances for Black Americans and other oppressed races during the Civil Rights Movement (e.g. the Court’s decision in Brown v. Board of Education) were used as propaganda by the United States in its struggle against communism during the Cold War. The passage of civil rights legislation allowed the United States to project an image of the moral superiority of its democratic system of government on the global stage, in response to foreign (especially Soviet) criticism of American racial discrimination and White supremacy. I hope to have persuasively demonstrated that any potential changes in citizenship status for the Pacific insular territories were meant to be benefit the United States’ interest in being perceived as the world leader of democracy, equality and fairness, and not for a genuine concern and sympathy of the well-being and desires of the inhabitants of the territories. Furthermore, when the interests of the United States and the Pacific insular territories diverged, I contended that citizenship legislation would not be enacted, which explains why Samoans are still non-citizen nationals, and not U.S. citizens, while still owing their allegiance to the United States and existing under its authority. I thus examined the legal histories of citizenship legislation in each of the Pacific insular territories to found evidence of Bell’s interest-convergence thesis.
My dissertation also provided an overview of the Supreme Court’s decision in *Downes v. Bidwell* (1901), the key precedent for the *Insular Cases*, which constitutionally legitimated U.S. imperialism by permitting Congress to maintain plenary authority over the insular territories (Puerto Rico, Guam, American Samoa, the Virgin Islands and the CNMI), which are still considered to be “unincorporated,” able to be treated differently than the states, and still exist in a status of permanent subjugation to the federal government. Based on the broad authority the Court granted to Congress to govern these territories, allowing each one to be governed in a nuanced manner, I argued that interest-convergence can be used to analyze U.S. citizenship legislation in the individual Pacific island territories to try to discern an overall U.S. policy for these areas. Since the Court’s decisions in the Insular Cases allow for Congress to have maximum flexibility when deciding how to govern each individual territory, this allowed for U.S. interests to be protected. By applying interest-convergence to the legal histories of the Pacific island territories, I believe I have accomplished three primary goals and contributed to Critical Race Theory scholarship: (1) demonstrated a sophisticated understanding of how to apply interest-convergence as a research methodology; (2) expanded the use of interest-convergence to outside the context of how Black Americans were treated during the Civil Rights Movement by analyzing how “Polynesians” were governed in the Pacific insular territories through U.S. citizenship legislation; and (3) to offered a counter-narrative to romanticized theories that promote the idea that citizenship in the United States developed in an increasingly progressive manner, in which it is argued that the United States has overcome its past history of exclusionary practices regarding eligibility for equal citizenship. The *Insular Cases* and the extension, or lack thereof, of U.S. citizenship to the Pacific Insular Territories pushes back
against progressive, mythologized understandings of the development of citizenship in the United States.

_Tuaua v. United States_

To conclude, I will examine a recent case involving American Samoa, _Tuaua v. United States_, that was ruled on by the District of D.C. and the D.C. Court of Appeals in 2015, but was denied certiorari by the Supreme Court in 2016. The _Tuaua_ case involves a group of Samoans who argued that indigenous population of Samoa should have access to birthright citizenship, despite Congress’ refusal to extend it. I will use the _Tuaua_ case to pursue a recent debate that was featured in the _Harvard Law Review_ from 2016-2017: can the constitutional framework established in the _Insular Cases_, rooted in White supremacy and constitutionally legitimizing U.S. imperialism, be “reclaimed” to serve the interests of indigenous populations living in U.S. territories by protecting local culture, policies and traditions? The _Tuaua_ case is useful in this inquiry, as a prominent group of Samoans were opposed to the extension of birthright citizenship due to concerns about local cultural policies that they believed would be threatened, mainly Samoans’ ability to use racial classifications for its land tenure system, if Congress or the judiciary were to decide to grant residents of American Samoa birthright citizenship. Interest-convergence theory helps to explain why birthright citizenship wasn’t extended to American Samoan, since the interests of Samoans diverged from U.S. interests, as there was no clear desire by Samoans to have Congress grant citizenship. As Bell would argue, when interests diverge, “progressive” legislation will not be enacted. However, I will pursue a different query that emerges from the _Tuaua_ case to set the possibility for future research: despite the racism used to

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143 This was a special edition titled “Developments in the Law: The U.S. Territories.”
justify the *Insular Cases*, can they be reimagined or redeemed in current times to be viewed as providing strong protections for territorial culture and local autonomy and governance? If so, does this make the “different” forms of citizenship that exist in the U.S. territories equal? These are the core questions I pursue in this concluding chapter.

**Redeeming the *Insular Cases***?

In this conclusion, I will provide an overview of the recent case involving birthright citizenship and its possible extension to American Samoa, *Tuaua v. United States*. I then explore how some of the issues raised by the *Tuaua* case offer a way to examine whether the *Insular Cases*, despite being rooted in racism, provide a way to protect indigenous cultures from certain forms of federal governance and preserve local culture, autonomy and traditions. As recently put by a special edition on the *Insular Cases* from the *Harvard Law Review*:

Where the doctrine [of the Insular Cases] once served colonial interests in an era of mainland domination of the territories, a revisionist argument would see it repurposed today to protect indigenous cultures from a procrustean application of the federal Constitution.

Do the *Insular Cases* allow for a “different” but equal form of citizenship in U.S. territories? Can these decisions, rooted in White supremacy, be refashioned in progressive ways, meant to preserve local culture? These are the main questions I pursue in this last section of the paper.

***Tuaua v. United States***

“The controversial history of the Insular Cases makes it tempting to seek an easy villain and declare the Samoan anomaly of noncitizen national status an unconstitutional anachronism. But the truth is more complicated” (*Harvard Law Review*, 1685).

The central issue in *Tuaua v. United States* is whether the Fourteenth Amendment’s Citizenship Clause, which states that "[a]ll persons born or naturalized in the United States, and subject to
the jurisdiction thereof, are citizens of the United States and of the State wherein they reside,” means that birth in an unincorporated territory, in this case American Samoa, automatically confers birthright citizenship to a person born there. The petitioners were a group of five American Samoan noncitizen nationals who argued that their birth in American Samoa should automatically confer a birthright U.S. citizenship, despite Congress’ inaction. In June 2015, the District Court for the District of Columbia (D.D.C.) ruled in Tuaua that "the United States" in the Fourteenth Amendment's Citizenship Clause does not extend to unincorporated territories, upholding the precedent set in the Insular Cases regarding birthright citizenship in the unincorporated territories.

What is important for the purposes of this paper is that representatives from the government of American Samoa were opposed to the petitioners’ argument in favor of extending birthright citizenship for Samoans, due to fears "that the extension of United States

144 The plaintiffs, some of whom had led "long careers in the military or law enforcement," alleged a variety of harms flowing from the denial of citizenship, including the inability to vote and ineligibility for certain varieties of employment, for federal work-study programs in college, for firearm permits, and for foreign travel and immigration visas. Another interesting area of study that the Tuaua case highlights is the rights, liberties and privileges that attach to U.S. citizenship.

145 The history of citizenship legislation for American Samoa since it was annexed at the turn of the 20th Century is complex. At various times in the 1920s and 1930s a majority of Samoans demanded the U.S. citizenship but faced U.S. Naval opposition. By the time Naval opposition receded in the aftermath of WWII and in the early years of the Cold War, a majority, or at least a substantial amount, of Samoans no longer desired U.S. citizenship. The reasons why will be discussed in this section of the paper, but a larger argument I make is that unlike in the other U.S. territories, the interests of Samoans and the U.S. government never converged to lead to Congress enacting citizenship legislation to American Samoa.

146 Congress has extended a statutory form of birthright citizenship to all the other unincorporated territories, continuing to refuse to confirm that this citizenship is rooted in the Fourteenth Amendment, which is why Samoans are the only indigenous population that remains non-citizen nationals living in these areas. Examples include: 8 U.S.C. 1402 (2012) (“All persons born in Puerto Rico on or after January 13, 1941, and subject to the jurisdiction of the United States, are citizens of the United States at birth.”); id. 1406(b) (“All persons born in [the Virgin Islands] on or after February 25, 1927, and subject to the jurisdiction of the United States, are declared to be citizens of the United States at birth.”); id. 1407(b) (“All persons born in the island of Guam on or after April II, 1899 ... subject to the jurisdiction of the United States, are declared to be citizens of the United States...”).

147 In particular, Boumediene v. Bush, (the last of the Guantanamo Bay cases that ruled enemy combatants being held there had a right to file habeas corpus petitions, was cited in the district court opinion, which reinforced the continued vitality of the Insular Cases framework, and was cited as precedent to deny the automatic extension of constitutional protections to unincorporated territories.

148 American Samoa's delegate in Congress, Eni F.H. Faleomavaega, filed an amicus brief opposing the plaintiffs.
citizenship to the territory could potentially undermine . . . aspects of the Samoan way of life 
[fa’a Samoa]..."the extension of citizenship could result in greater scrutiny under the Equal 
Protection Clause of the Fourteenth Amendment, imperiling American Samoa's traditional, 
racially-based land alienation rules” (Tuaua, 310). Samoans’ culture is centered around its land 
tenure system, or matai, which requires racial classifications for its continued existence. A 
substantial number of Samoans and the Samoan government view the extension of birthright 
citizenship as a genuine threat to the matai system; this case is not as simple as the judiciary 
deciding to uphold a legal framework rooted in White supremacy, but could, potentially, be 
understood as the court system using the Insular Cases to protect indigenous cultures and 
provide them with at least some level of protection and autonomy over their local affairs, 
political system and social structure. 149 The D.D.C.’s ruling, however, felt no need to consider or 
rule on the potential negative effects the extension of birthright citizenship would have on 
Samoan culture, however, since it felt that the constitutional precedents denying the extension of 
citizenship were clear and persuasive.

The Tuaua petitioners would appeal the D.D.C.’s ruling, which was then upheld by a 
unanimous panel of the D.C. Circuit. The D.C. Circuit ruling, however, would focus on a 
different line of reasoning in their decision denying the extension of birthright citizenship to 
American Samoa. First, after reviewing the text, legislative history, constitutional structure, and 
common law tradition of the Fourteenth Amendment, the D.C. Circuit concluded that it regards

149 I should note here that I am not suggesting the continued imperialist relationship between the United States and 
its territories can or should be justified. What I am trying to figure out is how these territories and their cultures can 
achieve the highest degree of protection and autonomy while existing in a subordinate position. I recognize that 
ultimate sovereignty over these areas rests with the United States, but complete independence or statehood does not 
seem a likely outcome in the short-term future. Until independence or statehood becomes a genuine possibility, I am 
concerned with determining how the residents of the U.S. territories can achieve as much independence, autonomy 
and protection as possible while existing in an inherently oppressive system in which ultimate sovereignty over them 
rests with a separate political entity in which they have no representation.

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to the Citizenship Clause, it was "textually ambiguous as to whether 'in the United States' encompasses America's unincorporated territories" (Tuaua, 302). Instead, the court embraced the *Insular Cases* framework to resolve the textual ambiguity it believed existed based on its understanding of the Citizenship Clause and its applicability in the territories. The D.C. Circuit emphasized the Supreme Court's continued reliance on the *Insular Cases*, explaining that "[a]lthough some aspects of the Insular Cases' analysis may now be deemed politically incorrect, the framework remains both applicable and of pragmatic use in assessing the applicability of rights to unincorporated territories" (Tuaua, 305). The key word here, especially for the purposes of this paper, is pragmatic: while the D.C. Circuit highlighted the racist and imperialist ideology that undergirded the rulings in the *Insular Cases*, the court argued that in modern times the overall framework allows for continued flexibility and adaptability in determining the constitutional provisions that apply to each territory. Or, as the D.C. Circuit put it, the framework of the *Insular Cases* establishes that "the determination of what particular provision of the Constitution is applicable, generally speaking, in all cases, involves an inquiry into the situation of the territory and its relations to the United States" (Tuaua, 307).

The D.C. Circuit Court followed the precedent set Justice Harlan’s concurrence in *Reid v. Covert* (1957), explaining that to determine whether a constitutional provision applies to a territory, it is necessary to account for the “particular circumstances, the practical necessities, and the possible alternatives” for each territory (Tuaua, 309. Id. [quoting *Reid v. Covert*, 354 U.S. 1, 75 (1957)]). In sum, the D.C. Circuit concluded that the court's task was to "ask whether the circumstances are such that

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150 Besides the “fundamental” rights that apply automatically, as highlighted by Brown’s concurrence in *Downes v. Bidwell*, which is discussed in the first section of this paper. The D.C. Circuit opinion continued the judicial precedent of ruling that birthright territorial citizenship was not a fundamental right, as understood from the Brown concurrence, but is "idiosyncratic to the American social compact or to the Anglo-American tradition of jurisprudence," and so are not "fundamental" (Tuaua, 788 F.3d at 309).
recognition of the right to birthright citizenship would prove 'impracticable and anomalous,' as applied to contemporary American Samoa" (Tuaua, 309. Id. [quoting Reid v. Covert, 354 U.S. 1, 74 (1957)]. This “impractical and anomalous” test would be what the court would use to determine whether birthright citizenship extends to American Samoa, finding that doing so would be “anomalous.”

The main focus of the ruling was that granting citizenship would be "to impose citizenship by judicial fiat where doing so requires us to override the democratic prerogatives of the American Samoan people themselves" (Tuaua, 302), since “[d]espite American Samoa's lengthy relationship with the United States, the American Samoan people have not formed a collective consensus in favor of United States citizenship” (Tuaua, 309). To further explain why no consensus has yet emerged regarding Samoan’s desire for citizenship, the American Samoan government itself joined with Delegate Faleomavaega to file an amicus brief against the plaintiffs. Just like the Delegate's argument before the D.D.C., this Samoan government’s amicus brief emphasized the conflict between extending birthright citizenship through the Fourteenth Amendment with "many aspects of the fa'a Samoa - the Samoan way of life” (Brief for the American Samoa Government and Congressman Eni F.H. Faleomavaega). Based largely on this argument, the D.C. Circuit declined to extend birthright citizenship to American Samoa and concluded that to do so “would be to mandate an irregular intrusion into the autonomy of Samoan democratic decision-making; an exercise of paternalism - if not overt cultural imperialism - offensive to the shared democratic traditions of the United States and modern American Samoa” (Tuaua,31).

151 Reid created what became known as the “impractical and anomalous” test, which is also known as the functionalist mode of U.S. territorial law.
In sum, while both the D.D.C. and the D.C. Circuit both denied the extension of birthright citizenship rooted in the Fourteenth Amendment to American Samoa, the courts used different lines of reasoning to reach the same outcome. For the D.D.C., the Insular Cases and the rulings on U.S. territorial law and policy that emerged throughout the 20th Century offer clear and persuasive precedents that birth in an unincorporated territory does not confer birthright citizenship. For the D.C. Circuit, the precedents regarding the Citizenship Clause and its applicability in the unincorporated territories were “ambiguous,” and its ruling instead focused on the “impractical and anomalous” test that was created in Reid, arguing that to extend birthright citizenship would indeed be anomalous, as it would be contrary to the majoritarian will of the Samoan people and their government, and would constitute a forceful judicial imposition against Samoan political autonomy.

The Redemption of the Insular Cases?

How should the Insular Cases be understood after reading the D.C. Circuit’s opinion in Tuaua? Can birthright citizenship be extended to American Samoa, while still allowing Samoans to make racial classifications to preserve their culture through their land-tenure system? If birthright citizenship is extended to American Samoa, would this mean equal protection jurisprudence would then apply? And, if so, would the racial classifications used by Samoans be able to survive an equal protection challenge, i.e. pass strict scrutiny? Would imposing equal protection on American Samoa’s land system be “impractical and anomalous,” Reid’s functionalist approach to U.S. territorial law that remained as precedent throughout the latter half of the 20th Century? Lastly, if the framework of the Insular Cases ultimately does allow for the protection of Samoan cultural autonomy and rights, does it matter that this wasn’t the intent, but instead exists because
of notions of Anglo-Saxon superiority? The Supreme Court has yet to provide a definitive answer to these questions, but there are a few lower court opinions that provide some guidance.

By 1960\textsuperscript{152}, a majority of Samoans were against, or at least reluctant, to have birthright citizenship extended to their territory. The cause of this shift is controversial and ambiguous, as in the decades leading up to World War II Samoans were clear about their desire for full U.S. birthright citizenship. While other models developed in Guam and the Northern Mariana Islands would seem to allow for Samoans to be granted a full Fourteenth Amendment Equal Protection Citizenship while still maintaining racial exceptions to allow for their land tenure system, and overall social and cultural structure, to remain protected, there has yet to be a definitive ruling from the Supreme Court to guarantee this, and lower court rulings offer conflicting precedents.

For example, in \textit{Wabol v. Villacrusis} (958 F.2d 1450 [9th Cir. 1990]), from the 9\textsuperscript{th} Circuit, a race-based land alienation law in the CNMI was ruled constitutionally permissible against an equal protection challenge. Remember, as highlighted earlier in the paper, Congress has extended birthright citizenship to Puerto Rico, Guam and the CNMI. In \textit{Wabol}, the 9\textsuperscript{th} Circuit used Reid’s “impractical and anomalous” test, explaining that since "land in the Commonwealth [the CNMI] is a scarce and precious resource," and "native ownership of land" played a "vital role . . . in the preservation of [C]NMI social and cultural stability," it would be "impractical and anomalous” to have equal protection jurisprudence govern the CNMI’s racial land classification system. The 9\textsuperscript{th} Circuit opinion also wrote that the Bill of Rights was created to preserve and protect the rights of minority populations, suggesting that there can be instances

\textsuperscript{152} A Senate report created before the ratification of American Samoa’s 1960 constitution explained that "[it is highly probable that a majority of the American Samoans desire citizenship, yet many are gravely troubled as to whether the 'equal protection of laws' doctrine implicit in citizenship would not conflict with the 'Samoan land for Samoans' doctrine” (S. Comm. on Interior and Insular Affairs, 86th Cong., Study Mission To Eastern American Samoa (Sens. Oren E. Long & Ernest Gruening).
where the rights of “discrete and insular” minorities can override equal protection concerns in the
U.S. constitutional system, a different test than what generally applies to laws that discriminate
based on race: strict scrutiny. A similar justification, emphasizing the small amount of land
that exists for American Samoa, could also apply.

Another important precedent from a lower court regarding whether the extension of
birthright citizenship to American Samoa would invalidate race-based land classifications is

Craddick v. Territorial Registrar (Am. Samoa 2d 10, 12-13 [1980]). American Samoa’s high
court ruled that equal protection jurisprudence did operate on Samoan racial land classifications,
but the system passed strict scrutiny. It is by no means a guarantee that the Supreme Court would
offer a similar finding, and its decision in Rice v. Cayetano (528 U.S. 495 [2000]) actually
suggests otherwise.

In Cayetano, the Court ruled that the state of Hawaii could not restrict eligibility to vote
in elections for the Board of Trustees of the Office of Hawaiian Affairs to persons of Native
Hawaiian descent. The Court's opinion, written by Justice Anthony Kennedy, contains a lecture
to the State of Hawaii, concluding with the observation that

When the culture and way of life of a people are all but engulfed by a history beyond
their control, their sense of loss may extend down through generations and their dismay
may be shared by many members of the larger community. As the State of Hawaii
attempts to address these realities, it must, as always, seek the political consensus that
begins with a sense of shared purpose. One of the necessary beginning points is this
principle: The Constitution of the United States, too, has become the heritage of all the
citizens of Hawaii.

153 The main standards when applying strict scrutiny are that needs to be a compelling governmental interest, the
legislation must be narrowly tailored and achieved through the least restrictive means possible. See Skinner v. State
(1996) and City of Boerne v. Flores, 521 U.S. 507 (1997) to trace how the Court’s equal protection jurisprudence
when it comes to evaluating various tiers of scrutiny has evolved.
Kennedy argues that Native Hawaiians, as birthright U.S. citizens, are not permitted to make race-based classifications that are meant to provide them with autonomy in local elections. For Kennedy, Native Hawaiians are no different from U.S. citizens born in Iowa; even race-based classifications that are meant to protect native self-determination are prohibited. A key difference between the decision in *Cayetano* and potentially extending birthright citizenship to American Samoa, however, is that Hawaii is a state (even if the Attorney General of the United States doesn’t recognize that fact)\(^\text{154}\), fully incorporated as a part of the United States, and American Samoa is an unincorporated territory. So, it seems that the ruling in *Cayetano* may not apply to American Samoa, but would extending a birthright citizenship mean the Constitution was also Samoans’ heritage? The point I emphasize here is that it is not clear how the Court would rule regarding American Samoa’s racial land classification system, and while Guam and the CNMI seem to offer good models as precedent, Samoans cannot be faulted for fearing their cultural autonomy could be seriously threatened with the extension of birthright citizenship. Thus, it is not clear if the *Insular Cases* can be redeemed from their racist history, since the Court hasn’t given a definitive ruling as to whether their framework allows for citizenship to be extended to territories while still permitting race-based classifications meant to preserve culture autonomy that would be unconstitutional in states, based on *Cayetano*.

Lastly, I desire to pursue the possibility of the redemption of the *Insular Cases* by using a “law and society” “bottom-up” approach to explore how Samoans think about and understand the *Insular Cases* and their citizenship status. For future research, I hope to engage in ethnographic work in American Samoa to determine what citizenship means to the residents living in these areas and how it is perceived and experienced, i.e. to examine their “legal

consciousness” (Ewick and Silbey) of territorial and U.S. citizenship. and whether they think the *Insular Cases* offer a useful framework in mediating their relationship with the United States. Determining how Samoans desire to navigate their association with the United States is vital to understanding whether the *Insular Cases* can be redeemed.
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